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Ira P. Robbins

American University Washington College of Law

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Magistrate Judges, Article III, and the Power to Preside Over Federal Prisoner Section 2255 Proceedings

By Ira P. Robbins *

Abstract

[a.1] In 1968, Congress enacted the Federal Magistrates Act to enhance judicial efficiency in the federal courts. Since then, some judicial functions delegated to magistrate judges have been challenged on constitutional grounds: while federal district judges, appointed pursuant to Article III of the United States Constitution, are protected with life tenure and undiminishable salary, thereby enhancing judicial independence, federal magistrate judges, appointed pursuant to Article I, have no such protection. The most recent major challenge to magistrate judge authority came in 2001, when the United States Court of Appeals for the Fifth Circuit, in *United States v. Johnston*, decided that referral to magistrate judges for final disposition of federal prisoner 28 U.S.C. § 2255 post-conviction motions, with the consent of the parties, violates Article III.

[a.2] This Article traces the evolution of the Federal Magistrates Act, explores constitutional and other challenges that have arisen under the Act and how the courts have resolved them, and reviews the unique nature of § 2255 motions. Professor Robbins argues against referral of § 2255 motions to magistrate judges for final disposition, and concludes with recommendations of other ways to deal with these motions without overloading the judicial system.

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* Barnard T. Welsh Scholar and Professor of Law and Justice, American University, Washington College of Law. A.B. 1970, University of Pennsylvania; J.D. 1973, Harvard University. Special Consultant to the Habeas Corpus Subcommittee of the Judicial Conference Advisory Committee on Criminal Rules. The author is grateful to Emily Anne Aldridge, Elizabeth Betta, and Sara Gillis for their outstanding research assistance; to United States Magistrate Judge Ila Jeanne Sensenich (W.D. Pa.) for her superb editorial assistance; and to the American University Law School Research Fund for providing financial support.

I. INTRODUCTION

[I.1] Since the enactment of the Federal Magistrates Act in 1968,¹ federal district courts' delegation of power and control to magistrate judges has raised a number of constitutional issues.² Under the Constitution, judicial power is to remain in the hands of Article III judges, who enjoy the protections of life tenure and undiminishable salary.³ Because the position of magistrate judges was created under Article I, rather than Article III, however, the delegation of some judicial functions to these judges is controversial.⁴ While many of these issues have been resolved, the constitutionality of magistrate judge power again came to the forefront in [United States v. Johnston](#),⁵ a Fifth Circuit decision regarding motions brought pursuant to [28 U.S.C. § 2255](#), seeking to vacate, set aside, or correct a federal sentence on the ground that it was imposed in violation of federal law.⁶

[I.2] After Edward John Johnston, III's conviction for conspiracy to possess with intent to distribute cocaine, cocaine base, and marijuana, he filed a § 2255 motion to vacate his sentence. With the parties' consent, the district judge referred the motion to a magistrate judge for final disposition. The magistrate judge denied the motion pursuant to [28 U.S.C. § 636\(c\)](#).⁷ While on appeal, Johnston never challenged the magistrate judge's jurisdiction to decide the § 2255 motion. The United States Court of Appeals for the Fifth Circuit addressed this issue *sua sponte* and found that the consensual delegation was unconstitutional.⁸

[I.3] For reasons explained in this Article, the court of appeals, despite the lack of clarity in its reasoning, came to the correct conclusion — magistrate judges cannot constitutionally rule on § 2255 motions, for reasons explained in this Article. [Part II](#) of this

¹ Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968); see *infra* Part II (discussing the Act).

² See *infra* Part III.

³ See *infra* Part III.A.

⁴ See *infra* Part III (providing examples of constitutional challenges to the Act).

⁵ [258 F.3d 361 \(5th Cir. 2001\)](#).

⁶ [28 U.S.C. § 2255](#) (1994 & Supp. V 1999); see *infra* Part V.A (discussing § 2255 motions).

⁷ Section 636(c)(1) provides that, with the consent of the parties, magistrate judges may conduct any proceedings in civil matters. See [28 U.S.C. § 631\(c\)\(1\)](#) (1994 & Supp. V 1999).

⁸ See *infra* Part IV (describing facts, prior proceedings, and reasoning of *Johnston*).

Article traces the evolution of the Federal Magistrates Act. [Part III](#) explores the constitutional challenges that have arisen under the Act and how the courts have resolved them. [Part IV](#) provides a detailed discussion of the facts and reasoning of the *Johnston* case. [Part V](#) reviews the unique nature of § 2255 motions and provides a critique of the Fifth Circuit’s rationale, ultimately agreeing with the court’s holding. Finally, in [Part VI](#), this Article argues against the referral of § 2255 motions to magistrate judges for final disposition, even if the parties consent; it concludes with recommendations of other ways to deal with § 2255 motions without overloading the judicial system.

II. FEDERAL MAGISTRATES ACT OF 1968

A. Reasons for Enactment

[II.A.1] Congress enacted the Federal Magistrates Act in 1968⁹ partly to replace the United States Commissioner system,¹⁰ which Congress found to be defective because, among other flaws, the commissioners were paid under a fee structure according to the nature and number of matters they handled.¹¹ This payment system was arguably unconstitutional due to the commissioners’ pecuniary interest in their cases.¹² The greater the number of cases over which they presided, the greater their salary.¹³

[II.A.2] In addition, Congress recognized that one-third of the commissioners were nonlawyers, yet they were applying rules of constitutional law that, to this day, even lawyers and judges find difficult to interpret.¹⁴ Moreover, the commissioners’ jurisdiction

⁹ Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968).

¹⁰ See H.R. Rep. No. 90-1629, at 12 (1968); see also Brendan Linehan Shannon, Comment, *The Federal Magistrates Act: A New Article III Analysis for a New Breed of Judicial Officer*, 33 Wm. & Mary L. Rev. 253, 256-57 (1991).

¹¹ See H.R. Rep. No. 90-1629, at 12-13 (1968).

¹² See [Tumey v. Ohio](#), 273 U.S. 510, 535 (1927) (holding that a judge must be disqualified if he has a direct pecuniary interest in the outcome or an “official motive to convict”). This holding became known as Tumey’s Rule. See also H.R. Rep. No. 90-1629, at 13 (1968).

¹³ See H.R. Rep. No. 90-1629, at 13 (1968). The law imposed a \$10,500 ceiling on the fees that a commissioner could earn each year. If this ceiling was easily attainable, commissioners would not have an incentive to rush through their cases. See *id.*

¹⁴ See *id.* The report also noted that, because of commissioners’ lack of training in judicial matters, “there [was] a great disparity from district to district on how even fundamental
(continued...)

was limited to petty-offense misdemeanors on federal reservations; thus, other minor criminal matters that a lesser judicial officer could handle still ended up before district judges.¹⁵

[II.A.3] Therefore, not only would the Magistrates Act, in the mind of Congress, abolish a flawed system, but it would also enhance judicial efficiency through the use of a judicial officer with expanded jurisdiction: the magistrate. While the commissioner system, too, had been created to promote this goal, the fact that commissioners were not able to handle minor matters led to an overload of cases for Article III judges. In 1968, for instance, the year in which the Act was passed, 102,000 cases were filed in the United States district courts, but there were only 323 district court judges to hear these matters.¹⁶ Congress wanted magistrates to perform certain subordinate duties, in order to promote more efficient management as well as to assist in pretrial proceedings.¹⁷ With the abolishment of the commissioner system and the creation of the more efficient judicial officer—the United States magistrate—came new rules and new powers.

B. Powers Granted to Magistrates Under the 1968 Act

[II.B.1] One of the drawbacks of the commissioner system was the fact that commissioners had limited jurisdiction, which Congress intended to change by giving additional power to magistrates. The original Act thus gave magistrates “all the powers and duties conferred or imposed upon United States commissioners by law . . . ; the power to administer oaths

¹⁴(...continued)

problems [were] handled” *Id.* The House Judiciary Committee found, for example, that “[c]ommissioners in many districts granted search and arrest warrant applications perfunctorily, thereby depriving . . . an independent determination of the question of probable cause.” *Id.*

¹⁵ See *id.* at 13-14 (noting that this limited jurisdiction undermined judicial efficiency). See generally Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge System*, [1999 Fed. Cts. L. Rev. 4](http://www.fclr.org/1999fedctsirev4.htm) (Dec. 1999) <<http://www.fclr.org/1999fedctsirev4.htm>> (discussing the evolution from the U.S. commissioner system to the present magistrate judge system).

¹⁶ See H.R. Rep. No. 94-1609, at 6 (1976).

¹⁷ See H.R. Rep. No. 90-1629, at 14 (1968) (stating that “the U.S. district courts are burdened with a number of minor criminal matters that could easily be handled by a lesser judicial officer.”). The Act, among other things, intended to give the district court discretion to use magistrates to assist a district court judge “ ‘in the conduct of pretrial or discovery proceedings in civil or criminal actions’ and to make a ‘preliminary review of applications for post[-]trial relief.’ ” H.R. Rep. No. 94-1609, at 6 (1976).

and affirmations . . . ; [and] the power to conduct trials under [section 3401, title 18](#)”¹⁸ Additionally, the district judge could assign magistrates “such additional duties as are not inconsistent with the Constitution and laws of the United States.”¹⁹ Congress stated that these duties included, but were not restricted to, service as special masters, assistance to district judges with pretrial and discovery proceedings, and preliminary consideration of petitions for post-conviction relief.²⁰ Although some interpreted these examples as a comprehensive list,²¹ Congress intended for the explicit grants of power to serve as a guide, allowing the district judges flexibility to experiment.²²

[II.B.2] In order to fulfill the original intent of the Act,²³ to improve access to the courts for the less advantaged,²⁴ and to continue the success of magistrates in aiding Article III

¹⁸ Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968); H.R. Rep. No. 90-1629, at 5 (1968).

¹⁹ *Id.*

²⁰ H.R. Rep. No. 90-1629, at 5 (1968). Relief pursuant to 28 U.S.C. § 2255—the relief sought by Johnston—is an example of post-trial relief, but Congress in the original Act did not grant magistrates the ability to decide matters concerning post-trial relief. The Act only authorized preliminary review of the applications. *See id.*

²¹ *See* [Wingo v. Wedding](#), 418 U.S. 461, 473 (1974) (concluding that Congress did not intend for magistrates to oversee habeas corpus proceedings, because the Federal Magistrates Act did not specify that magistrates could preside over such matters and because the habeas corpus statute was not amended).

²² *See* Shannon, *supra* note 10, at 257. *See also* H.R. Rep. No. 94-1609, at 2 (1976); S. Rep. No. 96-74, at 1, 3 (1979). *See generally* Magistrate Judges Division of the Administrative Office of the United States Courts Under the Supervision of the Judicial Conference Committee on the Administration of the Magistrate Judge System, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 255 (1993) [hereinafter *Magistrate Judge Authority*].

²³ *See* H.R. Rep. No. 94-1609, at 2 (1976); S. Rep. No. 96-74, at 1, 3 (1979); *see also* *Magistrate Judge Authority*, *supra* note 22, at 255 (noting that the 1976 amendments were made in response to [Wingo v. Wedding](#)).

²⁴ *See* S. Rep. No. 96-74, at 4 (1979). The Senate reasoned that the disadvantaged lacked “resources to cope with the vicissitudes of adjudication delay and expense,” thus possibly forcing them out of court. The “supply of magistrate services” could help cope with civil cases that were pushed to the “back of the docket.” *Id.*

judges,²⁵ Congress amended the Act in 1976²⁶ and 1979.²⁷ Further, in 1990, Congress changed the title from “magistrates” to “magistrate judges” to reflect the growing responsibilities of the office.²⁸

[II.B.3] The current Magistrates Act²⁹ grants many more powers to the magistrate judges than the original Act did. Significantly, it allows district judges to refer an entire civil case³⁰ or criminal misdemeanor case³¹ to a magistrate judge for trial with the consent of the parties. Supreme Court case law has established that the “additional duties” that a district judge may assign to a magistrate judge³² include supervision of voir dire.³³ Legislative history illustrates that Congress also intended the additional duties to include conducting

²⁵ See *id.* at 2 (indicating that, in the year prior to June 30, 1978, magistrates conducted 24,093 civil pre-trial motions, 4050 social security appeals, and 21,956 arraignments, among other things). Congress wished to expand the magistrates’ jurisdiction so that they could further assist the district judges. See *id.*

²⁶ Federal Magistrates Act, Pub. L. No. 94-520, 90 Stat. 2458 (1976).

²⁷ Federal Magistrates Act, Pub. L. No. 96-82, 93 Stat. 643 (1979).

²⁸ See Pub. L. No. 101-650, 104 Stat. 5089 § 321 (1990) (“After the enactment of this Act, each United States magistrate appointed under § 631 of title 28, United States Code, shall be known as a United States magistrate judge, and any reference to any United States magistrate or magistrate that is contained in title 28, United States Code, in any other Federal statute, or in any regulation of any department or agency of the United States in the executive branch that was issued before the enactment of this Act, shall be deemed to refer to a United States magistrate judge appointed under [§ 631 of title 28, United States Code](#).”).

²⁹ [28 U.S.C. §§ 631-639](#) (1994 & Supp. V 1999).

³⁰ *Id.* [§ 636\(c\)\(1\)](#).

³¹ *Id.* [§ 636\(a\)\(3\)](#); [18 U.S.C. § 3401](#) (1994) (granting magistrates the authority to preside over misdemeanors with the parties’ written consent).

³² [28 U.S.C. § 636\(b\)\(1\)\(C\)\(3\)](#) (1994 & Supp. V 1999).

³³ See [Peretz v. United States](#), 501 U.S. 923 (1991) (holding that the Act’s “additional duties” clause, [§ 636\(b\)\(3\)](#), which permitted the assigning to magistrates “such additional duties as are not inconsistent with the Constitution and the laws of the United States,” allowed a magistrate to supervise voir dire in a felony trial provided that the parties consented), discussed *infra* notes 84-98 and accompanying text.

evidentiary hearings for § 2255 proceedings.³⁴ But nowhere in either Supreme Court precedent or legislative history is it clear whether magistrate judges can constitutionally dispose of § 2255 proceedings. Therefore, the Fifth Circuit’s 2001 decision in [United States v. Johnston](#)³⁵ brings this issue into the limelight, and potentially into the hands of the Supreme Court.

III. CONSTITUTIONAL CHALLENGES TO MAGISTRATE JUDGE AUTHORITY

A. Article III Generally

[III.A.1] The controversy surrounding magistrate judge authority stems from the Constitution itself. [Article III of the Constitution](#) provides judges of the Supreme and inferior courts with undiminishable salary and life tenure (judges hold office during “good Behaviour”).³⁶ These judges can be removed only by impeachment,³⁷ and the Compensation Clause ensures that they receive a set, irreducible compensation.³⁸

[III.A.2] These protections aid in separating the judiciary from the other branches of government, as neither the President nor Congress may remove a judge nor lower a judge’s salary because of disagreement with the judge’s rulings or philosophy. This independence prevents other branches of the government from dominating the judiciary

³⁴ See H.R. Rep. No. 94-1609, at 2, 4 (1976). The report states that the House passed legislation amending [Rule 8\(b\)](#) of the habeas corpus rules, “tracking” the Magistrates Act and case law, so that magistrates could conduct evidentiary hearings for § 2255 motions. “[The amendment to the Magistrates Act] expands the authority of magistrates beyond that set forth in Rule 8(b) of the habeas corpus rules of procedure. It is therefore necessary to change Rule 8(b)” *Id.* at 4.

³⁵ [United States v. Johnston](#), 258 F.3d 361 (5th Cir. 2001).

³⁶ [U.S. Const. art. III, § 1](#). (“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.”); see generally [Northern Pipeline Construction Co. v. Marathon Pipe Line Co.](#), 458 U.S. 50, 58-59 (1982) (explaining historical context from which these provisions evolved).

³⁷ See [United States ex rel. Toth v. Quarles](#), 350 U.S. 11, 16 (1955) (“These courts are presided over by judges appointed for life, subject only to removal by impeachment. Their compensation cannot be diminished during their continuance in office. The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government.”).

³⁸ [United States v. Will](#), 449 U.S. 200, 218-21 (1980) (discussing history of the irreducible-salary provision and the idea that the provision is vital to an independent judiciary).

and aids in reducing the politics of the judicial branch. Article III judges do not have to worry that their decisions will cost them their jobs; they can rule according to the law and their consciences, as they see fit.³⁹ Tenure and salary provisions also protect Article III judges from other judges by curbing undue influence from judicial colleagues.⁴⁰ This provision also protects the rights and liberties of the public as a whole by ensuring that a neutral, detached judge, free from domination by other branches and other judges, protects the rights of the people.⁴¹

[III.A.3] But magistrate judges are not Article III judges. Instead they serve for a term of years.⁴² They are not afforded the protections of irreducible compensation and life tenure. Because Article III requires these protections for officers exercising judicial power, constitutional questions arise when Congress delegates judicial functions to non-Article III judges.

[III.A.4] [Northern Pipeline Construction Co. v. Marathon Pipe Line Co.](#),⁴³ is a fundamental case dealing with the power of non-Article III courts. *Northern Pipeline* addressed whether the Bankruptcy Act of 1978, which created bankruptcy courts,⁴⁴ violated Article III of the Constitution.⁴⁵

³⁹ Of course, judges may still decide certain cases with politics in mind as they hope for an appointment to a higher court, but that issue is beyond the scope of this Article.

⁴⁰ See J. Anthony Downs, Note, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. Chi. L. Rev. 1032, 1037 (1985) (noting that other judges' influence is an often overlooked part of judicial independence and listing cases discussing this point).

⁴¹ *Id.*

⁴² Full-time magistrate judges serve for an eight-year term; part-time magistrate judges serve for a four-year term. See [28 U.S.C. § 631\(e\)](#) (1994 & Supp. V 1999). They can be reappointed at the conclusion of their terms.

⁴³ [458 U.S. 50 \(1982\)](#).

⁴⁴ Prior to the Bankruptcy Act, federal district courts had jurisdiction over bankruptcy cases and utilized a "referee" system. The Act eliminated the referee system and enlarged the jurisdiction that the referees once held. See [id. at 53-54](#).

⁴⁵ See [id. at 52](#).

[III.A.5] Bankruptcy judges were largely independent, exercising many functions that were normally associated with Article III judicial power.⁴⁶ Bankruptcy judges handled all cases under Title 11 and had jurisdiction equivalent to that of the district judge with respect to bankruptcy cases—including presiding over jury trials, issuing declaratory judgments and writs of habeas corpus, and performing any other duties necessary to enforce the Bankruptcy Reform Act.⁴⁷ The Supreme Court, through a plurality opinion written by Justice Brennan, found that these judges were independent, exercising complete federal judicial power without Article III protection, therefore violating the Constitution.⁴⁸

[III.A.6] The Court explicitly addressed separation of powers and the guarantees of judicial impartiality and independence, noting that Article III defines the power and protects the independence of the judiciary.⁴⁹ Justice Brennan added that the Court recognized only three narrow categories wherein Congress was permitted to create courts under Article I

⁴⁶ See [id. at 84-85](#). See generally *Magistrate Judge Authority*, *supra* note 22, at 291 (providing a good analysis of *Northern Pipeline*'s contribution to Article III jurisprudence).

⁴⁷ See [458 U.S. at 53-55](#).

⁴⁸ See [id.](#) Given that Justice Brennan's opinion was a plurality opinion, one article has cited Justice Rehnquist's concurrence as the true holding of the case concerning the constitutionality of the Bankruptcy Act. See *Magistrate Judge Authority*, *supra* note 22, at 277. Unlike the plurality, Justice Rehnquist's narrow concurrence did not wage an attack on the authority of the bankruptcy court. Instead, he concluded that appellate review by an Article III judge did not make the bankruptcy court constitutional and that the bankruptcy court was not an "adjunct" of the district court, as it resolved all legal and factual issues before it. See *id.*; cf. [Thomas v. Union Carbide](#), 473 U.S. 568, 584 (1985) (concluding, through Justice O'Connor's use of Chief Justice Burger's dissent in *Northern Pipeline*, that since *Northern Pipeline* was a plurality opinion it established only "that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising out of state law, without consent of the litigants, and subject only to ordinary appellate review."). See generally *Magistrate Judge Authority*, *supra* note 22, at 272-91 (discussing [Northern Pipeline](#), [Union Carbide](#), and other cases and synthesizing case law involving Article III).

⁴⁹ See [Northern Pipeline](#), 458 U.S. at 58.

despite Article III requirements:⁵⁰ territorial courts,⁵¹ military courts, and courts for the adjudication of congressionally created rights.⁵²

[III.A.7] The appellants argued that the Bankruptcy Act was constitutional because the bankruptcy court was merely an “adjunct” to the district court.⁵³ The argument was based on the idea that Congress has the power to delegate certain fact-finding responsibilities to adjunct tribunals,⁵⁴ relying on the fact that the Court had already upheld the use of special masters, administrative agencies, and magistrates as adjuncts. Thus, bankruptcy judges should also be viewed as belonging to this category.⁵⁵

⁵⁰ See [id. at 64-67](#); see also Shannon, *supra* note 10, at 264 (noting that, in certain circumstances, Congress may create tribunals that are nearly indistinguishable from Article III courts, but that Congress does not need to extend the guarantees of tenure and salary to judges in those tribunals).

⁵¹ See Shannon, *supra* note 10, at 263 (explaining that the authority establishing territorial courts is not Article III, but rather Congress’ [Article IV, Section 3](#) imprimatur to govern territories of the United States).

⁵² See [Northern Pipeline, 458 U.S. at 64-67](#). This last category, also known as the “public rights” doctrine, may be the hardest to define. See [id. at 69](#) (noting that precedents have not adequately explained the distinctions between private and public rights). Justice Brennan suggested that

a matter of public right must at a minimum arise ‘between the government and others’ In contrast, ‘the liability of one individual to another under the law as defined,’ . . . is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from [Article] III courts and delegated to legislative courts or administrative agencies for their determination.

[id. at 69-70](#) (citations omitted).

⁵³ See [id. at 77](#).

⁵⁴ See [id.](#)

⁵⁵ See [id. at 77-79](#) (citing [Crowell v. Benson](#), 285 U.S. 22 (1932), in which the court upheld the use of administrative agencies as adjuncts; and [United States v. Raddatz](#), 447 U.S. 667 (1980), in which the court upheld the power of magistrate to hold evidentiary hearings).

[III.A.8] The Court rejected this argument, however, holding that, unlike bankruptcy judges, adjuncts are constitutional because they act merely as aids to Article III judges.⁵⁶ The authority of these adjuncts arises out of Article III, because Article III judges delegate responsibilities to adjuncts who may then act only within the jurisdiction delegated to them.⁵⁷ This delegation is constitutional as long as the Article III judges retain the “essential attributes”⁵⁸ of judicial power.⁵⁹ The Court held that bankruptcy judges’ authority exceeded that of adjuncts and thus was unconstitutional. In essence, the Court distinguished the case from [United States v. Raddatz](#),⁶⁰ which had upheld the use of magistrates as adjuncts.

B. Evidentiary Hearings

[III.B.1] One of the first cases heard by the United States Supreme Court challenging the Federal Magistrates Act was [United States v. Raddatz](#). In *Raddatz*, the Court addressed the constitutionality of a provision of the Act permitting magistrates to conduct evidentiary hearings.⁶¹ For certain dispositive proceedings, the Act authorizes a magistrate to hear testimony, review the evidence, and submit proposed findings of fact and recommendations to the district judge. The district judge may then make a decision

⁵⁶ See [id. at 81-83](#).

⁵⁷ See Shannon, *supra* note 10, at 265 (noting that the office of the magistrate originates from an [Article I](#) grant of power and examining the opinions in [Northern Pipeline](#)).

⁵⁸ The “essential attributes” test was first articulated in [Crowell v. Benson](#), 285 U.S. 22 (1932). The Court stated that, “in order to maintain the essential attributes of judicial power, all determinations of fact in constitutional courts shall be made by judges.” [Id. at 51](#). Over the years, however, the Court has interpreted this phrase as requiring that the majority of judicial power remain in Article III judges. It is not simply a question of whether Article III judges determine facts.

⁵⁹ See *infra* Part III.B (discussing [Raddatz](#)); see also *Magistrate Judge Authority*, *supra* note 22, at 257-63 (discussing [Raddatz](#)’s analysis and how it pertains to adjunct officers and the constitutionality of magistrate authority); Shannon, *supra* note 10, at 265-68 (same).

⁶⁰ [447 U.S. 667 \(1980\)](#), discussed *infra* Part III.B.

⁶¹ See [28 U.S.C. § 636\(b\)\(1\)\(B\)](#). Section 636(b)(1)(B) was enacted as part of the 1976 Amendments to the Federal Magistrates Act as a response to the Supreme Court’s decision in [Wingo v. Wedding](#), 418 U.S. 461 (1974), which held that magistrates could not hold evidentiary hearings in federal habeas corpus cases. See [Raddatz, 447 U.S. at 674](#).

based on the record developed by the magistrate.⁶² If a party objects to the proposed findings, the judge conducts a de novo review, and may either accept, reject, or modify the magistrate's recommendations.⁶³

[III.B.2] Following the district judge's acceptance of the magistrate's findings and recommendation that Raddatz's motion for suppression of evidence be denied,⁶⁴ Raddatz appealed his conviction, arguing that the Magistrates Act violated Article III of the Constitution.⁶⁵ The Supreme Court rejected the argument, holding that Congress had not improperly delegated judicial power to a non-Article III officer.⁶⁶ In making this determination, the Court emphasized that the federal district judge retained control over the entire process, and that the magistrate acted "subsidiary to and only in aid of the district court."⁶⁷ The Court concluded that, "so long as the ultimate decision is made by the district court," this type of delegation to a magistrate would not violate Article III.⁶⁸

[III.B.3] In his concurrence, Justice Blackmun agreed with the majority, concluding that because the district judges remained completely in control of the proceeding despite the delegation to a magistrate, no Article III violation had occurred.⁶⁹ Although the majority elaborated very little on this point, Justice Blackmun set out the ways in which district

⁶² See [§ 636\(b\)\(1\)\(B\)](#); see also [Raddatz, 447 U.S. at 669, 673](#) (noting that magistrates do not have the power to make ultimate, binding decisions).

⁶³ See [§ 636\(b\)\(1\)\(C\)](#).

⁶⁴ Respondent Herman Raddatz was indicted for a firearms violation. Prior to trial he filed a motion to suppress particular incriminating statements that he had made to law enforcement officials. The district judge referred the motion to a magistrate, over the objections of the respondent. See [447 U.S. at 669](#).

⁶⁵ See [id. at 672](#). Raddatz also made a statutory argument contending that, under the Magistrates Act, a de novo determination required the district judge to rehear the testimony on which the magistrate based his findings and recommendations. The Supreme Court rejected this argument. See [id. at 673-81](#).

⁶⁶ See [id. at 684](#) (per Burger, C.J., for the majority).

⁶⁷ [Id. at 681](#).

⁶⁸ [Id. at 683](#).

⁶⁹ See [id. at 685](#) (Blackmun, J., concurring) ("Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities.").

judges retain control. He noted that district judges have discretion over whether to refer a matter to a magistrate, are free to reject the magistrate's recommendations, may remand for additional findings, and may rehear the evidence that was presented to the magistrate.⁷⁰ District judges also have direct control over magistrates; they appoint the magistrates, may remove them from office, and have plenary authority over what responsibilities are delegated to them.⁷¹

[III.B.4] Although the Court in [Raddatz](#) never explicitly referred to magistrates as “adjuncts,”⁷² it is clear from the decision that the Court upheld their powers on this basis. In the context of dispositive pretrial motions, magistrates act as adjunct officers insofar as they aid federal district judges, while the district judges retain actual control over the proceedings and the authority to render final decisions.⁷³

[III.B.5] The Supreme Court reaffirmed the constitutionality of delegating power to adjuncts in [Northern Pipeline](#), holding that such delegation is permissible as long as the essential attributes of judicial power are retained by the Article III judge.⁷⁴ Taken together, [Northern Pipeline](#) and [Raddatz](#) suggest that central to the constitutionality of a delegation

⁷⁰ See [id.](#)

⁷¹ Justice Blackmun also commented on the separation-of-powers issue by stating that “the only conceivable danger of a ‘threat’ to the ‘independence’ of the magistrate comes from within, rather than without, the judicial department.” [Id.](#) (referring to the potential for magistrates to be unduly dominated and influenced by other members of the judiciary—namely district court judges).

⁷² In [Crowell v. Benson](#), 285 U.S. 22 (1932), the Supreme Court held that Congress possessed the power to assign certain fact-finding functions to adjunct tribunals. The Court acknowledged that Article III does not require that “all determinations of fact . . . be made by judges,” and upheld the use of administrative agencies as adjuncts. [Id. at 51.](#) Adjuncts, by definition, exercise only limited authority, while jurisdiction and control remain in the Article III court. Courts have traditionally used masters and commissioners as adjuncts to assist federal judges in a range of specified tasks. See [Downs](#), *supra* note 40, at 1032, 1042-43 (discussing the delegation of adjudicatory functions to adjunct tribunals).

⁷³ See *supra* notes 53-55 and accompanying text.

⁷⁴ [Northern Pipeline](#), 458 U.S. at 81 (“We conclude that . . . the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of ‘the essential attributes of the judicial power’ from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress’ power to create adjuncts to Art. III courts.”); see *supra* notes 43-60 and accompanying text (discussing [Northern Pipeline](#) and the essential attributes test).

of adjudicatory functions to magistrates is that ultimate decision-making authority and control remain with Article III judges.

C. Voir Dire in Criminal Cases

[III.C.1] In 1989, in [Gomez v. United States](#),⁷⁵ the Supreme Court laid the foundation for [Peretz v. United States](#),⁷⁶ one of its most influential cases concerning magistrates and the Federal Magistrates Act. Gomez and Chavez-Tesina were indicted for multiple felonies.⁷⁷ Over the objections of the defendants, the district judge delegated the responsibility of conducting voir dire to the magistrate.⁷⁸ After conviction, the defendants raised the issue of magistrate authority on appeal. The United States Court of Appeals for the Second Circuit rejected the argument that the magistrate had no power to conduct voir dire.⁷⁹

[III.C.2] The United States Supreme Court reversed, holding that the oversight of voir dire in felony criminal cases was not one of the additional duties that district judges could delegate to magistrates under the Magistrates Act without the parties' consent.⁸⁰ However, the Court did not address whether such a delegation violates the Constitution. Justice Stevens wrote for a unanimous Court that "[i]t is [our] settled policy . . . to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."⁸¹ Accordingly, the Court focused on the legislative history and construction of the Federal Magistrates Act to reach

⁷⁵ [490 U.S. 858 \(1989\)](#).

⁷⁶ [501 U.S. 923 \(1991\)](#).

⁷⁷ [Gomez, 490 U.S. at 860](#) (noting that the charges included conspiracy and racketeering involving the distribution of cocaine). Both Gomez and Chavez-Tesina chose to stand trial with three other defendants. [Id.](#)

⁷⁸ [Id. at 860](#). The magistrate, after telephoning the district judge, noted the objections and proceeded with voir dire. Eight days later, when defense counsel went before the district judge, he again objected, but the judge overruled the objection, stating that he would later review the magistrate's rulings de novo. [Id.](#)

⁷⁹ 848 F.3d 1324 (2d Cir. 1988), *rev'd*, 490 U.S. 858 (1989).

⁸⁰ See [490 U.S. at 876](#).

⁸¹ See [id. at 864](#).

an alternative that “pose[d] no constitutional question.”⁸² Because the Court concluded that voir dire in felony criminal cases was not one of the powers specifically granted by Congress to magistrates, the defendant had the right to object to the magistrate’s empanelment of a jury.⁸³

[III.C.3] The question of whether, as a constitutional matter, magistrates could oversee voir dire with the parties’ consent was not answered until two years later, in [Peretz v. United States](#).⁸⁴ The Court answered the question in the affirmative, concluding that voir dire is one of the additional duties that Congress did intend for district judges to delegate to magistrates, as long as the parties consented to the delegation and that such delegation was constitutional.⁸⁵

[III.C.4] Unlike the defendants in [Gomez](#), the defendants in [Peretz](#) consented to delegation to a magistrate judge. At the pretrial conference, the district judge asked if there was an objection to a magistrate judge presiding over voir dire; the defendant’s

⁸² [Id.](#)

⁸³ See [id. at 875-86](#). The Court stated that “[b]y a literal reading this additional duties clause would permit magistrates to conduct felony trials. But the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial.” [Id. at 871-72](#). The Court also stated that legislative history confirmed this inference and that “similar considerations” and inferences that Congress believed jury selection to be part of a felony trial led them to conclude that Congress did not intend for district judges to assign voir dire to magistrates. [Id. at 872](#). The Court also noted that, even if Congress did not consider jury selection as part of a felony trial,

it is unlikely that it intended to allow a magistrate to conduct jury selection without procedural guidance or judicial review. . . . It is incongruous to assume that Congress implicitly required such review for jury selection yet failed even to mention that matter in the statute. It is equally incongruous to assume, in the alternative, that Congress intended not to require any review Yet one of those assumptions would be a necessary component of a conclusion that Congress intended jury selection to be one of a magistrate’s additional duties.

[Id. at 873-74.](#)

⁸⁴ [501 U.S. 923 \(1991\)](#).

⁸⁵ See [id. at 932](#).

counsel responded that he would “love the opportunity.”⁸⁶ The magistrate judge later asked for assurance that the defendants consented, and counsel confirmed their consent. Neither party asked the district judge to review the magistrate judge’s voir dire rulings. Peretz was convicted, while his codefendant received an acquittal. Peretz did not raise an objection to the magistrate judge’s oversight of voir dire until he appealed his conviction. The Second Circuit affirmed the lower court’s judgment.

[III.C.5] The Supreme Court distinguished [Peretz](#) from [Gomez](#), noting that, in [Peretz](#), counsel and defendant consented to the magistrate judge’s oversight of voir dire.⁸⁷ The Court stated that “the defendant’s consent significantly changes the constitutional analysis.”⁸⁸ The Court initially focused on the purposes of the Magistrates Act to determine whether voir dire even fell within the category of “additional duties.” It noted that Congress intended to give judges room to experiment with the functions of magistrate judges in order to improve efficiency. If Congress had wanted to limit the duties to those discussed in congressional hearings or debates, it would have explicitly listed those duties instead of including an expansive clause.⁸⁹ Therefore, the Court held that the Act’s “additional duties” clause allows magistrate judges to preside over voir dire with the consent of the parties.⁹⁰

[III.C.6] The Court then turned to the constitutional questions, first addressing the defendant’s ability to waive his right to proceedings before an Article III judge. Presuming that the defendant has a right to have an Article III judge preside at jury selection, the Court reasoned that this right is just like any other right afforded to an individual under the Constitution—a person may choose either to invoke it or to waive it.⁹¹ Just as a litigant

⁸⁶ [Id. at 925](#) (quoting defense counsel).

⁸⁷ See [id. at 927-32](#). The Court stated that the *Gomez* holding was narrow and “limited to the situation in which the parties had not acquiesced at trial to the magistrate’s role.” [Id. at 927-28](#). Additionally the Court noted that, in *Gomez*, it recognized Congress’ intent that magistrates play “an integral and important role in the federal judicial system.” [Id. at 928](#).

⁸⁸ [Id. at 932](#).

⁸⁹ See [id. at 932-33](#). Moreover, the Court stated that it “would still be reluctant, as we were in *Gomez*, to construe the additional duties clause to include responsibilities of far greater importance than the specified duties assigned to magistrates. But the litigants’ consent makes the crucial difference on this score as well.” [Id. at 933](#).

⁹⁰ [Id. at 933](#).

⁹¹ See [Peretz, 501 U.S. at 936](#) (“[L]itigants may waive their personal right to have an Article III judge preside over a civil trial.”) (citations omitted); see also Downs, *supra* note 40, at (continued...)

may waive his right to have an Article III judge oversee his civil trial, the “most basic rights of criminal defendants are similarly subject to waiver.”⁹² The Court concluded by stating that the Constitution affords no assistance to one who waives his rights or does not ask for an Article III judge to preside over voir dire.⁹³

[III.C.7] Although the Supreme Court decided that a defendant could waive the personal protections afforded by Article III, the Court seemed to concede that a litigant does not have the ability to waive structural protections. However, it held that having a magistrate judge supervise voir dire did not implicate any structural protections.⁹⁴ Since “[m]agistrates are appointed and subject to removal by Article III judges[,] . . . [t]he decision whether to empanel the jury whose selection a magistrate has supervised also remains entirely with the district court.”⁹⁵ Thus, because Congress was not usurping the power of the judicial branch and transferring it to an Article I tribunal, there was no separation-of-powers violation.⁹⁶ By focusing on the power retained by Article III judges, the Court in

⁹¹(...continued)

1058-59 (noting that proponents of the Act often compare the ability to waive one’s right to proceedings before an Article III judge to that of the right to jury trial and the right to be free from self-incrimination).

⁹² [501 U.S. at 936.](#)

⁹³ See [id. at 936-37.](#)

⁹⁴ See [id. at 937-39](#) (reverting to the essential attributes test as discussed in [United States v. Raddatz](#), 447 U.S. 667 (1980), and emphasizing that there are no structural separation-of-powers issues because the entire process is under the Article III judge’s control); see also *infra* note 104 (describing the differences between personal and structural protections).

⁹⁵ [501 U.S. at 937.](#)

⁹⁶ See [id.](#) (stating that “[b]ecause the entire process takes place under the district court’s total control and jurisdiction, there is no danger that use of the magistrate involves a congressional attempt to transfer jurisdiction [to non-Article III tribunals]”) (citations and internal quotation marks omitted). The Court also noted that, although the provision in question does not expressly provide for de novo review, “[t]his omission . . . does not alter the result of the constitutional analysis.” [Id. at 939.](#) [Raddatz](#) established that de novo review is not required until requested by the parties. See [id.](#) Thus, if a defendant asks for review, “nothing in the statute precludes a district court from providing the review that the Constitution requires.” [Id.](#)

effect utilized the “essential attributes” test articulated in [Raddatz](#) and [Northern Pipeline](#).⁹⁷ In sum, the Supreme Court held that delegation of voir dire to magistrate judges as an additional duty with the consent of the parties does not violate Article III because the essential attributes of judicial power remain in Article III courts, thereby relegating magistrate judges to the status of adjuncts.⁹⁸

D. Hearing Civil Cases with the Parties’ Consent

[III.D.1] Another context in which the constitutionality of magistrate judges’ powers has been challenged is their jurisdiction in civil cases. The Supreme Court has never addressed the issue of whether parties consenting to allow a magistrate judge to hear a civil action deprives Article III judges of the essential attributes of judicial power.⁹⁹ [Section 636\(c\) of the Magistrates Act](#) allows magistrate judges to “conduct any and all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case,” provided that the parties consent to the magistrate judge’s authority.¹⁰⁰ Twelve courts of appeals have analyzed the constitutionality of § 636(c); all have upheld the constitutionality of consensual delegation of magistrate judge authority in civil cases.¹⁰¹

⁹⁷ See *supra* notes 53-60 and accompanying text (discussing the “essential attributes” test).

⁹⁸ See [501 U.S. at 940](#).

⁹⁹ See *Magistrate Judge Authority*, *supra* note 22, at 291.

¹⁰⁰ [28 U.S.C. § 636\(c\)\(1\)](#) (1994 & Supp. V 1999).

¹⁰¹ See [Johnston, 258 F.3d at 367-68](#):

[A]lmost all of the circuit courts, including ours, have specifically addressed that issue and concluded that magistrate judges’ jurisdiction over civil cases with the consent of the parties does not violate the Constitution. See *Puryear v. Ede’s Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Bell & Beckwith v. United States*, 766 F.2d 910 (6th Cir. 1985); *Gairola v. Va. Dep’t of Gen. Servs.*, 753 F.2d 1281 (4th Cir. 1985); *D.L. Auld Co. v. Chroma Graphics Corp.*, 753 F.2d 1029 (Fed. Cir. 1985); *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890 (D.C. Cir. 1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984); *Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313 (8th Cir. 1984); *Collins v. Foreman*, 729 F.2d 108 (2d Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir. 1984); *Campbell v. Wainwright*, 726 F.2d 702 (11th Cir. 1984); *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (en banc); *Wharton-Thomas v. United States*, 721 F.2d 922 (3d Cir. 1983); *cf.*

(continued...)

[III.D.2] The main case on point is *Pacemaker Diagnostic Clinic of America v. Instromedix, Inc.*,¹⁰² decided in 1984. *Pacemaker* involved a patent infringement matter in which both parties agreed to have the case heard by a magistrate. At the conclusion of the bench trial, both parties appealed. The Ninth Circuit panel, raising the issue sua sponte, ruled that magistrate civil authority was unconstitutional, noting that the office of the magistrate was not created under Article III, and that magistrates were not district court adjuncts because they could enter final judgment in civil matters.¹⁰³ The court reconvened en banc to reconsider the case. An eleven-judge panel of the Ninth Circuit, using a separation-of-powers analysis, found that magistrate judges' civil authority was constitutional. Then-Judge (now Justice) Kennedy, writing for the court, initially acknowledged that Article III separation of powers actually encompasses two types of protections: personal and structural.¹⁰⁴ The court stated that “[t]he component of the separation of powers rule that protects the integrity of the constitutional structure, as distinct from the component that protects the rights of litigants, cannot be waived by the parties”¹⁰⁵ However, the court found that the consent issue was irrelevant because no separation-of-powers violation had occurred by referring the civil matter to the

¹⁰¹(...continued)

United States v. Dobby, 751 F.2d 1140 (10th Cir. 1985) (quoting favorably from *Pacemaker* and *Collins*).

[*Id.*](#)

¹⁰² 725 F.2d 537 (9th Cir. 1984) (en banc).

¹⁰³ See *id.* at 539.

¹⁰⁴ See *id.* at 541 (noting that both personal and structural protections are at issue when a case is transferred to a non-Article III court). The personal protections involve the person (litigant) affected by government action, and insure that that individual has the right to be heard by a judge acting under the protections and insulation of Article III. The structural aspect of Article III insures the independence and separation of the judiciary. See *id.*

¹⁰⁵ *Id.* at 543-44. While most agree that the personal protections afforded by Article III may be waived by the litigant, some argue that consent is not sufficient to deal with the structural issues. The reasoning is that individuals are not concerned with ensuring the independence of the judicial branch; instead, their choice to allow a magistrate judge to hear the proceeding is based on matters of speed and likelihood of success. See Downs, *supra* note 40, at 1059 (“[Litigants] have little personal interest in protecting values such as the separation of federal powers, the allocation of powers between the states and the federal government, or the public’s interest in maintaining a highly qualified, impartial judiciary.”); Shannon, *supra* note 10, at 281 (noting that opponents of the Act argue that parties cannot waive the structural protections of Article III, as they relate to the nature of the judicial branch, not the individual).

magistrate.¹⁰⁶ Instead of attempting to decide whether the parties' consent was sufficient to safeguard the structural protections, the court turned to an analysis of whether the judiciary retained its essential powers and independence.¹⁰⁷ The court held that, because an Article III judge retained sufficient control over the magistrate, there was no separation-of-powers violation.

[III.D.3] The Ninth Circuit emphasized that the Act kept Article III judges in control over federal law matters¹⁰⁸—specifically, that “[t]he statute invests the Article III judiciary with extensive administrative control over management, composition, and operation of the magistrate system.”¹⁰⁹ Under the Act, Article III judges have the power to designate magistrate positions and to select and remove individual magistrates, as well as the power to control civil cases heard by magistrates through their ability to refer, to cancel a referral, and to review magistrates' cases in some circumstances. Article III judges also retain appellate review power.¹¹⁰

[III.D.4] Because the referral to a magistrate did not create a structural problem and the procedure required consent to waive the parties' right to be heard by an Article III judge, the court of appeals found the Act's provision permitting referral of civil cases to a magistrate for trial to be constitutional. Like the Supreme Court in [Peretz](#), the Ninth Circuit in *Pacemaker Diagnostic Clinic* determined that the magistrate was an adjunct, and therefore that the delegation in question did not threaten the independence of the judiciary.

¹⁰⁶ The court noted that, if a statute violated the separation-of-powers principle, waiver by the parties would not validate its provisions. In the case of civil matters delegated to magistrates under the Federal Magistrate's Act, however, the court held that there is no violation of the separation of powers and thus consent is not a significant issue. See 725 F.2d at 544-45.

¹⁰⁷ The court reverted to the essential attributes test set out in [Northern Pipeline, 458 U.S. at 76-81](#), holding that the separation-of-powers doctrine is not violated as long as there is “both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law.” 725 F.2d at 544. The court ultimately held that Article III courts controlled the magistrate system in numerous ways; thus the system was not unconstitutional. See *id.* at 544-45.

¹⁰⁸ See *id.* at 544.

¹⁰⁹ *Id.*

¹¹⁰ See *id.* at 546.

IV. **UNITED STATES v. JOHNSTON**

[IV.1] In July 2001, the United States Court of Appeals for the Fifth Circuit, in [United States v. Johnston](#),¹¹¹ revived the debate over the constitutionality of magistrate judges' powers and jurisdiction in at least one respect. The case presented the issue of whether magistrate judges have jurisdiction to dispose of federal prisoners' motions brought pursuant to [28 U.S.C. § 2255](#).¹¹² Johnston was convicted of conspiracy to possess with intent to distribute cocaine, cocaine base, and marijuana. The district judge sentenced him to 135 months of imprisonment, five years of supervised release, a \$6,000 fine, and a \$50 special assessment. On direct appeal, the Fifth Circuit panel affirmed the decision of the lower court.¹¹³ Johnston later filed a § 2255 motion to vacate, set aside, or correct the sentence.¹¹⁴ In accordance with [28 U.S.C. § 636\(c\)](#), both Johnston and the government consented to have a magistrate judge rule on the motion.¹¹⁵ The magistrate judge subsequently denied § 2255 relief. Although neither party challenged the magistrate judge's jurisdiction to rule on the § 2255 motion, the Fifth Circuit addressed this constitutional issue *sua sponte*.¹¹⁶

[IV.2] The court of appeals held that consensual delegation of § 2255 motions to a magistrate judge pursuant to § 636(c) is unconstitutional, although its analysis is less than clear.¹¹⁷ First, the court analyzed whether a § 2255 proceeding constitutes a civil or

¹¹¹ [258 F.3d 361 \(5th Cir. 2001\)](#).

¹¹² See *infra* Part V.A (discussing the nuances of [28 U.S.C. § 2255](#)).

¹¹³ See [258 F.3d at 363](#).

¹¹⁴ See *id.* Johnston alleged that the district court committed three errors: (1) “the district court erred in finding that [one of the witness’s] testimony was a sufficiently reliable basis for calculating Johnston’s sentence; (2) the government violated [18 U.S.C. § 201\(c\)](#) by paying [the witness] . . . for her testimony and by agreeing not to prosecute [a second witness] in exchange for his testimony; and (3) the prosecutor engaged in misconduct during the trial.” *Id.*

¹¹⁵ See *supra* Part III.D (discussing magistrate judges’ authority to hear civil matters with the parties’ consent).

¹¹⁶ See [258 F.3d at 363](#) (“[W]e have a ‘special obligation to satisfy [ourselves] not only of [our] own jurisdiction, but also that of the lower courts in a cause under review,’ even though the parties are prepared to concede it.”) (citation and internal quotation marks omitted).

¹¹⁷ See *id.* at 372.

a criminal matter.¹¹⁸ After reviewing how other courts have addressed this question¹¹⁹ and acknowledging the significant criminal attributes of the proceeding,¹²⁰ the court decided that, for the purposes of § 636(c), a § 2255 motion is a civil matter over which Congress intended magistrate judges to preside with the consent of the parties.¹²¹

[IV.3] Finding the proceeding civil in nature, the Fifth Circuit’s analysis went on to determine whether delegation of § 2255 motions to magistrate judges is constitutional in accordance with Article III. While the court found that Johnston’s consent was sufficient to waive his personal right to a proceeding before an Article III judge, consent was not enough to eliminate the structural guarantees provided by Article III.¹²² The court acknowledged that almost all of the circuit courts had determined that magistrate judges can constitutionally preside over civil cases with consent.¹²³ The court noted, however, that “a § 2255 motion does not easily comport with the average civil case.”¹²⁴

[IV.4] The Fifth Circuit panel distinguished § 2255 motions from other civil proceedings and from § 2254 state-prisoner habeas corpus petitions¹²⁵ because, unlike

¹¹⁸ See *infra* Part V.A (discussing the civil and criminal aspects of § 2255 proceedings).

¹¹⁹ See [258 F.3d at 364](#) (indicating that, while few courts had addressed this precise question, several courts have implied that the motion constituted a civil proceeding). See, e.g., *United States v. Bryson*, 981 F.2d 720, 723 (4th Cir. 1992) (concluding in dicta that a magistrate judge could dispose of a § 2255 motion).

¹²⁰ See [258 F.3d at 365](#) (stating that the [Advisory Committee’s note to Rule 1 of the Rules Governing Section 2255 Proceedings for the United States District Courts](#), 28 U.S.C. foll. § 2255 (1994), recognized a § 2255 motion as a “further step in the movant’s criminal case and not a separate civil action”).

¹²¹ See [id. at 366](#). The court also looked to the legislative history of § 636(c) and concluded that the history suggested that “the terms ‘civil matter’ in § 636(c) should be broadly interpreted to allow for increased availability of adjudications by magistrate judges.” *Id.*

¹²² See *supra* notes 104-06 and accompanying text (discussing the personal and structural protections implicated by Article III).

¹²³ See *supra* note 101 (citing decisions from those circuits that directly or indirectly support this conclusion).

¹²⁴ [258 F.3d at 368](#).

¹²⁵ Although a habeas corpus proceeding under [28 U.S.C. § 2254](#) is also a quasi-civil (continued...)

other civil matters, the § 2255 motion directly questions the ruling of an Article III judge. Thus, delegation to a magistrate judge puts the final say into the hands of a non-Article III judge, who is without the protections of life tenure and undiminishable salary.¹²⁶

[IV.5] The court next addressed the notion that, unlike a typical civil matter, the § 2255 motion is “a further step in the movant’s criminal case.” Therefore, “consensual delegation of such a proceeding may unwittingly embroil a magistrate judge in the constitutional conduct of a felony trial.”¹²⁷ The court stated that to permit a magistrate judge to preside over a felony trial would undoubtedly violate Article III.¹²⁸ While acknowledging that the Supreme Court has permitted the delegation of voir dire, another integral part of a felony criminal trial, to magistrate judges,¹²⁹ the court again distinguished § 2255 motions because, in voir dire, the ultimate decision remains in the district court and, therefore, fewer Article III problems arise.¹³⁰ Conversely, when a magistrate judge issues a final order in a consensual § 2255 proceeding, that order would not be subject to review by a district judge. This reviewability problem is “severe enough to create the impression that magistrate judges are not adjuncts, but are independent of Article III control.”¹³¹

¹²⁵(...continued)

proceeding and attacks a prior judgment, the court distinguished habeas petitions as referring to state criminal cases, which are heard by state judges who do not enjoy Article III protections. Thus, these proceedings do not involve a non-Article III judge reviewing an Article III judge’s determinations. See [id. at 368-69](#) (stating that, with § 2254 proceedings, “concerns over comity and federalism are more pronounced than any concerns over the structural guarantees of Article III”).

¹²⁶ See [id. at 369](#).

¹²⁷ [Id. at 369-70](#).

¹²⁸ See [id. at 370](#) (providing the following three reasons: “(1) a felony trial is a complex affair requiring close oversight of delicate constitutional questions; (2) a district court cannot adequately review a magistrate judge’s actions in an entire felony trial; and (3) by giving away critical criminal jurisdiction, federal judges risk devitalizing their coordinate branch of government, thereby upsetting our constitutional balance”).

¹²⁹ See [id.](#); see also *supra* Part III.C (discussing the Supreme Court’s approval of magistrate jurisdiction over voir dire).

¹³⁰ See [258 F.3d at 370](#) (also discussing plea allocutions and noting that they are not an essential component of the trial).

¹³¹ [Id.](#)

[IV.6] Citing [Northern Pipeline](#) and [Raddatz](#), the Fifth Circuit noted that the constitutionality of magistrate power has continually been upheld on the ground that magistrates act in a way that is subsidiary to district judges.¹³² But that is not the case in § 2255 proceedings, where magistrate judges review district judges’ determinations and Article III judges then have no power to review the magistrate judges’ determinations. This situation results in the magistrate judge possessing greater control and power than the district judge, thus “turn[ing] the concept of reviewability on its head.”¹³³

[IV.7] The court emphasized that the guarantees of Article III are to ensure the separation of governmental powers, thereby preventing the aggrandizement of one branch and ensuring an independent judiciary. It recognized that in other cases involving the constitutionality of magistrate judges’ powers the issue was not the typical separation-of-powers concern, “ ‘where the integrity of one branch is threatened by another.’ ”¹³⁴ Here, by contrast, the court wrote:

By allowing consensual delegation of § 2255 proceedings to magistrate judges, we exact a deadly blow to the vitality and strength of the independent judiciary. Congress, through its legislative powers to enact laws regulating and controlling the term, salary, the qualifications, the duties, and the establishment of magistrate judges, has then the capability to direct the affairs of Article III courts.¹³⁵

After assessing these various problems, the Fifth Circuit concluded that the consensual delegation of § 2255 motions to magistrate judges is unconstitutional.

¹³² See [id. at 370-72](#).

¹³³ [Id. at 371](#). The court added that the mechanisms of control that are normally available to district judges in civil matters—such as not appointing magistrate judges or not referring the matters to them—are not sufficient in the context of § 2255 where the system is so “starkly at odds with Article III.” [Id. at 372](#).

¹³⁴ [Id. at 372](#) (quoting *Pacemaker*, 725 F.2d at 544). In cases involving the consensual delegation of civil matters, the “only conceivable threat to the independence of the judiciary concerns the danger to the independence of the magistrate judges from *within*, rather than from without” [Id.](#) (emphasis added).

¹³⁵ [Id.](#) (footnote omitted).

V. ANALYSIS

[V.1] [*United States v. Johnston*](#) is a significant case regarding critical separation-of-powers issues. While the Fifth Circuit came to the correct conclusion that § 2255 proceedings should be beyond the purview of magistrate judge authority via consensual delegation, the court’s analysis is less than crystal clear.

A. Section 2255 Motions: Civil or Criminal?

[V.A.1] The first problem with the [*Johnston*](#) analysis is its handling of the characterization of § 2255 motions. Section 2255 permits a federal prisoner to file a motion to “vacate, set aside or correct [a] . . . [federal] sentence”¹³⁶ on the ground that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.”¹³⁷ This remedy is analogous to [28 U.S.C. § 2254](#), which provides a post-conviction mechanism for state prisoners to have their convictions or sentences reviewed.¹³⁸ Historically, federal prisoners utilized the habeas corpus remedy to challenge their convictions; however, Congress enacted § 2255 in order to improve particular problems in the technical management of applications for habeas corpus by federal prisoners.¹³⁹ Thus, today § 2254 is chiefly used by state prisoners, while the § 2255 remedy is reserved for federal prisoners. Although similar in purpose, § 2254 and § 2255 have distinguishing features, the most important of which, for present purposes, is that § 2254 has been clearly designated a civil proceeding, while it is unclear whether § 2255 is civil or criminal in nature.

¹³⁶ [28 U.S.C. § 2255](#) (1994 & Supp. V 1999).

¹³⁷ [*Id.*](#)

¹³⁸ See [28 U.S.C. § 2254](#) (1994 & Supp. V 1999).

¹³⁹ See 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* 1710 (4th ed. 2001) (noting three major problems with habeas corpus claims brought by federal prisoners: “(1) administrative costs precipitated by a tripling in the number of habeas corpus applications filed in federal courts annually between 1937 and 1945; (2) the longstanding assignment of venue in habeas corpus cases to cases in the federal district of confinement notwithstanding that federal prisoners generally were incarcerated at a great distance from the district in which they were convicted, so that securing the attendance of witnesses in the production of evidence presented peculiar difficulties . . . ; and (3) the incarceration of most federal prisoners in only a few federal districts . . . which meant that a few federal judges bore almost the entire case load of federal prisoner petitions.”).

[V.A.2] The Supreme Court has explicitly and repeatedly deemed habeas corpus petitions brought by state prisoners to be civil proceedings.¹⁴⁰ Categorizing § 2255 motions as either civil or criminal, however, has not been such a straightforward task. In some ways, a § 2255 motion appears to constitute a civil proceeding, while in other respects, it appears to be an extension of the criminal case in which the federal prisoner was convicted and sentenced. Because of these dual categorizations, courts have struggled with this issue and have yet to agree on a consistent classification.¹⁴¹

[V.A.3] There are several arguments that support characterizing a § 2255 proceeding as civil. First, § 2255 is located in Title 28 of the United States Code, which primarily sets out rules dealing with the civil aspects of judicial procedure.¹⁴² Section 2255 was not placed in Title 18, which deals mainly with crimes and criminal procedure. Second, § 2255 is analogous to § 2254. The latter, which is civil in nature, provides a means of collateral attack for state prisoners; by implication, the former, which provides a means of collateral attack for federal prisoners, arguably is also civil in nature.¹⁴³ Third, district court clerks generally assign a civil case number to § 2255 motions, in addition to the original criminal case number.¹⁴⁴ Fourth, the time for filing an appeal from an order disposing of a § 2255 motion is set out in [Rule 4\(a\) of the Federal Rules of Appellate Procedure](#), which stipulates the time for appeal for civil cases; the time for filing an appeal in criminal cases is governed by [Rule 4\(b\)](#).¹⁴⁵

¹⁴⁰ See, e.g., [Browder v. Director](#), 434 U.S. 257, 269 (1978) (“It is well settled that habeas corpus is a civil proceeding.”); [Fisher v. Baker](#), 203 U.S. 174, 181 (1906) (“The proceeding is in habeas corpus, and is a civil and not a criminal proceeding.”); *Ex parte Tom Tong*, 108 U.S. 556, 559-60 (1883) (holding that habeas corpus proceedings are civil, not criminal).

¹⁴¹ See [United States v. Johnston](#), 258 F.3d 361, 366 (5th Cir. 2001) (“We . . . have found consistency in defining § 2255 proceedings an elusive task.”).

¹⁴² See *Williams v. United States*, 984 F.2d 28, 29 (2d Cir. 1993) (discussing the civil and criminal aspects of a § 2255 motion).

¹⁴³ See *id.*

¹⁴⁴ See *id.* The reason for assigning the civil number is to have the proceeding count separately for statistical purposes. Interview with Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts, in Washington, D.C. (Mar. 15, 2002).

¹⁴⁵ See [Rule 11, Rules Governing Section 2255 Proceedings for the United States District Courts](#), 28 U.S.C. foll. § 2255 (1994).

[V.A.4] On the other hand, there are several arguments that support characterizing a § 2255 proceeding as criminal. First, and most convincingly, the Advisory Committee's note to the § 2255 Rules explicitly states that "a motion under § 2255 is a further step in a movant's criminal case and not a separate civil action."¹⁴⁶ Second, the Advisory Committee also states that the rules intentionally omitted a filing fee for § 2255 motions, "to recognize specifically the nature of a § 2255 motion as being a continuation of the criminal case whose judgment is under attack."¹⁴⁷ Third, the legislative history of § 2255 indicates that Congress viewed the motion as an extension of the criminal proceeding. The Senate Report supplementing a bill that put forth the language actually adopted in § 2255 contrasted the new motion with the civil remedy of habeas corpus, finding instead that the new "motion remedy is in the criminal proceeding."¹⁴⁸

[V.A.5] Because of the dualistic nature of § 2255, courts have had difficulty with its characterization. The result has been a patchwork of conflicting decisions.¹⁴⁹ Further

¹⁴⁶ See [Section 2255 Rules 1, 3, 11-12, Advisory Committee's notes](#), Pub. L. 94-426, § 1, 90 Stat. 1334 (1976). While this argument on its face appears to be controlling, some courts, such as the Fifth Circuit in [Johnston](#), have cautioned against relying heavily on the Advisory Committee's notes when dealing with the distinction between a § 2255 motion and a habeas proceeding. See, e.g., [Johnston, 258 F.3d at 365](#); [United States v. Nahodil](#), 36 F.3d 323, 328-29 (3d Cir. 1994) ("Considering . . . the argument that a § 2254 petition is a separate civil proceeding whereas a § 2255 proceeding is a continuation of the criminal trial, we understand the difference to have arisen in 1948 due to the Judicial Conference's urging that the administration of habeas corpus would be simplified if the proceeding could be brought in the sentencing court instead of the court of the district where the prisoner was confined. The change 'was intended simply to provide in the sentencing court a remedy *exactly commensurate* with that which had previously been available as habeas corpus.' Thus, this distinction in the form of the proceedings [as stated in the Advisory Committee's notes] has no substantive repercussions.") (citations omitted).

¹⁴⁷ [Section 2255 Rule 3, Advisory Committee's note](#). Prior to this rule, some jurisdictions charged a filing fee of \$15. This was the usual filing fee for civil actions, and was different from the special filing fee of \$5 that was charged for habeas corpus petitions. See [Williams v. United States](#), 984 F.2d 28, 30 (2d Cir. 1993).

¹⁴⁸ S. Rep. No. 1526, 80th Cong., 2d Sess. 2 (1948).

¹⁴⁹ See *infra* notes 152-66 and accompanying text.

complicating the matter, many courts have addressed the issue only indirectly,¹⁵⁰ and others have summarily characterized the § 2255 motion without full analysis.¹⁵¹

[V.A.6] While recognizing the criminal aspects of the § 2255 motion, some courts have nevertheless determined that the motion constitutes an independent civil proceeding. In *United States v. Balistreri*,¹⁵² for example, the United States Court of Appeals for the Seventh Circuit declared that “[S]ection 2255 has authoritatively been characterized as ‘an independent civil suit.’”¹⁵³ Although the issue before the court was whether a *coram nobis* motion was to be deemed civil or criminal, the Seventh Circuit noted the similarities to the § 2255 motion and concluded that the *coram nobis* motion was to be characterized as civil to the extent that it is like a § 2255 motion.¹⁵⁴ In *Baker v. United States*,¹⁵⁵ the Eighth Circuit also characterized the § 2255 motion as civil. The court held that, although the motion attacks a criminal conviction, it does not involve the issue of whether the prisoner is guilty or innocent, and it is, in fact, “a special civil rather than a criminal proceeding”¹⁵⁶ And although it has not heard a case on this precise question, the United States Supreme Court has briefly addressed the issue in dicta. In 1959, in *Heflin v. United States*,¹⁵⁷ the Court stated that “a motion under § 2255, like a petition for a writ

¹⁵⁰ See, e.g., *United States v. Bryson*, 981 F.2d 720, 723 (4th Cir. 1992) (finding that a magistrate judge could hear a § 2255 motion with the consent of the parties in accordance with [28 U.S.C. § 636\(c\)](#), which provides that “[u]pon consent of the parties,” a magistrate “may conduct any and all proceedings in a jury or nonjury *civil* matter.”) (emphasis added).

¹⁵¹ See, e.g., *United States v. Young*, 966 F.2d 164, 165 (5th Cir. 1992) (simply stating that “a section 2255 proceeding is civil,” and concluding that the 60-day appeals time limit of [Rule 4\(a\) of the Federal Rules of Appellate Procedure](#) applies); *United States v. Dean*, 919 F.2d 348, 349 (5th Cir. 1991) (concluding without explanation that “claims brought under § 2255 are civil actions”).

¹⁵² 606 F.2d 216 (7th Cir. 1979).

¹⁵³ *Id.* at 220.

¹⁵⁴ See *id.*

¹⁵⁵ 334 F.2d 444 (8th Cir. 1964) (holding that a federal prisoner bringing a § 2255 motion is not constitutionally entitled to have court-appointed counsel).

¹⁵⁶ *Id.* at 447 (citation and internal quotation marks omitted).

¹⁵⁷ 358 U.S. 415 (1959).

of habeas corpus, is not a proceeding in the original criminal prosecution, but an independent civil suit.”¹⁵⁸

[V.A.7] By contrast, other courts have ruled that § 2255 motions are not civil proceedings. In *United States v. Clark*,¹⁵⁹ for example, the Second Circuit noted that a § 2255 motion “is properly to be regarded as a step in the criminal case, and not the initiation of an independent civil proceeding.”¹⁶⁰ After a thorough discussion of the criminal and civil features of a § 2255 motion, that same court, in *Williams v. United States*,¹⁶¹ concluded that a § 2255 motion is a continuation of the criminal case in which the movant was convicted and does not initiate an independent civil proceeding.¹⁶² The Ninth Circuit has taken the same position, asserting that “[i]t is now clear that ‘a motion under § 2255 is a further step in the movant’s criminal case and not a separate civil action.’ ”¹⁶³ Although not ruling on this issue directly, the Tenth Circuit has indicated its adoption of this view as well.¹⁶⁴

[V.A.8] Still other courts have refused to place the § 2255 motion solely into one category or the other, instead fully acknowledging its dual qualities, characterizing the proceeding as a hybrid, and stating that the proceeding may be regarded as either, depending on the circumstances. The Sixth Circuit took this approach in [United States v. Means](#).¹⁶⁵ “The inescapable fact is that [a § 2255 proceeding] has characteristics of both

¹⁵⁸ *Id.* at 418 n.7.

¹⁵⁹ 984 F.2d 31 (2d Cir. 1993).

¹⁶⁰ *Id.* at 33.

¹⁶¹ 984 F.2d 28 (2d Cir. 1993).

¹⁶² See *id.* at 29 (concluding that “an order denying relief under section 2255 is not subject to [\[Rule 58 of the Federal Rules of Civil Procedure \(‘Entry of Judgment’\)\]](#) and that] no judgment is to be entered upon such an order”).

¹⁶³ [United States v. Martin](#), 226 F.3d 1042, 1047 n.7 (9th Cir. 2000) (concluding that, as a result, motions for reconsideration are available after a final order).

¹⁶⁴ See *United States v. Cook*, 997 F.2d 1312, 1315 n.1 (10th Cir. 1993) (“Unlike state prisoner habeas proceedings brought under 28 U.S.C. § 2254 which are new civil proceedings that require a civil docket number, a motion attacking sentence brought under § 2255 is a continuation of the original criminal action and must maintain the original docket number.”).

¹⁶⁵ [133 F.3d 444 \(6th Cir. 1998\)](#).

[a civil and a criminal proceeding], and may properly be categorized as one or the other depending on the context and reason for making the inquiry.”¹⁶⁶

[V.A.9] After surveying the legal landscape, the Fifth Circuit in [Johnston](#) held that, for purposes of magistrate judge authority under [28 U.S.C. § 636\(c\)](#), a § 2255 motion should be regarded as a civil matter.¹⁶⁷ In so doing, the court professed to adopt the contextual approach articulated in [Means](#). The court analyzed the “legislative and statutory framework” of the § 2255 motion and concluded that, in this context, the proceedings should be regarded as civil. But the court then went on to state that delegation of a § 2255 motion to a magistrate judge is problematic because the proceeding “is a further step in the movant’s criminal case.”¹⁶⁸ The court explained that “consensual delegation of such a proceeding may unwittingly embroil a magistrate judge in the unconstitutional conduct of a felony trial.”¹⁶⁹ This statement, however, is at odds with the court’s prior statements characterizing § 2255 as a civil proceeding. Although the court previously acknowledged the dual characteristics of the proceeding and admitted that it was partially criminal in nature,¹⁷⁰ it ultimately concluded that § 2255 motions were to be regarded as civil proceedings for purposes of § 636(c). It is a conspicuous contradiction then to revert to the criminal classification as a basis for the argument that delegation to a magistrate judge is unconstitutional.

[V.A.10] The Fifth Circuit could have avoided this contradiction in various ways. First, it could have held simply that § 2255 is not an independent civil proceeding, but rather is a continuation of the criminal case in which the prisoner was convicted. As previously noted, several courts have supported this conclusion,¹⁷¹ and there is ample evidence of the criminal nature of § 2255 motions. If the § 2255 proceeding is characterized in this manner, then delegation to a magistrate judge would violate the statute—as it permits

¹⁶⁶ [Id. at 449.](#)

¹⁶⁷ See [United States v. Johnston](#), 258 F.3d 361, 366 (5th Cir. 2001).

¹⁶⁸ [Id. at 369.](#)

¹⁶⁹ [Id.](#)

¹⁷⁰ See [id. at 365.](#)

¹⁷¹ See *supra* notes 146-48, 159-64 and accompanying text.

delegation only of civil matters¹⁷²—and would almost certainly be a violation of Article III as well.¹⁷³

[V.A.11] Second, the court could have adopted the Sixth Circuit’s approach in [Means](#), which acknowledges the dualistic nature of the proceeding, and holds that the proceeding “may properly be categorized as [civil or criminal] depending on the context and the reason for making the inquiry.”¹⁷⁴ While the Fifth Circuit paid lip service to this approach,¹⁷⁵ the court could have held squarely that, in the context of § 636(c), § 2255 motions must be regarded as criminal in nature.

[V.A.12] Third, the court could have characterized § 2255 motions as hybrid proceedings: quasi-civil and quasi-criminal. Although this approach may appear to be redundant with [Means](#), it would differ in that the proceeding would not have to be classified as one or the other depending on the context, and would instead simply be regarded as hybrid in nature and unable to fit into either classification. The court could then have reasoned that, because of its distinctive nature and its dissimilarity from the typical civil proceeding, § 2255 raises constitutional concerns and that it would be a violation of Article III to permit magistrate judges to preside over these proceedings.

[V.A.13] The court in [Johnston](#) was correct in its refusal to disregard the criminal aspects of the § 2255 proceeding and in noting the constitutional problems that its criminal nature raises in the context of delegation to magistrate judges under § 636(c). However, the court failed to deal sufficiently with the characterization issue. By formulating a somewhat contradictory analysis, the Fifth Circuit has made it difficult for other courts to adopt its reasoning in toto.

B. Separation of Powers

[V.B.1] The Fifth Circuit persuasively argued that consensual delegation of § 2255 motions to magistrate judges is unconstitutional because the final determination of the proceeding is left to the magistrate judge, who has the power to overturn the decision of an Article III judge. The court presented “three major problems”¹⁷⁶ with magistrate judges’ jurisdiction in § 2255 matters, although two of the arguments are somewhat similar.

¹⁷² See [28 U.S.C. § 636\(c\)](#) (1994 & Supp. V 1999).

¹⁷³ See [Johnston, 258 F.3d at 370](#) (“[W]e doubt that a non-Article III judge can preside over a felony trial without violating the strictures of Article III.”).

¹⁷⁴ [Means, 133 F.3d at 449.](#)

¹⁷⁵ See [Johnston, 258 F.3d at 365-66.](#)

¹⁷⁶ [Id. at 368.](#)

[V.B.2] First, the court declared that the ability to oversee § 2255 proceedings raises Article III concerns because a magistrate judge could essentially “attack the validity of an Article III judge’s rulings.”¹⁷⁷ Thus, judges without “lifetime tenure and undiminishable compensation would have controlling authority.”¹⁷⁸

[V.B.3] Second, without explicitly stating it and expanding upon it, the court was concerned with the separation-of-powers doctrine, which requires that the essential attributes of judicial power remain in Article III judges. As the *Johnston* court noted, because a magistrate judge has the ability to attack the validity of an Article III judge’s determination, the magistrate judge has “controlling authority.” Thus the magistrate judge in essence possesses more power than an Article III judge, therefore removing the essential attributes of judicial power from Article III. The power that the Constitution vests in the judicial branch must remain in that branch, and magistrate judges determining § 2255 motions through consensual delegation threaten this principle.

[V.B.4] The third argument presented by the court also focuses on the separation of powers. Although the argument is convincing, it is redundant with the first line of reasoning. The Fifth Circuit stated that, because district court judges cannot review magistrate judges’ determinations of § 2255 proceedings, it creates “the impression that magistrate judges are not adjuncts, but are independent of Article III control.”¹⁷⁹ The court noted that both the Fifth Circuit and other circuits have regularly upheld the delegation of civil matters to magistrate judges with the parties’ consent. However, the court distinguished § 2255 proceedings from other civil matters. The court stated that the “fact that a magistrate judge may essentially overturn the judgment of an Article III district court in a criminally related case detracts from the reasons supporting constitutionality of consensually delegated civil matters.”¹⁸⁰ Delegation of this responsibility does not have sufficient mechanisms of review and control to satisfy Article III. Unlike other civil matters in which the district judge has the ability to review magistrate judges’ determinations, “consensual magistrate judge authority of § 2255 motions creates the ironic situation whereby non-Article III magistrate judges review and reconsider the propriety of rulings by Article III district judges, but do not themselves have to worry about review.”¹⁸¹ The court recognized that “the district court could stop a magistrate judge from having its own criminal judgments vacated by: (1) not appointing magistrate judges; (2) not originally

¹⁷⁷ [*Id.* at 369.](#)

¹⁷⁸ [*Id.*](#)

¹⁷⁹ [*Id.* at 370.](#)

¹⁸⁰ [*Id.* at 371.](#)

¹⁸¹ [*Id.*](#)

referring § 2255 proceedings; or (3) vacating the civil reference under § 636(c)(4)”¹⁸²
But the court found these options inadequate:

If the only way to review and to control something so starkly at odds with Article III, like having magistrate judges review district court rulings but not vice versa, is to do any of the three listed options, then there is no sense for having a magisterial scheme dealing with the consensual delegation of § 2255 proceedings. The only options for reviewability and control are untenable with a consensual delegation of § 2255 proceedings to magistrate judges.¹⁸³

[V.B.5] Without ever making the point precisely, the Fifth Circuit relied on the “essential attributes” argument. The court intimated that, in situations involving consensual delegation of § 2255 proceedings, the essential attributes of judicial power do not remain with the district judges. Because the magistrate judge reconsiders an Article III judge’s determination and the district judge generally cannot review that determination, final authority rests with the magistrate judge. Therefore, an Article I judge usurps the power of an Article III judge in violation of the Constitution.

[V.B.6] While the court’s first argument focuses on a magistrate judge’s power to attack prior Article III judges’ rulings when determining § 2255 proceedings, its third argument emphasizes the non-reviewability of a magistrate judge’s decision. The core of both of these arguments, however, is rooted in the separation-of-powers doctrine and the notion that the essential attributes must remain in the Article III branch.

¹⁸² [Id. at 371-72.](#) While normally in the consensual delegation situation “an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court,” [28 U.S.C. § 636\(c\)\(3\)](#) (1994 & Supp. V 1999), § 636(c)(4) allows the parties to “further consent to appeal on the record to a judge of the district court” [Id. § 636\(c\)\(4\).](#)

¹⁸³ [258 F.3d at 372.](#)

VI. CONCLUSION

[VI.1] If proceedings under [28 U.S.C. § 2255](#) are properly viewed as civil in nature, then the United States Court of Appeals for the Fifth Circuit, in [United States v. Johnston](#), reached the correct result. Consensual delegation of these proceedings to magistrate judges is beyond the purview of Article III.

[VI.2] If followed by other circuits, however, this decision will not necessarily have drastic consequences for district court dockets,¹⁸⁴ for several reasons. First, as noted in this Article, some circuits treat § 2255 as criminal in nature;¹⁸⁵ in these circuits, therefore, consensual delegation—as a matter of statutory law, rather than constitutional law—simply does not apply.¹⁸⁶ Second, even in jurisdictions that treat § 2255 as civil in nature, magistrate judges clearly have the power to issue reports and recommendations that are subject to review by district judges. Indeed, the Federal Magistrates Act expressly provides that a district judge, without the consent of the parties, may designate a magistrate judge “to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of that court . . . of applications for post[-]trial relief made by individuals convicted of criminal offenses”¹⁸⁷ This type of non-consensual delegation contains sufficient

¹⁸⁴ Unfortunately, the Administrative Office of the U.S. Courts does not have a specific statistical category for consensual § 2255 proceedings. However, of 1,288 consensual delegations in prisoner cases to magistrate judges from July 1, 2000 to June 30, 2001, as many as 482 may have been in § 2255 cases. (The statistics indicate 10 cases in the category of “motion to vacate sentence” and 472 in the category of “general.”) Interview with Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts, in Washington, D.C. (Mar. 15, 2002).

¹⁸⁵ See *supra* notes 146-48, 159-64 and accompanying text.

¹⁸⁶ Judge Higginbotham, concurring in [Johnston](#), took this position: “I share the majority’s concern over the constitutionality of allowing magistrate judges to dispose of section 2255 motions. I would not, however, reach this constitutional question.” [258 F.3d at 372](#) (Higginbotham, J., concurring). “A proceeding to decide if a criminal conviction will stand is a criminal proceeding in every relevant practical and functional sense, however we choose to label it.” [Id. at 373.](#)

¹⁸⁷ [28 U.S.C. § 636\(b\)\(1\)\(B\)](#) (1994 & Supp. V 1999).

controls to avoid the constitutional concerns expressed in [Johnston](#).¹⁸⁸ Third, some jurisdictions may have sufficient resources to handle any additional burdens on the court.

[VI.3] Any jurisdictions in which a significant number of § 2255 motions are referred to magistrate judges for disposition could suffer significant impact from a decision like [Johnston](#); those courts will have to be more creative. For example, they might argue for more district judges, due to a “judicial emergency.”¹⁸⁹ Or chief district judges might be able to persuade senior district judges to assume some § 2255 responsibilities. Or the additional work on prisoner cases might justify a greater number of pro se law clerks. The point is that some courts may have to experiment to satisfy their legitimate needs. Indeed, one of the principle ideas pervading the congressional committee reports that accompanied the 1976 Federal Magistrates Act, and many Supreme Court cases construing it, is the notion that the Act should be interpreted broadly whenever possible,

¹⁸⁸ The statute reads:

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by a magistrate. The judge may also receive further evidence or remit the matter to the magistrate with instructions.

[Id. § 636\(b\)\(1\)\(C\).](#)

¹⁸⁹ See, e.g., Hon. William H. Rehnquist, Chief Justice of the United States, The 1997 Year-end Report on the Federal Judiciary at 7-9, January 1, 1998. Discussing “judicial emergencies,” Chief Justice Rehnquist wrote, *inter alia*: “Judicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed. Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary.” *Id.* at 7.

in order to “continue innovative experimentation in the use of this judicial officer.”¹⁹⁰ As the House Judiciary Committee noted,

[i]f district judges are willing to experiment with the assignment to magistrates of other functions in the 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.¹⁹¹

[VI.4] [United States v. Johnston](#) makes clear that one type of experimentation — consensual delegation of § 2255 matters to magistrate judges — fails as a matter of constitutional law. Undoubtedly courts can and will come up with other efficient ways to dispose of the critically important post-conviction work of the federal judiciary.

¹⁹⁰ Comm. on the Judiciary, H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172) (Report on Pub. L. No. 94-577, 90 Stat. 2729 (1976) [hereinafter House Judiciary Committee Report]; see *also* [McCarthy v. Bronson](#), 500 U.S. 136, 142 (1991) (adopting a broad reading of the Act “to authorize greater use of magistrates to assist federal judges ‘in handling an ever-increasing caseload’ ” and ruling that in all prisoner lawsuits brought in the federal district courts, a magistrate could hold a hearing and recommend findings of fact without the consent of the prisoner) (internal citation omitted).

¹⁹¹ House Judiciary Committee Report, *supra* note 190, at 12.