The New York American Inn of Court Judicial Roundtable

Meet the Magistrate Judges

February 28, 2018

Moderator: *Hon. Richard Sullivan*

Panelists:

Hon. Stewart D. Aaron
Hon. Robert W. Lehrburger
Hon. Barbara Moses
Hon. Katharine H. Parker

CLE Credits: 1 Professional Practice Reception: 5:30 to 6:45 PM Program: 6:45 to 7:45 PM United States Courthouse 500 Pearl Street Room 850	**Planning Committee:** *Hon. Richard Sullivan*, S.D.N.Y. *Vilia B. Hayes*, Hughes Hubbard & Reed LLP *Tom Brown*, Morea Schwartz Bradham Friedman & Brown LLP *Walter Ricciardi*, Paul, Weiss, Rifkind, Wharton & Garrison LLP *Rebecca L. Orel*, Paul, Weiss, Rifkind, Wharton & Garrison LLP *Annika K. Martin*, Lieff Cabraser Heimann & Bernstein LLP *Mark S. Pincus*, Pincus Law LLC *Alejo Cabranes*, Hughes Hubbard & Reed LLP

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Panel Discussion .....40 minutes

Question and Answer.....10 minutes

UNITED STATES DISTRICT COURT

for the

_____ *Plaintiff*	)	
v.	)	Civil Action No.
_____ *Defendant*	)	

NOTICE, CONSENT, AND REFERENCE OF A CIVIL ACTION TO A MAGISTRATE JUDGE

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States court of appeals like any other judgment of this court. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your case referred to a magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's authority. The following parties consent to have a United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings.

Printed names of parties and attorneys	*Signatures of parties or attorneys*	*Dates*

Reference Order

IT IS ORDERED: This case is referred to a United States magistrate judge to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

Date: _____

_____
District Judge's signature

_____
Printed name and title

Note: Return this form to the clerk of court only if you are consenting to the exercise of jurisdiction by a United States magistrate judge. Do not return this form to a judge.

Print Save As... Reset

A Model for Using Magistrate Judges to Help Mitigate Delay in Federal District Courts

By Edward D. Cavanagh

Magistrate judges play a key role in the handling of civil cases in the Eastern District of New York. By order of the court, a magistrate judge is assigned to each civil case at the time it is filed, in the same way that a judge is assigned, and is authorized to handle all nondispositive pretrial matters, unless the assigned judge orders otherwise. Magistrate judges regularly supervise discovery, resolve discovery disputes, chair settlement conferences, and determine whether matters should be referred to mediation or other forms of alternative dispute resolution. With increasing frequency, parties are agreeing to waive their rights to a trial before a judge and to have their cases tried before a magistrate judge in return for a date certain. All of these activities are in addition to the magistrate judge's traditional duties in the criminal arena.

Magistrate judges, however, were not always such an integral part of the federal civil justice system in the Eastern District. For many years, the position of magistrate judge in the Eastern District was an office in search of a mission. Even after Congress expanded the powers and the number of magistrate judges in 1976,[1] their role in the federal civil justice system remained ill-defined, and their utilization by judges remained somewhat haphazard. Magistrate judges worked principally in the criminal area, handling prisoner petitions, arraignments, and bail hearings. In the civil arena, they sometimes served as special masters or supervised discovery in complex civil cases. Litigants often attempted to avoid magistrate judges, preferring to have their disputes heard by a "real" judge. In short, magistrate judges were generally underemployed and ineffectively used by the courts.

Edward D. Cavanagh
is Professor of Law at St. John's University School of Law and Of Counsel to Morgan, Lewis & Bockius in New York City. He has been the Reporter to the Eastern District of New York Committee on Civil Litigation since 1982, and was a codrafter of the Revised Report of the Special Committee on Effective Discovery in Civil Cases for that district.

CHANGING THE SYSTEM

All of that began to change in the Eastern District in November 1982, on the eve of the adoption of the 1983 amendments to the Federal Rules of Civil Procedure. Concerned that the 1983 amendments with their heavy emphasis on mandatory sanctions for misconduct in the course of discovery and for assertion of baseless claims would prove counterproductive, then-Chief Judge Jack B. Weinstein created the Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York (Special Committee), a blue-ribbon panel of litigators, Eastern District judges, magistrate judges, and court personnel. Its charge was to study the conduct of discovery in the Eastern District and to "determine how discovery necessary to just and speedy resolution of disputes can be obtained at minimum costs in money, time and annoyance."[2] It was Judge Weinstein's view that discovery abuse was not widespread in the Eastern District and that where discovery problems did exist, they were more often than not the product of the lawyers' inexperience or ignorance, not obstructionism. He believed that the solution was to educate lawyers on the role of discovery in civil cases and to provide guidelines on how discovery ought to be conducted. Judge Weinstein saw sanctions as heavy-handed and unnecessarily punitive. More importantly, he felt that mandatory sanctions would have several significant, unintended negative effects on civil litigation in the Eastern District by (1) escalating tensions among counsel and the court, thereby lessening civility in discovery; (2) encouraging costly and time-consuming satellite litigation on discovery issues; and (3) further taxing an already overburdened judiciary.

Judge Weinstein specifically asked the Special Committee to consider how magistrate judges[3] might be utilized to alleviate problems on discovery. The Special Committee met regularly, conferred widely, held public hearings, and circulated a draft report for public comment. In January 1984, the Special Committee presented its final report to the court. In broad outline, the final report recommended a three-pronged approach to addressing discovery problems: (1) cooperation among counsel to avoid or resolve quickly discovery disputes; (2) prompt access to a magistrate judge when a discovery dispute cannot be resolved by the parties; and (3) a series of guidelines outlining presumptively proper behavior in discovery.

Prompt access to a magistrate judge to hear and determine discovery disputes was the keystone of the Special Committee's recommendations. A recurring theme in the comments of practitioners to the Special Committee was their frustration with the slow pace of some judges in deciding discovery issues and with the litigation logjam created by judicial inaction. The Special Committee found that, indeed, discovery disputes received low priority, not from judicial indifference, but rather from heavy workloads that simply pushed discovery matters to the bottom of the pile. To make the promise of prompt access and resolution realistic, the Special Committee proposed broader and routine usage of magistrate judges to oversee discovery. The court adopted that proposal and by standing order authorized each

judge to refer discovery disputes to magistrate judges for resolution. To facilitate the referrals, magistrate judges were assigned to each case at the same time an Article III judge was assigned. In addition, the court adopted procedures to minimize costs and expedite the hearing of discovery disputes by, *inter alia*, authorizing hearings by telephone, limiting the use of written motion papers on discovery issues, and permitting discovery rulings to be memorialized in deposition transcripts, thus obviating the need for formal written opinions.

Judge Weinstein actively encouraged all judges on the court to refer discovery matters to magistrate judges. While some judges were not initially enthusiastic, all judges eventually followed suit.[4] The result has been an unqualified success. Litigants have, in fact, gotten prompt access to a judicial officer and prompt resolution of discovery disputes. Availability of magistrate judges to intervene has had the salutary effect of reducing the number of disputes that parties cannot resolve. Provisions for informal presentation of issues and prompt decisions have achieved significant cost savings and reduced delay. Greater utilization of magistrate judges has also produced significant side benefits by opening the lines of communication between bench and bar and by creating greater uniformity in discovery practice and in decisions on discovery disputes.

EXPANDING MAGISTRATE JUDGE CONTRIBUTIONS

This initial success has led to an even greater role for magistrate judges in the pretrial process. First, the court by standing order has authorized magistrate judges to handle discovery from the outset of a case, without the necessity of a referral order, unless the assigned judge orders otherwise. Second, the court has more recently expanded the role of the magistrate judge in the pretrial phase of a case to cover all nondispositive matters. Accordingly, magistrate judges now routinely hold status conferences, supervise settlement discussions, and entertain a myriad of pretrial motions involving joinder, transfer, extensions of time, and *Daubert* issues, among others. Magistrate judges may be especially useful in settlement discussions in nonjury cases where the judge is the trier of fact and for that reason is uncomfortable with any involvement in settlement negotiations.

More extensive involvement of magistrate judges in pretrial matters has paid significant dividends. Judges have by and large been able to disengage themselves from these matters and more effectively use their limited time to try cases, hear dispositive motions, and handle criminal matters. Judges have remarked that they had had no involvement in as much as 50 percent of their civil cases because all proceedings from the date of filing through the date of termination had been handled by magistrate judges. Litigants have also clearly benefited from prompt access to magistrate judges to decide pretrial disputes and, as noted above, are increasingly availing themselves of the option for a prompt trial on a date certain before a magistrate judge.

Off the bench, magistrate judges have made important contributions to improving the quality of the civil justice system in the Eastern District by participating in court-appointed advisory committees and meeting periodically with these committees as a group. Because civil discovery is now handled almost exclusively by magistrate judges, they are the best source for information on the efficacy of discovery procedures from a judicial perspective. The input of magistrate judges on the effectiveness of mandatory automatic disclosure was a significant factor in persuading the Eastern District Advisory Group, in its final report to the court, to recommend that the practice continue under Rule 26(a) of the Federal Rules of Civil Procedure after the CJRA plan expired on December 1, 1997.

The experience in the Eastern District has shown that magistrate judges, once a largely untapped resource, can make significant and measurable contributions to the improvement of the civil justice system. It may be that some or all of the benefits of using magistrate judges are not easily transportable to other districts. The Eastern District is unique in several respects: its small, collegial court; its caseload, which includes a heavy mixture of criminal and complex civil matters; its location in an area which is at once metropolitan, suburban, and rural; and the uniformly high regard that the bar has for the Eastern District magistrate judges. Nevertheless, districts that have not found a role for their magistrate judges might consider the Eastern District approach as a model for reduction of litigation costs and delays.

NOTES

1. 28 U.S.C. § 636(b)(1), Pub. L. No. 94-577, 90 Stat. 2729 (1976); *see* Fed. R. Civ. P. 72.

2. Final report, 102 F.R.D. at 359.

3. The Judicial Improvements Act of 1990 changed the title of U.S. Magistrate to U.S. Magistrate Judge. Pub. L. No. 101-650, § 321, 104 Stat. 5117 (1990).

4. As noted, all nondispositive pretrial matters are now referred automatically to magistrate judges by court order. The assigned judge, however, is not obliged to use the magistrate judge. For a variety of reasons, judges may choose to retain control of discovery in certain cases but must enter an order to do so. Nevertheless, most Eastern District judges allow most pretrial issues to be handled by magistrate judges.

From the Bench

Should You Consent to the Magistrate Judge? Absolutely, and Here's Why

by Morton Denlow

Magistrate Judge for the United States District Court, Chicago, Illinois

You are probably familiar with the maxim that the wheels of justice grind slowly. As an attorney, you and your client will inevitably find yourselves in a position where you need the process to move faster. Envision a scenario where your corporate client comes to you, outraged and anxious that a former out-of-state employee has gone to work for a competitor in violation of his non-compete agreement. Not only that, but the employee appears to have downloaded confidential and sensitive company information to his home computer. Having exhausted all efforts to obtain a voluntary cease and desist, you decide to file suit in federal court to obtain a temporary restraining order (TRO) and preliminary injunction to halt the former employee's activities.

Your case comes before a district judge with a crowded docket, and she denies the motion for a TRO. She then refers discovery supervision and the motion for a preliminary injunction to a magistrate judge to conduct an evidentiary hearing and to prepare proposed findings of fact and recommendations for disposition by the district judge pursuant to 28 U.S.C. § 636(b)(1)(B). The magistrate judge supervises expedited discovery and conducts an evidentiary hearing, analyzes the law, and issues a timely and well-reasoned report and recommendation (R & R) to the district judge, recommending that the preliminary injunction be granted.

However, the R & R is not legally binding and has no force or effect on its own. *See United States v. Brown*, 79 F.3d 1499, 1503 (7th Cir. 1996). Rather, the parties have up to 14 days to submit objections to the R & R to the district judge, and then another 14 days to respond to objections. Fed. R. Civ. P. 72(b)(2). The district judge then reviews the R & R de novo and issues an order accepting, rejecting, or modifying the recommended disposition, or she can return the matter to the magistrate judge with instructions or to receive further evidence. Fed. R. Civ. P. 72(b)(3). The briefing of objections, ordering of transcripts, and review of the R & R can take months before a decision is entered by the district judge. Only when the district judge enters a ruling do the parties have an operative order. *Am. Family Mut. Ins. Co. v. Roth,* No. 05 C 3839, 2007 WL 2377335, at *5 (N.D. Ill. Aug. 16, 2007).

Between the time the magistrate judge issues the R & R and the district judge rules, all parties will incur substantial additional expense, delay, and continued uncertainty regarding their respective legal rights and obligations. The briefing of objections can be quite expensive, and it will take the district judge a great deal of time to make a careful de novo review of the facts and the law. *See* Fed. R. Civ. P. 72(b)(3). In the meantime, your client is forced to sit by while the former employee continues working for a competitor. Substantial harm is done in the interim, much of which may not be redressable in a claim for damages. Similarly, your client's former employee and the former employee's new employer may incur liability for significant damages if it is later determined that the covenant not to compete was breached or that confidential information was misappropriated. You and your client are frustrated by the delay and expense, and you wonder how this situation could have been resolved

Judge Denlow gratefully acknowledges the assistance of his law clerk, Janelle Skaloud.

more promptly and at less expense for all involved.

One solution is for all parties to execute a full consent to the magistrate judge's jurisdiction to decide the entire case or to execute a limited consent to permit the magistrate judge to decide the preliminary injunction motion. 28 U.S.C. § 636(c)(1) provides that "[u]pon the consent of the parties, a full-time United States magistrate judge . . . may conduct any and all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . . ." An appeal from a judgment by a magistrate judge in a consent case goes "directly to the appropriate United States Court of Appeals . . . in the same manner as an appeal from any other judgment of a district court." 28 U.S.C. § 636(c)(3). Even if the parties do not wish to consent to the magistrate judge for the entire case, some districts allow for a partial or limited consent to the assigned magistrate judge to decide specific motions, including a motion for a preliminary injunction. Consent to the magistrate judge's jurisdiction allows the magistrate judge to decide the motion for a preliminary injunction and enter a binding order. Any appeal would proceed directly to the court of appeals in the same way as if the motion were decided by a district judge. Fed. R. Civ. P. 73(c).

The Role of Magistrate Judges in the Federal District Courts

Attorneys who practice in federal court should be aware of the magistrate judge consent process available to them to bring about the "just, speedy, and inexpensive determination" of their case. *See* Fed. R. Civ. P. 1. Magistrate judges enable the federal courts to manage increasing caseloads with limited resources. Congress originally passed the Federal Magistrates Act in 1968 to expedite the disposition of the civil and criminal caseloads of the district court, improve access to the federal courts, and increase the overall efficiency of the federal judiciary. *See* Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 604, 631–639; 18 U.S.C. §§ 3401–3402). The position was designed to create "a supplementary judicial power to meet the ebb and flow of the demands made on the Federal judiciary." *Roell v. Withrow*, 538 U.S. 580, 588 (2003). Each district is given broad discretion as to the duties assigned to its magistrate judges.

Congress originally passed the Federal Magistrates Act in 1968 to increase the overall efficiency of the federal judiciary.

Since 1968, Congress has amended the act several times to increase the authority of magistrate judges and improve the selection process for magistrate judges. Among the most significant changes was the grant of authority to magistrate judges in 1979 to "conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case . . ." with the consent of the parties. 28 U.S.C. § 636(c). In giving magistrate judges case-dispositive civil authority, Congress hoped to relieve the district courts' "mounting queue of civil cases" and thereby "improve access to the courts for all groups." *Roell*, 538 U.S. at 588. Congress also hoped to give litigants "a less formal, more rapid, and less expensive means of resolving their civil controversies." *Id.*

Currently, there are 678 district judgeships, 523 full-time magistrate judge positions, and 41 part-time magistrate judge positions in the federal district court system. The role of magistrate judges has become increasingly important as caseloads, particularly criminal, have grown and district courts have encouraged litigants to consent to magistrate judges in civil cases. Although the responsibilities of magistrate judges vary widely from one jurisdiction to another, many courts assign civil cases to magistrate judges for pre-trial case management, including the resolution of discovery disputes and other non-dispositive motions, settlement conferences, and pre-trial conferences. Nearly one-third of the district courts assign entire cases directly to magistrate judges as the presiding judge at the outset, but if the parties decline to consent, the action is reassigned to a district judge. District judges may also refer dispositive civil motions, motions for class certification, and preliminary injunction motions to magistrate judges for factual findings and recommendations as to disposition. 28 U.S.C. § 636(b)(1)(B). Many courts also refer Social Security appeals and prisoner cases to magistrate judges, either for adjudication with consent or for an R & R.

If the parties have a matter before a magistrate judge, but do not consent to his jurisdiction, his orders are always subject to review by the district judge. A word about this review process is helpful here, although it has been covered more extensively elsewhere. *See* Jeffrey Cole, *Reversing the Magistrate Judge*, 36 Litigation 2 (Winter 2010).

The mechanism for review will depend on whether the matter is dispositive of "a claim or defense of a party" or whether it is non-dispositive. A magistrate judge's ruling on a non-dispositive matter is effective at the time of the ruling. A party who loses on a non-dispositive matter has discretion to appeal the magistrate judge's order within 14 days to the district judge who made the referral. Fed. R. Civ. P. 72(a). Upon review, the district judge will set aside only any portion of the order that is "clearly erroneous or is contrary to law." *Id.* If the party does not file any objections within the 14 days, the magistrate judge's order will stand as entered.

With a dispositive matter, on the other hand, the magistrate judge enters an R & R, which is not a binding order. The district judge's review of a recommended disposition applies a de novo standard and not a clearly erroneous standard. Fed. R. Civ. P. 72(b). The parties have 14 days after receiving the R & R to file objections, and responses to these objections must be filed no later than 14 days thereafter. Fed. R. Civ. P. 72(b)(2). The district judge must consider de novo any part of the R & R to which a party has objected. Fed. R. Civ. P. 72(b)(3). This much less deferential standard requires the district judge to come to her own determinations after review of the facts and law, although she need not hold any additional fact-finding proceedings.

Recent national statistics illustrate the increasing role of magistrate judges in assisting district judges in managing and resolving civil cases. According to

statistics of the Administrative Office of the U.S. Courts for fiscal year 2009, magistrate judges resolved 11,402 civil consent cases, up from 4,958 in 1990. *Judicial Business of the United States Courts: 2000 Annual Report of the Director* tbl.S-17. Of the 11,402 consent cases resolved, 459 were a result of trial, whether by jury or a bench trial. In 2009, magistrate judges also handled 20,021 settlement conferences in civil cases, 49,150 pre-trial conferences in civil cases, and 166,899 civil motions, as well as other civil tasks. *Judicial Business of the United States Courts: 2009 Annual Report of the Director* tbls. M-4A, M-4B.

Consenting to a Magistrate Judge

A magistrate judge's workload generally originates in one of two ways: referral of matters from a district judge or consent by the parties to the magistrate judge's jurisdiction. If a district judge has referred pre-trial matters to a magistrate judge, the magistrate judge may become more familiar with the case than the district judge, and it's possible the magistrate judge may have expertise and experience in the particular type of case. You may therefore determine that full consent to the magistrate judge would be advantageous to your client, and then discuss this option with the other side. If all parties agree to consent, the magistrate judge will take over the entire case, up to and including trial and entry of judgment. In a consent case, an appeal from the magistrate judge's judgment may be taken in the same way as an appeal from a judgment by a district judge. Fed. R. Civ. P. 73(c).

Generally, if the parties decide to consent to the magistrate judge's jurisdiction, they must do so voluntarily and in writing. Fed. R. Civ. P. 73. Under certain circumstances, consent can be inferred from a party's conduct during litigation. *Roell*, 538 U.S. at 580 (parties who participated in a jury trial before a magistrate judge, after having been told of their right to trial by a district judge, are deemed to have consented to the magistrate judge even in the absence of written consent). By statute, the decision of the parties on the issue of consent is communicated to the clerk of court. 28 U.S.C. § 636(c)(2). Judges are informed of the decision only if all consent.

Alternatively, if the district judge has referred the case to the magistrate judge to issue an R & R on a dispositive motion, a motion for preliminary injunction, or motion for class certification, you should consider executing a full consent for the entire case or a limited or partial consent to the magistrate judge to decide the motion. Consent provides a good option for parties who desire a faster and less expensive resolution of the motion. Chances are, if the district judge referred the motion to the magistrate judge, she cannot immediately devote the necessary time to decide it. After assigning it to the magistrate judge, the district judge must take time to review the magistrate judge's R & R, de novo, for any parts objected to, before making the ultimate determination. Consenting to the magistrate judge to decide the motion eliminates a potential second round of briefing and the waste of judicial time and delay. Consent brings about a faster and less expensive resolution for you and your client, without any loss in the quality of justice. Consent also avoids the legal limbo that is created while the R & R is being reviewed by the district judge. As with full consent, limited consent must be executed in writing in districts that allow it.

Practitioners should not be concerned that they are insulting the district judge by consenting to the magistrate judge's jurisdiction. District judges do not get upset when a case is taken off their busy calendars and reassigned to a magistrate judge. They will not run out of cases to keep them occupied.

The Quality of Magistrate Judges

The federal courts attract experienced, high-caliber attorneys, state court judges, and administrative law judges with diverse experience in civil and criminal litigation for magistrate judge positions. By statute, magistrate judges are selected through a merit selection process whereby lawyers and other residents of the judicial district comprise a merit selection panel that interviews and recommends the best qualified candidates to the court. 28 U.S.C. § 631(b)(5). The panel evaluates the applicants' scholarship, active practice of law, knowledge of the court system, personal attributes, and other criteria in making its recommendations to the court. Political party affiliation plays no part in the merit selection process. It is not unusual for a magistrate judge opening to attract up to 80 applicants. For each opening, five qualified candidates are interviewed and voted upon by the life-tenured federal district judges, following a recommendation by the merit selection panel.

A full-time magistrate judge is appointed for a term of eight years and may be reappointed for additional eight-year terms. Given the rigorous

appointment process, litigants can be fully confident in the background, credentials, and abilities of the magistrate judges. Moreover, magistrate judges have excellent reputations among their judicial peers and generally earn the respect of both the district judges they work with and the practitioners who appear before them. Currently, magistrate judges have gone on to receive 132 Article III judicial appointments as district judges and judges on federal courts of appeals.

Firm Early Trial Dates

Parties who consent to have their case tried before a magistrate judge will generally be able to receive a firm early trial date. Magistrate judges do not try felony criminal cases, and, as a result, their trial dockets are often less crowded and they can be more flexible in their calendaring. Moreover, the right to a speedy trial in felony criminal cases requires district judges to give criminal trials priority over civil trials. As a result, pending civil cases may be pushed back to make way for a criminal trial, perhaps multiple times, depending on the district judge's criminal caseload. Therefore, you are more likely to receive a firm early trial date from a magistrate judge.

Avoiding Duplication of Effort

It simply makes sense for a motion to be decided by one judge on the basis of one set of briefs rather than two judges and two sets of briefs. When a district judge refers a motion to a magistrate judge for an R & R, the magistrate judge does everything necessary to decide the motion. He reviews the facts, studies the law, and analyzes how the case should be decided. In some instances, as with a preliminary injunction, he conducts a hearing to consider the relevant evidence. He then prepares an R & R for consideration by the district judge. The district judge must then familiarize herself with the motion, review the law, review de novo any objections submitted by the parties, and make a decision in the case. By agreeing to consent to the magistrate judge, the parties can achieve a just and more timely resolution at less expense to the clients and without a duplication of efforts by the lawyers and judges.

The referral of dispositive motions for R & Rs can result in a waste of client and judicial resources. A district judge who is thinking of referring a dispositive motion should instead encourage full or limited consent by the parties for the magistrate judge to decide the motion. Many district courts no longer refer dispositive motions to magistrate judges as a means of making better use of their magistrate judges. Instead, they encourage parties to consent to the magistrate for all purposes. This practice benefits the parties and the court. In the Northern District of Illinois, dispositive motions are not referred. Instead, many parties consent to have their cases decided by magistrate judges.

Social Security Cases

In some districts, magistrate judges handle the bulk of the court's Social Security appeals. In 2009 alone, magistrate judges issued 4,296 R & Rs on Social Security appeals. *Judicial Business of the United States Courts: 2009 Annual Report of the Director* tbl.M4-B. Because the cases involve review of the administrative proceedings before the commissioner of Social Security, they do not require discovery and are resolved based on the administrative record. If you are a Social Security practitioner, you already know that the life cycle of a case can take years from the time your client starts the administrative appeal process. By the time the matter is brought to court, your client has likely gone a long time without much-needed benefits. Therefore, if the practice in your court is for Social Security cases to be referred to a magistrate judge for an R & R, your client will receive a faster result by consenting to the magistrate judge's jurisdiction. Because the courts of appeals review these cases de novo, there generally is no benefit to having the case decided by means of an R & R rather than by consent. Also, for the losing side, a second "bite at the apple" under the R & R procedures is mostly an illusory benefit because, in the vast majority of instances, R & Rs are adopted by the district judge. In the Northern District of Illinois, magistrate judges are assigned Social Security cases only when the parties consent.

Class Action Certification

If you handle a lot of class action litigation, consider full or limited consent to the magistrate judge if the district judge refers the class certification motion to a magistrate judge for an R & R. An often fact-intensive inquiry, a motion for class certification will require a judge to spend considerable time reviewing all the factors to determine whether the class should be certified. At that preliminary stage, you and your client, as well as opposing counsel, need to know the outcome of the class certification motion as soon as possible so that you can decide how to proceed with the case. Consenting to the magistrate judge enables you to achieve a result more quickly than proceeding with an R & R process.

Non-Dispositive Motions in Complex Discovery Disputes

Imagine you represent a party in a complex case and you are looking at a long, protracted discovery process ahead. The district judge refers all pre-trial matters, including discovery motions, to the magistrate judge. As discussed above, without consent to the magistrate judge's jurisdiction, the parties have the option to object to any of his discovery rulings. You perceive that several hotly contested discovery issues will arise, which may well be objected to and require continuous reviews by the district judge. The prospect of stretching out the discovery process even further to wait for these intermediate reviews is daunting, and so in the interest of streamlining the process, you encourage everyone to execute a limited consent to the magistrate judge on all discovery rulings or, possibly, a full consent to take over the case.

Enforcement of Settlement Agreements

Many district courts refer cases to magistrate judges to conduct settlement

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From the Bench

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conferences. After a magistrate judge has spent hours with the parties to help settle the case, the judge will be intimately familiar with the negotiations that have taken place and the settlement terms agreed to by the parties. Therefore, if anything should go awry with the execution or enforcement of the settlement agreement, it makes more sense for the parties to go to the judge who best understands the agreement to enforce it. If you settle a case before a magistrate judge, consider agreeing to execute the written consent form that very day to enable the magistrate judge to enforce the terms of your agreement.

Steps Courts Are Taking to Encourage Consent to Magistrate Judges

District courts are taking different individual approaches to encourage and facilitate consent to the jurisdiction of their magistrate judges. Some have adopted a direct assignment approach in which a percentage of all civil cases are assigned directly to a magistrate judge and transferred to a district judge only if the parties decline to consent to the magistrate judge. The District of Oregon, Eastern District of Wisconsin, and Western District of Washington are examples of those using this approach. In some courts that use this approach, if the parties do not consent, the magistrate judge may still handle pre-trial matters in the case. In the Eastern District of Missouri, the court has opted for a "one judge, one case" direct assignment arrangement whereby, if consent is not obtained, the magistrate judge discontinues all involvement and the case goes entirely to a district judge. Courts that have placed magistrate judges on the assignment wheel have found that parties regularly agree to consent to the magistrate judge.

Other courts are using methods other than direct assignment to encourage consent. In the Middle District of Tennessee, a district judge's standard order setting a scheduling conference provides that the possibility of consenting to the magistrate judge may be discussed at the initial case management conference. Others have taken steps to inform the bar about the magistrate judges and advantages of consent. Many courts facilitate consent by assigning civil cases to magistrate judges for pre-trial case management and encouraging consent after the magistrate judge has become familiar with the case.

The variety of civil consent cases handled by magistrate judges reflects the wide range of cases filed in the federal courts. While some magistrate judges may handle the bulk of certain types of cases, such as Social Security or prisoner cases, this is not a limitation on their authority. In fact, magistrate judges have disposed of all types of cases, large and small, including civil rights, patent and trademark infringement, Racketeer Influenced and Corrupt Organizations Act, contract disputes, personal injury, employment discrimination, admiralty, and many other issues. In doing so, they provide substantial assistance to the court and fulfill the intent of Congress in creating the position.

Litigants deserve justice delivered in a fair, thoughtful, and efficient manner. In the federal district court system, magistrate judges play a critical part in providing this justice to the parties that come before them. The increased use of consent to magistrate judge jurisdiction in civil cases represents one of the best ways to secure the "just, speedy, and inexpensive determination" of your client's case.

"NOTHING LESS THAN INDISPENSABLE": THE EXPANSION OF FEDERAL MAGISTRATE JUDGE AUTHORITY AND UTILIZATION IN THE PAST QUARTER CENTURY

Douglas A. Lee* & Thomas E. Davis**

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* Douglas A. Lee has worked as a senior attorney at the Administrative Office of the U.S. Courts since October 1989. He is currently the Special Advisor for Magistrate Judges in the Judicial Services Office, Department of Program Services. He received his B.A. *magna cum laude* from Brown University in 1979 and his J.D. from the University of Pennsylvania Law School in 1983, where he was a member of the law review. Prior to working at the Administrative Office, he was in private practice in the Philadelphia area.

** Thomas E. Davis has worked as a senior attorney at the Administrative Office of the U.S. Courts since October 1997. He received his B.S.F.S. from Georgetown University in 1976, an M.A. from New York University in 1984, and his J.D. from the University of Memphis Cecil C. Humphreys School of Law in 1988. Prior to working at the Administrative Office he served as a law clerk to Senior Judge Robert M. McRae, Western District of Tennessee, from 1989–1994, and to Magistrate Judge Diane K. Vescovo, Western District of Tennessee, from 1995–1997.

INTRODUCTION

"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*."*[1]

Almost twenty-five years have passed since Justice Stevens wrote these words. Justice Sonia Sotomayor recently reaffirmed the importance of the

[1] Peretz v. United States, 501 U.S. 923, 928 (1991) (emphasis added) (quoting Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989)).

United States magistrate judges in her majority opinion in *Wellness International Network, Ltd. v. Sharif*,[2] where she wrote:

> Congress has also authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protections of Article III, to assist Article III courts in their work. The number of magistrate and bankruptcy judgeships exceeds the number of circuit and district judgeships. And it is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt.[3]

Indeed, the organization of this conference, *Magistrate Judges and the Transformation of the Federal Judiciary*, with numerous distinguished contributors, further highlights the significant role that United States magistrate judges play in the operation of the federal district courts.

This conference provides us with an opportunity to share our perspectives on how the authority and utilization of magistrate judges have expanded over the past quarter century. By happy coincidence, this conference occurs twenty-five years after several events that profoundly shaped how magistrate judges exercise their authority and are utilized throughout the district courts. As senior attorneys for the Judicial Services Office in the Administrative Office of the U.S. Courts (Administrative Office), we have had a unique opportunity to observe the evolution of magistrate judge authority and utilization in the federal district courts that arose directly from those events.[4]

Part I of the paper will discuss several twenty-fifth anniversaries that occurred in 2015 and 2016 that proved to have a major impact on the expansion of magistrate judge authority and utilization. Part II will examine in depth numerous Supreme Court and circuit court cases that reflect how magistrate judge authority expanded over the past twenty-five years. Part III will discuss how magistrate judge utilization has expanded in the same period.

I. 25TH ANNIVERSARIES

In 1990 and 1991, several events occurred that had a significant impact on the federal magistrate judges system and led to the expansion of the magistrate judge authority and utilization throughout the United States district courts. The final report of the Federal Court Study Committee in 1990, the enactment of the Judicial Improvements Act of 1990, and the issuance of the Supreme Court's opinion in *Peretz v. United States*[5] in 1991 are discussed below.

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[2] Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

[3] *Id.* at 1938–39 (footnote omitted).

[4] The authors would like to thank James Duff, Director of the Administrative Office of U.S Courts, Laura Minor, Associate Director, Department of Program Services, and Michele Reed, Chief, Judicial Services Office, for graciously giving us the opportunity to participate in this conference and to write this paper.

[5] *Peretz*, 501 U.S. 923.

A. The Report of the Federal Courts Study Committee

Congress created the Federal Courts Study Committee (FCSC) in 1988 as an entity within the Judicial Conference of the United States.[6] Congress instructed the Committee to "recommend revisions to be made to laws of the United States as the Committee, on the basis of such study, deems advisable."[7] Chief Justice Rehnquist appointed the FCSC's fifteen members.[8] Twenty-five years ago, on April 2, 1990, the FCSC issued its final report.[9] This is the first anniversary we will discuss.

Although the FCSC's final report made several recommendations concerning the federal magistrates system,[10] two recommendations had particular significance for the development of magistrate judge authority and utilization in the years to come. First, the FCSC recommended that "Congress should amend 28 U.S.C. § 636(c)(2) to allow district judges . . . to remind parties of the possibilities of consent to civil trials before magistrates."[11] Noting that the existing language of § 636(c) specifically prohibited district judges and magistrates from discussing consent with parties after they received the initial consent notice,[12] the FCSC recommended allowing district judges and magistrates to further advise parties and counsel of the right to consent later in the case, while mandating that parties be told there would be no adverse consequences if they refused to consent.[13] This proposed amendment to the Federal Magistrates Act,

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[6] Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4644 (1988).

[7] *Id.* § 105, 102 Stat. at 4645.

[8] *See* FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 31 (Apr. 2, 1990). The Committee was chaired by Circuit Judge Joseph F. Weis, Jr., Court of Appeals for the Third Circuit; other notable members of the FCSC included Senators Charles E. Grassley from Iowa and Howell Heflin from Alabama, Representatives Robert W. Kastenmeier from Wisconsin and Carlos J. Moorhead from California, Circuit Judge Levin H. Campbell, Court of Appeals for the First Circuit, Circuit Judge Richard A. Posner, Court of Appeals for the Seventh Circuit, District Judge (now Circuit Judge) José A. Cabranes, District of Connecticut, and District Judge Judith N. Keep, Southern District of California. *Id.* at 193–96.

[9] *See id.*

[10] The full history of the proposals submitted to the FCSC by the Committee on the Administration of the Magistrates System (Magistrates Committee) and the complete list of the FCSC's final recommendations concerning the magistrates system are set forth in MAGISTRATE JUDGES DIV., ADMIN. OFFICE OF THE U.S. COURTS, A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGES SYSTEM 79–87 (2009) [hereinafter LEGISLATIVE HISTORY].

[11] *See* FED. COURTS STUDY COMM., *supra* note 8, at 79.

[12] The relevant language in § 636(c) stated,

> the clerk of the court shall, at the time [an] action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. . . . *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*.

Id. at 79–80.

[13] *Id.* at 80. The specific statutory language suggested by the FCSC stated, "Thereafter either the district judge or the magistrate may again advise the parties of that right but, in so doing,

enacted in the Judicial Improvements Act of 1990, relaxed the civil consent provision and cleared the way for innovative methods that would be utilized by district courts to encourage litigant consent to disposition of civil cases by magistrate judges.[14]

The second significant recommendation of the FCSC was to request that the Judicial Conference "authorize a study of the constitutional limits of United States magistrates' possible jurisdiction and catalog their duties."[15] In particular, the FCSC stated that "[s]ome district courts have been reluctant to expand the role of magistrates because of confusion over magistrates' constitutional and statutory authority."[16] Noting with concern that the Supreme Court's decisions in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[17] *Granfinanciera*, *S.A. v. Nordberg*,[18] and *Gomez v. United States*[19] had raised "serious questions about what matters non-Article III judicial officers may handle," the FCSC further stated:

> District judges should have available an analysis of the legislative history of the Magistrates Act and a list of those duties which bear "some relation to the specified duties," as *Gomez* dictates. . . . This study should include all cases and statutes (in addition to 28 U.S.C. § 636) that discuss duties magistrates may perform, so that the district court will have a full compilation of the magistrates' statutory jurisdiction, with a description of the presumption of validity and standard of review by the district court.[20]

After receiving the FCSC's recommendations, the Judicial Conference authorized the Committee on the Administration of the Magistrate Judges System (Magistrate Committee) to conduct a study of the magistrate judges system and compile a catalog of magistrate duties.[21] The Magistrate Committee distributed

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shall also advise the parties that they are free to withhold consent without fear of adverse substantive consequences." *Id.*

[14] Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 308, 104 Stat. 5104, 5112 (1990); *see also infra* Section I.B.1.b.ii.

[15] FED. COURTS STUDY COMM., *supra* note 8, at 80.

[16] *Id.*

[17] *See* N. Pipeline Constr. Co. v Marathon Pipe Line Co., 458 U.S. 50 (1982).

[18] *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

[19] *See* Gomez v. United States, 490 U.S. 858 (1989).

[20] FED. COURTS STUDY COMM., *supra* note 8, at 80.

[21] MAGISTRATE JUDGES DIV., ADMIN. OFFICE OF THE U.S. COURTS, A CONSTITUTIONAL ANALYSIS OF MAGISTRATE JUDGE AUTHORITY 1 (1993) [hereinafter CONSTITUTIONAL ANALYSIS]; *see* LEGISLATIVE HISTORY, *supra* note 10, at 86, 91; Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1522–23 (1995); *see also* ADMIN. OFFICE OF THE U.S. COURTS, 1991 ANNUAL REPORT OF THE DIRECTOR: ACTIVITIES OF THE ADMINISTRATIVE OFFICE 66–67 (1991).

> The Magistrate Judges Committee appointed a special subcommittee, composed of District Judge William T. Hart [Northern District of Illinois] (Chairman), District Judge Barbara J. Rothstein [Western District of Washington] and District Judge Frederic N. Smalkin [District of Maryland], to supervise the project. The study [was] prepared by the staff of the Magistrates

the first part of its study, the *Inventory of United States Magistrate Judge Duties* (the *Inventory*), in December 1991, with updated editions issued in 1995, 1999, and 2013.[22] The *Inventory* provides district courts with a quick guide to, and catalog of, the types of duties that magistrate judges may perform under statutory and case law as suggested by the FCSC. In June 1993, the Magistrate Committee published the second part of its study, *A Constitutional Analysis of Magistrate Judge Authority* (*Constitutional Analysis*), which "analyzes various Supreme Court and circuit court opinions examining the constitutional limits of magistrate judge authority [and] reviews pertinent Supreme Court opinions discussing the authority of other non-Article III judicial officers, including bankruptcy judges."[23] The third part of the study, *A Guide to the Legislative History of the Federal Magistrate Judges System* (*Legislative History*"), constituted the legislative analysis recommended by the FCSC of the Federal Magistrates Act and other statutes, and was originally published in February 1995. An updated edition of the *Legislative History* was issued in September 2009.[24]

In preparing these publications, the staff at the Administrative Office, which supports the Magistrate Judges Committee,[25] monitored, collected, and summarized court decisions that involved magistrate judge authority. The staff of the Administrative Office, which includes the authors of this paper, continue to do so up to the present. In the process, they observed the changes and expansions of magistrate judge authority that have occurred over the past twenty-five years and were often asked to advise the Magistrate Judges Committee on these changes. Similarly, Administrative Office staff have also monitored the various ways district judges have utilized magistrate judges over the past quarter century and are often asked to describe and analyze such utilization techniques for the Committee and for federal judges seeking information on different ways to utilize magistrate judges. Expansion of magistrate judges' authority and utilization were further facilitated, often in unanticipated ways, by Congress when it passed the Judicial Improvements Act of 1990.[26]

Judges Division of the Administrative Office of the United States Courts under the subcommittee's supervision.

CONSTITUTIONAL ANALYSIS, *supra*, at 1–2.

[22] *See* ADMIN. OFFICE OF THE U.S. COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES (4th ed. 2013).

[23] LEGISLATIVE HISTORY, *supra* note 10, at 92; *see* CONSTITUTIONAL ANALYSIS, *supra* note 21.

[24] *See* LEGISLATIVE HISTORY, *supra* note 10, at 92.

[25] The name was changed to the Committee on the Administration of the Magistrate Judges System from the Committee on the Administration of the Magistrates System after the official title of the office was changed to United States magistrate judge in a provision of the Judicial Improvements Act of 1990. *See infra* Section I.B.1.a. For a more detailed explanation of the role of the Magistrate Judges Committee, the Judicial Conference, and the Administrative Office in the administration of the federal magistrate judges system, see Pro & Hnatowski, *supra* note 21, at 1507–10.

[26] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990).

B. Judicial Improvements Act of 1990

On December 1, 1990, President George H.W. Bush signed the Judicial Improvements Act of 1990. Title I of the Judicial Improvements Act was the Civil Justice Reform Act (CJRA). "Title III contained the Federal Courts Study Committee Implementation Act. Other titles created new Article III judgeships and revised judicial discipline and removal procedures. The Judicial Improvements Act amended the Federal Magistrates Act, and had far-reaching effects on the Judiciary as a whole."[27]

1. Civil Justice Reform Act

On January 25, 1990, Senators Joseph Biden and Strom Thurmond initially introduced the CJRA as S. 2027.[28] "The stated purpose of the S. 2027 was to improve access to the courts by reducing costs and delays in civil litigation."[29] The proposed legislation was based upon recommendations set forth in a report issued by the Brookings Institution in 1989.[30]

a. CJRA and Magistrate Judges

In its original form, "S. 2027 would have required that 'a mandatory discovery-case management conference, presided over by a judge and not a magistrate, be held in all cases,' " and in other ways would have explicitly limited the role of magistrate judges in the civil pretrial process.[31] "In testimony before the [Senate] Judiciary Committee, several witnesses, including the Judicial Conference's representative, favored reinstatement of a pretrial role for magistrate judges."[32]

On May 17, 1990, after several discussions between members of Congress and members of the Judicial Conference (including an April 1990 meeting between Chief Justice Rehnquist and Senator Biden) concerning Judicial Conference objections to the legislation, the bill was revised and resubmitted as S. 2648.[33] In his statement introducing the bill, Senator Biden observed that S. 2648 contained numerous changes from the original proposed legislation.[34] In

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[27] LEGISLATIVE HISTORY, supra note 10, at 87.

[28] *Id.*

[29] *Id.* at 87–88.

[30] *Id.* at 88 n.288; *see* BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 12–33 (1989).

[31] LEGISLATIVE HISTORY, *supra* note 10, at 88 (quoting S. REP. NO. 101-416, at 20 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6802, 6823).

[32] *Id.*; *see Civil Justice Reform Act of 1990 and Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the S. Comm. on the Judiciary*, 101st Cong. 208, 212 (1990) (statement of Aubrey E. Robinson, C.J., United States District Court for the District of Columbia, Washington, DC).

[33] LEGISLATIVE HISTORY, *supra* note 10, at 88.

[34] *Id.*

particular, the revised legislation permitted magistrate judges to be involved in civil pretrial practice in response to concerns conveyed by the Conference and by witnesses who testified during the Judiciary Committee's first hearing on the bill.[35]

The Committee's report on the bill gave several reasons for authorizing magistrate judges to take part in the preliminary phases of civil cases. First, the Committee expressed concern that fewer cases might settle if district judges were required to conduct all pretrial conferences because parties would be reticent to reveal all aspects of their case to the judge who would finally resolve the matter at trial.[36] Second, allowing magistrate judges to handle civil case management duties would provide district judges with more time to conduct other adjudicatory matters.[37] Finally, noting that district courts faced growing civil and criminal caseloads, and that magistrate judges had increasingly impressive credentials as judges, the Committee set forth its view that magistrate judges should be given significant authority to conduct pretrial and case management duties in civil cases.[38] Interestingly, the Judiciary Committee, observing that the revised legislation would provide for the exercise of the "full role of magistrates in the pretrial process," noted that "valid questions had been raised about the full extent of magistrates' constitutional authority," and it "therefore endorsed the recommendation of the [FCSC] that the Judicial Conference conduct an in depth study of magistrate judge authority."[39]

The enactment of the CJRA in December 1990 acknowledged the important role of magistrate judges in the pretrial management of civil cases in the federal courts. This explicit acceptance of the use of magistrate judges in pretrial phases of federal civil litigation contributed directly to the expansion of magistrate judge authority in civil cases throughout the nation in the years following the CJRA's enactment.

b. Federal Court Study Committee Implementation Act of 1990

The Federal Courts Study Committee Implementation Act appears in Title III of the Judicial Improvements Act of 1990.[40] "The [FCSCI] Act's statement of purpose described the legislation as proposing 'noncontroversial' recommendations of the Federal Courts Study Committee.[41] The Federal Courts

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[35] *See* 136 CONG. REC. S6473 (daily ed. May 17, 1990). For a more detailed discussion of the Judicial Conference's objections to the Civil Justice Reform Act and its response to the proposed legislation, see LEGISLATIVE HISTORY, *supra* note 10, at 88–89.

[36] LEGISLATIVE HISTORY, *supra* note 10, at 89.

[37] *Id.*

[38] *Id.* at 89 & n.292.

[39] *Id.* at 89 n.292 (quoting S. REP. NO. 101-416, at 20 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6823 n.10).

[40] LEGISLATIVE HISTORY, *supra* note 10, at 89; *see* Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, 104 Stat. 5104 (1990).

[41] LEGISLATIVE HISTORY, *supra* note 10, at 89.

Study Committee Implementation Act contained [two] significant amendments to the Federal Magistrates Act."[42]

i. Change of Title to "Magistrate Judge"

Under section 321, the FCSCI Act changed the title from United States magistrate to "United States magistrate *judge*."[43] The section stated:

> After the enactment of this Act, each United States magistrate appointed under section 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 section 631 of title 28, United States Code.[44]

The title change applied equally to both full-time and part-time magistrate judges.[45]

"The committee report noted that the title "judge" is commonly assigned to non-Article III adjudicators in the federal court system, and that the new title of magistrate judge is consistent with that of other judicial officers such as bankruptcy judges, tax court judges and claims court judges."[46] It further stated that "[t]he provision is one of nomenclature only and is designed to reflect more accurately the responsibilities and duties of the office," and "[i]t is not intended to affect the substantive authority or jurisdiction of full-time or part-time magistrates."[47] In June 1991, "the Executive Committee of the Judicial Conference changed the name of the Magistrates Committee to 'Committee on the Administration of the Magistrate Judges System.' "[48]

ii. Relaxation of Judicial Notification of Consent to Trial By Magistrate Judges in Civil Actions

Under section 308(a), the FCSCI Act "amended 28 U.S.C. § 636(c)(2) to permit [district] judges and magistrate judges to advise civil litigants of the op-

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[42] *Id.* See *id.* at 89–91 for the procedural history of Federal Courts Study Committee Implementation Act.

[43] H.R. REP. NO. 101-734, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860.

[44] *Id.*

[45] Interestingly, the title change was described in the statute's legislative history as a "noncontroversial" recommendation of FCSC, although the FCSC did not recommend a change in the title and the Judicial Conference did not request that the title of United States magistrate be changed prior to the statute's enactment. *See* LEGISLATIVE HISTORY, *supra* note 10, at 85, 89–90.

[46] *Id.* at 90.

[47] *Id.* (quoting H.R. REP. NO. 101-734, at 31).

[48] *See id.*

tion to consent to trial by a magistrate judge."[49] In the committee report accompanying this provision, Congress expressed concern that its intent in enacting § 636(c) in 1979 was being impeded by the existing language:

> Under present provisions, judicial officers may not attempt to persuade or induce any party to consent to reference of a civil matter to a magistrate. Many judges refrain entirely from mentioning to parties the option to consent to civil trial by a magistrate. Litigants in many jurisdictions often receive little more than a standardized written notification of this option with the pleadings in a civil case. As a result, most parties in civil cases do not consent to magistrate jurisdiction. The present procedures have effectively frustrated the intent of the 1979 amendments to the Federal Magistrates Act which authorized magistrates to try civil consent cases.[50]

If the intent of this legislation was to further encourage the use of magistrate judges to dispose of civil cases with the consent of the parties, the effect was also to free district judges to experiment with new and novel ways of expanding the utilization of magistrate judges in civil consent cases.

c. Authorization of Additional District Judgeships

Title II of the Act, known as the Federal Judgeship Act of 1990, authorized additional Article III judgeships for the district courts and the courts of appeals.[51] Specifically, the provisions authorized sixty-one additional district court judgeships and eleven circuit court judgeships.[52] In addition, the legislation converted eight temporary district judgeships into permanent status and converted four judgeships that were split between different districts into four permanent judgeships.[53]

The significance of this legislation only became apparent after many years had passed. To date, this has been the last omnibus judgeship bill where Congress authorized a significant number of Article III judgeships. In the subsequent twenty-five years, Congress authorized only twenty-seven additional permanent district judgeships: nine in 1999, ten in 2000, and eight in 2002.[54] In short, the number of Article III judges has remained largely stable over the past quarter century.

To deal with the demands of caseloads that continued to grow after 1990, district courts increasingly looked to the Judicial Conference to authorize addi-

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[49] *Id.*; *see* H.R. REP. NO. 101-734, at 27.

[50] H.R. REP. NO. 101-734, at 27.

[51] S. REP. NO. 101-416, at 65–66 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6802, 6854–55.

[52] *See Authorized Judgeships*, U.S. CTS., http://www.uscourts.gov/judges-judgeships/authorized-judgeships [https://perma.cc/P5AQ-ZXHL] (last visited Apr. 19 2015) (charting the total numbers of judgeships authorized for each district and appeals court in 1990).

[53] *Id.*

[54] *See id.*; *see also* Act of Nov. 29, 1999, Pub. L. No. 106-113, § 1000, 113 Stat. 1501, 1501A-37; Act of Dec. 21, 2000, Pub. L. No. 106-553 app. B, 114 Stat. 2762, 2762A-84 to 85; 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 312, 116 Stat. 1758, 1786 (2002).

tional full-time magistrate judge positions. Between fiscal years 1990 and 2016, the Judicial Conference authorized 234 new full-time magistrate judge positions, while converting or eliminating 117 part-time magistrate judge positions and 5 clerk/magistrate judge positions.[55] The contrast with the Article III judi-

[55] *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 26–31 (Mar. 1989) (authorizing seven full-time magistrate judge positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 73–79 (Sept. 1989) (authorizing six full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 28–37 (Mar. 1990) (authorizing ten full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES at 95–101 (Sept. 1990) [hereinafter JCUS-SEP 1990] (authorizing seven full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 21–31 (Mar. 1991) (authorizing sixteen full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 67–71 (Sept. 1991) (authorizing nine full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31–34 (Mar. 1992) [hereinafter JCUS-MAR 1992] (authorizing fifteen full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 75–79 (Sept. 1992) (authorizing five full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 19–22 (Mar. 1993) (authorizing seven full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 52–56 (Sept. 1993) (authorizing four full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23–27 (Mar. 1994) (authorizing eleven full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 61–65 (Sept. 1994) (authorizing ten full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 24–28 (Mar. 1995) (authorizing seven full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 91–95 (Sept. 1995) (authorizing three full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 30–33 (Mar. 1996) (authorizing one full-time position); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 65–68 (Sept. 1996) (authorizing six full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 29–33 (Mar. 1997) (authorizing seven full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 78–81 (Sept. 1997) (authorizing three full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 25–28 (Mar. 1998) (authorizing four full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 82–85 (Sept. 1998) (authorizing four full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 29–32 (Mar. 1999) (authorizing seven full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 70–73 (Sept. 1999) (authorizing seven full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23–26 (Mar. 2000) (authorizing two full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 61–64 (Sept. 2000) (authorizing ten full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 28–30 (Mar. 2001) (authorizing four full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 65–67 (Sept./Oct. 2001) (authorizing one full-time position); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 26–28 (Mar. 2002) (authorizing six full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 54–57 (Sept. 2002) (authorizing nine full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22–24 (Mar. 2003) (authorizing one full-time position); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 32–34 (Sept. 2003) (authorizing four full-time positions); REPORT OF THE PROCEEDINGS OF THE

ciary is startling. The number of full-time magistrate judges has increased by 62 percent in the past twenty-five years.[56] In the same time period, as noted above, the growth in the number of Article III judgeships has been negligible.

At the same time, the role of part-time magistrate judges in the federal courts has declined, with a significant decrease in the number of these positions. In fiscal year 1990, there were 159 part-time magistrate judge positions, while in fiscal year 2014 only 36 part-time positions remained, a decline of 78 percent.[57] Much of this decline can be attributed to the long-standing preference of Congress and the Judicial Conference for establishing a system of full-time magistrate judges where feasible.[58] Indeed, the Magistrates Committee made the following recommendation at its June 1990 meeting for the Judicial Conference's consideration in September 1990:

> Your Committee concluded that it must move faster in achieving a system composed primarily of full-time magistrates. Consequently, your Committee concluded that all part-time magistrate positions should be examined in the near future, with a view towards expediting the process of eliminating, consolidating, or converting the positions. Some part-time magistrate positions will undoubtedly need to be retained at locations where the volume of district court business clearly does not warrant the authorization of a full-time magistrate position, but where other legitimate considerations exist. In this respect, your Committee is of the opinion that geographical considerations and the cost-savings generally as-

JUDICIAL CONFERENCE OF THE UNITED STATES 23–26 (Mar. 2004) [hereinafter JCUS-MAR 2004] (authorizing four full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 27–31 (Sept. 2004) (authorizing five full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33–36 (Sept. 2005) (authorizing three full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 30–31 (Sept. 2006) (authorizing two full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 30–32 (Sept. 2007) (authorizing two full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 30–33 (Sept. 2008) (authorizing six full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 7 (Mar. 2009) (authorizing three full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 26–30 (Sept. 2009) (authorizing four full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 26–27 (Sept. 2010) (authorizing four full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 32–33 (Sept. 2011) (authorizing three full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 25–26 (Sept. 2014) (authorizing three full-time positions); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 27–28 (Sept. 2015) [hereinafter JCUS-SEP 2015] (authorizing two full-time positions).

[56] At the beginning of fiscal year 1990, there were 329 full-time magistrate judge positions authorized by the Judicial Conference, while in fiscal year 2014, there were 534 full-time magistrate judge positions authorized. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES 2014 tbl.1.1 (2014), http://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2014 [https://perma.cc/FP4Y-ZMGS].

[57] *See id.*; *see also* ADMIN. OFFICE OF THE U.S. COURTS, 1990 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS 43 tbl.30 (1990).

[58] *See* LEGISLATIVE HISTORY, *supra* note 10, at 9–10, 24, 46, 51, 73, 77–78.

> sociated with part-time magistrate positions are not sufficient in and of themselves to justify retention of individual part-time magistrate positions.[59]

In response, the Conference reaffirmed its view that the federal magistrates system should as much as possible consist of full-time judicial officers, and therefore endorsed the Committee's plan "to review each part-time magistrate position on an individual basis with a view towards eliminating as many part-time positions as feasible, either by abolishing them, combining them, or converting them to full-time status."[60] This is exactly what happened in the following twenty-five years, with a large number of these part-time positions being converted into full-time magistrate judge positions.[61]

C. Peretz v. United States

The third significant anniversary occurred in 2016. June 27, 2016, was the twenty-fifth anniversary of the Supreme Court's decision in *Peretz v. United States*,[62] a case that has had an enormous impact on how magistrate judges are used in the district courts. Indeed, much of the expansion of magistrate judge duties in the past twenty-five years has resulted from the Court's interpretation of § 636(b)(3) and its view that magistrate judges may handle many critical duties in felony and other cases, with the defendant's consent and with the availability of *de novo* review by an Article III judge.

As in the Court's earlier decision in *Gomez v. United States*,[63] *Peretz* concerned whether a magistrate judge could preside over *voir dire* in a felony case.[64] Unlike the petitioner in *Gomez*, however, petitioner Rafael Peretz specifically consented to having a magistrate judge select the jury in his case.[65] For the majority in *Peretz*, the defendant's consent to the magistrate judge's authority was the critical factor that allowed the referral of *voir dire* to a magistrate judge without violating Article III of the Constitution.[66]

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[59] *Id.* at 77.

[60] *Id.* at 78; *accord* JCUS-SEP 1990, *supra* note 55, at 93.

[61] For example, at its June 2015 meeting the Magistrate Judges Committee voted to recommend "the conversion of the part-time magistrate judge position at Wichita Falls in the Northern District of Texas to a full-time magistrate judge position designated as Wichita Falls or Fort Worth." JCUS-SEP 2015, *supra* note 55. The recommendation was subsequently adopted by the Judicial Conference at its September 2015 session and the last part-time magistrate judge position in the Fifth Circuit will be discontinued with the appointment of the newly-authorized full-time magistrate judge position. *Id.*

[62] Peretz v. United States, 501 U.S. 923 (1991).

[63] Gomez v. United States, 490 U.S. 858, 874–76 (1989) (holding that § 636(b)(3) did not authorize a magistrate judge to conduct *voir dire* in a felony case as an additional duty if the defendant objected to the magistrate judge's involvement); *see also* CONSTITUTIONAL ANALYSIS, *supra* note 21, at 12–14.

[64] *Peretz*, 501 U.S. at 925.

[65] *Id.*

[66] *See id.* at 936.

Peretz was charged with importing heroin in the Eastern District of New York.[67] At a pretrial conference attended by Peretz and his attorney, the district judge asked Peretz's attorney if he had any objection to a magistrate judge selecting the jury for the trial.[68] Counsel responded, "I would love the opportunity."[69] Before beginning jury selection, the magistrate judge also received assurances from counsel that there was no objection to her involvement.[70] The magistrate judge selected the jury, and the district judge was not asked to review any ruling made by the magistrate judge during *voir dire*.[71]

The case proceeded to trial and Peretz was convicted.[72] Only on appeal to the Court of Appeals for the Second Circuit (and after the Supreme Court had released its opinion in *Gomez*) did the defendant raise an objection to the magistrate judge's involvement in *voir dire*.[73] The court of appeals rejected the petitioner's argument and upheld the conviction.[74] Recognizing a split in the circuit courts' interpretations of its *Gomez* decision,[75] the Supreme Court granted Peretz's petition for certiorari.[76]

Writing for the majority, Justice Stevens, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter, began his analysis by declaring, "Our holding in *Gomez* was narrow."[77] Justice Stevens emphasized that the question before the Court in *Gomez* was limited to whether a magistrate judge could conduct felony *voir dire* over a defendant's objection.[78] Even while the Court had held in *Gomez* that felony *voir dire* without the defendant's consent was not an "additional duty" that could be delegated to magistrate judges under 28 U.S.C. § 636(b)(3), it also recognized that magistrate judges "play an integral and important role in the federal judicial system."[79]

The petitioner's consent changed everything in *Peretz*. Unlike *Gomez*, where the Court deduced "an alternative interpretation of the additional duties clause" from the context of the statutory scheme to avoid constitutional ques-

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[67] *Id.* at 925.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *See, e.g.*, United States v. Musacchia, 900 F.2d 493, 494 (2d Cir. 1990), *vacated*, 955 F.2d 3 (2d Cir. 1991); United States v. Wey, 895 F.2d 429 (7th Cir. 1990); Virgin Islands v. Williams, 892 F.2d 305 (3d Cir. 1989); United States v. Lopez-Pena, 912 F.2d 1542 (1st Cir. 1989); United States v. Vanwort, 887 F.2d 375, 382–83 (2d Cir. 1989); United States v. France, 886 F.2d 223, 226 (9th Cir. 1989); United States v. Mang Sun Wong, 884 F.2d 1537, 1544 (2d Cir. 1989); United States v. Ford, 824 F.2d 1430, 1430–31 (5th Cir. 1987) (en banc).
[76] *Peretz*, 501 U.S. at 927.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 927–28 (quoting Gomez v. United States, 490 U.S. 858, 869 (1989)).

tions,[80] petitioner's consent in *Peretz* removed many of the perceived constitutional difficulties. Justice Stevens declared, "The absence of any constitutional difficulty removes one concern that motivated us in *Gomez* to require unambiguous evidence of Congress' intent to include jury selection among a magistrate's additional duties."[81] Consent thus provided the Court with greater latitude to construe the "additional duties" clause and Congress' intent.

Under the majority's reasoning, the reduction of constitutional concerns allowed the Court to focus on the Federal Magistrate Act's more general purpose of aiding the judiciary. The Act's purpose thus became paramount to the Court:

> The generality of the category of "additional duties" indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen. If Congress had intended strictly to limit these additional duties to functions considered in the committee hearings or debates, presumably it would have included in the statute a bill of particulars rather than a broad residuary clause. Construing this residuary clause absent concerns about raising a constitutional issue or depriving a defendant of an important right, we should not foreclose constructive experiments that are acceptable to all participants in the trial process and are consistent with the basic purposes of the statute.[82]

Although the Court acknowledged the importance of *voir dire* as a critical phase of a felony trial, the Court again viewed consent as the key factor.[83] The Court revisited its statutory analysis in *Gomez* to determine whether there was a connection between consensual felony *voir dire* and other duties referred to magistrate judges under the Act.[84]

The Court noted that "[b]ecause the specified duties that Congress authorized magistrates to perform without the consent of the parties were not comparable in importance to supervision of felony trial *voir dire* . . . , we did not waver from our conclusion that a magistrate cannot conduct *voir dire* over the defendant's objection."[85] Justice Stevens concluded, "However, with the parties' consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials. These duties are comparable in responsibility and importance to presiding over *voir dire* at a felony trial."[86] Accordingly, felony voir dire with the defendant's consent was a permissible additional duty under § 636(b)(3).[87]

Consent was also crucial to the Court's constitutional analysis. Justice Stevens began by stating flatly that "[t]here is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants con-

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[80] *Gomez*, 490 U.S. at 864.
[81] *Peretz*, 501 U.S. at 932.
[82] *Id.* at 932–33.
[83] *Id.* at 931.
[84] *Id.*
[85] *Id.* at 932.
[86] *Id.* at 933.
[87] *Id.*

sent."[88] This position was based on a two-step Article III analysis. First, the majority observed that the Court in *Commodity Futures Trading Commission v. Schor*,[89] *United States v. Gagnon*,[90] and other decisions had held that a litigant may waive his or her right to an Article III judge, as well as other fundamental rights in both civil and criminal cases.[91] Accordingly, the Court concluded that with his consent the defendant in *Peretz* had waived any personal constitutional right to a district judge at *voir dire*.[92]

Second, even if the "structural" protections of Article III, which guarantee the separation of powers between the three branches of the government, could not be waived by an individual litigant, the Court concluded that the district court's procedures in supervising magistrate judges allayed any fears that Article III had been violated.[93] A district court's overall control of its magistrate judges through its powers of appointment and removal, the referral of duties, and its ultimate power to review the magistrate judge's actions in conducting the *voir dire* satisfied any separation of powers concerns regarding the independence of the Judiciary from the other branches.[94]

To reach its conclusion, the majority adopted Justice Blackmun's concurring opinion in *United States v. Raddatz*, where he concluded that the district court's supervisory authority over magistrate judges satisfied lingering constitutional questions:

> Under these circumstances, I simply do not perceive the threat to the judicial power or the independence of judicial decisionmaking that underlies Art. III. . . . [W]e confront a procedure under which 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.[95]

The majority finally addressed the issue of the appropriate standard of review applicable to § 636(b)(3) that had troubled the Court in *Gomez*. While acknowledging that the statutory provision contained no express standard of review to be applied by the supervising court, the Court again cited *Raddatz* for the proposition that any standard of review under § 636(b) is only invoked when a party objects to the magistrate judge's decision.[96] Because Peretz did not object to the magistrate judge's handling of *voir dire* at trial, the issue of the applicable standard of review did not arise in the case at bar.[97] The Court noted,

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[88] *Id.* at 936.
[89] 478 U.S. 833 (1986).
[90] 470 U.S. 522 (1985).
[91] *Peretz*, 501 U.S. at 936.
[92] *Id.* at 937.
[93] *Id.*
[94] *Id.*
[95] *Peretz*, 501 U.S. at 938–39 (quoting United States v. Raddatz, 447 U.S. 667, 685–86 (1980) (Blackmun, J., concurring)).
[96] *Id.* at 939.
[97] *Id.*

however, that if review was requested, "nothing in the statute precludes a district court from providing the review that the Constitution requires."[98] By implication, the Court suggested that *de novo* determination might be applicable.

The majority's opinion in *Peretz*,[99] with its emphasis on litigant consent and its reaffirmation of Congress' purpose in enacting the Federal Magistrates Act to allow for constructive experimentation in referring duties to magistrate judges, would prove to have a significant impact on magistrate judge authority and utilization in succeeding years. As we shall explore in greater detail, district courts have repeatedly applied the reasoning in *Peretz* as a basis for expanding magistrate judge utilization in a variety of innovative ways.

D. Three Anniversaries

Taken together, the FCSC's final report in April 1990, the enactment of the Judicial Improvements Act in December 1990, and the Supreme Court's opinion in *Peretz* in June 1991 set the stage for the significant expansion of magistrate judge authority and utilization that occurred in the following years. For the first time, pursuant to the FCSC's recommendation, district judges and magistrate judges were provided with reference materials, particularly the *Inventory*, which provided a catalog of duties that could be referred to magistrate judges.[100] As we shall discuss in greater depth, the CJRA specifically encouraged district courts to use magistrate judges in pretrial case management.[101] In addition, the FCSC implementation provisions enacted in 1990 changed the official title of the office to "magistrate judge" and made it easier for district judges and magistrate judges to discuss with litigants the option of consenting to have a magistrate judge dispose of civil cases under 28 U.S.C. § 636(c).[102] A year later, the Supreme Court in *Peretz* permitted magistrate judges to conduct critical duties in felony cases with the parties' consent, and reaffirmed a basic purpose of the Federal Magistrates Act to encourage district courts to experiment with innovative ways with using magistrate judges.[103]

Finally, although not recognized until years later, Congress's reluctance to authorize significant numbers of Article III judgeships in the years following the Federal Judgeship Act of 1990 led district courts to seek the authorization of large numbers of additional magistrate judge positions to deal with growing caseloads.[104] The result was profound growth in the authority and utilization of

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[98] *Id.*

[99] For a more detailed examination of the *Peretz* decision, including discussion of the dissenting opinions in the case, see CONSTITUTIONAL ANALYSIS, *supra* note 21, at 16–21.

[100] *See supra* note 22 and accompanying text.

[101] *See, e.g.*, R. Lawrence Dessem, *The Role of the Federal Magistrate Judge in Civil Justice Reform*, 67 SAINT JOHN'S L. REV. 799, 814–18 (1993).

[102] *See* FED. COURTS STUDY COMM., *supra* note 8, at 79–80.

[103] *See Peretz*, 501 U.S. at 940.

[104] *See supra* Part I.A.

magistrate judges in the subsequent twenty-five years.[105] The following parts of our paper will describe examples of how courts expanded magistrate judge utilization and the various ways federal courts extended the authority of magistrate judges.

II. EXPANSION OF MAGISTRATE JUDGE AUTHORITY

A. Supreme Court Cases Discussing Magistrate Judge Authority Since Peretz

Since the *Peretz* decision, the Supreme Court has decided two more cases dealing with magistrate judge authority under 28 U.S.C. § 636: *Roell v. Withrow*, concerning litigant consent in civil cases referred to magistrate judges under § 636(c),[106] and *Gonzalez v. United States*, concerning consent to a magistrate judge presiding over felony *voir dire* as an "additional duty" under § 636(b)(3).[107] While neither case deals directly with the constitutionality of magistrate judge authority under Article III, both cases have facilitated the expansion of magistrate judge authority in the district courts in recent years.

1. Roell v. Withrow

In *Roell*, the Supreme Court, in a five to four decision, held that consent to disposition of a civil case by a magistrate judge may be inferred in certain circumstances "from a party's conduct during litigation."[108]

Respondent Jon Withrow, a Texas state prisoner, filed an action under 42 U.S.C. § 1983 in the Southern District of Texas against several prisoner officials, alleging that the officials "deliberately disregarded his medical needs in violation of the Eighth Amendment."[109] At a preliminary hearing, a magistrate judge informed Withrow that he could choose to have the magistrate judge rather than a district judge preside over the case under 28 U.S.C. § 636(c).[110] Withrow consented orally to disposition by the magistrate judge.[111] But an attorney from the Texas attorney general's office, who was not permanently assigned to the case, stated that she would need to talk to the attorneys assigned to the case concerning consent.[112]

The district judge subsequently referred the case to the magistrate judge, indicating that "all defendants [would] be given an opportunity to consent" to disposition by the magistrate judge and that the referral would be withdrawn if

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105 *See supra* Part I.A.
106 *See* Roell v. Withrow, 538 U.S. 580 (2003).
107 *See* Gonzalez v. United States, 553 U.S. 242 (2008).
108 *Roell*, 538 U.S. at 582.
109 *Id.*
110 *Id.* at 582–83.
111 *Id.* at 583.
112 *Id.*

any of the defendants did not consent.[113] After the clerk of court sent the referral order to all the defendants, which included a "summons directing them to include [i]n their answer" a statement either that the defendants consented or did not consent to disposition by the magistrate judge, only one defendant gave written consent, while defendants Roell and Garibay filed answers that were silent about consent.[114]

The case proceeded to a jury trial before the magistrate judge and all of the parties voluntarily participated without raising any objections to the magistrate judge's authority.[115] After a verdict was reached in favor of the defendants, Withrow appealed to the Fifth Circuit.[116] The circuit court sua sponte remanded the case, instructing the district court to determine whether all the parties had consented to trial before the magistrate judge.[117] Only at this time did defendants Roell and Garibay file formal written consents with the district court.[118] The district judge referred the remanded case back to the magistrate judge.[119] The magistrate judge issued a report finding that, although Roell and Garibay "by their actions [had] clearly implied their consent" to the magistrate judge's jurisdiction, under Fifth Circuit precedent, consent to disposition by a magistrate judge could not be implied by the parties' conduct.[120] The magistrate judge therefore concluded that she did not have authority to try the case.[121] After the district judge adopted the magistrate judge's report and recommendation, the defendants again appealed to the Fifth Circuit.[122] The appellate court concluded that (1) consent to disposition by a magistrate judge under § 636(c) must be express; (2) consent could not be implied by conduct; and (3) the two defendants' post-judgment consent did not satisfy the statutory consent requirement.[123] After the court affirmed the district court's ruling, the Supreme Court granted certiorari.[124]

Justice Souter, writing for the majority, began by analyzing the text of § 636(c) and Federal Rule of Civil Procedure 73(b):

> The procedure created by 28 U.S.C. § 636(c)(2) and Rule 73(b) thus envisions advance, written consent communicated to the clerk, the point being to preserve the confidentiality of a party's choice, in the interest of protecting an objecting party against any possible prejudice at the magistrate judge's hands later on.[125]

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113 *Id.* (alteration in original).
114 *Id.* (quotation marks omitted) (alteration in original).
115 *Id.* at 583–84.
116 *Id.* at 583.
117 *Id.*
118 *Id.* at 583–84.
119 *Id.* at 584.
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.* at 585.
124 *Id.*
125 *Id.* at 586.

After acknowledging that what occurred in Withrow's case did not conform to these procedures, the majority stated:

> Nonetheless, Roell and Garibay "clearly implied their consent" by their decision to appear before the Magistrate Judge, without expressing any reservation, after being notified of their right to refuse and after being told that she intended to exercise case-dispositive authority. The only question is whether consent so shown can count as conferring "civil jurisdiction" under § 636(c)(1), or whether adherence to the letter of § 636(c)(2) is an absolute demand.[126]

The Court closely examined the text of § 636(c), noting the provision merely requires "the consent of the parties" for disposition of a case before a full-time magistrate judge.[127] The Court contrasted this language with the provision allowing for consent to trial before part-time magistrate judges, noting that the statute required "specific written consent" in that situation.[128] Focusing on this distinction, the majority reasoned that while the procedures set forth in § 636(c) and Rule 73(b) should not be considered merely advisory, a defect in the referral of a civil consent case to a magistrate judge would not "eliminate that magistrate judge's 'civil jurisdiction' under § 636(c)(1) so long as the parties have in fact voluntarily consented."[129]

The Court then emphasized Congress's practical concerns in relieving civil caseloads and granting "improve[d] access to the courts" as justification for permitting a defendant's implied consent in certain circumstances.[130] Balancing these considerations, Justice Souter noted that "the virtue of strict insistence on the express consent requirement embodied in § 636(c)(2) is simply the value of any bright line: here, absolutely minimal risk of compromising the right to an Article III judge."[131] He also noted, however, that application of such a rule ran the risk of wasting "a full and complicated trial . . . at the option of an undeserving and possibly opportunistic litigant."[132] Justice Souter reasoned that because "Withrow consented orally and in writing to the Magistrate Judge's authority following notice of his right to elect trial by an Article III district judge," the plaintiff received the protection intended by the Federal Magistrates Act, and therefore Withrow did not deserve to receive an advantage from some of the defendants' failure to expressly consent to the magistrate judge's authority.[133]

Under the situation in this case, the majority concluded,

> The bright line is not worth the downside. We think the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of

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126 *Id.* at 586–87 (footnote omitted) (citation omitted).
127 *Id.* at 587.
128 *Id.*
129 *Id.*
130 *Id.* at 588.
131 *Id.* at 589–90.
132 *Id.* at 590.
133 *Id.*

> the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge. Inferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority. Judicial efficiency is served; the Article III right is substantially honored.[134]

Concluding that "Roell's and Garbay's general appearances before the Magistrate Judge" after being informed of their right to adjudication by a district judge was sufficient to constitute consent to the magistrate judge's authority under § 636(c), the Court reversed the appellate court's judgment.[135]

The Court's reasoning in *Roell* has significantly altered the meaning of consent under 28 U.S.C. § 636(c). Whereas before, courts had routinely held that a party's consent to disposition of a civil case by a magistrate judge had to be "clear, unambiguous, explicit," and on the record, if not necessarily in writing,[136] *Roell* opened the door to the ambiguities of implied consent. Courts are still wrestling with the implications raised by *Roell*.[137] Moreover, as we shall see, the majority's reasoning in *Roell* was a major factor in the Supreme Court's recent decision concerning the consensual authority of bankruptcy judges in *Wellness International Network, Ltd. v. Sharif*.[138]

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[134] *Id.*

[135] *Id.* at 591.

[136] Lovelace v. Dall, 820 F.2d 223, 223 (7th Cir. 1987); *see, e.g.*, Am. Suzuki Motor Corp. v. Bill Kummer, Inc., 65 F.3d 1381 (7th Cir. 1995); Hall v. Sharpe, 812 F.2d 644 (11th Cir. 1987); Archie v. Christian, 808 F.2d 1132 (5th Cir. 1987) (en banc); Ambrose v. Welch, 729 F.2d 1084 (6th Cir. 1984) (per curiam).

[137] *See, e.g.*, Yeldon v. Fisher, 710 F.3d 452 (2d Cir. 2013) (holding that a pro se plaintiff in a prisoner civil rights case under 42 U.S.C. § 1983, who explicitly indicated on the consent form at the beginning of his case that he did not consent to disposition of his case by a magistrate judge, could not be found to have impliedly consented to the magistrate judge's authority under the reasoning of *Roell*, even though he participated in subsequent litigation before the magistrate judge); Wilhelm v. Rotman, 680 F.3d 1113 (9th Cir. 2012) (holding that a prisoner plaintiff's execution of the district court's form consenting to disposition by "a United States magistrate judge" was sufficient to constitute consent to have the case disposed of by another magistrate judge after the case was reassigned from the magistrate judge who originally received the referral, and that the plaintiff's conduct during litigation before the second magistrate judge also constituted implied consent to disposition of the case by the magistrate judge under the Supreme Court's reasoning in *Roell*, even if the consent form signed by the plaintiff was in some way defective); Chambless v. Louisiana-Pacific Corp., 481 F.3d 1345 (11th Cir. 2007) (applying the reasoning in *Roell* and holding the plaintiff's original consent to disposition of her Title VII case by a magistrate judge under § 636(c), combined with her conduct during pretrial proceedings before the magistrate judge in her second, related civil rights employment case, together would be construed to constitute consent to having the magistrate judge dispose of the second case); Phillips v. Beierwaltes, 466 F.3d 1217 (10th Cir. 2006) (holding magistrate judge did not have authority to make a final ruling on a foreign party's application for assistance in obtaining discovery from non-party witnesses under 28 U.S.C. § 1782, where there was no evidence that the parties consented to the magistrate judge's authority, and where there was no notification to the defendants or their counsel of the need to consent or the right to refuse consent, *Roell* does not permit the court to infer consent to the magistrate judge's authority to act for the district court).

[138] 135 S. Ct. 1932 (2015). For a detailed analysis of the *Wellness* decision, see *infra* Section II.C.1.b.

2. Gonzalez v. United States

In *Gonzalez v. United States*, the Supreme Court held, in an eight to one decision, that the express consent by a defendant's attorney is sufficient to permit a magistrate judge to preside over jury selection in a felony trial under § 636(b)(3).[139]

As in *Gomez* and *Peretz*, the Supreme Court focused on magistrate judge authority to conduct felony *voir dire* proceedings under 28 U.S.C. § 636(b)(3) to explore the nature of litigant consent to a magistrate judge.[140] Defendant Homero Gonzalez was charged in the Southern District of Texas with felony drug offenses.[141] During the selection of the jury at trial, Gonzalez's counsel consented on the defendant's behalf to have a magistrate judge preside over *voir dire*.[142] Gonzalez made no objection and was subsequently convicted on all charges.[143] On appeal to the Fifth Circuit, Gonzalez contended "for the first time" that the district court erred in not obtaining his personal consent to have the magistrate judge preside over *voir dire*.[144] The appellate court concluded that there was no error, holding that the right to have a district judge preside over jury selection could be waived by a defendant's attorney, and thus affirmed the convictions.[145] The Supreme Court subsequently granted certiorari to resolve a split among courts of appeals on this issue.[146]

Writing for the majority, Justice Kennedy began by examining the Federal Magistrates Act, particularly the "additional duties" provision at 28 U.S.C. § 636(b).[147] Restating the Court's earlier reasoning in *Gomez* and *Peretz*, he framed the question before the Court as follows:

> Taken together, *Gomez* and *Peretz* mean that "the additional duties" the statute permits the magistrate judge to undertake include presiding at *voir dire* and jury selection provided there is consent but not if there is an objection. We now consider whether the consent can be given by counsel acting on behalf of the client but without the client's own express consent.[148]

The majority acknowledged that there are some instances in federal criminal proceedings where only the defendant can waive the right in question, citing as the primary example the felony plea colloquy under Federal Rule of Criminal Procedure 11, where the presiding judge must determine whether the defendant understands the rights he or she is waiving by pleading guilty.[149] The

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139 Gonzalez v. United States, 553 U.S. 242, 253 (2008).
140 *Id.* at 243.
141 *Id.* at 244.
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.* at 244–45.
147 *Id.* at 245.
148 *Id.* at 246.
149 *Id.* at 247.

Court also noted that some statutes mandate explicit consent by the defendant, such as the waiver of adjudication by a district judge in Class A misdemeanor cases under 18 U.S.C. § 3401(b).[150] Noting that 28 U.S.C. § 636(b)(3) lacks such clarity, the majority observed that "for now it suffices to note that we have acknowledged that some rights cannot be waived by the attorney alone."[151]

At the same time, however, the Court also observed that other rights in a criminal trial may be waived by a defendant's attorney as a matter of trial management.[152] After noting the pragmatic necessity for counsel to make many decisions at trial on behalf of their clients, the Court observed that the question of who should preside over *voir dire* in a felony trial was similar to other tactical decisions that the Court had recognized could be left to the attorney without the defendant's express consent.[153] The majority thus concluded "that express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial, pursuant to the authorization in § 636(b)(3)."[154] The Court further observed:

> Although a criminal defendant may demand that an Article III judge preside over the selection of a jury, the choice to do so reflects considerations more significant to the realm of the attorney than to the accused. Requiring the defendant to consent to a magistrate judge only by way of an on-the-record personal statement is not dictated by precedent and would burden the trial process, with little added protection for the defendant.[155]

The Court therefore held that, under § 636(b)(3), a magistrate judge may preside over *voir dire* in a felony case where either the defendant or his counsel consented.[156] After noting that it did not decide the question of whether such consent might be inferred from either the party's or his or her counsel's failure to raise an objection to participation by the magistrate judge, the Court affirmed the court of appeal's ruling.[157]

The *Gonzalez* decision is significant because it reaffirmed the Court's earlier reasoning in *Peretz* that a defendant's consent was sufficient to permit a magistrate judge to conduct a critical stage of a felony criminal trial as an "additional dut[y]" under § 636(b)(3).[158] Moreover, in rejecting the defendant's argument that consent under § 636(b)(3) must be express and personal, the Court also reaffirmed its holding in *Roell* that a party may authorize the disposition of his civil case by a full-time magistrate judge via implied consent.[159] Lower

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150 *Id.*
151 *Id.* at 247–48.
152 *Id.* at 249.
153 *Id.* at 250.
154 *Id.* at 250.
155 *Id.* at 253.
156 *Id.*
157 *Id.*
158 *Id.* at 246.
159 *Id.* at 252.

courts have applied the Court's reasoning in *Gonzalez* to permit counsel to consent on behalf of defendants in other critical stages of a felony case.[160]

B. Judicial Expansion of Magistrate Judge Authority

The Judicial Improvements Act of 1990[161] did not end congressional expansion of magistrate judge authority. In the years following 1990, Congress on several occasions amended the Federal Magistrates Act to increase magistrate judge authority in both civil and criminal cases.[162] Nevertheless, federal courts have remained at the forefront in expanding magistrate judge authority (and debating the nature of such expansion), often in ways unanticipated when the Act was first enacted.

1. Felony Guilty Plea Proceedings Under Federal Rule of Criminal Procedure 11

Perhaps the most dramatic expansion of magistrate judge authority in the past twenty-five years has been in the referral of guilty plea colloquies in felony cases under Federal Rule of Criminal Procedure 11 to magistrate judges. Applying the Supreme Court's holding in *Peretz* that critical stages in felony cases may be referred to magistrate judges under 28 U.S.C. § 636(b)(3) with the defendant's consent, district judges throughout the country began to refer guilty plea proceedings to magistrate judges in increasing numbers.[163]

It is notable that courts increased the referral of felony Rule 11 plea proceedings to magistrate judges despite early disapproval of the practice by the Magistrate Judges Committee. At its December 1991 meeting, the members of the Committee expressed the "strong view that judicial duties in critical stages of a felony trial, particularly the acceptance of guilty pleas and conducting sen-

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[160] *See, e.g.*, United States v. Gamba, 541 F.3d 895, 900 (9th Cir. 2008) (applying *Gonzalez* and holding that defense counsel's consent to having a magistrate judge preside over closing arguments in a felony trial without the defendant's express personal consent was lawful).

[161] *See supra* Part I.B.

[162] For detailed discussion of amendments to the Federal Magistrates Act that expanded magistrate judges' authority after 1990, see LEGISLATIVE HISTORY, *supra* note 10, at 93–97.

[163] In the year ending on September 30, 2000, the first year that specific statistics on the number of felony guilty plea proceedings were collected, magistrate judges reported conducting 10,614 felony guilty plea proceedings. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2000, at tbl.M-4 (2000) [hereinafter JUDICIAL BUSINESS 2000], http://www.uscourts.gov/statistics-reports/judicial-business-2000 [https://perma.cc/AQL7-7KVS]. In the year ending on September 30, 2014, magistrate judges reported conducting 29,536 felony guilty plea proceedings. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2014, at tbl.M-4 (2014) [hereinafter JUDICIAL BUSINESS 2014], http://www.uscourts.gov/statistics-reports/judicial-business-2014 [https://perma.cc/23MR-DZRN]. Although the number of guilty plea proceedings reported by magistrate judges in 2014 was down somewhat from the high of 33,334 felony guilty plea proceedings reported in 2011, the number of these proceedings conducted by federal magistrate judges between 2000 and 2014 still almost tripled. *See infra* Section III.D.1 (analyzing the utilization of magistrate judges in felony guilty plea proceedings).

tencing proceedings, as well as presiding over the felony trial itself, are fundamental elements of the authority district judges under Article III of the Constitution."[164] The Committee further stated that felony guilty plea proceedings should not be referred "to magistrate judges as a matter of policy, regardless of whether the parties consent to the delegation."[165] This position concerning felony guilty pleas "was originally proposed for Judicial Conference consideration, but was withdrawn for further consideration at the Committee's June 1992 meeting."[166]

At its June 1992 meeting, the Magistrate Judges Committee, in an information item in its report to the September 1992 session of the Judicial Conference, reiterated its earlier position "that judicial duties in certain 'critical stages of felony cases, including accepting guilty pleas, conducting sentencing proceedings, and presiding over the trial of a felony case,'" are fundamental elements of the "authority of Article III judges and, therefore, were not appropriate for delegation to magistrate judges," regardless of whether a defendant consents to a Magistrate Judge's involvement.[167] Nevertheless, "[t]he Committee did not seek Judicial Conference endorsement of its position at that time."[168]

During long-range planning discussions, the majority of the Committee's members stated that the parties' consent to magistrate judge authority in felony proceedings reduced constitutional questions about such authority. By contrast, a smaller number of the Committee's members disagreed with this view and reiterated concerns about the constitutionality of magistrate judges conducting certain critical proceedings in felony cases.[169] Accordingly, "the Committee agreed that 'it would be prudent to proceed cautiously, expanding the involvement of magistrate judges in felony matters on an experimental basis.'"[170] After sessions devoted to the discussion of long-range planning for the federal magistrate judges system, the Committee issued a report, where the Committee wrote, "[t]he projected growth of the criminal caseload of the federal courts makes the delegation of expanded consensual felony authority to magistrate judges an increasingly acceptable alternative for courts attempting to manage growing felony and civil dockets."[171] The Committee therefore suggested that pilot programs might be set up in certain district courts where magistrate judges would be permitted to conduct guilty plea proceedings and sentence felony de-

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[164] *See* CONSTITUTIONAL ANALYSIS, *supra* note 21, at 56–57.

[165] *Id.* at 57.

[166] *Id.*

[167] LEGISLATIVE HISTORY, *supra* note 10, at 66 (quoting JCUS-MAR 1992, *supra* note 55, at 16–17); *accord* CONSTITUTIONAL ANALYSIS, *supra* note 21, at 57.

[168] *See* LEGISLATIVE HISTORY, *supra* note 10, at 66.

[169] *Id.*

[170] *Id.* (quoting COMM. ON THE ADMIN. OF THE MAGISTRATE JUDGES SYS., JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM 5 (Supp. June 1994) [hereinafter MAGISTRATE JUDGES PLAN]).

[171] *Id.* at 66 (quoting MAGISTRATE JUDGES PLAN, *supra* note 170, at 4–6).

fendants, with the parties' consent and under the supervision and control of district judges.[172] It also recommended that if federal courts found these programs to be constitutional, "an additional experimental pilot program be established to permit magistrate judges to try felony cases with consent."[173]

The Committee, however, included these recommendations merely as information items to the September 1994 session of the Judicial Conference, and the full Conference did not express any views on them.[174] In addition, although these recommendations were included in the Supplement to the Long Range Plan, no district court set up any pilot programs.[175] But the referral of felony guilty plea proceedings to magistrate judges expanded in numerous courts regardless of the changing views of the Committee.[176]

Every circuit court of appeals that has examined the issue of the referral of felony guilty plea proceedings to magistrate judges has concluded that the practice does not violate the Constitution and that "plea colloquies under [Federal Rule of Criminal Procedure] 11 in felony cases are additional duties that may be delegated to magistrate judges under 28 U.S.C. § 636(b)(3) with the defendants' consent."[177] At the same time, however, courts have disagreed over whether the magistrate judge may only issue a report recommending whether or not the plea should be accepted by the district judge, or whether the magistrate judge may actually accept the defendant's plea. Cases on both sides of this disagreement are analyzed below.

a. Report and Recommendation with the Defendant's Consent

Most circuit courts have held that a magistrate judge may conduct a felony guilty plea proceeding under Rule 11 with the defendant's consent, after which the magistrate judge must prepare a report recommending whether the district judge should accept the defendant's plea.[178] Several of these cases are discussed below.

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[172] *Id.* at 66–67.

[173] *Id.* at 67.

[174] *Id.*

[175] *Id.*

[176] See *infra* Part III.D.1 for further analysis of the utilization of magistrate judges in felony guilty plea proceedings.

[177] LEGISLATIVE HISTORY, *supra* note 10, at 67 n.228; *see* United States v. Benton, 523 F.3d 424, 433 (4th Cir. 2008); United States v. Vega-Martinez, 425 F.3d 15, 18 (1st Cir. 2005); United States v. Woodard, 387 F.3d 1329, 1329 (11th Cir. 2004); United States v. Reyna-Tapia (*Reyna-Tapia II*), 328 F.3d 1114, 1122 (9th Cir. 2003) (en banc); United States v. Torres, 258 F.3d 791, 791–92 (8th Cir. 2001); United States v. Dees, 125 F.3d 261, 269 (5th Cir. 1997); United States v. Ciapponi, 77 F.3d 1247, 1251 (10th Cir. 1996); United States v. Williams, 23 F.3d 629, 629 (2d Cir. 1994); *see also* United States v. Harden, 758 F.3d 886, 891 (7th Cir. 2014) (addressing the defendant's statutory, not constitutional, claim).

[178] *See Harden*, 758 F.3d at 891; *Reyna-Tapia II*, 328 F.3d at 1122; *Torres*, 258 F.3d at 796; *Dees*, 125 F.3d at 269; *Williams*, 23 F.3d at 634.

i. United States v. Williams

In 1994, the Second Circuit, in *United States v. Williams*, became the first federal appellate court to address whether a magistrate judge could constitutionally be referred a felony guilty plea proceeding with the defendant's consent on a report and recommendation basis.[179] The Second Circuit held that a magistrate judge could administer the colloquy under Rule 11 to accept a defendant's guilty plea in a felony case with the defendant's consent without violating Article III of the Constitution or the Federal Magistrates Act.[180] The court further endorsed a procedure whereby the magistrate judge conducted the Rule 11 allocution with the defendant's consent and submitted a recommendation to the district judge regarding whether to accept the guilty plea.[181]

After defendant Lloyd Williams was arrested in 1991 and charged with felony drug importation offenses in the Eastern District of New York, he consented in writing to have a magistrate judge conduct the proceeding to accept his guilty plea.[182] Following the district's standard practice, a magistrate judge conducted the plea allocution, made a finding that the guilty plea was made knowingly and voluntarily by the defendant, and submitted a recommendation to the district judge that Williams's guilty plea be accepted.[183] The district court agreed, accepted Williams's guilty plea, and sentenced him to 292 months of imprisonment.[184] Williams appealed to the Second Circuit, arguing that allowing a magistrate judge to conduct the guilty plea colloquy under Rule 11 violated Article III of the Constitution and the Federal Magistrates Act, notwithstanding his consent to the procedure.[185]

The appellate court first examined whether the referral of felony guilty plea proceedings to magistrate judges was permissible under the Federal Magistrates Act.[186] Noting that 28 U.S.C. § 636(b)(3) was the provision of the Act that applied in this case, the court acknowledged it was bound by *Gomez* and *Peretz*.[187] The court further stated:

> In order for a Rule 11 allocution properly to fall within the sphere of "additional duties" authorized by Congress in the Magistrates Act, it must bear some relationship to those duties already assigned to magistrates by the Act. An allocution is an ordinary garden variety type of ministerial function that magistrate judges commonly perform on a regular basis. The catechism administered to a defendant is now a standard one, dictated in large measure by the comprehensive provisions of Rule 11 itself, which carefully explain what a court must inquire

179 *See Williams*, 23 F.3d 629.
180 *Id.* at 630.
181 *Id.* at 634.
182 *Id.* at 630.
183 *Id.* at 631.
184 *Id.*
185 *Id.* at 632.
186 *Id.*
187 *Id.*

> about, what it should advise a defendant and what it should determine before accepting a plea. Further, administrating an allocution is less complex than a number of duties the Magistrates Act specifically authorizes magistrates to perform. For example, such judicial officers may hear and determine pretrial matters, other than eight dispositive motions. In addition, a magistrate may conduct hearings, including evidentiary hearings, and submit to the district court recommended findings of fact for the eight dispositive motions, and do the same with habeas petitions.[188]

The court also noted that even if guilty plea proceedings were of greater importance than other duties specifically assigned to magistrate judges, "the consent requirement—fulfilled in this case—saves the delegation. Consent is the key."[189] The panel therefore held "that the 'additional duties' clause of the Magistrates Act authorizes a district court judge in a felony prosecution to delegate to a magistrate judge the task of administering a Rule 11 allocution, *provided the defendant consents*."[190]

Turning to the defendant's constitutional argument, the court again relied on the Supreme Court's analysis in *Peretz* to conclude that the defendant's consent was crucial to the constitutional analysis "because a defendant may waive even his most basic rights."[191] The panel also cited the Supreme Court's decision in *Commodity Futures Trading Commission v. Schor*[192] to conclude

> the structural protections of Article III are not implicated. Because the district court remains in control of the proceeding, and the matter is reported to that court for its approval, there should be no concern that the use of a magistrate judge to allocute a defendant accused of a felony will tend to devitalize Article III courts.[193]

The court observed that the district judge was free to review the transcript of the Rule 11 colloquy and could re-administer the allocution if infirmities were discovered.[194] The court therefore concluded that the referral of the felony guilty plea proceeding to the magistrate judge in Williams's case did not contravene Article III of the Constitution and affirmed the district court's judgment.[195]

As the first court of appeals case to address the issue of whether felony guilty plea proceedings could be referred to magistrate judges without violating the Federal Magistrates Act or the Constitution, the *Williams* decision has been

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188 *Id.* at 632–33 (citations omitted).
189 *Id.* at 633.
190 *Id.* at 634.
191 *Id.*
192 478 U.S. 833 (1986). See CONSTITUTIONAL ANALYSIS, *supra* note 21, at 32–37, for a detailed analysis of *Schor*.
193 *Williams*, 23 F.3d at 634.
194 *Id.*
195 *Id.* at 634, 636.

cited by almost all the courts of appeals that have addressed the question.[196] Indeed, the Second Circuit's analysis has served as a template for other courts examining the issue.

ii. United States v. Reyna-Tapia I & II

The panel of the Ninth Circuit that issued the first opinion in *United States v. Reyna-Tapia* (*Reyna-Tapia I*), came close to effectively ending the referral of felony guilty plea proceedings to magistrate judges in the Ninth Circuit by requiring district judges to conduct *de novo* review every time a magistrate judge issued a report and recommendation after conducting a Rule 11 plea colloquy, even in cases where the defendant did not object to the recommendation.[197] On rehearing en banc, however, the Ninth Circuit backed away from the original panel's view and held that *de novo* review was only required when an objection was made.[198] Both decisions are discussed below.

In *Reyna-Tapia I*, a panel of the Ninth Circuit held that a magistrate judge could, with the defendant's consent, conduct a Rule 11 plea colloquy and recommend that a district judge accept a defendant's guilty plea in a felony case, provided that the district court conducted *de novo* review of the proceeding.[199]

Defendant Jose Reyna-Tapia was charged in the District of Arizona with illegal re-entry into the United States after being deported in 1999.[200] After agreeing to plead guilty to this charge, the defendant agreed to have a magistrate judge administer the Rule 11 plea colloquy.[201] The magistrate judge conducted the proceeding and recommended that the defendant's plea be accepted. The district judge reviewed the record *de novo* before accepting the defendant's plea.[202] After sentencing, Reyna-Tapia appealed to the Ninth Circuit, arguing that the district court erred in permitting a magistrate judge to conduct the Rule 11 colloquy proceeding.[203]

The panel affirmed, but not without voicing numerous concerns about the referral of felony guilty plea colloquies to magistrate judges. Noting that the Supreme Court had observed in *Gomez* that the Federal Magistrates Act provides no jurisdiction for a magistrate judge to preside over an entire felony trial

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[196] *See, e.g.*, United States v. Harden, 758 F.3d 886, 891 (7th Cir. 2014); United States v. Benton, 523 F.3d 424, 431 (4th Cir. 2008); United States v. Woodard, 387 F.3d 1329, 1331 (11th Cir. 2004); *Reyna-Tapia II*, 328 F.3d 1114, 1119 (9th Cir. 2003) (en banc); United States v. Torres, 258 F.3d 791, 795 (8th Cir. 2001); United States v. Dees, 125 F.3d 261, 263 (5th Cir. 1997); United States v. Ciapponi, 77 F.3d 1247, 1250 (10th Cir. 1996).

[197] United States v. Reyna-Tapia (*Reyna-Tapia I*), 294 F.3d 1192, 1201 (9th Cir. 2002), *reh'g en banc granted*, *opinion vacated by* 315 F.3d 1107 (9th Cir. 2002).

[198] *Reyna-Tapia II*, 328 F.3d at 1122.

[199] *Reyna-Tapia I*, 294 F.3d at 1201.

[200] *Id.* at 1194.

[201] *Id.* at 1194–95.

[202] *Id.* at 1195.

[203] *Id.* at 1194–95.

simply because a defendant consents to that authority,[204] the Ninth Circuit stated that "a felony plea colloquy constitutes a sensitive and critical stage of a criminal prosecution where the same rights are at stake as with felony trials and the court must exercise similar discretion."[205] Emphasizing the importance of a judge's observations and impressions of a defendant in evaluating voluntariness of the defendant's guilty plea, the panel noted, "*De novo* review, which entails a reading of a cold transcript, acts as a poor substitute for these first-hand impressions."[206] It further opined that "[c]onsent may be insufficient to cure the problems involved with the delegation of Rule 11 duties to a non-Article III judge."[207]

The court was particularly concerned with the delegation of the duty to inquire into the factual basis of the guilty plea under Rule 11(f):

> Rule 11(f) is designed to protect defendants who do not realize that their conduct does not actually fall within the charge. Only the sentencing judge has the benefit of the presentence report, which may reveal additional facts showing that the defendant's conduct does not fall within the charge to which he is pleading. To delegate this responsibility to a magistrate judge, who will conduct the inquiry without the benefit of the presentence report, dilutes the important safeguard in Rule 11(f).[208]

In light of these concerns, the court placed particular importance on having the district judge conduct *de novo* review in all circumstances where a magistrate judge conducted the Rule 11 colloquy.[209]

Even with these reservations, the court acknowledged that four other circuits had already concluded that the duty of conducting a Rule 11 plea colloquy was a duty comparable in responsibility to other duties assigned to magistrate judges under the Federal Magistrates Act.[210] The panel however specifically departed from the reasoning used by the Second Circuit in *Williams* to justify the referral of felony guilty plea proceedings to magistrate judges:

> We disagree with the Second Circuit that a Rule 11 plea colloquy is a "garden variety ministerial function." . . . [A] plea colloquy is a highly critical stage of a criminal prosecution. However, we recognize the weight of authority holding that magistrate[judges] may perform this function with the defendant's consent, and we join our sister circuits in acknowledging that Congress intended to give district courts significant leeway to experiment with the use of magistrate[judges]. Therefore, we hold that, when a defendant explicitly consents, a magistrate judge may administer the Rule 11 plea colloquy in a felony case, so long as the district court reviews the proceedings *de novo*.[211]

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204 *See* Gomez v. United States, 490 U.S. 858, 872 (1989).
205 *Reyna-Tapia I*, 294 F.3d at 1199.
206 *Id.*
207 *Id.*
208 *Id.* at 1200 (citations omitted).
209 *Id.* at 1201.
210 *See id.* at 1200.
211 *Id.* at 1200–01.

The panel affirmed the district court's denial of the defendant's motion to withdraw his guilty plea, concluding that Reyna-Tapia had not provided an adequate reason for withdrawing his plea and that the district court's referral of Rule 11 duties to the magistrate judge "was proper under the circumstances of this case."[212] Nevertheless, the court appeared to mandate that *de novo* review must occur whenever a magistrate judge conducted a Rule 11 guilty plea proceeding.

The Ninth Circuit panel's decision in *Reyna-Tapia I* cast doubt on the efficacy of district judges referring felony guilty plea proceedings to magistrate judges by emphasizing the need for *de novo* review every time a magistrate judge conducted a Rule 11 colloquy, even when a defendant did not object. By suggesting that *de novo* determination was mandatory in all cases, the panel undermined the time-saving rationale for such referrals. If a district judge was required to conduct *de novo* review of every plea allocution handled by a magistrate judge, what was the purpose of, or efficiency in, delegating such duties? While we do not know whether these concerns were brought to the attention of the judges of the Ninth Circuit, six months after the panel issued the opinion in *Reyna-Tapia I*, the Ninth Circuit en banc granted rehearing of the case and vacated the first decision.[213]

In May 2003, the Ninth Circuit issued its en banc opinion in *United States v. Reyna-Tapia* (*Reyna-Tapia II*).[214] The court held that Rule 11 plea colloquies in felony cases are additional duties that may be delegated to magistrate judges under 28 U.S.C. § 636(b)(3) for findings and recommendations with the defendants' consent.[215] The court further held that *de novo* review of the magistrate judge's findings and recommendations in a guilty plea proceeding is mandated only when a party specifically objects to them.[216]

Noting that a defendant has at least three procedural safeguards available when a magistrate judge conducts a guilty plea proceeding (consent to the magistrate judge, objections to the magistrate judge's report and recommendation, and the right to withdraw the guilty plea prior to its acceptance by the district court), the court reasoned:

> [I]t merits re-emphasis that the underlying purpose of the Federal Magistrates Act is to improve the effective administration of justice. A rule requiring automatic de novo review of findings and recommendations to which no one objects would not save time or judicial resources. It would do just the opposite, and defeat the whole purpose of referring the plea to the magistrate judge.[217]

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[212] *Id.* at 1201.

[213] *See* United States v. Reyna-Tapia, 315 F.3d 1107 (9th Cir. 2002).

[214] 328 F.3d 1114 (9th Cir. 2003).

[215] *Id.* at 1116, 1122.

[216] *Id.* at 1116.

[217] *Id.* at 1121–22 (citation omitted) (citing Peretz v. United States, 501 U.S. 923, 928 (1991)).

The Ninth Circuit once again affirmed the district court's denial of the defendant's motion to withdraw his guilty plea.

iii. United States v. Harden

The Seventh Circuit, in *United States v. Harden*, is the latest court to address the issue of referring felony guilty plea proceedings to magistrate judges.[218] In *Harden*, the court held that a magistrate judge conducting a Rule 11 guilty plea colloquy could not accept the defendant's guilty plea at the conclusion of the colloquy, but was required to issue a report to the district judge recommending whether to accept the plea.[219]

Defendant Stacy Harden agreed to plead guilty in the Southern District of Illinois to a drug charge and consented to a magistrate judge conducting the plea colloquy.[220] Following the colloquy, the magistrate judge accepted Harden's guilty plea.[221] The district judge then conducted a sentencing hearing and imposed a within-guidelines sentence.[222] Harden appealed his conviction, raising for the first time his objection to the magistrate judge's authority to accept a guilty plea in a felony case.[223]

The Seventh Circuit concluded that the taking of a felony guilty plea is "too important to be considered a mere 'additional duty' permitted" under the Federal Magistrates Act.[224] Because of the importance of this task, the court held that the Act "cannot be stretched to reach acceptance of felony guilty pleas, even with a defendant's consent."[225] Noting that its view of the Act conflicted with several other circuits,[226] the Seventh Circuit nonetheless concluded:

> [T]he prevalence of guilty pleas does not render them less important, or the protections waived through them any less fundamental. A felony guilty plea is equal in importance to a felony trial leading to a verdict of guilty. And without explicit authorization from Congress, the district court cannot delegate this vital task.[227]

Noting that the conflicting authority had emphasized the Supreme Court's statement in *Peretz* that "Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process,"[228] the Seventh Circuit closed its decision by stating:

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[218] United States v. Harden, 758 F.3d 886 (7th Cir. 2014).
[219] *Id.* at 891.
[220] *Id.* at 887.
[221] *Id.*
[222] *Id.*
[223] *Id.* at 887–88.
[224] *Id.* at 888.
[225] *Id.*
[226] *Id.* at 891 (citing United States v. Benton, 523 F.3d 424, 432–32 (4th Cir. 2008); United States v. Woodard, 387 F.3d 1329, 1332–33 (11th Cir. 2004); United States v. Ciapponi, 77 F.3d 1247, 1250–52 (10th Cir. 1996)).
[227] *Id.*
[228] Peretz v. United States, 501 U.S. 923, 932 (1991).

> The desire to make more efficient the district courts' management of large criminal caseloads is understandable. These days, over 97% of criminal convictions are the result of guilty pleas. Truly, "criminal justice today is for the most part a system of pleas, not a system of trials." . . . A felony guilty plea is equal in importance to a felony trial leading to a verdict of guilty. And without explicit authorization from Congress, the district court cannot delegate this vital task. The authority to experiment set forth in *Peretz* is bounded; the Court has never suggested that magistrate judges, with the parties' consent, may perform every duty of an Article III judge, regardless of the duty's importance.[229]

Acknowledging efficiency concerns, the appellate court held that a magistrate judge may conduct a Rule 11 guilty plea colloquy, but that the judge must issue a report to the district court with a recommendation on the plea.[230] The court agreed with other circuits that "this is a permissible practice."[231] Because the magistrate judge in *Harden* had actually accepted his plea, the court reversed the judgment of the district court.[232]

The main thrust of the decision in *Harden* was a rejection of the view that a magistrate judge may accept the defendant's plea in a felony case after the Rule 11 colloquy. Since *Harden*, other circuits have continued to adhere to their precedent that magistrate judges may accept a felony guilty plea.[233] The Seventh Circuit's *Harden* decision emphatically highlights the disagreement existing among the courts of appeals as to whether a magistrate judge can accept a defendant's guilty plea in a felony case.

b. Magistrate Judge's Acceptance of Guilty Plea

At present, two courts of appeals have taken the position that magistrate judges not only may conduct felony guilty plea proceedings under Rule 11 with the consent of the defendant, but also that magistrate judges may accept defendants' pleas without preparing a report and recommendation to the district judge.[234] The *Ciapponi* and *Benton* decisions are discussed below.

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[229] *Harden*, 758 F.3d at 891–92 (citations omitted) (quoting Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012)).

[230] *Id.* at 891.

[231] *Id.*

[232] *Id.* at 892.

[233] *See, e.g.*, United States v. Shropshire, 608 F. App'x 143, 143 (4th Cir. 2015); United States v. Farmer, 599 F. App'x 525, 526 (4th Cir. 2015); United States v. Ross, 602 F. App'x 113, 114 (4th Cir. 2015).

[234] *See* United States v. Benton, 523 F.3d 424 (4th Cir. 2008); United States v. Ciapponi, 77 F.3d 1247 (10th Cir. 1996).

i. United States v. Ciapponi

The Tenth Circuit was the first court of appeals to endorse the view that a magistrate judge may accept a felony defendant's guilty plea with the defendant's consent.[235]

Defendant George Ciapponi was arrested in the District of New Mexico and charged with possession of marijuana with the intent to distribute.[236] When Ciapponi agreed to a plea agreement, the district judge referred the guilty plea proceeding to a magistrate judge.[237] After being informed that he had a right to appear before a district judge, Ciapponi, with the advice of counsel, executed a written consent to have his plea accepted by the magistrate judge.[238] The magistrate judge then conducted a Rule 11 plea colloquy and accepted the defendant's guilty plea.[239] At the later sentencing proceeding before the district judge, Ciapponi did not object to the magistrate judge's acceptance of the plea.[240]

The defendant's first objection to the plea proceeding was raised on appeal, where he argued that the magistrate judge's acceptance of the guilty plea violated the Federal Magistrates Act and Article III of the Constitution.[241] The Tenth Circuit rejected both arguments. The court observed that the defendant's failure to object or otherwise request review of the plea in the district court undercut his claim of a constitutional violation and that the court would review Ciapponi's claim under the plain error standard.[242] Citing with approval the Second Circuit's reasoning in *United States v. Williams*,[243] the court held that "[c]onsistent with *Peretz* and *Williams*, . . . with a defendant's express consent, the broad residuary 'additional duties' clause of the Magistrates Act authorizes a magistrate judge to conduct a Rule 11 felony plea proceeding, and such does not violate the defendant's constitutional rights."[244]

The court further concluded that the district judge's failure to conduct *de novo* review of the plea proceeding was insignificant, reasoning that "neither the Magistrates Act nor Article III requires that a referral be conditioned on subsequent review by the district judge, so long as a defendant's right to demand an Article III judge is preserved."[245] The court noted that the right to Article III review in a felony guilty plea proceeding is protected by Federal Rule of Criminal Procedure 32(d), which allows a defendant to move to withdraw a

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235 *See Ciapponi*, 77 F.3d 1247.
236 *Id.* at 1249.
237 *Id.*
238 *Id.*
239 *Id.*
240 *Id.*
241 *Id.*
242 *Id.* at 1249–50.
243 23 F.3d 629 (2d Cir. 1994).
244 *Ciapponi*, 77 F.3d at 1251.
245 *Id.* at 1251–52.

guilty plea prior to sentencing.[246] The Tenth Circuit concluded that the availability of the Rule 32 withdrawal procedure adequately protected a defendant's rights under Article III.[247] The court therefore held that the magistrate judge did not err in accepting Ciapponi's guilty plea and affirmed the district court's judgment.[248]

ii. United States v. Benton

In *United States v. Benton*, the Fourth Circuit agreed with the Eleventh Circuit in holding that a magistrate judge had the authority to accept a defendant's felony guilty plea with the consent of the defendant without the preparation of a report and recommendation.[249]

After defendant Cedric Benton was arrested in the Western District of North Carolina on drug charges, he entered into a plea agreement where he agreed to allow a "duly-qualified federal Magistrate Judge" to conduct his Rule 11 plea colloquy.[250] At the plea hearing, Benton affirmatively consented to the magistrate judge's authority.[251] He also stipulated that there was a factual basis for the plea and agreed to defer the district court's confirmation of this stipulation until the sentencing hearing before a district judge.[252] After conducting the plea colloquy, the magistrate judge "accepted Benton's plea, finding it to be both knowing and voluntary."[253] After the guilty plea proceeding, however, Benton changed counsel and moved to withdraw his guilty plea.[254] The district judge denied Benton's motion, concluding that the defendant "had not established a fair and just reason for withdrawing his plea."[255] The district judge entered a final judgment of conviction and sentenced Benton to 262 months in prison and a ten-year term of supervised release.[256] Benton appealed to the Fourth Circuit.[257]

On appeal, Benton argued that the magistrate judge did not have authority to "accept" his guilty plea under Rule 11 and that therefore the district court should have allowed him to withdraw his guilty plea for "any reason or no rea-

246 *Id.* at 1252.
247 *Id.*
248 *Id.* at 1253.
249 United States v. Benton, 523 F.3d 424, 431–33 (4th Cir. 2008).
250 *Id.* at 426.
251 *Id.*
252 *Id.*
253 *Id.*
254 *Id.* at 427.
255 *Id.*
256 *Id.*
257 *Id.*

son" under Rule 11(d)(1).[258] The Fourth Circuit reviewed for plain error, noting that Benton failed to raise this argument before the district court.[259]

Applying the Supreme Court's reasoning in *Peretz*, the court held that "magistrate judges possess the authority to bind defendants to their plea for the purposes of Rule 11, so long as district judges retain the authority to review the magistrate judge's actions *de novo*."[260] On the question of whether a magistrate judge may actually accept the defendant's plea, rather than issuing a report and recommendation, the court opined that the "distinction between plea colloquy and plea acceptance does not appear to necessitate different results under *Peretz*. . . . [T]he acceptance of a plea is merely the natural culmination of a plea colloquy."[261]

The court summarized its ruling:

> We thus find that the district court did not commit error in refusing to allow Benton to withdraw his plea "for any or no reason." . . . [A]cceptance of a plea is a duty that does not exceed the responsibility and importance of the more complex tasks a magistrate [judge] is explicitly authorized to perform, the parties have consented to the procedure, and the ultimate control of the district judge over the plea process alleviates any constitutional concerns. And just as a practical matter, allowing magistrate judges to accept pleas for the purposes of Rule 11 preserves judicial resources—the very goal underlying the creation of the office of magistrate judge—and prevents litigants from exploiting bifurcated plea procedures.[262]

The court affirmed the district court's judgment and Benton's conviction and sentence.[263]

As noted earlier, the Fourth Circuit has recently reaffirmed its holding in *Benton* in three decisions issued after the Seventh Circuit's decision in *Harden*.[264]

iii. United States v. Woodard & Brown v. United States

Eight years after the *Ciapponi* decision, the Eleventh Circuit also endorsed a procedure where a magistrate judge accepts the defendant's guilty plea after conducting the Rule 11 colloquy. In *United States v. Woodard*, the court held that § 636(b)(3) authorized a magistrate judge to conduct a Rule 11 proceeding with the defendant's consent and to accept the defendant's guilty plea, and that the delegation of the authority to conduct such proceedings did not offend the principles of Article III.[265] Ten years later, however, the Eleventh Circuit, in a

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[258] *Id.*
[259] *Id.* at 429.
[260] *Id.*
[261] *Id.* at 431.
[262] *Id.* at 433.
[263] *Id.* at 435.
[264] *See supra* note 233.
[265] United States v. Woodard, 387 F.3d 1329, 1329 (11th Cir. 2004).

footnote in *Brown v. United States*, clarified its holding in *Woodard* to conclude that a felony guilty plea proceeding conducted by a magistrate judge should always be considered "akin to a report and recommendation rather than a final adjudication of guilt."[266] Accordingly, the Eleventh Circuit has become the only circuit court to change its position concerning felony guilty plea proceedings from permitting magistrate judges to accept felony guilty pleas to requiring the issuance of a report and recommendation in such proceedings. Both cases are discussed below.

Defendant David Woodard was charged in the Southern District of Florida with being a felon in possession of a firearm.[267] After Woodard signed a plea agreement, a magistrate judge conducted a change of plea hearing under Rule 11. After Woodard expressly consented, the magistrate judge accepted his guilty plea and adjudged Woodard guilty of the firearm offense. When a district judge later sentenced him, Woodard did not object to the sentence or to having the plea colloquy conducted by a magistrate judge.[268] On appeal to the Eleventh Circuit, however, Woodward asserted for the first time that, although he had specifically consented to having the magistrate judge conduct the guilty plea proceeding, the magistrate judge had no statutory or constitutional authority to accept Woodward's guilty plea or to adjudicate him guilty of a felony.[269]

The Eleventh Circuit held that 28 U.S.C. § 636(b)(3) authorized a magistrate judge, with the defendant's consent, to conduct a Rule 11 colloquy in a felony case and to accept the defendant's guilty plea. Noting that several courts of appeals had addressed the statutory issue, the court noted:

> Like our sister circuits, we find that conducting a Rule 11 proceeding is comparable to the [Federal Magistrates Act]'s enumerated duties. Therefore, we join our sister circuits in similarly holding that a magistrate judge has the authority under the "additional duties" clause of [the Act] to conduct Rule 11 proceedings when the defendant consents.[270]

Turning to Woodard's constitutional argument, the court applied the Supreme Court's reasoning in *Peretz*, focusing on whether delegating certain duties to a magistrate judge would offend the structural protections provided by Article III.[271] It noted that in *Peretz*,

> the Court held the structural protections of Article III are not jeopardized when magistrate judges conduct voir dire because district judges still exert ultimate control over magistrate judges. The Court explained that because district judges have supervisory power over magistrate judges, "there is no danger that use of

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[266] *See* Brown v. United States, 748 F.3d 1045, 1071 n.53 (11th Cir. 2014). See *infra* Part II.B.2.b.i(b) for a detailed analysis of the *Brown* decision.

[267] *Woodard*, 387 F.3d at 1330.

[268] *Id.* at 1330–31.

[269] *Id.* at 1331.

[270] *Id.* at 1333.

[271] *Id.*

> the magistrate involves a congressional attemp[t] to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts."[272]

The court further applied the *Peretz* analysis to conclude that the possibility of *de novo* review by a district judge removed any suggestion that Article III authority was being undermined when particular matters were referred to magistrate judges.[273] In response to Woodard's argument that the procedure used in his case was improper because the magistrate judge accepted his guilty plea rather than issuing a report and recommendation, the Eleventh Circuit observed that the critical factor in all cases examining the referral of guilty plea proceedings to magistrate judges "was that a district court, as a matter of law, retained the ability to review the Rule 11 hearing *if requested*."[274] Woodard did not request that the district judge review the guilty plea proceeding and therefore "the magistrate judge did not appropriate the district judge's ultimate decision-making authority."[275] The appellate court thus concluded that "there was no plain error, statutory or constitutional, with the magistrate judge accepting the Woodard's guilty plea and adjudicating him guilty."[276]

Although the Eleventh Circuit panel that decided *Brown* held that a federal habeas corpus case arising under 28 U.S.C. § 2255 was not a civil matter that could be disposed of by a magistrate judge under 28 U.S.C. § 636(c), the court, in a lengthy footnote at the end of its opinion, clarified its holding in *Woodard* regarding the procedures to be followed when magistrate judges conduct felony guilty plea proceedings.[277]

Noting that the panel in *Woodard* had "described somewhat imprecisely the circumstances giving rise to the appeal, which thus slightly muddled our constitutional holding," the court further reasoned,

> We held in *Woodard* that "there was no error, statutory or constitutional, in the magistrate judge accepting Woodard's guilty plea and adjudicating him guilty." But that holding overlooked the mechanics of the district court's actions in that case. For although the magistrate judge purported to adjudge the defendant guilty, it was the district court that actually entered judgment. That is, the magistrate judge did not make the final adjudication of guilt.
>
> We noted in *Woodard* that different magistrate judges categorized their actions as an acceptance of a plea or a report and recommendation, "reveal[ing] a lack of uniformity in the language used by magistrate judges." . . . We believe that there is value in uniformity; thus we clarify today that the magistrate judge's

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[272] *Id.* at 1333–34 (alterations in original) (quoting Peretz v. United States, 501 U.S. 923, 937 (1991)).

[273] *Id.* at 1334.

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] Brown v. United States, 748 F.3d 1045, 1071 n.53 (11th Cir. 2014). See *infra* Part II.B.2.b.i(b) for a detailed discussion of the holding and reasoning in *Brown*.

> action in such proceedings are akin to a report and recommendation rather than a final adjudication of guilt.[278]

The Eleventh Circuit therefore appeared to back away from its earlier holding in *Woodard* that seemed to validate a procedure where a magistrate judge could accept a felony defendant's guilty plea after conducting the Rule 11 colloquy with the defendant's consent. It became the first circuit court to change its position on this issue. Interestingly, the court chose to do this in a footnote in a case that did not involve guilty plea proceedings under Rule 11. Moreover, to date this language has only been cited in one unpublished decision from the Eleventh Circuit.[279] While the court intended to clarify the practical procedures to be followed by magistrate judges when referred Rule 11 proceedings, it remains unclear to what extent magistrate judges are aware of this change in the circuit's law.

c. Conclusion

Despite the disagreement among the courts of appeals concerning whether a magistrate judge may accept a defendant's felony guilty plea after conducting the Rule 11 colloquy, the referral of felony guilty plea proceedings to magistrate judges under 28 U.S.C. § 636(b)(3) is a widely accepted practice across the country. Of course, district judges do not uniformly favor this practice and there remain principled arguments against the delegation of these duties to magistrate judges. Nevertheless, the cases analyzed above demonstrate the wide application of the Supreme Court's reasoning in *Peretz* to justify a significant expansion of magistrate judge authority throughout the nation.

2. Issues in Civil Consent Cases

Setting aside for a moment the broader issue of whether the civil consent authority of magistrate judges under 28 U.S.C. § 626(c) violates Article III of the Constitution,[280] courts have also dealt with several issues regarding the extent of magistrate judge authority in civil consent cases, including whether magistrate judges have authority to rule on issues involving parties who have not consented to the magistrate judge's authority under § 626(c), whether magistrate judges may dispose of federal and state habeas corpus cases with consent, and whether district courts may use "opt out" procedures, where the liti-

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[278] *Brown*, 748 F.3d at 1071 n.53 (alteration in original) (citations omitted).

[279] *See* United States v. Millender, No. 15-10024, 2015 WL 7750663 (11th Cir. Dec. 2, 2015).

[280] For a detailed discussion of the appellate cases dealing with the constitutionality of 28 U.S.C. § 626(c) that were issued after the initial enactment, see CONSTITUTIONAL ANALYSIS, *supra* note 21, at 41–54. For a detailed discussion of two recent Supreme Court cases dealing with the constitutionality of bankruptcy judge authority under Article III, see Wellness Int'l Network, Ltd. V. Sharif, 135 S. Ct. 1932 (2015), Stern v. Marshall, 131 S. Ct. 2594 (2011), and *infra* Section II.C.1.

gants' failure to act may be deemed to be implied consent to disposition by a magistrate judge.

a. Magistrate Judge Authority in Class Action Consent Cases to Issue Rulings that Are Binding on Non-Consenting Parties

Several appellate courts have considered whether a magistrate judge presiding in a class action case with the consent of the parties has the authority to issue rulings that are binding on litigants that have not individually consented to disposition of the case by the magistrate judge under 28 U.S.C. § 636(c). These cases are reviewed below.

i. Williams v. General Electric Capital Auto Lease, Inc.

In *Williams v. General Electric Capital Auto Lease, Inc.*, the Seventh Circuit held that where the representative plaintiff in a class action case consented to a magistrate judge disposing of the case, the presiding magistrate judge had the authority to enjoin related litigation begun by an absent class member in another district.[281]

Plaintiff Stacey Williams filed a class action suit against General Electric Capital Automobile Lease, Inc (GECAL) in the Northern District of Illinois challenging provisions of automobile leases issued by GECAL under the Consumer Leasing Act.[282] The named parties consented to have the case disposed of by a magistrate judge.[283] The magistrate judge certified a national class and eventually approved a settlement.[284] Unnamed plaintiffs filed a virtually identical class action suit against GECAL in the Middle District of Florida.[285] GECAL moved in the Northern District of Illinois to enjoin further prosecution of the case in Florida.[286] The magistrate judge granted the injunction, and the Florida plaintiffs appealed.[287]

On appeal, the Florida plaintiffs argued that the magistrate judge did not have the authority under 28 U.S.C. § 636(c) to enjoin them because they had not consented to have the magistrate judge preside over the case.[288] The Seventh Circuit, while noting that unanimous and voluntary consent is the constitutional "linchpin" to magistrate judge authority under § 636(c), concluded that the Florida plaintiffs, as unnamed members of the class, were not full "parties"

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[281] Williams v. General Elec. Capital Auto Lease, Inc., 159 F.3d 266, 269–70 (7th Cir. 1998).
[282] *Id.* at 268.
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] *Id.* at 272.

to the Illinois lawsuit because they could not direct the litigation.[289] Thus, the named class representative plaintiff's consent to the magistrate judge's authority was binding on other members of the class.[290] The unnamed members did not challenge the class representative's consent to magistrate judge disposition even after receiving notice of a proposed settlement that named the magistrate judge as the presiding judge.[291] Accordingly, the court held that the magistrate judge had authority to enter the injunction and that the appellate court had jurisdiction to hear the appeal.[292] The court also concluded that the injunction was properly granted on its merits.[293]

ii. Dewey v. Volkswagen Aktiengesellschaft

In *Dewey v. Volkswagen Aktiengesellschaft*, the Third Circuit held that a magistrate judge who was presiding over a class action in the District of New Jersey with the consent of the parties under 28 U.S.C. § 636(c) did not abuse her discretion by denying an absent class member's motion to intervene in the case to challenge the magistrate judge's authority in the case, even though the absent class member had not personally consented to disposition of the case by the magistrate judge.[294]

Numerous plaintiffs brought a class action lawsuit against defendants Volkswagen and Audi for alleged design defects in vehicles manufactured by the defendants that resulted in leaking sunroofs.[295] After the magistrate judge initially approved a settlement of the class action and calculated attorney's fees, the case was appealed to the Third Circuit and subsequently reversed and remanded.[296] On remand, the magistrate judge approved a revised settlement agreement of the class action and once again calculated the attorney's fees award.[297] Absent class member Peter Braverman moved to intervene in the case to challenge the magistrate judge's authority to approve the settlement and to award attorney's fees.[298] The magistrate judge denied the motion to intervene, and Braverman appealed to the Third Circuit.[299] The appellees argued that Braverman should have objected to the magistrate judge's ruling in the district court and had therefore waived the argument on appeal.[300] Two other class

[289] *Id.* at 268–69.
[290] *Id.* at 269.
[291] *Id.* at 274–75.
[292] *Id.* at 270, 275.
[293] *Id.* at 275.
[294] Dewey v. Volkswagen Aktiengesellschaft, 558 F. App'x 191, 198–99 (3d Cir. 2014).
[295] *Id.* at 194.
[296] *Id.* at 194–95.
[297] *Id.* at 195.
[298] *Id.* at 194–95.
[299] *Id.* at 195.
[300] *Id.* at 198.

members also appealed, challenging the magistrate judge's calculation of attorney's fee.[301]

The Third Circuit began its analysis by noting that Braverman had not consented to the magistrate judge's authority and, following circuit precedent, had applied to the district judge originally assigned to the case to hear his motion to intervene under Rule 24(a).[302] Nevertheless, the appellate court concluded that the magistrate judge had the authority under 28 U.S.C. § 636(b) to rule on Braverman's motion even absent the consent of the parties.[303] The court, assuming without deciding that Braverman had not waived his right to appeal, further held that the magistrate judge did not err in denying the motion because Braverman failed to rebut the presumption that his interests were aligned with those of the named plaintiffs.[304] The court reasoned, "The mere fact that he objected is insufficient to rebut the presumption of aligned interests."[305] The court also noted that Braverman could point to nothing in the record to suggest that there was "any conflict of interest between the plaintiffs and class counsel."[306] The magistrate judge's denial of the motion to intervene was therefore not an abuse of discretion, and Braverman's lack of consent to the magistrate judge's authority under § 636(c) did not prevent the magistrate judge from ruling on the motion.[307]

iii. Day v. Persels & Associates, LLC

In *Day v. Persels & Associates, LLC*, the Eleventh Circuit held that a magistrate judge in the Middle District of Florida had authority under 28 U.S.C. § 636(c) to approve a settlement agreement and dispose of a class action case involving approximately 125,000 consumers, even though absent class members did not consent to disposition of the case by the magistrate judge.[308]

Plaintiff Miranda Day brought a class action lawsuit in the Middle District of Florida on behalf of herself and a class of 10,000 similarly situated Florida residents against several debt management companies and associated legal service providers.[309] The class alleged violations of the Florida Deceptive and Unfair Trade Practices Act, the Credit Repair Organization Act, and other common law provisions.[310] Day and the legal service providers "consented to have a magistrate judge conduct all proceedings and . . . to enter a final judgment"

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301 *Id.* at 195–96.
302 *Id.* at 198 & n.6.
303 *Id.*
304 *Id.* at 199.
305 *Id.*
306 *Id.*
307 *Id.*
308 Day v. Persels & Assocs., LLC, 729 F.3d 1309, 1316, 1324 (11th Cir. 2013).
309 *Id.* at 1313.
310 *Id.*

under 28 U.S.C. § 636(c).[311] After Day filed an amended complaint under Federal Rule of Civil Procedure 23(b)(3), Day and the legal service providers "notified the court that they had reached an agreement in principle on the resolution of the case."[312] The final settlement agreement "defined the class as all persons in the United States who had entered into agreements for legal advice concerning debt with the legal service defendants on or after April 28, 2008, except those consumers who were class members in a class action pending in the Eastern District of Washington."[313] The class included over 125,000 absent plaintiffs.[314]

The settlement agreement limited the legal service defendants' ability to collect fees from class members, placed other duties on these defendants, required the defendants to pay the costs of administering the settlement, provided for a $5,000 incentive payment to Day, and required the defendants to pay attorney's fees up to $300,000.[315] However, the agreement provided no monetary relief to the absent plaintiffs and released any claims by absent plaintiffs against the legal service defendants.[316] Although five class members objected to the settlement, the magistrate judge, after a fairness hearing, approved the settlement agreement, "certified the class, awarded class counsel $300,000, and awarded Day $5,000."[317] The magistrate judge also made findings that six of the defendants were financially unable to satisfy the judgment.[318] The magistrate judge's judgment was subsequently appealed to the Eleventh Circuit.[319]

The appellate court concluded that the consent of the representative party in the class action was binding on the absent class members and that the magistrate judge's disposition of the class action case with the consent of representative parties did not violate Article III of the Constitution.[320] The court rejected an argument that § 636(c) is unconstitutional under the Supreme Court's reasoning in *Stern v. Marshall*, the 2011 case holding that a bankruptcy judge could not rule on a state court counterclaim arising in a "core" proceeding, which will be analyzed later in this paper.[321] However, the panel further held that the magistrate judge had abused his discretion by concluding that six of the seven defendants were unable to satisfy the judgment.[322] The court therefore

311 *Id.*
312 *Id.*
313 *Id.* at 1313–14.
314 *Id.* at 1314.
315 *Id.* at 1314.
316 *Id.*
317 *Id.* at 1314, 1316.
318 *Id.* at 1312, 1326–27.
319 *Id.* at 1316.
320 *Id.* at 1324.
321 *See id.* at 1323–24. For a detailed analysis of the *Stern* case, see *infra* at Section II.C.1.a.
322 *Day*, 729 F.3d at 1326–27.

vacated the final judgment and remanded the case to the magistrate judge for further proceedings.[323]

One panel member sitting by designation, Senior Judge Philip Pro from the District of Nevada, issued a lengthy opinion concurring in part and dissenting in part.[324] He would have held that consent by the absent plaintiffs was required under 28 U.S.C. § 636(c):

> Day did not have the authority to consent to a magistrate judge on behalf of the unnamed class members before class certification. Following conditional class certification, Day consented to the magistrate judge on her own behalf through her litigation conduct by voluntarily appearing before the magistrate judge at the fairness hearing. Of the 125,011 class members, Day was the only non-objecting class member to appear personally or through counsel. However, Day's post-certification implied consent to the magistrate judge did not bind the unnamed class members because, upon certification, unnamed class members become later-added "parties" whose consent is required under § 636(c)(1).[325]

Judge Pro also stated that he "would hold that the unnamed class members became 'parties' upon certification whose express or implied consent was required under § 636(c)(1)," and that "the magistrate judge lacked authority to approve the class action settlement because Day's post-certification implied consent to the magistrate judge operated only on her own behalf, and the unnamed class members did not satisfy § 636(c)(1)'s consent requirement."[326]

At least one academic commentator focused on Judge Pro's dissenting opinion in *Day* to argue that magistrate judges should not be involved in class action cases with the parties' consent under 28 U.S.C. § 636(c).[327]

iv. Stackhouse v. McKnight

By contrast with decisions in the Third, Seventh, and Eleventh Circuits, the Second Circuit, in *Stackhouse v. McKnight*, held that a magistrate judge did not have authority to rule on a motion to intervene in a class action case where the parties seeking to intervene had not consented to disposition of the case by a magistrate judge under 28 U.S.C. § 636(c).[328]

The plaintiffs brought a class action lawsuit in the Eastern District of New York asserting unfair lending practices in violation of federal and state statutes.[329] After the parties reached a proposed agreement to settle the law suit, they consented to have the case disposed of by a magistrate judge under 28

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[323] *Id.* at 1328.

[324] *See id.* at 1328 (Pro, J., dissenting in part and concurring in part).

[325] *Id.* at 1338 (citation omitted).

[326] *Id.* at 1339.

[327] *See* Elizabeth French, *Respecting the Linchpin: Why Absentee Consent Should Limit Magistrate Judge Jurisdiction*, 3 STAN. J. COMPLEX LITIG. 32, 35 (2015).

[328] Stackhouse v. McKnight, 168 F. App'x 464, 466 (2d Cir. 2006).

[329] *Id.* at 465.

U.S.C. § 636(c).[330] The presiding magistrate judge subsequently issued an order preliminarily approving of the settlement agreement and gave class members over two months to submit objections to the settlement.[331] In response, several class members moved to intervene in the case and also moved to vacate the consensual reference of the case to the magistrate judge under 28 U.S.C. § 636(c).[332] The magistrate judge denied the motions and the case was appealed to the Second Circuit.[333]

The Second Circuit concluded that it could not review the magistrate judge's decision because it was not a final judgment.[334] Citing circuit precedent, the court reaffirmed, "A magistrate judge's decision can constitute a final judgment only on the consent of all parties to the dispute."[335] When only the original parties in a case have consented to disposition by a magistrate judge, "a district judge must rule on a motion to intervene brought by a third party."[336] Examining the record, the court could not conclude that the objectors had given their consent to the disposition of their motion to intervene by a magistrate.[337] Although the court acknowledged that the objectors did not specifically object to the fact that the magistrate judge had made findings, it concluded—based on *Roell*—that "this by itself does not evidence consent."[338] The court thus concluded that the magistrate judge's order on the motion to intervene was the equivalent of a report and recommendation subject to *de novo* review by the district judge, not a final judgment that could be reviewed by the appellate court.[339] The Second Circuit therefore vacated and remanded the magistrate judge's judgment to the district court for further proceedings.[340]

b. Authority in Habeas Corpus Cases Under 28 U.S.C. §§ 2254–2255

While the constitutionality of civil consent authority under 28 U.S.C. § 636(c) was affirmed by all courts of appeals that considered the issue in the years following the amendment of the Federal Magistrates Act in 1979,[341] some

330 *Id.*
331 *Id.*
332 *Id.*
333 *Id.*
334 *Id.* at 467.
335 *Id.* at 466.
336 *Id.*
337 *Id.*
338 *Id.* ("At best . . . the evidence is inconclusive with respect to the parties' intent. This is not enough to demonstrate consent.").
339 *Id.* at 467.
340 *Id.*
341 *See* Bell & Beckwith v. United States, 766 F.2d 910, 912 (6th Cir. 1985); Gairola v. Va. Dep't. of Gen. Servs., 753 F.2d 1281, 1285 (4th Cir. 1985); D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029, 1033 (Fed. Cir. 1985) (finding an appeal that challenged the constitutionality of § 636(c) "abusive of the judicial process" and grounds for an award of

judges continue to express concerns about the constitutionality of magistrate judge consent authority with regard to federal habeas corpus petitions arising under 28 U.S.C. §§ 2254 and 2255. Decisions in the Fifth and Eleventh Circuits demonstrate particular unease with magistrate judges disposing of motions to vacate sentences imposed by a district judge under 28 U.S.C. § 2255 with the consent of the parties. These cases are discussed below.

i. Federal Habeas Corpus Cases Under § 2255

(a) United States v. Johnston

In *United States v. Johnston*, the Fifth Circuit held that the consensual disposition of a federal habeas corpus petition under 28 U.S.C. § 2255 by a magistrate judge under 28 U.S.C. § 636(c) violated the constitutional doctrine of separation of powers set forth in Article III of the Constitution.[342]

Defendant Edward Johnston was convicted in federal court on felony drug charges in the Southern District of Texas.[343] After his conviction was affirmed on direct appeal, Johnston filed a motion under 28 U.S.C. § 2255 challenging the validity of his trial and sentence.[344] Both Johnston and the government consented to have a magistrate judge dispose of the matter.[345] "Johnston timely filed a notice of appeal" after "[t]he magistrate judge issued a memorandum and order denying Johnston's § 2255 motion."[346] "The magistrate judge construed the notice of appeal as a motion for a [Certificate of Appealability] and denied it . . . ."[347] Johnston then filed another motion for a Certificate of Appealability with the Fifth Circuit.[348]

The Fifth Circuit *sua sponte* raised the issue of whether the magistrate judge had proper jurisdiction to dispose of the § 2255 motion.[349] The court first

attorney's fees against the party raising the issue); Fields v. Wash. Metro. Area Transit Auth., 743 F.2d 890, 893 (D.C. Cir. 1984); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1038 (7th Cir. 1984); Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Ref. Corp., 739 F.2d 1313, 1315 (8th Cir. 1984); Campbell v. Wainwright, 726 F.2d 702, 704–05 (11th Cir. 1984); Goldstein v. Kelleher, 728 F.2d 32, 34 (1st Cir. 1984); Collins v. Foreman, 729 F.2d 108, 109–10 (2d Cir. 1984); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 540 (9th Cir. 1984) (en banc); Wharton-Thomas v. United States, 721 F.2d 922, 923 (3d Cir. 1983); *see also* CONSTITUTIONAL ANALYSIS, *supra* note 21, at 41–53 (analyzing *Pacemaker*, *Wharton-Thomas*, *Collins*, and *Geras*). See *infra* Section II.C.1 for a detailed analysis of recent Supreme Court cases concerning the constitutionality of bankruptcy judge authority in certain "core" proceedings.

342 United States v Johnston, 258 F.3d 361, 363 (5th Cir. 2001).

343 *Id.*

344 *Id.*

345 *Id.*

346 *Id.*

347 *Id.*

348 *Id.*

349 *See id.* at 363–64. Although federal habeas corpus petitions arising under 28 U.S.C. § 2255 are described as motions to vacate, set aside, or correct a criminal sentence, they are

explored the issue of whether motions under § 2255 should be considered civil or criminal matters, and held that, "for purposes of § 636(c), a § 2255 proceeding is a civil matter over which Congress intended magistrate judges to exercise jurisdiction upon consent of the parties."[350] The court then confronted the constitutional issue of whether the delegation of § 2255 matters to magistrate judges with consent violated Article III. Applying the Supreme Court's holding set forth in *Commodity Futures Trading Commission v. Schor*, that Article III protects both litigants' rights and structural guarantees that ensure respect for separation-of-powers principles,[351] the court recognized that the parties had waived their personal rights to Article III protection through their consent.[352] The Fifth Circuit therefore concluded that the only issue before it was "whether the delegation of the § 2255 motion pursuant to § 636(c) offended the structural guarantees of Article III."[353]

The court began by noting that "a § 2255 motion does not easily comport with the average civil case or even another quasi-civil proceeding such as a § 2254 petition and, consequently, presents three major problems" under Article III.[354] First, unlike other civil matters, "a § 2255 motion directly questions the validity of a prior federal court ruling."[355] The court found this troubling: "If the parties to a § 2255 motion consent to proceed before a magistrate judge, that magistrate judge could attack the validity of an Article III judge's rulings. Such an act clearly raises Article III concerns because judges without lifetime tenure and undiminishable compensation would have controlling authority."[356]

The second problem the court articulated was the fact that the consensual disposition of a § 2255 motion by a magistrate judge may embroil the magistrate judge in an integral part of a federal felony trial, namely sentencing, which is not ministerial in nature, and "may need the shield of independence afforded Article III jurists."[357] Finally, the court, noting that only the court of appeals can review a magistrate judge's ruling in a case heard with consent, concluded that the district court lacked sufficient supervision and control over the magistrate judges' rulings in § 2255 matters heard on consent.[358]

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generally considered to be civil rather than criminal proceedings. *See id.* at 364 (citing Hilton v. Braunskill, 481 U.S. 770 (1987)). While magistrate judges have the authority to dispose of any civil matter with consent under 28 U.S.C. § 636(c), there is no similar statutory consent provision concerning criminal proceedings in the Federal Magistrates Act besides magistrate judge authority to dispose of Class A misdemeanor cases under 28 U.S.C. § 636(a)(5) and 18 U.S.C. § 3401(b). *See generally* LEGISLATIVE HISTORY, *supra* note 10.

[350] *Johnston*, 258 F.3d at 366.

[351] *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986). See CONSTITUTIONAL ANALYSIS, *supra* note 21, at 32–37, for an analysis of *Schor*.

[352] *Johnston*, 258 F.3d at 367.

[353] *Id.*

[354] *Id.* at 368.

[355] *Id.*

[356] *Id.* at 369.

[357] *Id.* at 370.

[358] *Id.* at 371 & n.6.

In view of these problems, the Fifth Circuit concluded that the consensual delegation of § 2255 proceedings "exact[s] a deadly blow" to an independent judiciary and was thus unconstitutional.[359] The court reasoned that the delegation to magistrate judges would violate the separation of powers as it would give Congress "the capability to direct the affairs of Article III courts" through its legislative powers over "the term, the salary, the qualifications, the duties, and the establishment of magistrate judges."[360]

The court therefore vacated the magistrate judge's judgment and remanded the case for further proceedings.[361] Judge Higginbotham wrote a concurring opinion, stating that the court did not need to reach the constitutional issue, but also calling into question the very practice of referring any civil cases to magistrate judges under § 636(c) in an era where the number of trials conducted by district judges has declined.[362]

(b) Brown v. United States

Thirteen years after the *Johnston* decision, the Eleventh Circuit, in *Brown v. United States*, held that a federal habeas corpus petition arising under 28 U.S.C. § 2255 is not a "civil matter" under 28 U.S.C. § 636(c) and therefore could not be disposed of by a magistrate judge with the parties' consent.[363] The court invoked the canon of constitutional avoidance in reaching this holding.[364] In dicta, however, the court went further to express "serious concerns as to the facial constitutionality of § 636(c)," particularly whether the civil consent authority of magistrate judges and the petty offense jurisdiction of magistrate judges under 18 U.S.C. § 3401 violate Article III of the Constitution as exercises of "the judicial Power of the United States" by non-Article III judicial officers.[365]

In 2005, petitioner James Brown pled guilty in the Southern District of Florida to "using a computer . . . to knowingly persuade, induce, entice and coerce an individual who had not attained the age of eighteen years, to engage in sexual activity under circumstances [that] would constitute a criminal offense . . . in violation of 18 U.S.C. § 2422(b)."[366] As a career offender, he was sentenced to a term of 235 months imprisonment.[367] In March 2011, Brown moved under 28 U.S.C. § 2255 to have the district court vacate his conviction and sentence.[368] In April 2011, both Brown and the government consented to have a

[359] *Id.* at 372.
[360] *Id.*
[361] *Id.*
[362] *See id.* at 372–73 (Higginbotham, J., concurring).
[363] Brown v. United States, 748 F.3d 1045, 1047 (11th Cir. 2014).
[364] *Id.* at 1059.
[365] *See id.* at 1068.
[366] *Id.* at 1047.
[367] *Id.* at 1048.
[368] *Id.*

magistrate judge dispose of the matter under 28 U.S.C. § 636(c).[369] In July 2011, the magistrate judge denied Brown's § 2255 motion for failure to state a basis for granting relief and later denied Brown's motion for reconsideration.[370] After appealing both rulings to the court of appeals, Brown moved to have the magistrate judge vacate his order under Federal Rule of Civil Procedure 60(b)(4), arguing that, under the Fifth Circuit's decision in *United States v. Johnston*,[371] "the consensual delegation of § 2255 motions to magistrate judges violates Article III of the Constitution."[372] Although the magistrate judge denied Brown's motion to vacate, the magistrate judge issued a Certificate of Appealability on this question.[373]

The court of appeals began its analysis of Brown's appeal with an exhaustive review of the history of the Federal Magistrates Act and the earlier United States commissioner system, stating in summary,

> [M]agistrate judges (and their predecessors, the commissioners) are not—and have never purported to be—Article III judges. Instead, magistrate judges "draw their authority entirely from an exercise of Congressional power under Article I of the Constitution." Although Congress considered magistrate judges to be "adjunct[s] of the United States District Court, appointed by the court and subject to the court's direction and control," the fact is that when magistrate judges exercise their authority to try petty offenses and to enter final judgment in civil cases, they are exercising the essential attributes of "judicial Power." They do not function as mere adjuncts. They are puisne judges acting as courts. But Article III is clear . . . . As previously recounted, magistrate judges do not hold lifetenure, nor is their compensation undiminishable. Therefore, these puisne judges cannot exercise "the judicial Power of the United States." Thus, a magistrate judge who exercises final judgment on a § 2255 motion implicates a potentially serious constitutional problem.[374]

The court further suggested that earlier decisions directly or indirectly upholding the constitutionality of § 636(c) under Article III, including the Supreme Court's ruling in *Roell*,[375] and its own recent opinion, *Day*,[376] had been called into question by the Supreme Court's reasoning in *Stern*.[377] The Eleventh Circuit therefore invoked the doctrine of constitutional avoidance to resolve the issue, concluding that "although § 636(c) could plausibly be read to authorize a

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369 *Id.*

370 *Id.*

371 258 F.3d 361 (5th Cir. 2001). See *supra* Section II.B.2.b.i(a) for an analysis of *Johnston*.

372 *Brown*, 748 F.3d at 1048–49.

373 *Id.* at 1049.

374 *Id.* at 1057–58 (second alteration in original) (emphasis added) (footnote omitted) (citations omitted) (first quoting Thomas v. Whitworth, 136 F.3d 756, 758 (11th Cir. 1998); then quoting H.R. REP. NO. 96-287, at 8 (1979); and then quoting U.S. CONST. art. III, § 1).

375 Roell v. Withrow, 538 U.S. 580 (2003). See *supra* Section II.A.1 for a detailed analysis of *Roell*.

376 *See* Day v. Persels & Assocs., LLC, 729 F.3d 1309 (11th Cir. 2013); *supra* Section II.B.2.a.iii.

377 *See Brown*, 748 F.3d at 1072. For an analysis of *Stern*, see *infra* Section II.C.1.a.

magistrate judge to enter final judgment in a § 2255 proceeding, to avoid Article III concerns we hold that it does not because such a reading is equally plausible."[378] Accordingly, the court held that 28 U.S.C. § 636(c) does not authorize magistrate judges to enter final judgments on § 2255 motions because such motions are not "civil matters" under § 636(c).[379]

Because the Eleventh Circuit panel deliberately avoided making a decision on the constitutionality of 28 U.S.C. § 636(c) and based its holding on statutory grounds, the opinion's lengthy discussion of the panel's "serious concerns" about whether aspects of magistrate judge authority violate Article III is dicta. Nevertheless, the court expressed doubts about the constitutionality of § 636(c) and even suggested that a magistrate judge's authority in a petty offense case under 18 U.S.C. § 3401 may violate Article III.[380] The dicta in *Brown* is a striking reminder that some judges retain doubts about the constitutionality of expanded magistrate judge authority under the Federal Magistrates Act.

ii. State Habeas Corpus Petitions Under § 2254

Prior to the Fifth Circuit's opinion in *Johnston*, at least two appellate courts had held that magistrate judges could dispose of state habeas corpus petitions arising under 28 U.S.C. § 2254 with the parties consent.[381] After *Johnston*, however, there were attempts to apply the Fifth Circuit's reasoning to argue that magistrate judges also were not permitted to dispose of habeas corpus matters under 28 U.S.C. § 2254. To date, however, courts have rejected these arguments.

For example, in *White v. Thaler*, the Fifth Circuit held that a magistrate judge had authority to dispose of a state habeas corpus petition with the consent of the parties and that this authority did not violate the separation of powers under Article III.[382]

After petitioner Wendell White was convicted of murder and aggravated assault charges in a Texas state court, he filed a petition for habeas corpus under 28 U.S.C. § 2254 in the Southern District of Texas, claiming that his attorney at trial rendered ineffective assistance.[383] After White and attorneys for the State of Texas consented to disposition of the case by a magistrate judge, the magistrate judge denied White's petition, concluding that the trial court's decision was not objectively unreasonable under federal law.[384] The magistrate

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[378] *Brown*, 748 F.3d at 1072.

[379] *Id.*

[380] *See id.* at 1057–58. For further discussion of constitutional arguments concerning the authority of magistrate judges to dispose of petty offense cases without the defendant's consent, see *infra* Section II.C.2.

[381] *See* Norris v. Schotten, 146 F.3d 314, 326 (6th Cir. 1998); Orsini v. Wallace, 913 F.2d 474, 483 (8th Cir. 1990).

[382] White v. Thaler, 610 F.3d 890, 898 (5th Cir. 2010).

[383] *Id.* at 892, 894–95.

[384] *Id.* at 895.

judge also granted White's request for a Certificate of Appealability to the Fifth Circuit only on the issue "whether counsel was ineffective."[385]

On appeal, the Fifth Circuit *sua sponte* addressed the issue of "whether the consensual delegation of a 28 U.S.C. § 2254 proceeding to a magistrate judge violates Article III of the Constitution," noting that it had previously held in *Johnston* that the consensual delegation of a proceeding under § 2255 to a magistrate judge for disposition violated Article III.[386] The court acknowledged, however, that it had distinguished between § 2254 and § 2255 matters in *Johnston* in that a § 2255 motion "questions the validity of a prior federal court ruling," while a § 2254 proceeding attacks a state court's judgment.[387] After noting that three other circuits had concluded that the consensual delegation of petitions under § 2254 to magistrate judges under § 636(c) did not violate the Constitution, the court concluded that, as a § 2254 proceeding does not raise separation of powers concerns, the consensual delegation of these matters to magistrate judges did not violate Article III.[388]

Turning to the merits of the case, the Fifth Circuit disagreed with the magistrate judge's findings, concluding that White was prejudiced by the deficient performance of his trial attorney.[389] It therefore reversed "the district court's judgment denying habeas relief" and remanded the case to the district court "with instructions to grant the writ and require a retrial of White."[390]

In a footnote in her opinion dissenting on the merits of the panel's decision, then-Chief Judge Edith Jones agreed with the majority's view that Article III was not violated when the magistrate judge decided the merits of this case on consent, but was nevertheless disturbed by that result:

> While I concur in the conclusion that Article III of the Constitution was not violated when the parties consented to proceed in this federal habeas action before a United States Magistrate Judge, this result is somewhat troubling. When federal courts exercise our habeas corpus jurisdiction to overturn the decisions of a state's highest court, we directly interfere with state sovereignty. Article III judges should assume ultimate responsibility for deciding these consequential cases, although they may choose to accept a report and recommendation from a magistrate judge.[391]

Judge Jones' view that the use of magistrate judges to dispose of state habeas corpus matters under 28 U.S.C. § 2254 with consent is a "troubling" development reflects the unease some judges continue to have with the expansion of magistrate judge authority.

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385 *Id.*
386 *Id.*
387 *Id.* at 896.
388 *Id.* at 896, 898.
389 *Id.* at 912.
390 *Id.*
391 *Id.* at 916 n.2 (Jones, J., dissenting).

Eight years before *White*, the Seventh Circuit, in *Farmer v. Litscher*, also held that the consensual delegation of a state prisoner's habeas corpus petition under 28 U.S.C. § 2254 for disposition by a magistrate judge did not violate Article III.[392]

Appellants James Farmer and Emmett White were state prisoners who filed petitions for writs of habeas corpus under 28 U.S.C. § 2254 in the Eastern District of Wisconsin.[393] The parties consented under 28 U.S.C. § 636(c), and a magistrate judge denied both "petitions and refused to issue certificates of appealability."[394] After the prisoners appealed to the Seventh Circuit, the court asked the parties to brief the issue of whether "a magistrate judge acting with the parties' consent ha[d] the authority under § 636(c) to issue a final judgment in a § 2254 proceeding."[395]

The Seventh Circuit noted that answering the question required the court to consider two issues: (1) whether Congress intended to give magistrate judges authority to dispose of § 2254 matters on consent; and, if so, (2) whether the delegation of such authority to magistrate judges violated Article III.[396] The court held that because state habeas corpus matters are considered civil cases in federal court, magistrate judges can dispose of them under § 636(c).[397] The court rejected the appellants' argument that § 636(b)(2)(B) limited the reach of § 636(c), concluding that the two sections are "independent provisions that address different circumstances."[398] The Seventh Circuit also concluded that Article III does not prohibit magistrate judges from entering final judgments in § 2254 proceedings with the consent of the parties.[399]

c. "Opt Out" Consent Procedures

As noted elsewhere in this paper, district courts have used a variety of approaches and procedures to encourage parties to consent to the disposition of civil cases by magistrate judges.[400] One of these procedures is the assignment of a share of civil cases to magistrate judges, rather than district judges, as the presiding judge in the case. In the mid-1990s, however, several district courts implemented "opt out" consent procedures, where, after a case was assigned to a magistrate judge, parties who did not act within a specific time period would be deemed to have consented to disposition of the case by the magistrate

392 Farmer v. Litscher, 303 F.3d 840, 843 (7th Cir. 2002).
393 *Id.* at 842.
394 *Id.*
395 *Id.*
396 *Id.*
397 *Id.* at 843.
398 *Id.*
399 *Id.*
400 *See supra* Section II.B.2.a.

judge.[401] "Opt out" consent procedures thus allowed for implied consent by the parties by interpreting a litigant's failure to object as acquiescence to disposition of the case by a magistrate judge.[402]

Beginning in 1994, appellate courts held in several cases that these procedures were impermissible under the Federal Magistrates Act. These cases are discussed below. The Supreme Court's decision in *Roell*, however, holding that in some situations a litigant's actions might constitute consent under 28 U.S.C. § 636(c), which was analyzed earlier in this paper, once again raises the question of whether "opt out" procedures might once again be feasible in the district courts.[403]

The Ninth Circuit ruled in three separate opinions that "opt out" procedures implemented in the Northern District of California, the District of Idaho, and the District of Montana violated 28 U.S.C. § 636(c).[404] In *Nasca*, the Ninth Circuit examined an "opt out" consent procedure adopted by local rule in the Northern District of California, whereby parties were deemed to have consented to disposition of their civil case by the magistrate judge if they did not object to the assignment within a set period of time.[405] The court held that the magistrate judge did not have proper jurisdiction over the case.

The case began "as a divorce proceeding in California Superior Court."[406] After the husband joined his pension plan, Peoplesoft, as a defendant in the action, Peoplesoft removed the case to the Northern District of California under provisions of the Employee Retirement Income Security Act (ERISA).[407] The magistrate judge assigned to the case remanded it to state court and ordered Peoplesoft to pay the plaintiffs' attorney's fees.[408] Peoplesoft appealed these orders to the Ninth Circuit, which raised *sua sponte* the issue of the magistrate judge's authority to hear the case.[409]

Restating the reasoning it expressed previously in its *Aldrich* decision,[410] the Ninth Circuit concluded that the magistrate judge had no jurisdiction to hear the case without the parties' consent under 28 U.S.C. § 636(c)(3) and Federal Rule of Civil Procedure 73(b).[411] The court stated that consent "must be explicit, clear, unambiguous, and cannot be inferred from the conduct of the parties,

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401 *See, e.g.*, Nasca v. Peoplesoft, 160 F.3d 578, 579 (9th Cir. 1998), *overruled by* Wilhelm v. Rotman, 680 F.3d 1113 (9th Cir. 2012).

402 *See id.*

403 *See* Roell v. Withrow, 538 U.S. 580 (2003); *supra* Section II.A.1.

404 *See Nasca*, 160 F.3d 578 (Northern District of California); Aldrich v. Bowen, 130 F.3d 1364 (9th Cir. 1997) (District of Idaho); Laird v. Chisholm, 85 F.3d 637 (9th Cir. 1996) (unpublished table decision) (District of Montana).

405 *Nasca*, 160 F.3d at 579.

406 *Id.* at 578.

407 *Id.*

408 *Id.*

409 *Id.* at 578–79.

410 *See Aldrich*, 130 F.3d at1365.

411 *Nasca*, 160 F.3d at 580.

general orders by the district court to the contrary notwithstanding."[412] It held that the general order adopted by the Northern District of California, which provides for "consent by failure to object" to the assignment of the case to a magistrate judge, did not constitute adequate consent under the Federal Magistrates Act.[413] Noting that magistrate judge authority is "strictly circumscribed by statute," the court concluded that "courts, whether by general order or otherwise, are not at liberty to disregard or modify the statutory prerequisites to a magistrate[judge]'s jurisdiction."[414] Because the magistrate judge had no jurisdiction to enter the remand order or the award of attorney's fees, the appellate court concluded that it had no jurisdiction to hear the appeal.[415] It therefore dismissed the appeal.[416]

Similarly, the *Eleventh* Circuit issued two opinions involving "opt out" procedures in the Southern District of Alabama.[417] In *Rembert v. Apfel*, the Eleventh Circuit held that a magistrate judge presiding in a social security appeal assigned under an "opt out" consent procedure lacked authority to render a judgment and therefore the appellate court did not have jurisdiction to consider the appeal.[418]

Plaintiff Rachel Rembert filed a complaint in the Southern District of Alabama contesting the denial of supplemental security income benefits.[419] Under a standing order of the court, the case was automatically assigned to a magistrate judge and the parties were notified that unless they requested reassignment to a district judge by returning a form within thirty days, the parties would be deemed to have consented.[420] Neither party filed the form and the magistrate judge then entered a final judgment against Rembert.[421] On appeal, the Eleventh Circuit "*sua sponte* asked the parties to address whether they had consented the magistrate[judge]'s authority, [rendering the] . . . judgment final and appealable."[422]

Citing with approval the Ninth Circuit's opinion in *Nasca*, the Eleventh Circuit concluded that consent to disposition by a magistrate judge through the district's "opt out" standing order was not proper.[423] Noting that Rembert, "did nothing, either before or after judgment, to indicate her express consent to final disposition of her case before a magistrate judge," the court treated the magis-

412 *Id.*
413 *Id.* at 579.
414 *Id.* at 579–80.
415 *Id.* at 580.
416 *Id.*
417 *See* McNab v. J & J Marine, Inc., 240 F.3d 1326 (11th Cir. 2001); Rembert v. Apfel, 213 F.3d 1331 (11th Cir. 2000).
418 *Rembert*, 213 F.3d at 1335.
419 *Id.* at 1333.
420 *Id.*
421 *Id.*
422 *Id.*
423 *Id.* at 1334–35 (citing Nasca v. Peoplesoft, 160 F.3d 578, 578 (9th Cir. 1998)).

trate judge's order as "in essence . . . a nonfinal, nonappealable report and recommendation not yet adopted by the district court."[424] It therefore dismissed the case for lack of jurisdiction.[425]

The Supreme Court's opinion in *Roell v. Withrow*, holding that consent to disposition of a civil case by a magistrate judge under 28 U.S.C. § 636(c) may be inferred in certain situations from a party's conduct during litigation, has cast doubt on the reasoning applied in *Nasca*, *Rembert*, and other decisions.[426] To the extent that these pre-*Roell* decisions held that consent under 28 U.S.C. § 636(c) must be express and on the record, later decisions by both the Ninth and Eleventh Circuits have acknowledged that *Roell* clearly abrogated the reasoning in those opinions.[427] While no court has formally enacted local rules or standing orders reviving "opt out" consent procedures after *Roell*, some magistrate judges have expressed the view in unpublished opinions that parties, by failing to make timely responses to consent deadlines, have opted to consent to disposition of their case by the magistrate judge.[428]

C. Remaining Issues Under Article III of the Constitution

1. Does Civil Consent Authority Under 28 U.S.C. § 636(c) Violate Article III of the Constitution?

As noted earlier, the question of whether the civil consent authority of magistrate judges under 28 U.S.C. § 636(c) violates Article III of the Constitution had not been seriously considered by courts since the numerous circuit court opinions issued in the early 1980s.[429] Furthermore, the Supreme Court has never directly addressed the question of whether § 636(c) violates Article III. In the early 1980s, however, every court of appeals that had considered the question concluded that 28 U.S.C. § 636(c) did not violate Article III.[430] Apart

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[424] *Id.*

[425] *Id.*

[426] *See* Roell v. Withrow, 538 U.S. 580, 582 (2003); *supra* Section II.A.

[427] *See* Wilhelm v. Rotman, 680 F.3d 1113, 1120 (9th Cir. 2012) ("To the extent that we have previously held that we can *never* infer consent, we have been overruled by the Supreme Court in *Roell*." (citing *Nasca*, 160 F.3d 578)); Chambless v. Louisiana-Pacific Corp., 481 F.3d 1345, 1350 (11th Cir. 2007) (noting that the reasoning in *Rembert* has been abrogated by *Roell*).

[428] *See, e.g.*, Little Bend River Co. v. Molpus Timberlands Mgmt., L.L.C., No. CA 05-0450-C, 2005 WL 2897400, at *1 n.1 (S.D. Ala. Nov. 3, 2005) (citing *Roell* and holding that the parties had implicitly consented to the magistrate judge's jurisdiction under § 636(c) by failing to object to the referral of the case to a magistrate judge within the time period provided under the district's consent procedure); Alicea v. Comm'r of Soc. Sec., No. 10-1967 (CVR), 2011 WL 4753451, at *1 (D.P.R. Oct. 5, 2011).

[429] *See* CONSTITUTIONAL ANALYSIS, *supra* note 21, at 31–36.

[430] *See* Bell & Beckwith v. United States, 766 F.2d 910, 912 (6th Cir. 1985); Gairola v. Va. Dept. of Gen. Servs., 753 F.2d 1281, 1285 (4th Cir. 1985); D.L. Auld Co. v. Chroma Graphics Corp., 753 F.2d 1029, 1033 (Fed. Cir. 1985) (finding an appeal that challenged the constitutionality of § 636(c) "abusive of the judicial process" and grounds for an award of

from the Fifth Circuit's 2001 decision in *Johnston*, holding that the consensual disposition of a federal habeas corpus petition under 28 U.S.C. § 2255 by a magistrate judge under § 636(c) violated Article III,[431] it appeared that this issue was well settled.

The Supreme Court's opinion in *Stern v. Marshall*, however, revived questions about the extent that non-Article III judges could handle state common law claims without violating the Constitution. Although *Stern* involved the authority of bankruptcy judges (and the Court's majority opinion never mentioned magistrate judges), much of the majority opinion's language appeared to implicate the authority of magistrate judges, particularly in consent cases.[432]

a. Stern v. Marshall

In *Stern*, the Supreme Court, in a five to four decision, held that a final judgment issued by a bankruptcy judge on a state law tort counterclaim, defined as a "core proceeding" under 28 U.S.C. § 157(b)(2)(C),[433] violated the separation of powers principles set forth in Article III of the Constitution.[434]

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attorney's fees against the party raising the issue); Fields v. Wash. Metro. Area Transit Auth., 743 F.2d 890, 893 (D.C. Cir. 1984); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1038 (7th Cir. 1984); Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Ref. Corp., 739 F.2d 1313, 1315 (8th Cir. 1984); Campbell v. Wainwright, 726 F.2d 702, 704–05 (11th Cir. 1984); Goldstein v. Kelleher, 728 F.2d 32, 34 (1st Cir. 1984); Collins v. Foreman, 729 F.2d 108, 109–10 (2d Cir. 1984); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 540 (9th Cir. 1984) (en banc); Wharton-Thomas v. United States, 721 F.2d 922, 923 (3d Cir. 1983); *see also* CONSTITUTIONAL ANALYSIS, *supra* note 21, at 41–53 (analyzing *Pacemaker*, *Wharton-Thomas*, *Collins*, and *Geras*).

431 *See supra* Section II.B.2.b.i(a) for a detailed analysis of the *Johnston* case.

432 *See* Stern v. Marshall, 131 S. Ct. 2594 (2011).

433 As the Supreme Court described in its *Wellness* decision,

> [D]istrict courts have original jurisdiction over bankruptcy cases and related proceedings. 28 U.S.C. §§ 1334(a), (b). But "[e]ach district court may provide that any or all" bankruptcy cases and related proceedings "shall be referred to the bankruptcy judges for the district." § 157(a). Bankruptcy judges are "judicial officers of the United States district court," appointed to 14–year terms by the courts of appeals, and subject to removal for cause. §§ 152(a)(1), (e). "The district court may withdraw" a reference to the bankruptcy court "on its own motion or on timely motion of any party, for cause shown." § 157(d).
>
> When a district court refers a case to a bankruptcy judge, that judge's statutory authority depends on whether Congress has classified the matter as a "[c]ore proceedin[g]" or a "[n]on-core proceedin[g]," §§ 157(b)(2), (4) . . . . Congress identified as "[c]ore" a nonexclusive list of 16 types of proceedings, § 157(b)(2), in which it thought bankruptcy courts could constitutionally enter judgment. Congress gave bankruptcy courts the power to "hear and determine" core proceedings and to "enter appropriate orders and judgments," subject to appellate review by the district court. § 157(b)(1); *see* § 158. But it gave bankruptcy courts more limited authority in non-core proceedings: They may "hear and determine" such proceedings, and "enter appropriate orders and judgments," only "with the consent of all the parties to the proceeding." § 157(c)(2). Absent consent, bankruptcy courts in non-core proceedings may only "submit proposed findings of fact and conclusions of law," which the district courts review *de novo*. § 157(c)(1).

Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939–40 (2015) (alterations in original) (footnotes omitted).

434 *Stern*, 131 S. Ct. at 2600–01; *see Wellness*, 135 S. Ct. at 1959–60.

The majority opinion was written by Chief Justice Roberts, in which Justices Alito, Kennedy, Scalia, and Thomas joined. Justice Scalia issued a concurring opinion. Justice Breyer issued a dissenting opinion in which Justices Ginsburg, Kagan, and Sotomayor joined.

i. Case Summary

The case arose from the well-publicized and convoluted legal dispute between the estates of Vickie Lynn Marshall (Vickie, more famously known as Anna Nicole Smith) and E. Pierce Marshall (Pierce) over the fortune of J. Howard Marshall (J. Howard), Vickie's deceased husband and Pierce's father.[435]

> Before J. Howard passed away, Vickie filed suit in Texas state probate court, asserting that Pierce . . . fraudulently induced J. Howard to sign a living trust that did not include her, even though J. Howard meant to give her half his property. . . . .
>
> After J. Howard's death, Vickie filed a bankruptcy petition in the Central District of California. Pierce filed a complaint in that bankruptcy proceeding, contending that Vickie had defamed him by inducing her lawyers to tell members of the press that he had engaged in fraud to gain control of his father's assets. The complaint sought a declaration that Pierce's defamation claim was not dischargeable in the bankruptcy proceedings. Pierce subsequently filed a proof of claim for the defamation action, . . . [seeking] to recover damages . . . from Vickie's bankruptcy estate. Vickie responded to Pierce's initial complaint by asserting truth as a defense to the alleged defamation and by filing a counterclaim for tortious interference with the gift she expected from J. Howard.[436]

In 1999, "the Bankruptcy Court issued an order granting Vickie summary judgment on Pierce's claim for defamation."[437] In making its decision, the bankruptcy court determined an issue of Texas state law that had not yet been addressed by the Texas Supreme Court.[438]

> [A]fter a bench trial, the Bankruptcy Court issued a judgment on Vickie's counterclaim in her favor, . . . [and] awarded Vickie over $400 million in compensatory damages and $25 million in punitive damages.
>
> In post-trial proceedings, Pierce argued that the Bankruptcy Court lacked jurisdiction over Vickie's counterclaim. In particular, Pierce renewed a claim he had made earlier in the litigation, asserting that the Bankruptcy Court's authority over the counterclaim was limited because Vickie's counterclaim was not a "core proceeding" under 28 U.S.C. § 157(b)(2)(C).[439]

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435 *See Stern*, 131 S. Ct. at 2601.

436 *Id.* (citations omitted).

437 *Id.*

438 *See id.*

439 *Id.* (citations omitted).

The bankruptcy court disagreed, "conclud[ing] that Vickie's counterclaim was 'a core proceeding' under § 157(b)(2)(C)," and that it "had the 'power to enter judgment' on the counterclaim under § 157(b)(1)."[440]

On appeal, the district court "concluded that a 'counterclaim should not be characterized as core' when it 'is only somewhat related to the claim against which it is asserted, and when the unique characteristics and context of the counterclaim place it outside of the normal type of set-off or other counterclaims that customarily arise.' "[441] Further,

> the court determined that it was required to treat the Bankruptcy Court's judgment as "proposed[,] rather than final," and engage in an "independent review" of the record. Although the Texas state court had by that time conducted a jury trial on the merits of the parties' dispute and entered a judgment in Pierce's favor, the District Court declined to give that judgment preclusive effect and went on to decide the matter itself. Like the Bankruptcy Court, the District Court found that Pierce had tortiously interfered with Vickie's expectancy of a gift from J. Howard, . . . and awarded Vickie compensatory and punitive damages, each in the amount of $44,292,767.33.[442]

On appeal to the Ninth Circuit, the court reversed the district court on different grounds, and the Supreme Court subsequently reversed the Ninth Circuit on that issue.[443] On remand from the Supreme Court, the Ninth Circuit

> held that § 157 mandated "a two-step approach" under which a bankruptcy judge may issue a final judgment in a proceeding only if the matter both "meets Congress' definition of a core proceeding *and* arises under or arises in title 11 . . . ." The court also reasoned that allowing a bankruptcy judge to enter final judgments on all counterclaims raised in bankruptcy proceedings "would certainly run afoul" of [the Supreme] Court's decision in *Northern Pipeline*.[444]

The court therefore

> concluded that "a counterclaim under § 157(b)(2)(C) is properly a 'core' proceeding 'arising in a case under' the [Bankruptcy] Code only if the counterclaim is so closely related to [a creditor's] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself."[445]

Under this reasoning, the Ninth Circuit ruled that Vickie's counterclaim did not constitute a "core" proceeding under § 157(b)(2)(C).[446] The judgment of the Texas probate court was thus "the earliest final judgment entered 'on

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440 *Id.* at 2602.

441 *Id.* (quoting Marshall v. Marshall (*In re* Marshall), 264 B.R. 609, 632 (C.D. Cal. 2001)).

442 *Id.* (first alteration in original) (citations omitted) (quoting *In re Marshall*, 264 B.R. at 633).

443 *Id.* (citing Marshall v. Marshall, 547 U.S. 293, 314–15 (2006); Marshall v. Marshall (*In re* Marshall), 392 F.3d 1118, 1137 (9th Cir. 2004)).

444 *Id.* (citations omitted) (quoting Marshall v. Stern (*In re* Marshall), 600 F.3d 1037, 1057 (9th Cir. 2010)).

445 *Id.* (alterations in original) (quoting *In re Marshall*, 600 F.3d at 1058).

446 *Id.*

matters relevant to this proceeding.' "[447] Therefore, the Ninth Circuit "concluded that the District Court should have 'afford[ed] preclusive effect' to the Texas 'court's determination of relevant legal and factual issues.' "[448] The Supreme Court subsequently granted certiorari.[449]

Writing for the majority, Chief Justice Roberts initially ruled that "Vickie's counterclaim against Pierce for tortious interference [was] in fact a 'core proceeding' under the plain text of § 157(b)(2)(C)."[450] Nevertheless, he further concluded that while "§ 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not."[451]

The majority noted that the Court had long recognized a "public rights" exception to the requirements of Article III,[452] first articulated in *Murray's Lessee v. Hoboken Land & Improvement Co.*[453] The Supreme Court has explained that

> "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers" [set forth in Article III] is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication.[454]

Emphasizing the Court's earlier analysis of bankruptcy courts under the "public rights" exception in *Northern Pipeline*,[455] Chief Justice Roberts stated:

> It is clear that the Bankruptcy Court in this case exercised the "judicial Power of the United States" in purporting to resolve and enter final judgment on a state common law claim, just as the court did in *Northern Pipeline*. No "public right" exception excuses the failure to comply with Article III in doing so, any more than in *Northern Pipeline*.[456]

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[447] *Id.* (quoting *In re Marshall*, 600 F.3d at 1064–65).

[448] *Id.* at 2602–03 (alteration in original) (quoting *In re Marshall*, 600 F.3d at 1064–65).

[449] *Id.* at 2603.

[450] *Id.* at 2604.

[451] *Id.* at 2608.

[452] *Id.* at 2611.

[453] 59 U.S. 272 (1856).

[454] *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853–54 (1986) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985)).

[455] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69–70 (1982). In *Northern Pipeline*, a majority of the Supreme Court declared that the portion of the Bankruptcy Reform Act of 1978 that conferred Article III powers on bankruptcy judges without the protections of life tenure and irreducible salaries violated Article III of the Constitution. In particular, Justice Brennan defined the "public rights" doctrine as, "matters of public right [that] must at a minimum arise 'between the government and others' . . . our precedents clearly establish that *only* [such] controversies . . . may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination." *Id.* For a detailed analysis of *Northern Pipeline*, see CONSTITUTIONAL ANALYSIS, *supra* note 21, at 23–30.

[456] *Stern*, 131 S. Ct. at 2611.

The majority therefore concluded that "Vickie's counterclaim cannot be deemed a matter of 'public right' that can be decided outside the Judicial Branch," and her counterclaim did not "fall within any of the varied formulations of the public rights exception in this Court's cases."[457] After discussing several Supreme Court decisions that analyzed the authority of particular non-Article III tribunals under Article III, including *Thomas v. Union Carbide Agricultural Products Co.*,[458] *Commodity Futures Trading Commission v. Schor*,[459] and *Granfinanciera, S.A. v. Nordberg*,[460] Chief Justice Roberts summarized the Court's Article III analysis:

> What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.[461]

The Court further rejected Vickie's argument that the bankruptcy court's final judgment was constitutional because bankruptcy courts under the Bankruptcy Act of 1984 were deemed "adjuncts" of the district courts, stating that "a bankruptcy court can no more be deemed a mere 'adjunct' of the district court than a district court can be deemed such an 'adjunct' of the court of appeals."[462] It also noted that its Article III analysis was not affected by the fact that judges of an Article III court, rather than the President, appoint that bankruptcy judges, concluding: "If . . . the bankruptcy court itself exercises 'the essential attributes of judicial power [that] are reserved to Article III courts,' it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remains."[463]

The majority concluded by summarizing its holding:

> Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984. The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.[464]

The Court therefore affirmed the Ninth Circuit's judgment.

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457 *Id.* at 2611, 2614.
458 *Thomas*, 473 U.S. 568.
459 *Schor*, 478 U.S. 833.
460 492 U.S. 33 (1989).
461 *Stern*, 131 S. Ct. at 2615.
462 *Id.* at 2619.
463 *Id.* (second alteration in original) (citation omitted) (quoting *Schor*, 478 U.S. at 851).
464 *Id.* at 2620.

ii. Potential Application of Stern Reasoning to Magistrate Judge Authority

The majority's ruling in *Stern* applied only to the "core" jurisdiction of bankruptcy judges under 28 U.S.C. § 157(b)(2)(C). Chief Justice Roberts described the Court's holding as applying only in "one isolated respect" where Congress exceeded the limitations of Article III in the Bankruptcy Act of 1984.[465] As noted above, magistrate judges were not mentioned in the majority or concurring opinions, and were only mentioned in passing in Justice Breyer's dissenting opinion.[466] Nevertheless, the *Stern* majority's analysis of Article III arguably could be applied to limit the authority of magistrate judges.

Prior to *Stern*, analysis of whether expansions of magistrate judge authority implicated separation of powers concerns under Article III had focused on the Supreme Court's decision in *Peretz*.[467] As noted earlier, the Court stated in *Peretz* that a defendant's right to have an Article III judge adjudicate certain proceedings in a felony case (in that case, *voir dire*) could be waived by the defendant, and that referring such duties to a magistrate judge under 28 U.S.C. § 636(b)(3) did not violate Article III of the Constitution.[468] In particular, the Court adapted its Article III analysis of the Federal Magistrates Act in *Peretz* from the analysis set forth in *Schor*.[469]

In *Peretz* and *Schor*, the Supreme Court set forth a two-part analysis to determine whether a statutory scheme granting judicial duties to non-Article III judicial officers violates Article III of the Constitution.[470] Under that analysis, Article III protects two sets of values: (1) an individual's right to have a claim adjudicated by an Article III judge, and (2) the court's "structural" interest in maintaining an independent judiciary within the constitutional scheme of tripartite government.[471] A statute must adequately protect both values to survive scrutiny under the Court's Article III analysis.

The continuing validity of the constitutional analysis set forth in *Peretz* and *Schor* was called into question by the Supreme Court's decision in *Stern*. Although the majority in *Stern* cited the Court's earlier opinion in *Schor* as one of several Supreme Court opinions analyzing Article III challenges to non-Article III tribunals since the *Northern Pipeline* decision, it did not emphasize the sev-

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465 *Id.*

466 *See id.* at 2627 (Breyer, J., dissenting) ("[A]lthough Congress technically exercised its Article I power when it created bankruptcy courts, functionally, bankruptcy judges can be compared to magistrate judges, law clerks, and the Judiciary's administrative officials, whose lack of Article III tenure and compensation protections do not endanger the independence of the Judicial Branch.").

467 *See supra* Part I.C.

468 *See* Peretz v. United States, 501 U.S. 923, 935–39 (1991).

469 *See* CONSTITUTIONAL ANALYSIS, *supra* note 21, at 18.

470 *See id.*

471 *Id.*

eral factors of the balancing test set forth in *Schor* in its analysis.[472] Instead, the majority explicitly reasserted the narrower interpretation of the "public rights" exception to Article III originally stated in *Northern Pipeline* to conclude that a bankruptcy judge, as a non-Article III judicial officer, did not have authority to rule on the state law counterclaim at issue in the case.[473] It was therefore unclear whether the balancing test in *Schor*, previously applied by the Court in *Peretz* and Gonzalez, would still be used by the Court in the future.

A significant question left unresolved by the Court in *Stern* was whether litigant consent to the authority of a bankruptcy judge in a state common law claim might satisfy Article III concerns. Chief Justice Roberts noted that Pierce's failure to consent to having the bankruptcy court resolve Vickie's tortious interference counterclaim was one factor in concluding that the bankruptcy court's exercise of jurisdiction violated Article III: "Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings. He had nowhere else to go if he wished to recover from Vickie's estate."[474] In the footnote following this assertion, the majority emphasized this point:

> Contrary to the claims of the dissent, Pierce did not have another forum in which to pursue his claim to recover from Vickie's prebankruptcy assets, rather than take his chances with whatever funds might remain after the Title 11 proceedings. . . . That is why, as we recognized in *Granfinanciera*, the notion of "consent" does not apply in bankruptcy proceedings as it might in other contexts.[475]

At the time that the Court issued the *Stern* opinion, it remained to be seen whether litigant consent to disposition of a case by a magistrate judge under 28 U.S.C. § 636(c) would constitute one of the "other contexts" suggested in footnote eight that would satisfy Article III concerns under this reasoning. Indeed, the Fifth Circuit Court of Appeals sua sponte raised the issue of whether § 636(c) violated Article III under the reasoning in *Stern* three months after the decision was issued.[476] That court, however, ultimately held that it was bound by its earlier precedent holding that 28 U.S.C. § 636(c) did not violate the Constitution.[477] Uncertainties about the constitutionality of § 636(c), however, ap-

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[472] *See* Stern v. Marshall, 131 S. Ct. 2594, 2613–15 (2011).

[473] *Id.* at 2614–15.

[474] *Id.* at 2614.

[475] *Id.* at 2615 n.8 (citation omitted).

[476] *See* Tech. Automation Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399, 401 (5th Cir. 2012). On September 9, 2011, a panel of the Fifth Circuit sua sponte ordered the parties in an appeal of a civil case disposed of by a magistrate judge in the Southern District of Texas to submit letter briefs addressing whether the reasoning in *Stern* applied to magistrate judges. In particular, the Fifth Circuit requested briefing on whether, under *Stern*, a magistrate judge can enter a final judgment in a case tried to a magistrate judge by consent under 28 U.S.C. § 636(c) where jurisdiction is based on diversity of citizenship and state law provides the rule of decision. *Id.*

[477] *See id.* at 405 (citing Puryear v. Ede's Ltd., 731 F.2d 1153, 1154 (5th Cir. 1984)).

pear to have been removed by the Court's 2015 decision in *Wellness International Network v. Sharif*.[478]

b. Wellness International Network, Ltd. v. Sharif

On May 26, 2015, the Supreme Court issued its decision in *Wellness*. In a six to three decision written by Justice Sotomayor, the Court held that Article III of the Constitution "is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy court."[479]

i. Case Summary

The case arose from a litigant's repeated attempts to enforce a judgment.[480] Petitioner Wellness, a manufacturer of health and nutrition products, entered into an agreement with respondent Richard Sharif whereby Sharif would distribute Wellness products.[481] After the business arrangement soured, Sharif sued Wellness in the Northern District of Texas.[482] "Sharif repeatedly ignored Wellness' discovery requests and other litigation obligations," so the court entered default judgment and imposed sanctions against Sharif in the amount of $650,000.[483] In February 2009, Sharif filed a Chapter 7 bankruptcy petition in the Northern District of Illinois, listing Wellness as a creditor.[484] When Wellness discovered that Sharif had listed more than $5 million in assets on a 2002 loan application, Sharif responded that the assets were controlled by the Soad Wattar Living Trust (Trust), an entity he administered on behalf of his mother and for his sister's benefit.[485] When Sharif failed to respond to requests for information about the Trust, "Wellness filed a five-count adversary complaint against Sharif in the Bankruptcy Court."[486] The first four counts of the complaint objected to the discharge of Sharif's debts on the grounds that he "had concealed property by claiming that it was owned by the Trust."[487] In the fifth count of the complaint, Wellness sought a declaratory judgment that the Trust was in fact Sharif's alter ego and its assets should be included as part of the bankruptcy estate.[488] In his answer to the complaint, Sharif conceded that the adversary proceeding was a "core" proceeding under 28 U.S.C. § 157(b) over

478 *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1948 (2015).
479 *Id.* at 1939.
480 *Id.* at 1940.
481 *Id.*
482 *Id.*
483 *Id.*
484 *Id.*
485 *Id.*
486 *Id.*
487 *Id.*
488 *Id.*

which the bankruptcy court had jurisdiction, and requested a judgment in his favor on all counts.[489]

After Sharif again refused to respond to discovery requests, Wellness moved to compel discovery and for sanctions.[490] Although the bankruptcy court warned Sharif that a default judgment might be entered against him if he did not comply with the court's orders compelling discovery, Sharif failed to produce any documents regarding the Trust.[491] The bankruptcy court subsequently ruled that Sharif had violated the court's discovery order, "denied Sharif's request to discharge his debts and entered a default judgment against him in the adversary proceeding."[492] In particular, the bankruptcy court ruled that the Trust's assets at issue in the fifth count of the complaint were in fact the property of Sharif's bankruptcy estate.[493]

Sharif appealed the bankruptcy court's rulings to the district court.[494] Six weeks before Sharif filed his opening brief, the Supreme Court issued its decision in *Stern*.[495] "Sharif did not cite *Stern* in his opening brief. Rather, after the close of briefing, Sharif moved for leave to file a supplemental brief," arguing that under *Stern* and *In re Ortiz*, the bankruptcy court's ruling should be treated as a report and recommendation by the district court.[496] After the district court denied Sharif's motion as untimely and affirmed the bankruptcy court's judgment, Sharif appealed to the Seventh Circuit.[497]

The Seventh Circuit affirmed in part and reversed in part. While acknowledging that Sharif's *Stern* claim was untimely, the court held that it must nonetheless consider the claim because it "concerned 'the allocation of authority between bankruptcy courts and district courts' under Article III" of the Constitution.[498] It therefore concluded "that 'a litigant may not waive' a *Stern* objection."[499] As to the merits of the claim, the court agreed that the bankruptcy court had properly resolved the first four counts in Wellness's adversary complaint.[500] It further held, however, that the fifth count of the complaint (reassigning the Trust's assets to Sharif's bankruptcy estate) alleged a *Stern* claim, and that the bankruptcy court lacked constitutional authority to enter a final

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489 *Id.* at 1941.
490 *Id.*
491 *Id.*
492 *Id.*
493 *Id.*
494 *Id.*
495 *Id.*
496 *Id.*; *see* Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), 665 F.3d 906, 915 (7th Cir. 2011).
497 *Wellness*, 135 S. Ct. at 1941.
498 *Id.*
499 *Id.*
500 *Id.*

judgment on that claim.[501] The Supreme Court subsequently granted certiorari.[502]

Writing for the majority, Justice Sotomayor stated: "This case presents the question whether Article III allows bankruptcy judges to adjudicate [*Stern* claims] with the parties' consent. We hold that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge."[503]

The majority relied heavily on the Supreme Court's reasoning in three cases: *Schor*,[504] *Gomez*,[505] and *Peretz*.[506] Applying the reasoning in these three cases to the case at bar, the majority stated:

> The question here, then, is whether allowing bankruptcy courts to decide *Stern* claims by consent would "impermissibly threate[n] the institutional integrity of the Judicial Branch." And that question must be decided not by "formalistic and unbending rules," but "with an eye to the practical effect that the" practice "will have on the constitutionally assigned role of the federal judiciary." The Court must weigh
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> > the extent to which the essential attributes of judicial power are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[507]

In its application of the *Schor* and *Peretz* factors, the majority determined that parties in bankruptcy cases could waive their rights to adjudication of *Stern* claims by an Article III judge without undermining the basic constitutional authority of Article III courts.[508] In particular, it noted that "[b]ankruptcy judges, like magistrate judges, 'are appointed and subject to removal by Article III judges,' . . . 'serve as judicial officers of the United States district court,' and collectively 'constitute a unit of the district court' for that district."[509] Moreo-

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[501] *Id.* at 1941–42.

[502] *Id.* at 1942.

[503] *Id.* at 1939.

[504] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 834–35 (1986) (holding that a litigant's consent to have claims disposed of by a non-Article III tribunal did not violate Article III and was at most a "de minimis" infringement of the prerogatives of the federal court); *see also* CONSTITUTIONAL ANALYSIS, *supra* note 21, at 32–37.

[505] Gomez v. United States, 490 U.S. 858 (1989) (holding that a magistrate judge could not conduct *voir dire* in a felony case as an additional duty under § 636(b)(3) if the defendant objected to the magistrate judge's involvement); *see also* CONSTITUTIONAL ANALYSIS, *supra* note 21, at 12–14.

[506] Peretz v. United States, 501 U.S. 923 (1991); *see also* CONSTITUTIONAL ANALYSIS, *supra* note 21, at 16–21.

[507] *Wellness*, 135 S. Ct. at 1944 (footnotes omitted) (citations omitted) (quoting *Schor*, 478 U.S. at 851).

[508] *Id.* at 1944–45.

[509] *Id.* at 1945 (citations omitted).

ver, just as in *Peretz* the majority noted that the district court made the overriding decision to refer a matter to a magistrate judge in the first place, the Court here observed that bankruptcy courts only hear bankruptcy matters because district courts refer those cases to them, and that the district court retains the authority to withdraw such references *sua sponte* or at the request of a party under 28 U.S.C. § 157(d).[510] The majority therefore concluded, "'[S]eparation of powers concerns are diminished' when, as here, 'the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction' remains intact."[511]

The majority further observed there was "no indication that Congress gave bankruptcy courts the ability to decide *Stern* claims in an effort to aggrandize itself or humble the Judiciary."[512] Quoting language from the *Peretz* decision, the Court stated 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 [bankruptcy court] involves a congressional attemp[t] to transfer jurisdiction to [non-Article III tribunals] for the purpose of emasculating constitutional courts."[513]

The majority rejected an expansive reading of the Court's *Stern* decision, stating that *Stern* "turned on the fact that the litigant 'did not truly consent to' resolution of the claim against it in a non-Article III forum."[514] The Court further reasoned that "[b]ecause *Stern* was premised on nonconsent to adjudication by the Bankruptcy Court, the 'constitutional bar' it announced simply does not govern the question whether litigants may validly consent to adjudication by a bankruptcy court."[515]

The majority summarized the governing Supreme Court decisions on litigant consent to disposition of claims by a non-Article III tribunal:

> In sum, the cases in which this Court has found a violation of a litigant's right to an Article III decisionmaker have involved an objecting defendant forced to litigate involuntarily before a non-Article III court. The Court has never done what Sharif and the principal dissent would have us do—hold that a litigant who has the right to an Article III court may not waive that right through his consent.[516]

Noting Chief Justice Roberts' strong dissent to the majority's interpretation of *Stern*, the majority stated:

> The principal dissent warns darkly of the consequences of today's decision. To hear the principal dissent tell it, the world will end not in fire, or ice, but in a bankruptcy court. . . .

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[510] *Id.*

[511] *Id.* (alteration in original) (quoting *Schor*, 478 U.S. at 855).

[512] *Id.*

[513] *Id.* (alterations in original) (quoting Peretz v. United States, 501 U.S. 923, 937 (1991)).

[514] *Id.* at 1946 (quoting Stern, 131 S. Ct. at 2614).

[515] *Id.* (citation omitted).

[516] *Id.* at 1947.

> Adjudication based on litigant consent has been a consistent feature of the federal court system since its inception. Reaffirming that unremarkable fact, we are confident, poses no great threat to anyone's birthrights, constitutional or otherwise.[517]

The majority finally held that consent to adjudication by a bankruptcy court need not be express. Relying squarely on the Supreme Court's reasoning in *Roell*,[518] the majority concluded that the implied consent of the parties was sufficient to provide the bankruptcy court with authority to dispose of a claim under 28 U.S.C. § 157, provided the consent was also "knowing and voluntary."[519] After determining that the lower court record was insufficient to decide whether the implied consent of Sharif was knowing and voluntary, the majority reversed the Seventh Circuit's judgment and remanded the case for further proceedings.[520]

ii. Significance of Wellness for Magistrate Judge Authority

Although the majority opinion in *Wellness* is of particular importance to bankruptcy judges, the decision has constitutional significance for magistrate judges. Notably, the majority opinion relies on the Supreme Court's reasoning in *Peretz*,[521] thereby reaffirming the Court's view that the consent of parties may overcome constitutional concerns when certain matters are referred to magistrate judges. Moreover, the majority relied heavily on the Court's reasoning in *Roell* when it held that knowing and voluntary consent to disposition of *Stern* claims by a bankruptcy judge may be implied by the litigants' conduct.[522] The majority opinion in *Wellness* thus clearly reaffirms that the reasoning set forth in *Peretz* and *Roell* remain the governing standards for evaluating whether the referral of particular matters to magistrate judges comply with the strictures of Article III.[523]

It is also significant that the Court acknowledged, in a footnote, that "[*c*]*onsistent with our precedents*, the Courts of Appeals have unanimously upheld the constitutionality of § 636(c)."[524] This footnote is the closest the Supreme Court has come to an express declaration that 28 U.S.C. § 636(c) does not violate Article III.

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[517] *Id.*

[518] Roell v. Withrow, 538 U.S. 580, 590 (2003).

[519] *Wellness*, 135 S. Ct. at 1948.

[520] *Id.* at 1949.

[521] Peretz v. United States, 501 U.S. 923 (1991).

[522] *Wellness*, 135 S. Ct. at 1948.

[523] *See, e.g.*, United States v. Underwood, 597 F.3d 661 (5th Cir. 2010) (applying the reasoning in *Roell* and holding a defendant's consent to have a magistrate judge conduct a guilty plea proceeding in a felony case under Fed. R. Crim. P. 11 and 28 U.S.C. § 636(b)(3) could be inferred from the defendant's conduct when he failed to object to the magistrate judge conducting the plea colloquy).

[524] *Wellness*, 135 S. Ct. at 1948 n.12. (emphasis added).

After *Wellness*, the constitutionality of magistrate judge authority to dispose of civil consent cases under 28 U.S.C. § 636(c) under Article III appears to be secure. With every circuit court to have considered the issue agreeing that § 636(c) is constitutional,[525] it appears unlikely that there will be a circuit split on the issue that would bring it before the Supreme Court for ultimate resolution.[526]

Nevertheless, there remain at least two areas of magistrate judge authority under the Federal Magistrates Act where the constitutionality of particular provisions of the Act remains untested.

2. Does the Authority of Magistrate Judges to Dispose of Petty Offense Cases Without the Consent of the Defendant Under 18 U.S.C. § 3401 Violate Article III?

In 2000, Congress removed completely the requirement that defendants must consent to have magistrate judges dispose of petty offense cases.[527] Amendments to 28 U.S.C. § 636(a) and 18 U.S.C. § 3401(b) expanded magistrate judges' authority "to try all petty offense cases without [a] defendant's consent."[528] However, the Federal Courts Improvement Act of 2000 left unchanged "the requirement that a defendant must consent to magistrate judge jurisdiction to dispose of a Class A misdemeanor."[529]

The constitutional argument for eliminating consent in petty offense cases was based primarily on the common law reasoning used to explain why defendants charged with petty offenses do not have a right to a jury trial. It has long been argued that because petty offense cases were not recognized as "crimes" at the common law, fewer constitutional protections, such as trial by jury and adjudication by an Article III judge, were required.[530] Felix Frankfurter and Thomas Corcoran, in a widely cited law review article published in 1926, set forth an exhaustive history of the common law of England and the American colonies prior to the American Revolution and concluded that no right to trial by jury was recognized for minor offenses and therefore federal petty offense cases also did not require jury trials.[531] At least two older Su-

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[525] *See supra* note 177 and accompanying text.

[526] *But see* Brown v. United States, 748 F.3d 1045, 1068 (11th Cir. 2014) (raising in dicta "serious concerns" about the constitutionality of 28 U.S.C. § 636(c)); *supra* Section II.B.2.b.i(b).

[527] *See* Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 203(b), 114 Stat. 2410, 2414.

[528] LEGISLATIVE HISTORY, *supra* note 10, at 95; *see* 28 U.S.C. § 636(a) (2012); 18 U.S.C. § 3401(b) (2012).

[529] LEGISLATIVE HISTORY, *supra* note 10, at 95.

[530] *See* H.R. REP. NO. 96-287, at 18 (1979); *Federal Magistrate Act: Hearing on S. 3475 Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 89th Congress 246–56 (1966) (memorandum of subcomm. staff).

[531] *See* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

preme Court cases followed this reasoning to conclude that petty offense cases in federal courts did not constitute "crimes" under the common law and thus did not mandate jury trials.[532]

In addition, another law review article published in 1959, co-written by an assistant Attorney General of the United States, suggested that non-Article III magistrate judges should be authorized by Congress specifically to handle minor federal offenses in order to relieve Article III judges from the burden of disposing such cases.[533] The authors argued that the disposition of petty offenses by non-Article III judicial officers would not violate Article III:

> An analysis of this constitutional objection to the proposed commissioners' petty offense jurisdiction indicates that it does not constitute a barrier to the accomplishment of this salutary step. The historical background of the "good behavior" provision supports such a distinct treatment of petty offenses, and review upon appeal to the district courts would provide for a sufficient exercise of judicial power to satisfy article III.[534]

Interestingly, the authors did not discuss any need for the defendant to consent to the jurisdiction of United States commissioners or proposed federal magistrate judges as part of their constitutional analysis. They concluded that the petty offense defendant's right to appeal the judgment of the non-Article III judge to an Article III judge would be sufficient to ensure the constitutionality of their proposal:

> Summary proceedings by subordinate magistrates have traditionally characterized petty offense trials. The provision of life tenure for the judiciary in the regular courts of record, embodied in article III of the Constitution, carries an implicit exception for inferior tribunals which try minor crimes. And any possible demand of article III is satisfied by provision of review. It may be concluded that there are no substantial obstacles to the creation of federal petty offense tribunals or the endowment of United States commissioners with such authority.[535]

The subsequent legislative history of the 1996 amendment also concluded that there was no constitutional impediment to eliminating defendants' consent in petty offense cases.[536]

Until recently, the constitutionality of a magistrate judge's authority to dispose of petty offense cases without the defendant's consent had not been seriously questioned or analyzed in the federal courts.[537] A 2015 Fifth Circuit case,

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[532] *See* District of Columbia v. Colts, 282 U.S. 63, 72–73 (1930); Capital Traction Co. v. Hof, 174 U.S. 1, 45–46 (1899).

[533] *See* George Cochran Doub & Lionel Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. PA. L. REV. 443, 443 (1959).

[534] *Id.* at 456.

[535] *Id.* at 467.

[536] *See* S. REP. NO. 104-366, at 28 (1996).

[537] The most thorough analysis of the constitutionality of the amended provisions of 28 U.S.C.§ 636(a) and 18 U.S.C. § 3401(b) was by a magistrate judge in *United States v. McCrickard*, 957 F. Supp. 1149 (E.D. Cal. 1996), which provided an in-depth review of the constitutional arguments concerning magistrate judges' petty offense authority and conclud-

however, raises questions about whether this authority might violate Article III under certain circumstances.

In *United States v. Hollingsworth*, a panel of the Fifth Circuit Court of Appeals held that a petty offense defendant did not have a constitutional right to a trial before an Article III judge where the offense took place on a federal enclave and the magistrate judge acted as an Article I judge pursuant to Congress' authority to create territorial judges under Clause 17 of Article I of the Constitution.[538] In a strongly worded dissent, however, another member of the panel argued that magistrate judges, as adjuncts to Article III judges, do not have the authority to try, convict, or sentence a petty offense defendant without violating Article III of the Constitution, unless the defendant consents to the magistrate judge's jurisdiction.[539]

Defendant David Hollingsworth was charged in the Eastern District of Louisiana with a petty offense assault that occurred at a naval facility in Belle Chasse, Louisiana, in violation of 18 U.S.C. § 113(a)(5), a federal criminal statute that applies only "within the special maritime and territorial jurisdiction of the United States."[540] While the defendant filed an objection to having the case tried by a magistrate judge, the magistrate judge concluded that she had authority under the Federal Magistrates Act to preside over the trial without Hollingsworth's consent.[541] After a bench trial before the magistrate judge, Hollingsworth was convicted and sentenced to six months imprisonment.[542] After being convicted before the magistrate judge, the defendant appealed to the district court, raising a new argument that he had a right to a jury trial in his case.[543] The district judge, however, rejected this argument and affirmed the magistrate judge's conviction and sentence.[544] Hollingsworth then appealed to the Fifth Circuit, arguing "for the first time that he ha[d] a constitutional right to trial before an Art. III judge."[545]

Writing for a majority of the panel, Judge Clement rejected Hollingsworth's argument. The court began with the Supreme Court's reasoning in *Palmore v. United States*, where the Court held that "Congress was not required to provide an Art. III court for the trial of criminal cases arising under its laws

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ed "that 18 U.S.C. § 3401 and 28 U.S.C. § 636(a) are well within constitutional bounds." *McCrickard*, 957 F. Supp. at 1155. In two more recent cases where defendants challenged the magistrate judge's authority to try their petty offense cases with consent, the courts simply held that the magistrate judges had proper authority without providing in-depth constitutional analysis. *See* United States v. Zenón-Encarnación, 387 F.3d 60, 64 (1st Cir. 2004); United States v. Rivera-Negron, 201 F.R.D. 285, 287 (D.P.R. 2001).

538 United States v. Hollingsworth, 783 F.3d 556, 559–60 (5th Cir. 2015).

539 *Id.* at 567 (Higginson, J., dissenting).

540 *Id.* at 558 (quoting 18 U.S.C. § 113(a) (2012)).

541 *Id.*

542 *Id.* at 557–58.

543 *Id.* at 558.

544 *Id.*

545 *Id.* at 558–59.

applicable only within the District of Columbia."[546] Noting that the defendant was tried for violating 18 U.S.C. § 113(a)(5), which applies only "within the special maritime and territorial jurisdiction of the United States," the court concluded that "under *Palmore*, Hollingsworth has no constitutional right to trial before an Art. III court."[547] The court further rejected the defendant's argument that magistrate judges are not members of a territorial court created by Congress under Clause 17 of Article I, noting that Hollingsworth did not cite any section of the Constitution that Congress presumably violated when it authorized federal magistrate judges to conduct trials in misdemeanor cases.[548] The court further observed that under Clause 17, "Congress could have referred all trials for crimes committed at Belle Chasse to an Article I judge, including felony trials. But Congress chose to refer only trials for petty offenses to federal magistrate judges."[549] The court finally stated that although it was not certain from the constitutional text that the defendant was guaranteed even the right to appeal to an Article III court, Congress had in fact provided Hollingsworth the right to appeal to two Article III courts under the current statutory scheme.[550]

The court therefore held that "Hollingsworth did not have a right to trial before an Art. III judge, and that his trial, conviction, and sentence before a federal magistrate judge was constitutional."[551] It applied its holding, however, "only to defendants tried for petty offenses committed on federal enclaves obtained by Congress pursuant to Clause 17."[552]

Turning to address arguments raised in the dissenting opinion, the majority court further observed that historically Congress had "referred trials for misdemeanors committed on certain federal lands" to United States commissioners without the defendant's consent.[553] The court further noted that it had found no case where a defendant in a petty offense case before a United States commissioner had ever challenged the constitutionality the commissioner's authority: "The fact that these statutes survived unchallenged for more than half a century ought to inform our constitutional analysis."[554]

Further comparing magistrate judges to judges on legislative courts created by Congress under Clause 17 of Article I, the majority concluded,

> Magistrate judges have the professional competence and resources found in the legislative courts. We discern no meaningful difference between the federal magistracy and the legislative courts. Indeed, because the federal magistracy's members are appointed by federal judges instead of the President or the Presi-

546 Palmore v. United States, 411 U.S. 389, 410 (1973).
547 *Hollingsworth*, 785 F.3d at 559.
548 *Id.*
549 *Id.* (citation omitted).
550 *Id.* at 559–60.
551 *Id.* at 560.
552 *Id.*
553 *Id.* at 560–61.
554 *Id.* at 561.

> dent's appointees, we can have greater confidence in federal magistrate judges' ability to fairly exercise federal judicial power and to avoid diminution of the separation of powers.[555]

Finally, after further holding that Hollingsworth had no right to a jury trial, the court affirmed the district court's judgment.

In a strongly worded dissent, Judge Higginson argued that magistrate judges are "adjuncts" to the Article III courts and therefore cannot render final decisions on matters without the parties' consent:

> Finding constitutional birthright in Article I, Section 8, Clause 18's "other powers" phrase—instead of Clause 17's Seat of Government Clause or its Enclave Clause enhancement of Article I powers—enhances Article III courts' discretion to refer matters to the federal magistracy for preliminary review and a recommended decision. Indeed, as Congress has revised and expanded matters that may be so referred, the Supreme Court repeatedly has tested each subsequent delegation, when there is no consent, according to one constant principle, namely, that case-dispositive matters may be handled by magistrate judges provided that Article III district courts retain full and ultimate authority "to make an informed, final determination" of the case.[556]

Judge Higginson ended his dissenting opinion stating,

> It is said that a well-built house requires but little repairs. Article III federal district judges are not over-burdened in their most essential judicial function, trying federal criminal cases. Without consent, persons accused of federal offenses should not lose their liberty except after trial in a constitutional court, unless an Article III judge reserves "the ultimate decisionmaking authority."[557]

Both opinions in *Hollingsworth* raise several questions. While the majority opinion affirms the authority of magistrate judges to dispose of petty offense cases arising from federal enclaves where the United States has sole territorial jurisdiction under Clause 17 of Article I, the court's decision explicitly does not address whether magistrate judges have dispositional authority over petty offenses that arise on federal lands where jurisdiction is shared with a state or another entity. The authors of one treatise on public natural resources law estimated that federal enclaves created pursuant to Clause 17 "comprise less than 5 percent of federal land holdings."[558] The majority opinion would therefore appear to invite constitutional challenges to magistrate judge petty offense authority under 18 U.S.C. § 3401 in most federal lands.

In addition, Judge Higginson's dissenting opinion embraces the view that magistrate judges are "adjuncts" to Article III judges, a view explicitly rejected

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[555] *Id.* at 563.

[556] *Id.* at 567 (Higginson, J., dissenting) (citations omitted) (quoting United States v. Raddatz, 447 U.S. 667, 682–83 (1980)).

[557] *Id.* at 570 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 79 (1982)).

[558] 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 3:6 (2d ed. 2015).

by the Supreme Court as applied to bankruptcy judges in *Stern*.[559] Moreover, Judge Higginson's opinion repeatedly emphasizes that without consent "case-dispositive matters may be handled by magistrate judges provided that Article III district courts retain full and ultimate authority 'to make an informed, final determination' of the case."[560] It therefore would appear that, should Judge Higginson's argument prevail in the future, the restoration of defendant consent in petty offense cases, either by legislation or simply secured by a magistrate judge at trial, might arguably resolve the constitutional problem.

Finally, none of the opinions in *Hollingsworth*, for all their extensive historical analysis, address the fact that Congress specifically amended 18 U.S.C. § 3401 in the Federal Courts Improvement Act of 2000 to remove the defendant's consent in all petty offense cases.[561] Nor do they attempt to analyze the legislative history of this provision.

Along with Judge Higginson's dissent in *Hollingsworth*, the Eleventh Circuit also questioned in dicta the constitutionality of magistrate judge authority to dispose of petty offense cases in *Brown v. United States*, also discussed above.[562] While the panel in *Brown* held that a federal habeas corpus matter arising under 28 U.S.C. § 2255 was not a civil matter and thus could not be disposed of by a magistrate judge with the consent of the parties under 28 U.S.C. § 636(c), the majority opinion's lengthy dicta called into question the constitutionality under Article III of a magistrate judge disposing of *any* case in federal court, including Class A misdemeanor and petty offense cases.[563] In particular, the majority stated,

> [M]agistrate judges (and their predecessors, the commissioners) are not—and have never purported to be—Article III judges. Instead, magistrate judges "draw their authority entirely from an exercise of Congressional power under Article I of the Constitution." Although Congress considered magistrate judges to be "adjunct[s] of the United States District Court, appointed by the court and subject to the court's direction and control," the fact is that *when magistrate judges exercise their authority to try petty offenses* and to enter final judgment in civil cases, they are exercising the essential attributes of "judicial Power." They do not function as mere adjuncts. They are puisne judges acting as courts. But Article III is clear:
>
> > 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 stat-

[559] *See* Stern v. Marshall, 131 S. Ct. 2594, 2610–11 (2011).

[560] *Hollingsworth*, 783 F.3d at 567 (quoting *Raddatz*, 447 U.S. at 682–83).

[561] Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 202, 114 Stat. 2410, 2412–14.

[562] *See* Brown v. United States, 748 F.3d 1045, 1057–58, 1068 (11th Cir. 2014); *see also supra* Section II.B.2.b.i(b).

[563] *Brown*, 748 F.3d at 1057–58.

> ed Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> As previously recounted, magistrate judges do not hold life-tenure, nor is their compensation undiminishable. Therefore, these puisne judges cannot exercise "the judicial Power of the United States."[564]

The views expressed in Judge Higginson's dissent in *Hollingsworth* and the majority's dicta in *Brown* have so far not been followed by other courts, but serve as a reminder that the constitutionality of magistrate judge authority to dispose of petty offense cases without the consent of the defendant arguably remains unsettled.

3. Does Summary Contempt Authority and Expanded Criminal and Civil Contempt Authority of Magistrate Judges Under 28 U.S.C. § 636(e) Violate Article III?

a. Congressional Expansion of Magistrate Judge Contempt Authority

The Federal Courts Improvement Act of 2000 greatly expanded magistrate judge contempt authority.[565] Section 636(e) of Title 28 was amended and completely changed by this legislation.[566] Prior to these amendments, magistrate judges had no direct authority to impose contempt sanctions of any kind and could only certify a litigant or attorney's contemptuous behavior to a district judge for further proceedings under § 636(e). These changes are summarized briefly below.

The amended § 636(e)(1) gave magistrate judges "the power to exercise contempt authority as set forth in the other provisions of the amended § 636(e) within the territorial jurisdiction prescribed by their appointments."[567] Section 636(e)(2) provided magistrate judges with summary criminal contempt authority to punish any misbehavior occurring in their presence "so as to obstruct the administration of justice."[568] "Summary criminal contempt authority [was] granted to magistrate judges to maintain order and to protect the court's dignity in response to contumacious behavior by witnesses, parties, counsel, and others present at court proceedings."[569] Thus, "[w]hen presiding over cases or proceedings as the primary judicial officer for the district court, a magistrate judge is provided appropriate immediate authority to control activity in the court-

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[564] *Id.* (second alteration in original) (emphasis added) (footnote omitted) (citations omitted) (first quoting Thomas v. Whitworth, 136 F.3d 756, 758 (11th Cir. 1998); then quoting H.R. REP. NO. 96-287, at 8 (1979); and then quoting U.S. CONST. art. III, § 1).

[565] *See* Federal Courts Improvement Act of 2000 § 202, 114 Stat. at 2412–14.

[566] *See* LEGISLATIVE HISTORY, *supra* note 10, at 95–97.

[567] Memorandum from Thomas C. Hnatowski, Chief, Magistrate Judges Div. of the Admin. Office of the U.S. Courts, to All U.S. Magistrate Judges attach. I, at 1 (Nov. 16, 2000) (on file with author); *see* 28 U.S.C. § 636(e)(1) (2012).

[568] *Id.* § 636(e)(2); *see* LEGISLATIVE HISTORY, *supra* note 10, at 96.

[569] Hnatowski, *supra* note 567.

room. The limited penalties magistrate judges may impose for summary criminal contempts are set forth in § 636(e)(5)," which is summarized below.[570]

Section 636(e)(3) "gave magistrate judges additional criminal contempt authority in their civil consent cases under 28 U.S.C. § 636(c) and in misdemeanor cases under 18 U.S.C. § 3401."[571] The section gave magistrate judges "authority to punish misbehavior occurring *outside* their presence that constitutes disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command in civil consent and misdemeanor cases."[572] This authority permits "a magistrate judge to enforce his or her orders and to vindicate the magistrate judge's (and the court's) authority over cases tried by the magistrate judge."[573]

Section 636(e)(4) "authorizes magistrate judges to exercise civil contempt authority in civil consent cases under 28 U.S.C. § 636(c), and in misdemeanor cases under 18 U.S.C. § 3401."[574] In such cases, this section enables the magistrate judge to "exercise civil contempt authority identical to the civil contempt authority of a district judge."[575]

Under § 636(e)(5), the penalties for criminal contempts that magistrate judges may impose are limited:

> Imprisonment for a summary criminal contempt committed in the magistrate judge's presence, or for a criminal contempt occurring in a civil consent or misdemeanor case outside the magistrate judge's presence, may not exceed [thirty] days incarceration (the maximum term of imprisonment for a Class C misdemeanor, set forth in 18 U.S.C. § 3581(b)(8)), and a fine may not exceed $5,000 (the maximum fine that may be imposed upon an individual for a Class C misdemeanor under 18 U.S.C. § 3571(b)(6)).[576]

These limits on the contempt penalties that magistrate judges could impose were intended to clearly differentiate magistrate judge criminal contempt authority from that exercised by district judges. Moreover, these limits were modeled after the penalty limits in petty offense cases that magistrate judges may dispose of without the defendant's consent so that magistrate judge contempt authority would better withstand constitutional scrutiny. For example, 18 U.S.C. § 401 "sets no limits upon [either] the fine or imprisonment penalties [a district judge] may impose when punishing contemptuous behavior."[577] By contrast, magistrate judge criminal contempt authority was strictly prescribed.[578]

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570 *Id.*

571 LEGISLATIVE HISTORY, *supra* note 10, at 96.

572 *Id.*

573 *Id.*; *accord* Hnatowski, *supra* note 567.

574 Hnatowski, *supra* note 567, attach. I, at 2.

575 *Id.*; *see* LEGISLATIVE HISTORY, *supra* note 10, at 96.

576 Hnatowski, *supra* note 567, attach. I, at 2.

577 *Id.* attach. II, at 3; *see also* 18 U.S.C. § 401 (2012).

578 *See* 28 U.S.C. § 636(e)(5) (2012).

Congress recognized that some "contumacious conduct may be so egregious as to require more severe punishment."[579] In such situations, 28 U.S.C. § 636(e)(6) retained the certification procedure that existed "before enactment of the Federal Courts Improvement Act of 2000":

> If, in the opinion of the magistrate judge, a criminal contempt occurring in the magistrate judge's presence, or a criminal contempt in a civil consent or misdemeanor case, is sufficiently serious that [thirty] days incarceration or a $5,000 fine would not be an adequate punishment, the magistrate judge has the option of certifying the facts to a district judge for further contempt proceedings.
>
> The section also provides that in any other case or proceeding referred to a magistrate judge under 28 U.S.C. §§ 636(a) or (b), or any other statute, criminal contempts that occur outside the magistrate judge's presence must [continue to] be handled through the certification procedure. Under this provision, the magistrate judge [certifies] the facts constituting the contempt to a district judge to show cause why that person should not be adjudged in contempt of court by the facts so certified.
>
> Finally, the section requires that certification procedures must also be used for civil contempts that occur in any other case or proceedings referred to a magistrate judge under 28 U.S.C. §§ 636(a) or (b), or any other statute.[580]

Finally, § 636(e)(7) provides that in civil consent cases under § 636(c), the court of appeals hears appeals from a magistrate judge's contempt order under 28 U.S.C. § 636(c)(3).[581] "The appeal of any other order of contempt issued under this section shall be made to the district court."[582]

b. Constitutional Questions

To date, no federal court has analyzed whether the expanded magistrate judge contempt authority set forth in the amended § 636(e) violates Article III of the Constitution. Although one academic commentator suggested that the summary contempt provision in the 2000 amendments to § 636(e) violates separation of powers principles under Article III,[583] no court has yet raised or discussed this issue directly.[584] A review of cases since 2000 where the contempt provisions of § 636(e) have been cited shows that in most cases magistrate judges have used the certification procedure under § 636(e)(6) to recommend that district judges order contempt.[585] At least one magistrate judge, however,

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[579] *Id.* § 636(e)(6).

[580] Hnatowski, *supra* note 567, attach. I, at 2.

[581] 28 U.S.C. § 636(e)(7).

[582] Hnatowski, *supra* note 567, attach. I., at 3.

[583] *See* Mark S. Kende, *The Constitutionality of New Contempt Powers for Federal Magistrate Judges*, 53 HASTINGS L.J. 567, 569 (2002).

[584] *Cf.* Kiobel v. Millson, 592 F.3d 78, 91–92 (2d Cir. 2010) (Leval, J., concurring) (arguing that the 2000 amendment of the Federal Magistrates Act granting magistrate judges with limited contempt authority was a justification for considering a motion for sanctions under FED. R. CIV. P. 11 as a non-case-dispositive motion under 28 U.S.C. § 636(b)(1)(A)).

[585] *See, e.g.*, Stream Cos., Inc. v. Windward Advert., No. 12-cv-4549, 2013 WL 3761281, at *10 (E.D. Pa. July 17, 2013); Universitas Educ., LLC v. Nova Grp., Inc., Nos. 11 Civ. 1590

has exercised summary criminal contempt authority and imposed jail time on a contemnor under 28 U.S.C. § 636(e)(2).[586]

An examination of cases before 2000 that discuss magistrate judge's contempt authority is instructive on how courts might approach challenges to the expanded magistrate judge contempt authority. In the Seventh Circuit's decision on the constitutionality of 28 U.S.C. § 636(c), *Geras v. Lafayette Display Fixtures, Inc.*, the majority opinion discussed contempt authority as a clear line demarcating the authority of Article III judges and non-Article III judicial officers. In particular, the majority stated:

> Unlike the relatively mechanical entry of judgment, the power to punish for contempt of court is the means by which many court judgments, not including the collection of money judgments, are enforced. Despite the effort of the dissent to trivialize the significance of the contempt power, it remains the primary means of enforcing many court judgments, particularly injunctions. The vesting of this power exclusively in the hands of Article III judicial officers would seem, for present purposes at least, to provide an adequate distinction between such judges and non-Article III officers. This clear line also serves to limit the ultimate exercise of judicial power to persons enjoying the constitutional guarantee of independence.[587]

Similarly, the Ninth Circuit's en banc opinion upholding the constitutionality of 28 U.S.C. § 636(c) in *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, noted that the authority of Article III judges was preserved under § 636(c) because "[d]istrict courts retain the power to adjudge a party in contempt."[588]

Four years before the amendments to 28 U.S.C. § 636(e) were enacted, the Ninth Circuit addressed whether a magistrate judge could exercise contempt authority in a civil consent case under 28 U.S.C. § 636(c). In *Bingman v. Ward*, the court ruled that a magistrate judge erred when he adjudicated a criminal contempt sanction against a litigant in a civil consent case.[589] The panel asserted that the exercise of contempt authority was an exclusive power of Article III

(LTS)(HBP), 11 Civ. 8726 (LTS)(HBP), 2013 WL 3487350, at *1 (S.D.N.Y. July 12, 2013), *vacated by* 784 F.3d 99 (2015); Reed v. A & A Stanley Constr., Inc., No. 12-869 (MJD/LIB), 2013 WL 1065371, at *2 (D. Minn. Feb. 13, 2013); Lynch v. Southampton Animal Shelter Found., Inc., No. CV 10-2917(ADS)(ETB), 2013 WL 80178, at *4 (E.D.N.Y. Jan. 7, 2013); Aetna Grp. USA, Inc. v. AIDCO Int'l, Inc., No. 1:11-mc-023, 2012 WL 3309049, at *1 (S.D. Ohio Aug. 13, 2012).

[586] *See* United States v. Bryant, No. 2:14-CR-08, 2014 WL 2931051, at *3 (W.D.N.C. June 30, 2014) (holding a defendant in summary contempt under 28 U.S.C. § 636(e)(1) and FED. R. CIV. P. 42(b) for appearing intoxicated at a felony initial appearance and sentencing the defendant to fourteen days in jail).

[587] Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1044 (7th Cir. 1984).

[588] Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 545 (9th Cir. 1984).

[589] Bingman v. Ward, 100 F.3d 653, 654 (9th Cir. 1996).

judges absent a specific act of Congress giving magistrate judges contempt authority.[590]

Plaintiff James Bingman, a state prisoner in Montana, brought suit in the District of Montana against prison officials for alleged inadequate dental care.[591] The parties consented to have the case heard by a magistrate judge under 28 U.S.C. § 636(c).[592] After receiving evidence, the magistrate judge issued a preliminary injunction ordering the prison officials to provide the plaintiff with necessary dental care and to submit a proposal to eliminate deficiencies in the prison's dental care system.[593] Dissatisfied with prison officials' response to the injunction, Bingman moved to have the officials held in contempt.[594] The magistrate judge granted this motion, ordering the prison officials to pay $1,450 to the Clerk of Court because they had not submitted a plan within the time allotted by the court, and $500 to the plaintiff because the officials had not given him the expeditious dental care required by the order.[595] The magistrate judge stated that the sanctions were intended as punishment "for failing to timely and expeditiously comply with the terms . . . of the injunction, and, further, to encourage adherence to this or other orders of [the] Court in the future."[596]

On appeal, the defendants argued that the magistrate judge had no authority to hold them in contempt.[597] After finding that the magistrate judge's ruling was a criminal contempt order that could be reviewed through an interlocutory appeal, the Ninth Circuit agreed with the defendants' view, holding that magistrate judges have no authority under the Federal Magistrates Act to adjudicate criminal contempts.[598] Rejecting arguments that the Supreme Court's decision in *Peretz* somehow by analogy allowed magistrate judges to exercise contempt authority, the court stated,

> Moreover, criminal contempt proceedings are not the same as simple misdemeanor prosecutions or the conduct of voir dire in felony trials. Contempt proceedings implicate the authority, the discretion, and the dignity of Article III courts. They constitute "the ultimate exercise of judicial power . . . ." Congress has carefully avoided conferring that power upon magistrate judges. The mere fact that some analogies can be drawn between contempt proceedings and criminal proceedings does not mean that we should guard use of the contempt power any less jealously than Congress did.[599]

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590 *Id.* at 657.
591 *Id.* at 654.
592 *Id.* at 655.
593 *Id.*
594 *Id.*
595 *Id.*
596 *Id.* (alterations in original).
597 *Id.*
598 *Id.* at 656.
599 *Id.* at 658 (citation omitted) (quoting Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1044 (7th Cir. 1984)).

Nevertheless, the court specifically did not rule on whether Congress had authority under the Constitution to provide magistrate judges limited contempt authority, simply stating, "It has not done so."[600] The court therefore vacated the magistrate judge's contempt order and remanded the case for further proceedings in which the magistrate judge was required to certify facts constituting contempt to a district judge under the procedures set forth in 28 U.S.C. § 636(e).[601]

Although as yet untested in a federal court, there are cogent arguments for concluding that expanded magistrate judge contempt authority set forth in the 2000 amendments to 28 U.S.C. § 636(e) does not violate Article III of the Constitution. In particular, applying the "structural" interest analysis to Article III issues used by the Supreme Court in *Schor*, *Peretz*, and *Wellness*, it does not appear that Congress provided magistrate judges with expanded contempt authority "in an effort to aggrandize itself or humble the Judiciary."[602] Moreover, in all other respects, district judges maintain their supervisory control over magistrate judges in the same way that bankruptcy judges remain under the control of Article III judges in a manner approved of by the Supreme Court in *Wellness*.[603]

With regards to the "personal" interest prong protected under Article III, at first blush it might be argued that the limited summary contempt provisions of 28 U.S.C. § 636(e) do not adequately protect individuals' "personal" interests under Article III because those affected by a magistrate judge's exercise of summary contempt authority do not consent to the magistrate judge's actions. Congress, however, has provided magistrate judges with non-consensual dispositional authority in petty offense cases under 18 U.S.C. § 3401 that arguably does not offend the Constitution.[604] Indeed, the strict limits on the summary and criminal contempt penalties that magistrate judges may impose under § 636(e)(5) were intended to explicitly differentiate magistrate judge contempt authority from that of Article III judges.[605] It stands to reason that if the non-consensual referral of all petty offense cases to magistrate judges for final disposition does not offend the Constitution, the summary imposition of limited criminal contempt penalties by magistrate judges under § 636(e)(5) would also withstand constitutional scrutiny. The Supreme Court has declared that a "criminal contempt is a petty offense unless the punishment makes it a serious [offense]."[606] Viewed in this context, granting magistrate judges summary non-

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600 *Id.*

601 *Id.*

602 Wellness Int'l. Network, Ltd. v. Sharif, 135 S. Ct.1932, 1945 (2015).

603 *See id.* at 1945–46.

604 *See supra* Section II.C.2 (concluding that while some courts question the constitutionality of the power granted magistrate judges to dispose of petty cases in 18 U.S.C. § 3401, it has not been held to be unconstitutional).

605 Hnatowski, *supra* note 567, attach. I, at 2.

606 Bloom v. Illinois, 391 U.S. 194, 198 (1968).

consensual criminal contempt authority with penalties limited to those for Class C misdemeanors arguably does not offend the "personal" interests embodied in Article III of the Constitution.

It remains to be seen, however, how these arguments would fare in the federal courts if the expanded magistrate judge contempt provisions in 28 U.S.C. § 636(e) were challenged on constitutional grounds.

III. THE EXPANSION OF MAGISTRATE JUDGE UTILIZATION SINCE 1990

A. Magistrate Judge Utilization: An Introduction

The nation's federal magistrate judges perform more duties today than they did twenty-five years ago. To confirm this basic fact and to get an idea of *how much* "more," one need look no further than the judiciary's national statistics on magistrate judge workload. From 1990 to 2014, the number of total matters[607] handled by all magistrate judges in the nation increased 146 percent (from 448,107 to 1,102,396).[608]

Building on the discussion of the expansion of magistrate judge authority in Parts I and II of this article, Part III analyzes the growth in the utilization of magistrate judges from 1990 to 2015 and the causal factors contributing to that growth. It proposes to show that the expansion of utilization resulted not only from larger volumes of cases and duties generally, but also from a broader range of duties assigned to magistrate judges.

The expansion of magistrate judge utilization[609] since 1990 does not appear to have received much scholarly attention, with certain notable exceptions.[610] It

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[607] "Total matters" is virtually every judicial proceeding regardless of type, including all cases terminated in which magistrate judges presided (e.g., civil consent cases and petty offense cases), and all matters referred to magistrate judges in civil and criminal cases for determination or reports and recommendations, including discovery motions, evidentiary hearings, settlement conferences, initial appearances in felony cases, search warrants, etc.

[608] *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

The court statistics for 1990, unless otherwise indicated, refers to the 12-month period ending June 30, 1990, and court statistics from 1992 onward unless otherwise indicated, refers to 12-month periods ending September 30 (due to a change in the Administrative Office's statistical reporting year).

[609] The "utilization" of magistrate judges is a term of art referring to the various types of judicial duties that district judges, individually, and district courts, collectively, delegate to magistrate judges throughout ninety-four district courts. The concept encompasses two signature qualities of the work of United States magistrate judges: (1) the extensive judicial authority of the office conferred by statute, 28 U.S.C. § 636 (2012), and (2) the broad discretion that Congress gave to district judges to determine which of these authorized duties to delegate to magistrate judges to meet local needs and conditions, 28 U.S.C. § 636 (b)(1)(A). *See* PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM 64 (2014), http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System.aspx?FT=.pdf [https://perma.cc/99UK-8FY4].

[610] *See, e.g.*, MCCABE, *supra* note 609; CARROLL SERON, THE ROLES OF MAGISTRATES: NINE CASE STUDIES (1985); Tim A. Baker, *The Expanding Role of Magistrate Judges in the Fed-*

has been the subject of occasional articles in legal periodicals[611] and the print media.[612] In Part III of this article, the authors approach the subject using the extensive statistics maintained by the Administrative Office on matters handled by magistrate judges and practical knowledge obtained through their work experience as senior attorneys in the Administrative Office.

Congress and the Judicial Conference have promoted the full utilization of magistrate judges in the interest of responsible stewardship of judicial resources and to fulfill the purposes of the magistrate judges system. In 1983, the U.S. Government Accountability Office (GAO) concluded in its report to Congress that the utilization of magistrate judges should be expanded.[613] In response to that report, the Judicial Conference endorsed actions "to encourage the further use of magistrates" at its March 1984 session.[614] Nearly twenty-five years ago, the Committee on the Administration of the Magistrate Judges System of the

eral Courts, 39 VAL. U. L. REV. 661 (2005); Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 475 (2002); Dessem, *supra* note 101; George C. Hanks, Jr., *Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation*, 99 JUDICATURE, May 2015, at 46; Pro & Hnatowski, *supra* note 21; James G. Woodward & Michael E. Penick, *Expanded Utilization of Federal Magistrate Judges: Lessons from the Eastern District of Missouri*, 43 ST. LOUIS U. L.J. 543 (1999). *See generally* JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT (2012) (discussing institutional specialization in the judicial branch in the post-war period, including establishment of the modern magistrate judges system); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1996) (providing background and analysis of the growth in the federal caseload since 1960 and the institutional reforms in response); 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 (providing a detailed account of the historical origins of the office of magistrate judge and evolution of its judicial powers dating back to United States Commissioners); Jack B. Streepy, *The Developing Role of the Magistrate in the Federal Courts*, 29 CLEV. ST. L. REV. 81 (1980) (discussing developments in magistrate judge authority and utilization nationally and particularly in the Northern District of Ohio during the author's service there as a United States magistrate judge).

[611] *See, e.g.*, Michael Newman, *Magistrate Judges in the Federal Courts: A Special Issue*, 61 FED. LAW. May/June 2014, at 33.

[612] *See, e.g.*, Ann E. Marimow & Craig Timberg, *Low-Level Federal Judges Balking at Law Enforcement Requests for Electronic Evidence*, WASH. POST (Apr. 24, 2014), https://www.washingtonpost.com/local/crime/low-level-federal-judges-balking-at-law-enforcement-requests-for-electronic-evidence/2014/04/24/eec81748-c01b-11e3-b195-dd0c1174052c_story.html [https://perma.cc/7F3X-46GQ]; Joe Palazzolo, *Magistrate Judges Play a Larger Role*, WALL STREET J. (Apr. 6, 2015, 5:20 PM), http://www.wsj.com/articles/magistrate-judges-play-a-larger-role-1428355226.

[613] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-83-46, COMPTROLLER GENERAL'S REPORT TO THE CONGRESS: POTENTIAL BENEFITS OF FEDERAL MAGISTRATES SYSTEM CAN BE BETTER REALIZED 18–19 (1983). The GAO found that some district judges did not use magistrate judges as extensively as they could, for various reasons. It recommended, among other things, that the Judicial Conference encourage courts to use magistrate judges "for all types of judicial and administrative duties, whenever possible and practical," to have a positive impact on the courts' caseloads. *Id.*

[614] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 20 (Mar. 1984).

Judicial Conference described the mission of the federal magistrate judges system in these words:

> The mission of the magistrate judges system is to provide the federal district courts with supportive and flexible supplemental judicial resources. The magistrate judges system is available to cope with the ever-changing demands made on the federal judiciary, thereby improving public access to the courts, promoting prompt and efficient case resolution, and preserving scarce Article III resources.[615]

Magistrate judge utilization has expanded greatly over the past quarter century by any measure. For example, the volume of all matters handled by magistrate judges nationally surpassed one million for the first time in the 2000s,[616] and from 1990 to 2014, the Judicial Conference authorized over 200 new full-time magistrate judge positions.[617] Since 1990, magistrate judges have exercised plenary authority with consent of the parties under 28 U.S.C. § 636(c) in more civil cases, including several high-profile cases.[618] Also, Congress changed the title of the office from "magistrate" to "magistrate judge" to more accurately reflect the judicial duties of the office.[619] Likewise, the Judicial Conference agreed in March 2004 to include a magistrate judge observer at its sessions for the first time.[620]

At the same time, however, looking back at magistrate judge utilization since 1990 evokes in the observer the familiar saying that "the more things change, the more they stay the same." There are several reasons for this impression, but four are mentioned here. First, while the utilization of magistrate judges has expanded, the basic mission of the magistrate judges system "to

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[615] Pro & Hnatowski, *supra* note 21, at 1526 (quoting MAGISTRATE JUDGES PLAN, *supra* note 170, at 3-1).

[616] Magistrate judges disposed of 1,065,413 total matters in 2004. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2013, at tbl.S-17 (2013), http://www.uscourts.gov/statistics/table/s-17/judicial-business/2013/09/30 [https://perma.cc/9SBE-4W29].

[617] ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 56.

[618] *See, e.g.*, Dep't of Fair Emp't and Hous. v. Law Sch. Admission Council, Inc., No. 12-cv-01830-JCS, 2015 WL 4719613, at *25–26 (N.D. Cal. Aug. 7, 2015) (granting in part and denying in part appeal of report of panel of experts regarding application of the Americans with Disabilities Act of 1990 to accommodations for disabilities while taking the Law School Admission Test); Latta v. Otter, 19 F. Supp. 3d 1054, 1086 (D. Idaho 2014) (holding Idaho's marriage laws unconstitutional in prohibiting same-sex marriage and not recognizing legal out-of-state marriages of same-sex couples residing in Idaho); Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1253 (D. Or. 1998) (holding that the requested use of a golf cart by a disabled professional golfer in a golf tournament is a required accommodation under the ADA).

[619] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 321, 101 Stat. 5089, 5117.

[620] As approved by the Judicial Conference, Chief Justice William H. Rehnquist selected a magistrate judge and a bankruptcy judge for two-year terms to attend sessions of the Judicial Conference as non-voting observers, a practice that has been continued by Chief Justice Rehnquist's successor, Chief Justice John G. Roberts, Jr. *See* JCUS-MAR 2004, *supra* note 55, at 22.

provide the federal district courts with supportive and flexible supplemental judicial resources" has not changed.[621] Second, decisions on how magistrate judges are to be used remain in the hands of district judges at the local district court level. Third, the utilization of magistrate judges varies widely from district to district, and this variation still extends to some degree to disparities in the range of duties given to magistrate judges. Fourth, while this paper concludes that while nationally magistrate judges are generally utilized for a broader range of duties today than in 1990, many courts continue to rely on magistrate judges as "specialists" in particular areas (for example, prisoner cases and social security appeals).

This part of the article has four sections. The first is a review of the national policies that favor flexibility and innovation in magistrate judge utilization. The second section analyzes the global expansion of magistrate judge utilization and its causes from 1990 to 2015. The third section narrows the focus to examine three recent growth areas of magistrate judge utilization: (1) felony guilty plea proceedings, (2) search warrants and investigative orders, and (3) civil cases adjudicated to finality by magistrate judges on consent of the parties. The final section will attempt an initial inquiry into the institutional challenges posed by the ways magistrate judges are actually used compared with advice on best practices for the effective use of magistrate judges. The section will consider, in particular, the practice of referring case-dispositive matters to magistrate judges for reports and recommendations and the role of magistrate judges as "specialists" in certain areas.

B. National Policies Favoring Flexibility and Innovation

"Flexibility has been the hallmark of the magistrate judges system throughout its development."[622] As acknowledged by Congress in 1979, the magistrate judges system is designed to "improve access to justice on a district-by-district basis."[623] Reporting to Congress in 1981, the Judicial Conference observed that the Federal Magistrates Act "does not contemplate uniformity from district to district in the actual assignment of duties to magistrates," but rather "[f]lexibility and diversity are a necessary part of the genius of the magistrates system."[624]

Since the early years of the magistrate judges system, there have been wide variations in the duties assigned to magistrate judges from court to court and, even, from district judge to district judge within the same court.[625] These varia-

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621 *See supra* note 615 and accompanying text.

622 Pro & Hnatowski, *supra* note 21, at 1527.

623 S. REP. NO. 96-74, at 4 (1979), *reprinted in* 1979 U.S.C.C.A.N 1469, 1472.

624 THE FEDERAL MAGISTRATES SYSTEM: REPORT TO THE CONGRESS BY THE JUDICIAL CONFERENCE OF THE UNITED STATES 44 (1981).

625 *Id.* ("Even within a given district court, the use of magistrates will not always be uniform."). The 1981 Report to the Congress quoted a study conducted in the Southern and

tions are beneficial, but they result in differences in the range and volume of duties of magistrate judges system-wide.[626]

Congress has also encouraged courts to be innovative in using magistrate judges. Innovative uses are impliedly authorized under 28 U.S.C. § 636(b)(3), which broadly states, "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."[627] The House Report to the 1976 jurisdictional amendments to the Federal Magistrates Act commented on the purpose of § 636(b)(3):

> This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. . . .
>
> . . . .
>
> 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.[628]

Eastern Districts of New York that described individualized utilization of magistrate judges by district judges:

> Each judge determines how the magistrates can work most effectively. Since each judge has his own areas of competence and expertise, he can utilize magistrates to assist him in different ways, say, for all pretrial matters or a limited part of the case. The high degree of flexibility in magistrate use depending on the magistrate's and judge's expertise is an important element underlying the magistrates system.

Id. (quoting Steven Puro, Roger L. Goldman & Alice M. Padawer-Singer, *The Evolving Role of U.S. Magistrates in the District Courts*, 64 JUDICATURE 437, 444 (1981) (footnote omitted)).

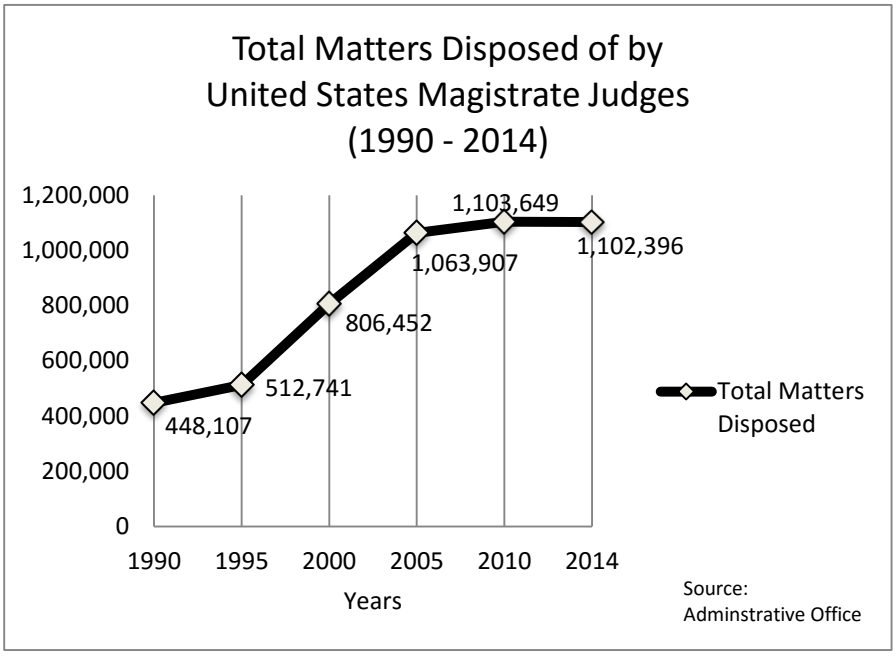
626 *See* MCCABE, *supra* note 609, at 23. Peter G. McCabe, the first chief of the Magistrate Judges Division of the Administrative Office, from 1972 to 1982, and Assistant Director for Judges Programs of the Administrative Office, from 1982 to 2013, noted that flexibility has resulted in "substantial disparity in usage" in his 2014 white paper on the magistrate judges system: "This flexibility has been beneficial, and most districts use their Magistrate Judges broadly and imaginatively. But it has also led to substantial disparity in usage of Magistrate Judges among the courts, based on differences in caseloads, local conditions, and the preferences of District Judges." *Id.*

627 28 U.S.C. § 636(b)(3) (2012).

628 H.R. REP. NO. 94-1609, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172.

C. Expansion of Duties of Magistrate Judges from 1990 to 2014

FIGURE 1



As noted above, the aggregate number of duties performed by magistrate judges nationally increased dramatically from 1990 to 2014, more than doubling from 448,107 to 1,102,396 matters.[629] (See Figure 1). The largest shares of additional matters disposed of were in referred matters in civil cases, referred matters in felony cases, and initial proceedings in felony cases.[630] The growth in each of these areas are discussed in more detail below. Civil consent cases increased substantially from 1990 to 2014, growing 222 percent (from 4,958 to 15,959).[631] Reports and recommendations in prisoner cases also increased, but by a much smaller margin—27 percent (from 20,583 to 26,140).[632] There were exceptions to the growth trend in some categories, however.[633]

[629] *See supra* note 608 and accompanying text.

[630] *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[631] *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[632] Prisoner cases are comprised of prisoner civil rights cases, state habeas corpus cases, federal habeas corpus cases and motions to vacate sentence. *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[633] The numbers of reports and recommendations in social security appeals rose only slightly, by 15 percent (from 5,112 to 5,881), although filings in these appeals increased overall by almost 160 percent (from 7,439 to 19,146). This discrepancy is attributable, in part, to a

In general, the expansion in duties performed by magistrate judges was caused or enabled by four factors: (1) expansion of magistrate judge authority by statute and case law, (2) growth in case filings and workload in the district courts, (3) increased magistrate judge resources in the district courts, and (4) larger volumes of traditional magistrate judge duties and a broader range of duties assigned to magistrate judges. The first factor, the expansion of magistrate judge authority, was discussed in Parts I and II. Clearly, a precondition to any growth in the duties of magistrate judges is the legal authority they have to conduct their assigned duties. As the expansion of authority has already been discussed, this section will focus on the other three factors.

1. Caseload

The statistics indicate that increases in district court caseload alone were less of a factor in the expansion of magistrate judge utilization than might be expected. From 1960 to 1985, the district courts experienced extraordinary growth in total filings (from 80,891 to 312,556).[634] From 1990 to 2014, case filings continued to rise but at a much less rapid rate (from 284,220 to 376,536).[635] Despite the slower growth in caseload after 1985, however, the numbers of matters disposed of by magistrate judges rose dramatically from 1995 to 2005 (from 512,741 to 1,063,907).[636] In 2005, the rate of increase dropped off considerably, so that, from 2005 to 2014, the numbers increased slightly overall (from 1,063,907 to 1,102,396).[637] As a result, from 1995 to 2014, total matters disposed of by magistrate judges increased 115 percent while total case filings grew 20 percent.[638] Therefore, the widening gap be-

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marked increase in social security appeals that were disposed of by magistrate judges on consent of the parties during the relevant period. Dispositions of Class A misdemeanors by magistrate judges decreased by 37 percent during this period (from 13,248 to 8,351). The reduction correlates with a decrease in filings of misdemeanor defendant offenses during that period (from 14,938 to 8,774). Dispositions of petty offense cases by magistrate judges increased marginally from 1990 to 2014 (from 87,682 to 98,303). *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 56, at tbl.4.4. *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbls.D-1 & S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbls.D-1 & S-17.

634 POSNER, *supra* note 610, at 56–64, 391–93 & tbl.A.2.

635 See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 56, tbls.4.1 & 5.1. From 1990 to 2014, civil filings grew from 217,879 to 295,310 (up 77,000 filings, 36 percent), and criminal defendant filings grew from 66,341 to 81,226 (up almost 15,000 filings, 22 percent). *Id.*

636 *Compare* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 1999, at tbl.S-18 (1999), http://www.uscourts.gov/statistics-reports/judicial-business-1999 [https://perma.cc/5RPA-M2K8], *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

637 JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17. From 2010 to 2014, matters disposed of by magistrate judges decreased slightly overall (from 1,103,649 to 1,102,396), after peaking in 2013 (1,181,874). *Id.* The cause of the overall decrease from 2010 to 2014 appears to have been a decrease in felony filings. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 56, at tbl.5.1.

638 This observation is made realizing that aggregate matters disposed of by magistrate judges will *always* be greater than cases filed because "matters disposed of" include multiple proceedings arising from each case. Nevertheless, from 1995 to 2014, the ratio of the in-

tween the growth in magistrate judge duties and case filings suggests that, although rising case filings were a contributing factor, they were not decisive but were one of a number of factors leading to the increase in duties performed by magistrate judges after 1990.

A more useful standard for assessing caseloads is the *workload* of judges, as measured by weighted caseload per district judgeship.[639] The national statistics on weighted caseload indicate that, on average, the workload of judges in all district courts increased over the past twenty-five years. From 1990 to 2015, the average number of weighted case filings per district judgeship in all district courts rose from 448 to 522.[640] The authors of this paper conclude that the following caseload-related factors contributed to the increase in magistrate judge utilization from 1990 to 2015: (1) more time-consuming cases due to increased legal and evidentiary complexity; (2) the cumulative effects of the previous twenty-five year expansion in caseload; (3) and a continuing, albeit gradual, rise in the caseloads of district courts generally. As a result of these factors, it is hypothesized that district judges delegated more duties to magistrate judges to help them better manage their time and their caseloads.

2. Magistrate Judge Resources

As noted in Part I, the number of full-time magistrate judge positions increased by 56 percent over the past twenty-five years.[641] The number of new full-time magistrate judge positions authorized by the Judicial Conference increased considerably in the five-year span from 1990 to 1995 from 329 to 416 positions.[642] From 1995 to 2005, the number of new positions continued to in-

crease in "matters disposed of" to the increase in case filings was quite high, 6:1, indicating expansive use of magistrate judges. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 636; JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17; *see also* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 56, at tbls.4.1 & 5.1.

639 "Weighted caseload" is an Administrative Office statistic that

> account[s] for the different amounts of time district judges require to resolve various types of civil and criminal actions. The Federal Judiciary has employed techniques for assigning weights to cases since 1946. . . . Average civil cases or criminal defendants each receive a weight of approximately 1.0; for more time-consuming cases, higher weights are assessed . . . ; and cases demanding relatively little time from judges receive lower weights . . . .

ADMIN. OFFICE OF THE U.S. COURTS, EXPLANATION OF SELECTED TERMS 1 (2015). Judge Posner has opined on the utility of weighted caseload statistics thusly: "Without statistics it would be impossible to know when a court should be enlarged. For this purpose, however, raw caseload statistics are inadequate. A case is not a uniform measure, like a dollar. The relevant statistic is not caseload but workload, which is to say, weighted caseload." *See* POSNER, *supra* note 610, at 227–31.

640 *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES 2015, at tbl.6.2 (2015), http://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2015 [https://perma.cc/Q6B5-TX68].

641 *See* discussion *supra* Section I.B.1.c and notes 56–57 and accompanying text.

642 *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 56. Under the Federal Magistrates Act, the Judicial Conference authorizes new magistrate judge positions, in the light of rec-

crease, but at a lower rate spread over ten years (from 416 to 503 positions).[643] From 2005 to 2010, the growth in new full-time magistrate judge positions abated significantly (increasing by 24 new positions to 527), and from 2010 to 2014 the new positions were authorized at an even lower rate (increasing by 7 new positions to 534).[644]

When the trend in creating new full-time magistrate judge positions is compared to the increase in total matters disposed of by magistrate judges, interesting patterns emerge. From 1990 to 1995, during the greatest surge in new magistrate judge positions, the increase that occurred in matters disposed of was relatively moderate. However, from 1995 to 2005, the increase in duties performed "took off" (increasing from 512,741 to 1,063,907 matters). (See Figure 1). The upward trends in positions and matters disposed of did not continue after 2005. From 2005 to 2010, when the number of new magistrate judge positions sharply decreased, there was a parallel drop-off in the rate of increase in matters disposed of by magistrate judges.[645]

It is difficult to know what to make of these parallel trends in the statistics on new magistrate judge positions and duties performed by magistrate judges, particularly with respect to the parallel upward trends from 1995 to 2005. There seems to be a correlation, but the real connections between these two variables are not clear without further study. There is a "chicken-or-the-egg" question whether more duties were performed because more positions were created, or whether more positions were created because more duties were performed.[646] There is also a question as to why there was an apparent delay in the steep increase of duties performed until after 1995, especially when the period of the greatest increase in new positions occurred throughout the previous five years, 1990 to 1995.[647] In view of these issues, the question of the causal relationship

ommendations of the Director of the Administrative Office, the district courts, and the circuit judicial councils. *See* 28 U.S.C. § 633(b) (2012).

643 ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 56.

644 *Id.*

645 *See supra* note 636 and accompanying text.

646 Moreover, it cannot be inferred from the data that the increase in total matters disposed of by magistrate judges was caused solely by the increase in magistrate judge positions. If the increase in total matters disposed of was caused merely by the increase in new positions, it seems logical that the average number of total matters performed per full-time magistrate judge position would remain relatively constant. However, the national average of total matters performed *per full-time magistrate judge position* increased from 1990 to 2014 (from 1,362 to 2,076), even as the numbers of new full-time magistrate judge positions were increasing significantly (from 329 to 534 at the end of fiscal years 1990 and 2014, respectively). *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17. Therefore, while the increase in positions certainly contributed to the increase in total matters disposed of, the large increase in matters disposed of seemed to be fueled by more than new magistrate judges doing the work.

647 A possible explanation for the delay may be that from 1990 to 1995 the number of part-time magistrate judge positions were decreasing as the number of full-time magistrate judge positions were increasing, therefore increases in duties performed due to the new full-time

between new magistrate judge positions and increased utilization of magistrate judges is beyond the scope of this paper. However, common sense suggests that the probable effect of adding new magistrate judge positions would be an increase in the overall output of magistrate judges, assuming that the increase in capacity (new positions) satisfied an increasing demand for the services of magistrate judges (i.e., matters referred by district judges). Therefore, based on the parallel statistical trends described above, it can be conservatively concluded that, but for the great increase in new full-time magistrate judge positions from 1990 to 2005, the increase in total matters disposed of would not have been as large as it was.[648]

3. More Duties and a Broader Range of Duties

For purposes of this analysis, the expansion of magistrate judge utilization can be divided into at least two different types. The first type, which could be called "intensified utilization," refers to an increased volume of duties in a type of duty that magistrate judges are already assigned, such as would occur, for example, if social security filings increased, causing an increase in the amount of social security appeals referred to magistrate judges. The second type, which might be called "broadened utilization," refers to the broadening of assignments into duty categories in which magistrate judges have not been utilized before, such as would occur if a court began referring discovery motions in civil cases to magistrate judges where, previously, the court had only referred settlement conferences. Broadened utilization indicates that magistrate judges are being used more extensively over a range of duties, which has been a national goal.[649] The data from 1990 to 2014 suggests that the expansion of utilization during that period was a combination of both broadened and intensified utilization.

Statistical data indicate that from 1990 to 2014, the largest shares of the expansion in utilization were in three broad categories: (1) pretrial matters and additional duties in civil cases, (2) pretrial matters and additional duties in felo-

positions may have been offset by immediate decreases in duties performed by part-time magistrate judges whose positions were abolished. *See supra* Section I.B.1.c.

[648] Another aspect of judicial resources, or lack thereof, which was discussed *supra* Section I.B.1.c, is the discrepancy from 1990 onward between the low number of new district judgeships created and the greater number of new magistrate judge positions. The lack of additional district judgeships led courts, particularly the busier courts, to seek additional magistrate judge positions. However, the Judicial Conference authorizes new magistrate judge positions based on the court's need for magistrate judge resources and not in lieu of additional district judgeships. While there can be overlap between duties performed by district judges and magistrate judges, magistrate judges are non-Article III judges and their authority is not coextensive with the authority of district judges. For example, it is universally recognized that magistrate judges have no authority to try felony cases or conduct sentencings in felony cases. Therefore, the two types of judges are not interchangeable.

[649] JUDICIAL CONFERENCE OF THE U. S., LONG RANGE PLAN FOR THE FEDERAL COURTS 101 (1995); *cf.* United States v. Benton, 523 F.3d 424, 433 (4th Cir. 2008).

ny cases,[650] and (3) initial proceedings in criminal cases. Each of these categories is discussed below.

a. Civil Cases: Pretrial Matters and Additional Duties

The prime example of broader utilization of magistrate judges is the expansion of pretrial matters and additional duties in civil cases referred to magistrate judges[651] from 1990 to 2014. During this period, referred civil matters disposed of by magistrate judges increased from 114,968 to 371,672.[652]

Using seventy or less as a baseline value denoting a small number of civil pretrial duties referred to magistrate judges (excluding evidentiary hearings) in a given court, the number of courts that reported seventy or less civil pretrial matters handled by magistrate judges decreased from nine courts to one court from 1990 to 2014.[653] Therefore, the statistics suggest that in 1990 there were nine courts that were not utilizing magistrate judges to an appreciable extent in general civil cases, but by 2014, virtually all courts were using magistrate judges to handle civil pretrial matters routinely, albeit in varying amounts.

It should be noted that the use of magistrate judges for judicial settlement of cases was an important part of the expansion of magistrate judge utilization in civil cases after 1990. From 1990 to 2014, the numbers of settlement conferences conducted by magistrate judges increased 63 percent (from 12,656 to 20,641).[654]

There were several causal factors that generated increased referrals of civil matters to magistrate judges. As discussed above, two factors were the gradual rise in civil filings and the increase in the number of authorized magistrate

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[650] The first and second categories are matters referred to magistrate judges in civil and felony cases that are assigned to district judges, as distinguished from cases assigned to magistrate judges as the presiding judge, such as civil consent cases and petty offense cases.

[651] These matters include referred non-case-dispositive pretrial motions, settlement conferences and other pretrial conferences, evidentiary hearings, special masterships, and reports and recommendations on referred case-dispositive motions in non-consent civil cases, including social security appeals but not including prisoner cases. *See* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[652] The actual increase was not as large as the bare statistics indicate because certain types of matters, including uncontested non-case-dispositive motions, were added to this category for the first time in 2000, causing a large spike in the aggregate number that year. When the statistics are adjusted to take this change into account, the increase in referred civil matters from 1990 to 2014 is still estimated to have been substantial, about 70 percent. The reporting of these data for the first time in 2000 increased the total number of referred civil matters by about 100,000 in 2000. *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[653] The one court in 2014 was the District Court for the Northern Mariana Islands, which is the only court in the nation that has one magistrate judge who is in a combination clerk of court/magistrate judge position (receiving no additional salary or staff for judicial duties), and who reports few judicial duties. *Compare* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 57, at 283–84 tbl.M-4A, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.M-4A.

[654] *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

judge positions. But the main impetus in the early part of this period was the civil justice reform legislation of 1990, which is discussed in Part I of this paper.[655] The Judicial Improvements Act of 1990 "actually enhanced the potential role and status of federal magistrate judges," and Title I of that legislation, the CJRA of 1990, created an opportunity for each district court to review the role and utilization of its magistrate judges in civil cases.[656]

The CJRA required all district courts to adopt a civil justice expense and delay reduction plan after considering recommendations of a local advisory group appointed by each chief district judge in consultation with the other judges.[657] In general, these plans and recommendations recognized the significant role of magistrate judges in civil pretrial management.[658] The CJRA led to more extensive utilization of magistrate judges in civil cases, although many courts had already established case management practices involving magistrate judges before the CJRA.[659] These reports and plans made a wide variety of recommendations regarding the use of magistrate judges, including promoting the referral of pretrial conferences and discovery motions to magistrate judges, referral of settlement conferences to magistrate judges, and taking steps to encourage parties to consent to full adjudication of consent cases by magistrate judges.[660]

b. Felony Cases: Pretrial Matters and Additional Duties

Another example of broadened utilization from 1990 to 2014 was referred pretrial and additional matters in felony cases,[661] dispositions of which increased from 35,576 to 182,230.[662] To illustrate the effects of broadened utili-

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[655] *See supra* Part I.B.1.

[656] Dessem, *supra* note 101, at 811. The Senate Judiciary Committee's Report concluded: "[G]iven the increasingly heavy demands of the civil and criminal dockets and the increasingly high quality of the magistrates themselves, . . . magistrates can and should play an important role, particularly in the pretrial and case management process." LEGISLATIVE HISTORY, *supra* note 10, at 89 (quoting S. REP. NO. 101-416, at 20 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6823).

[657] Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 103, 104 Stat. 5089, 5090–96 (codified at 29 U.S.C. §§ 471–482 (2012)).

[658] *See* Dessem, *supra* note 101, at 811.

[659] Pro & Hnatowski, *supra* note 21, at 1521.

[660] Dessem, *supra* note 101, at 811–41; *see also* Pro & Hnatowski, *supra* note 21, at 1520–22.

[661] Pretrial and additional duties in felony cases include non-case-dispositive motions, reports and recommendations on case-dispositive motions, pretrial conferences, probation and supervised release revocation hearings, evidentiary hearings, felony guilty plea proceedings, and miscellaneous other matters. This category is distinguished from initial proceedings in felony cases, which refer to such proceedings as search warrants, initial appearances, and pretrial detention hearings. *See* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[662] As with the statistics on civil matters, the actual increase in felony duties was not as large as indicated in the statistical data because certain types of matters, including uncontested non-case-dispositive motions and felony guilty plea proceedings, were added to this category for the first time in 2000, causing a large one-year increase in the aggregate number. When

zation, in 1990 there were twenty district courts that reported thirty or fewer felony pretrial matters handled by magistrate judges, but in 2014 that number had decreased to one (the Northern Mariana Islands).[663]

Innovation is a theme in magistrate judge utilization in felony pretrial matters. One of the most significant examples of this is the referral of felony guilty plea proceedings to magistrate judges as an "additional duty" under 28 U.S.C. § 636(b)(3).[664] This was an innovative practice when it began in the 1980s in a few courts and became a routine practice in the southwest border courts and many other districts.[665] The national expansion of referrals of felony guilty pleas is discussed in more detail below. More recently, an innovative duty for magistrate judges that has been adopted in a number of courts is presiding over "reentry court" proceedings. "Reentry courts" themselves are innovative programs in federal district courts, which offer community-based services, such as drug treatment and job skills training, with regularly scheduled appearances before a judge as a beneficial alternative to traditional post-conviction supervised release.[666]

Another innovative use of magistrate judges in felony cases has been supervised release revocation proceedings. In 1992, an amendment to 18 U.S.C. § 3401 allowed district judges to designate a magistrate judge to conduct hearings to modify, revoke, or terminate supervised release, including evidentiary hearings, and to submit proposed findings of fact and recommendations to the district judge.[667] Some courts had referred supervised release proceedings to magistrate judges for reports and recommendations before these amendments. The total number of probation and supervised release revocation proceedings conducted by magistrate judges nationally grew from 1990 to 2014 (from 529 to 2,521).[668]

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the statistics are adjusted to account for this change, the actual increase in referred felony matters from 1990 to 2014 is still estimated to have been quite large, about 280 percent. *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[663] *Compare* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 57, at 281–82 tbl.M-4, *with* JUDICIAL BUSINESS 2014, *supra* note 163.

[664] *See* Baker, *supra* note 610, at 679.

[665] *See infra* Section III.D.1.

[666] *See* MCCABE, *supra* note 609, at 56–57.

[667] *See* 18 U.S.C. § 3401(i) (2012); MCCABE, *supra* note 609, at 55–56.

[668] *See supra* note 663. It is interesting to note that the innovative use that was the subject of a leading case on magistrate judge authority, Peretz v. United States, 501 U.S. 923 (1991), the referral of *voir dire* in felony cases to magistrate judges, has not become a widespread practice, although there are a number of courts that refer felony *voir dire* to magistrate judges occasionally on an ad hoc basis. In 2014, only 316 *voir dires* were conducted by magistrate judges, in civil and criminal cases. JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.M-3A. Magistrate judges conducted these *voir dires* in varying numbers in 40 courts, but conducted none of them in 54 courts that year. *Id.*

c. Initial Proceedings in Criminal Cases

The third main area of expansion in magistrate judge utilization is initial proceedings in criminal cases.[669] This is an example of intensified utilization. There is a long history in the federal courts of assigning felony preliminary duties to subordinate federal officers, going back to the predecessors of magistrate judges, U.S. Commissioners.[670] With some exceptions, all these proceedings are assigned to magistrate judges in all district courts, and therefore, the number of such duties performed by magistrate judges is closely related to the levels of felony filings.[671]

From 1990 to 2014, the number of felony preliminary proceedings conducted by magistrate judges increased 119 percent (from 157,987 to 346,318)[672] which coincided with the 22 percent rise in felony defendant filings during the same period (from 66,341 to 81,226).[673] A major factor in the increase in felony preliminary proceedings conducted by magistrate judges was search warrants, which increased tremendously from 1990 to 2014 (from 20,672 to 61,758).[674]

In summary, the primary causes of the large expansion of magistrate judge utilization over the past twenty-five years appear to be the general broadening of magistrate judge utilization in district courts for various duties in civil and criminal cases and intensified utilization in initial proceedings in criminal cases. The incremental increase in the caseload of the district courts during the relevant period was a contributing factor, but not decisive; however, the rising overall national workload of the courts, as measured by weighted caseload and other factors, was an important factor. The significant number of new magistrate judge positions that were added to the system during the first half of the period led to a greater expansion of utilization than would have occurred without the new positions. Therefore, the national trend from 1990 to 2015 was toward full utilization of magistrate judges, consistent with the judiciary's 1984 endorsement of actions to "encourage the further use of magistrate[judges]."[675]

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669 Initial proceedings include search warrants, arrest warrants, initial appearances, preliminary examinations, arraignments, and pretrial detention hearings. As with civil case filings, the matters performed by magistrate judges in felony cases are always greater than the number of filings of cases. JUDICIAL BUSINESS 2014, *supra* note 163, tbl.S-17.

670 Foschio, *supra* note 610, at ¶¶ [1]–[II.15]; *see* MCCABE, *supra* note 609, at 8–10.

671 Even with initial proceedings, however, local variations exist that lead to differences in utilization from district to district, including variations in types of felony cases, variations in investigative activities, prosecutorial policies determining the frequency of pretrial detention, and variations in preliminary examinations.

672 *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

673 ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 56, at tbl.5.1.

674 *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

675 *See* LEGISLATIVE HISTORY, *supra* note 10.

D. Growth Trends in Utilization of Magistrate Judges for Specific Types of Proceedings

This section will highlight certain growth trends that contributed to the expansion of magistrate judge utilization since 1990 in felony guilty plea proceedings, search warrants, and civil consent cases.

1. Felony Guilty Pleas

The expansion of the authority of magistrate judges to conduct felony guilty plea proceedings with the consent of the parties was analyzed in Part II of this paper.[676] As discussed, the Supreme Court's reasoning in *Peretz v. United States*, decided in 1991, clarified the legal basis for the referrals of these proceedings to magistrate judges.[677] After *Peretz*, felony-guilty-plea proceedings became the largest growth area in magistrate judge utilization and are a good example of broader utilization during the period. From 2000, when the Administrative Office began capturing this data, to 2014, the number of felony guilty plea proceedings conducted by magistrate judges almost tripled, increasing from 10,614 to 29,536.[678]

Historically, most felony guilty plea proceedings conducted by magistrate judges have been in the five district courts along the southwest border—Southern District of California, District of Arizona, District of New Mexico, Western District of Texas, and Southern District of Texas.[679] The referrals are necessary in these courts to help the districts cope with extremely large numbers of immigration and drug cases.[680] The felony guilty pleas in these courts are in the thousands,[681] far more than in other courts. However, since 1990, the practice of referring felony guilty plea proceedings has expanded to many, but not all, district courts throughout the nation. In 2014, magistrate judges conducted felony guilty plea proceedings in widely varying amounts in fifty-seven of ninety-four district courts, not including the southwest border courts.[682]

The numbers of felony guilty plea proceedings conducted by magistrate judges increased 40 percent nationally from 2005 to 2014.[683] From 2005 to 2011, they rose 54 percent, with most of the increase occurring in the southwest

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[676] *See supra* Part II.B.1.

[677] Peretz v. United States, 501 U.S. 923, 932–33 (1991).

[678] *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, *with* JUDICIAL BUSINESS 2014, *supra* note 163.

[679] In 2014, more than one-half of felony guilty plea proceedings conducted by magistrate judges were in the five southwest border courts. *See* JUDICIAL BUSINESS 2014, *supra* note 163.

[680] For example, the Southern District of Texas had 4,744 immigration defendant filings and 1,082 drug defendant filings in 2014. *See id.* at tbl.D-3.

[681] For example, the magistrate judges in the Southern District of Texas conducted 2,911 felony guilty plea proceedings in 2014. *Id.* at tbl.M-4.

[682] *Id.*

[683] *See* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

border courts.[684] The numbers peaked in 2011 at 32,682.[685] Since then, the numbers have fluctuated slightly from year to year.[686]

The practice of referring felony guilty plea proceedings to magistrate judges is emblematic of the flexibility of the magistrate judges system. It is important to remember that, despite its growth nationally, acceptance of the practice by district judges is far from unanimous. To illustrate, thirty-two district courts of various sizes throughout all twelve geographic circuits reported no felony guilty plea proceedings conducted by magistrate judges in 2014.[687] In the courts where these proceedings are referred, it is not uncommon for some of the district judges to refer them either routinely or on an *ad hoc* basis, while other district judges in the court choose not to refer them at all.

2. Search Warrants

One of the largest growth areas in magistrate judge utilization based on statistical data is one that has a relatively low public profile—search warrants, as that category is defined in Administrative Office statistics.[688] In 1990, magistrate judges handled 20,672 search warrants (not an insignificant number then).[689] By 2014, the number of search warrants had risen dramatically to 61,758.[690] Most of the growth occurred after the terrorist attack on September 11, 2001. The number increased 75 percent from 2005 to 2014 (from 35,155 to 61,758) and 42 percent from 2010 to 2014 (from 43,435 to 61,758).[691]

Magistrate judges handle the vast majority of felony preliminary proceedings in the district courts, including search warrants, arrest warrants, criminal complaints, initial appearances, arraignments, and pretrial detention hearings. But while the total number of felony preliminary proceedings conducted by magistrate judges nearly doubled from 1990 to 2014, the number of search warrants alone nearly trebled during that period.[692]

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[684] *See id.* at tbls.M-4 & S-17.

[685] *Id.*

[686] *Id.*

[687] *See id.* at tbl.M-4.

[688] "Search warrants," as the term is used for statistical purposes in the Administrative Office, is a broad generic category that includes not only traditional search warrants issued under FED. R. CRIM. P. 41, but also numerous other orders authorizing searches and seizures based on probable cause or a lesser standard, including pen registers, trap and trace devices, and newer kinds of searches and surveillance, such as mobile tracking devices, cell phone tracking techniques, and disclosure of stored electronic communications. *See* MCCABE, *supra* note 609, at 26–28.

[689] *See* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17.

[690] *See* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[691] *See id.*

[692] *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

Magistrate judges have the authority to issue search warrants under the Federal Magistrates Act[693] and Federal Rule of Criminal Procedure 41(b).[694] United States commissioners had the authority to issue search warrants for specific federal offenses,[695] and magistrate judges inherited that authority through the Federal Magistrates Act, which, among other things, gave magistrate judges "all powers and duties conferred or imposed on United States commissioners."[696]

Several factors have led to the increase in search warrants, the most obvious being the intensified investigations of terrorist activity since September 11, but also the prevalence of electronic and audio communications via the internet and cell phones, continuing advancements in search and surveillance technologies, and the increased use of these technologies in criminal investigations.[697] Federal Rule of Criminal Procedure 41 and other rules and statutes have also required magistrate judges to grapple with multiple new surveillance technologies when deciding whether to issue search warrants. A review of recent cases reveals numerous examples where magistrate judges have considered applications for warrants or other search and surveillance orders involving cell phones, historic cell site information, electronic data under the Stored Communications Act,[698] and other investigative technologies.[699]

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693 *See* 28 U.S.C. § 636(a)(1) (2012).

694 FED. R. CRIM. PROC. 41(b)(1) provides:

> (b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:
>
> (1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district . . . .

695 Foschio, *supra* note 610, at ¶ II.4.

696 28 U.S.C. § 636(a)(1) provides:

> (a) Each United States magistrate judge serving under this chapter shall have . . .
>
> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts . . . .

697 *See* MCCABE, *supra* note 609, at 26–28.

698 *See* 18 U.S.C. §§ 2701–2712 (2012).

699 *See, e.g.*, United States v. Davis, 785 F.3d 498 (11th Cir. 2015); United States v. Thousand, 558 Fed. App'x 666 (7th Cir. 2014); *In re* Application for Tel. Info. Needed for a Criminal Investigation, No. 15-XR-90304-HRL-1(LHK), 2015 WL 4594558 (N.D. Cal. July 29, 2015); United States v. Scully, 108 F. Supp. 3d 59 (E.D.N.Y. 2015); *In re* Application of U.S. for an Order for Authorization to Obtain Location Data Concerning an AT&T Cellular Tel., 102 F. Supp. 3d 884 (N.D. Miss. 2015); *In re* Application for Cell Tower Records Under 18 U.S.C. § 2703(d), 90 F. Supp. 3d 673 (S.D. Tex. 2015); *In re* Application of U.S. for an Order Authorizing Prospective and Continuous Release of Cell Site Location Records, 31 F. Supp. 3d 889 (S.D. Tex. 2014); *In re* Nextel Cellular Tel., No. 14-MJ-8005-DJW, 2014 WL 2898262 (D. Kan. June 26, 2014); *In re* [Redacted]@gmail.com, 62 F. Supp. 3d 1100 (N.D. Cal. 2014); *In re* Application of U.S. for an Order Authorizing Disclosure of Historical Cell Site Info. for Tel. No. [Redacted], 40 F. Supp. 3d 89 (D.D.C. 2014); *In re* Search of Black iPhone 4, 27 F. Supp. 3d 74 (D.D.C. 2014).

3. Civil Consent Cases

The use of magistrate judges to preside in civil cases with the consent of the parties under 28 U.S.C. § 636(c)[700] expanded broadly from 1990 to 2014. Civil consent authority was established in 1979 by amendments to the Federal Magistrates Act.[701] By 1990, magistrate judges were handling civil consent cases in the majority of district courts, but in about a quarter of courts, magistrate judges had none or very few civil consent cases.[702]

By 2014, the number of courts reporting no civil consent cases had decreased to four, and the number reporting five or less had decreased to five.[703] Therefore, the percentage of courts in which magistrate judges were utilized for more than a minimum of civil consent cases expanded from about 75 percent of courts to about 90 percent.[704] The size of the expansion of civil consent authority is amply illustrated by the court with the largest number of civil consent cases disposed of in 2014, which was the Northern District of California with 1,623 civil consent cases.[705]

Several factors have contributed to the expansion of civil consent cases. Perhaps the most significant was the statutory amendment to the Federal Magistrates Act that allowed district judges and magistrate judges, after litigants are given initial notification of the consent option at the time of filing, to "again advise the parties of the availability of the magistrate" judge to exercise consent jurisdiction.[706] After this statutory change in 1990, individual district judges and courts began using various methods for facilitating consent in civil cases, including reminding parties of the consent option at scheduling conferences and educating the bar on civil consent authority in speeches at bar association functions. One of the court-wide methods, which has proved effective in a number of courts, has been the inclusion of magistrate judges on the civil case assignment wheel for direct assignment of civil cases to the magistrate judge as the presiding judge, subject to affirmative consent of the parties at a later date.[707]

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[700] The statute authorizes full-time magistrate judges "upon consent of the parties . . . to 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) (2012).

[701] *See* The Federal Magistrate Act of 1979, Pub. L. No. 96-82, § 2, 93 Stat. 643, 643–45 (codified at 28 U.S.C. § 636(c) (2012)).

[702] In 1990, there were eight courts that reported no civil consent cases and fourteen courts that reported five or fewer civil consent cases. The seventy other courts reported civil consent cases in widely varying numbers throughout the circuits. The highest number reported was 487 in the District of Oregon. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 57, at 285–86 tbl.M-5.

[703] *See* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.M-5.

[704] *See supra* notes 702–03.

[705] *See* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.M-5.

[706] Federal Courts Study Committee Implementation Act, Pub. L. No. 101-650, § 308(a), 104 Stat. 5112 (1990) (codified at 28 U.S.C. § 636(c)(2)); *see also supra* Section I.B.1.b.ii.

[707] *See, e.g.*, Woodward & Penick, *supra* note 610.

Approximately one-third of district courts have implemented a "direct assignment" system in one form or another.[708]

An additional causal factor has been the efforts of courts to encourage consents in social security and prisoner cases, which comprise a sizeable portion of civil consent cases. While it is still a common practice for magistrate judges to handle social security appeals on a report and recommendation basis, dispositions on consent of the parties actually outnumbered reports and recommendations in these cases in 2014.[709]

Parties consent to magistrate judges in various types of cases, from diversity cases such as motor vehicle accidents to more complex commercial litigation, including intellectual property cases. In the vast majority of civil cases in district courts, of course, district judges are the presiding judges, but magistrate judges preside on consent of the parties in a portion of civil cases. Civil consent cases were 6 percent of the total number of terminations of civil cases in district courts in the 12-month period ending September 30, 2013.[710]

E. Questions Relating to Effective Utilization of Magistrate Judges

The advice of the Magistrate Judges Committee to district courts on best practices for the effective and efficient utilization of magistrate judges is proffered in a document originally adopted by the Committee in 1999, entitled *Suggestions for Utilization of Magistrate Judges* (*Suggestions*).[711]

Two practices that are beneficial to courts but that also raise practical questions about the most effective use of magistrate judges are examined below: (1) the practice of referring case-dispositive motions to magistrate judges for reports and recommendations, and (2) the practice in many courts of using magistrate judges as "specialists" in certain types of cases and proceedings.

There is no single model within the judiciary for the utilization of magistrate judges, but the Judicial Conference resolved many years ago to encourage "the full and effective utilization" of magistrate judges by the district courts.[712] The dynamic relationship between the general goal of full and effective utilization and flexibility is adumbrated in the *Long Range Plan for the Federal Courts*, which was adopted by the Judicial Conference in 1995:

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[708] Statistics in possession of authors.

[709] Reports and recommendations in social security appeals increased 39 percent from 2010 to 2014 (from 4,229 to 5,881), *see* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17, but the number of social security appeals disposed of on consent rose 53 percent during that period (from 4,324 to 6,630) (statistics in possession of authors).

[710] *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 56, at tbl.6.6.

[711] *See* Comm. on the Admin. of the Magistrate Judges Sys., Judicial Conference of the U.S., Suggestions for Utilization of Magistrate Judges (rev. ed. 2013) (unpublished document) (on file with authors); *see also* MCCABE, *supra* note 609, at 24–25.

[712] *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Sept. 1982).

> Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy. Individual districts should retain flexibility, consistent with the national goal of effective utilization of all magistrate judge resources, to have magistrate judges perform judicial services most needed in light of local conditions and changing caseloads.[713]

1. Reports and Recommendations

The referral of case-dispositive motions by district judges to magistrate judges for proposed findings of fact and recommendations for disposition (i.e., reports and recommendations) is a statutorily authorized procedure.[714] In effect, it allows district judges to refer such motions that magistrate judges are not authorized by statute to adjudicate with finality absent consent of the parties. After the magistrate judge's submission of a report and recommendation, the parties have fourteen days to file objections for "a de novo determination" by the district judge.[715] From the perspective of considering the most efficient means of disposing of a motion, the report and recommendation procedure inserts extra procedural steps (and an additional judge) into the process of deciding a motion. To that extent, it tends to make the report and recommendation process a less efficient means of ruling on a motion than if the motion were decided by one judge with authority to make a final determination.

The Magistrate Judges Committee advises in its *Suggestions* that referrals of case-dispositive motions for reports and recommendations may involve inefficient duplication of judicial work and therefore should be limited.[716] The Committee acknowledges that real benefits accrue to the court from the reports and recommendations process, such as saving district judges' time to permit them to attend to other Article III duties, but concludes that the most efficient references are those that do not involve *de novo* review by a district judge.[717]

However, the practice of referring case-dispositive matters for reports and recommendations continued much the same in certain types of cases and increased in others during the expansion of utilization after 1990. From 1990 to 2014, the largest segment of reports and recommendations was in prisoner cases (state habeas corpus, federal habeas corpus and prisoner civil rights cases).[718] The number of reports and recommendations in prisoner cases grew by a

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713 JUDICIAL CONFERENCE OF THE U. S., *supra* note 649.

714 28 U.S.C. § 636(b)(1) (2012).

715 *Id.* Section 636(b)(1) provides that "[w]ithin fourteen days after being served with a copy" of the report and recommendation, "any party may serve and file written objections . . . as provided by rules of court." The district judge "shall make a de novo determination of those portions of the [report and recommendation] to which objection is made," and "may accept, reject, or modify, in whole or in part, the [report and recommendation]." *Id.*

716 *See supra* note 711.

717 *See supra* note 711.

718 *See supra* note 632.

relatively small margin from 1990 to 2014 (from 20,583 to 26,140).[719] The second largest segment is general civil cases (i.e., all civil cases other than prisoner cases and social security appeals), but the number of reports and recommendations in these cases more than doubled in the past twenty-five years (from 7,388 to 19,081).[720] The third largest segment of reports and recommendations is in social security appeals. They rose slightly from 1990 to 2014 (from 5,112 to 5,881).[721] Finally, the numbers of reports and recommendations in felony cases varied annually from 1990 to 2014, but declined overall (from 4,169 to 3,200).[722]

As the statistics indicate, the practice of referring case-dispositive matters for reports and recommendations continues to be used in virtually all district courts, with a few exceptions. Courts give valid reasons for local referrals for reports and recommendations.[723] Some courts view reports and recommendations as a "necessary evil" for practical and equitable division of the court's judicial workload among the court's judges, often in the context of a heavy overall caseload. Many district judges find referrals of certain case-dispositive motions, especially if they are to require evidentiary hearings (e.g., motions to suppress evidence in felony cases), as extremely valuable time-savers. A substantial number of magistrate judges and district judges note that referral of case-dispositive motions provide magistrate judges with some of the most professionally satisfying judicial work that they have. Finally, courts report that, typically, objections are not filed to reports and recommendations issued in particular types of cases, such as social security appeals, in which case the delay in adjudication of the motion is shortened to some degree.

Interestingly, courts continue to refer motions to magistrate judges for reports and recommendations at the same time that the numbers of civil consent cases have risen since 1990. This suggests that the courts' continued referrals for reports and recommendations do not imply a lack of confidence in the use of magistrate judges to the fullest extent of their authority. However, in the authors' opinion, it does suggest that the report and recommendation process will continue to be used for some time to come.

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[719] *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[720] *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[721] *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[722] *Compare* JUDICIAL BUSINESS 2000, *supra* note 163, at tbl.S-17, *with* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[723] Although it is not verifiable by citation to any publication available to the public, the content is based on numerous interviews with judges about magistrate judge utilization practices in many district courts, and periodic written reports on individual courts' practices which are made by the authors and other attorneys in the normal course of their work at the Administrative Office.

2. The Specialist-Generalist Question

Carroll Seron, in her excellent 1985 study for the Federal Judicial Center (FJC) on magistrate judge utilization, identified three models of utilization from her empirical research on the district courts: (1) the "specialist," (2) the "team player," and (3) the "additional judge."[724] The specialist role is of interest here. Using a magistrate judge as a specialist refers to the automatic referral of cases to magistrate judges in certain special areas of the civil docket, most commonly social security appeals and prisoner cases, for reports and recommendations or disposition on consent, to allow magistrate judges to build up a special expertise in an area where there is an ongoing, large caseload. The specialist model is also implicated by the practice of referring all pretrial matters of a certain type, such as discovery motions or settlement conferences, to capitalize on the expertise that magistrate judges have developed.[725]

As Carroll Seron's study indicates, there is a long history of courts using magistrate judges in specialist roles.[726] Many courts today refer all or most prisoner cases and social security appeals to magistrate judges for reports and recommendations or disposition on consent.[727] Moreover, in many courts, magistrate judges are heavily relied on to conduct settlement conferences in recognition of their mediation skills.[728]

However, with the establishment of the magistrate judges system, Congress sought to avoid creating a lower-tiered federal judicial position with jurisdiction limited to certain types of litigation.[729] The FCSC, likewise, recognized the need to "safeguard against undermining the institutional supplementary role" of magistrate judges, and against the "unintentional creation of a lower-tiered judicial office with separate and distinct responsibilities."[730] Legislation has been proposed from outside the judiciary from time to time that would carve out certain matters for assignment to magistrate judges. The Judicial Conference has disapproved in principle of legislation that mandates that a district court auto-

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[724] SERON, *supra* note 610, at 35–46, 59–92.

[725] *Id.* at 35.

[726] *See id.*

[727] Magistrate judges issued 26,140 reports and recommendations in prisoner cases in the twelve months ending September 30, 2014. *See* JUDICIAL BUSINESS 2014, *supra* note 163, at tbl.S-17.

[728] Magistrate judges conducted 20,641 settlement conferences in the twelve months ending September 30, 2014. *Id.*

[729] *See* H.R. REP. NO. 96-287, at 11 (1979). As the House Committee on the Judiciary stated in rejecting jurisdictional limitations on civil consent authority in the committee report on H.R. 1046, the Federal Magistrate Act of 1979:

> If a magistrate is competent to handle any case-dispositive jurisdiction, he should be fully competent to handle all case-dispositive jurisdiction. Such a rule preserves the generalist posture of the magistrate, as well as insures that . . . there is [not] an impetus to appoint "specialized" magistrates to handle only narrow types of cases.

Id.

[730] FED. COURTS STUDY COMM., *supra* note 8, at 79.

matically refer particular types of cases to magistrate judges.[731] In addition, the Magistrate Judges Committee advises that courts benefit from using the full array of its magistrate judges' skills rather than assigning them only specified types of cases that consume most of their time.[732] The generalist nature of magistrate judge positions is, moreover, a recruitment asset, helping to attract top-quality candidates with broad substantive knowledge and skills.

Therefore, the question is, how can the longstanding practice in many courts of using magistrate judges as specialists be reconciled with the preferred policy of not limiting magistrate judge jurisdiction to certain types of cases? This "specialist-generalist question" usually arises with respect to courts that have heavy prisoner or social security caseloads and that find it most effective and efficient to use magistrate judges as specialists to adjudicate these cases. On the other hand, some courts with low overall caseloads appear to emphasize the use of magistrate judges as specialists for prisoner cases or social security appeals in lieu of referrals and consents in general civil cases. In a number of courts, the specialist-generalist roles appear to have been reconciled by using magistrate judges in both roles, that is, as specialists for certain narrow types of cases (e.g., state habeas corpus cases) but also as generalists in a range of other types of cases. This continues to be a complicated issue with no easy solutions.

CONCLUSION

It seems certain that the use of magistrate judges in the federal judiciary will continue to evolve and expand in the coming years. Just as district judges have expanded the authority of magistrate judges and courts have explored innovative ways of utilizing magistrate judges in the past twenty-five years, it is likely that these trends will carry over into the future. It is our hope that the analysis of the expansion of magistrate judge authority and utilization described in this paper has increased the readers' overall awareness of these significant federal judges and convinced them of their indispensable role in the federal judiciary.

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[731] *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Mar. 1980).

[732] *See supra* note 711, 723.

The Federal Magistrate Judges Association created a Committee on Diversity to develop practical and innovative ways to promote the appointment of diverse Magistrate Judges of the highest quality and ethics and to promote diversity among judicial clerks and interns within the court system as a whole.

By Hon. Marian Payson

Diversity in the Magistrate Judge System

The Federal Magistrate Judges Association (FMJA), with more than 600 active, retired, and recalled U.S. Magistrate Judges, is dedicated to promoting the efficient administration of justice; to protecting the integrity, dignity, and independence of the federal judiciary; and to educating the public about the important role that Magistrate Judges play in criminal and civil cases that come into our federal court system. To further its mission, the FMJA established the Committee on Diversity in recognition of the important role the FMJA must play in promoting and increasing diversity in the federal judiciary in general and in the Magistrate Judge system in particular. The committee comprises approximately a dozen Magistrate Judges who serve on different courts throughout the country and represent diverse backgrounds and experiences.[1] It meets telephonically on a monthly basis and in person at the FMJA's annual meeting to discuss and adopt concrete measures to further its mission of increasing diversity in the Magistrate Judge system.

For fiscal year 2012, 577 Magistrate Judges served in active and recalled positions. Of those, 471 (82 percent) were Caucasian; 39 (7 percent) were African-American; 27 (5 percent) were Hispanic; 13 (2 percent) were Asian; 1 was Native American; and 1 was a Pacific Islander. 401 Magistrate Judges (69 percent) were male, and 176 (31 percent) were women.

The FMJA's Commitment to Diversity and the Diversity Committee's Charge

The FMJA is committed to the goal of encouraging and facilitating the appointment of Magistrate Judges who reflect the diverse populations represented throughout the nation's communities. In the FMJA's view, diverse appointments are essential to the success of, and respect accorded, the Magistrate Judge system. Such appointments reflect the understanding that the judiciary should represent, as much as possible, the people who appear before them. The perception of inclusion requires not only that judges have diverse areas of practice or legal expertise, but also that they have varied personal backgrounds and experiences in making the difficult and sensitive decisions required of them.

The FMJA has charged the diversity committee with identifying and implementing practical measures designed to promote, recruit, and develop Magistrate Judges from all walks of life. Those measures, some of which are described below, focus on educating law students, members of the legal profession, and the community at large about the work of Magistrate Judges and the process of appointment; identifying and publicizing Magistrate Judge vacancies; and working, often in cooperation with bar associations and outside organizations, to identify and promote law students and young attorneys from diverse backgrounds to work as judicial interns, law clerks, and staff attorneys.

The Diversity Committee's Work to Identify and Publicize Magistrate Judge Openings

Recognizing the importance of making the Magistrate Judge appointment process as transparent and public as possible, the committee works to identify and publicize vacancies and openings. At its monthly meetings, a list of identified vacancies is circulated to allow committee members and other Magistrate Judges the opportunity to ensure that members of the relevant legal community learn about the vacancy in sufficient time to apply. The committee believes that better publicity about openings will attract a broader group of qualified applicants, which, in turn, will enhance the strength, experience, and wisdom of the bench.

One method of doing so is to publicize the openings on the FMJA's website. That compilation is easily accessed by visiting the homepage of the website and clicking the link for "Magistrate Judge Vacancies." Any member of the public may visit the website at www.fmja.org and access the listings.

Another means of promoting awareness of particular Magistrate Judge openings is to publicize them to all appropriate bar associations, including diversity-based associations, in the communities where the openings exist. The committee has worked to identify such associations and to develop relationships with them through the committee or through individual Magistrate Judges. Assisting to ensure that those associations know of vacancies so that their members may be notified in adequate time to submit an application is part of the committee's work to promote diversity.

The Committee's Diversity Presentations

For the past several years, the committee has planned and presented diversity programs twice a year, which have been held in and for the communities in which the judges' semi-annual educational seminars have been conducted. The programs have consisted of panel presentations—the focus of which has been the Magistrate Judge system, the work performed by Magistrate Judges, and the importance of diversity in the judiciary—followed by social receptions. To date, diversity programs have been held in Atlanta, Miami, Denver, New Orleans, and San Diego, and programs are planned for San Antonio and Philadelphia in 2014. The committee is dedicated to continuing this important work.

The purpose of the programs is to further educate members of the legal profession, individually and as bar associations, and the community at large, about the work that Magistrate Judges do, the process by which Magistrate Judges are appointed, and the diverse backgrounds and experiences represented by our Magistrate Judge colleagues. The committee believes that greater diversity becomes a more realistic and achievable goal when the community understands and appreciates what Magistrate Judges do, the paths that lawyers from diverse backgrounds have traveled to become judges, and how the federal judiciary is enhanced by a diverse population of judges.

The committee works closely with local bar associations, particularly diversity-based associations, to plan and present the programs. Some are sponsored by local bar associations, and some program moderators are bar association presidents or representatives. With the help of local bar associations, the committee works hard to publicize the programs and encourage attendance by a broad and diverse group of attorneys and law students. All of the programs conclude with a reception that allows continued dialogue between panel presenters and attendees.

The panels generally consist of three to five Magistrate Judges from different courts who represent different backgrounds and experiences, as well as a member of a merit selection committee and, as scheduling permits, the chief of the Fair Employment Practices Office of the Administrative Office of the U.S. Courts. Typically, each judge speaks about his or her background and path to the bench and reflects on the experiences and influences that each believes were significant to his or her career and appointment. The merit selection committee representative shares information about the appointment process and perspectives on the qualities and characteristics important in recommending Magistrate Judge candidates to the Chief Judge of the district where the vacancy exists. The fair employment practices chief provides demographic information about federal judges, and Magistrate Judges in particular, and explains and promotes the partnership with the Just the Beginning Foundation (discussed in the next section). Following the panelists' presentations, the audience is invited to ask questions, generally prompting a lively and wide-ranging discussion.

Judicial panelists have included distinguished Magistrate Judges from across the country, including one who has served in both the Eastern District of Michigan and the Middle District of Alabama. Many have been trailblazers; for example, program attendees have heard from the first female African-American federal judge in Pennsylvania, the first Indian-American federal judge in California, the first African-American judge in the Northern District of New York, and a recipient of the National Hispanic Bar Association's Medal of Merit. Some have served for decades, including as Chief Magistrate Judge for their district, while others were recently appointed. Their professional backgrounds are as varied as the location of their courthouses—including former capital defenders, labor and employment litigators, assistant attorney generals, and corporate counsel.

Programs to Promote Diversity Among Judicial Interns and Clerks

The FMJA and its diversity committee believe that increasing diversity among judicial interns and clerks serves two important goals. First, it promotes the goal of ensuring that all facets of the judiciary, not just judges, are representative of the community the court serves. Second, increasing diversity among law students interested in the work of the judiciary is likely to increase the pool of interested and qualified candidates for the federal bench.

One national program that promotes those goals is the partnership between the Just the Beginning Foundation (JTBF) and the Judicial Resources Committee of the Judicial Conference of the United States. JTBF was founded in 1992 as a not-for-profit organization of judges, lawyers, and other citizens dedicated to developing educational programs to inspire and foster careers in the law among students of color and from other underrepresented groups, from middle school through law school. Several members of the federal judiciary serve on the JTBF's judicial advisory committee.

JTBF works with members of the federal judiciary, including Magistrate Judges, to identify qualified minority, underrepresented, or economically disadvantaged law students and to match them with judges interested in hiring them as interns. The program, now in its fourth year, has been very successful and continues to grow. In 2011, JTBF assisted in placing 42 law students in internships with the federal judiciary. In 2012, 62 students worked as federal judicial

interns; 24 of them worked with 20 Magistrate Judges. JTBF also collaborates with a panel of federal judges to select qualified law students to participate in a round of interviewing for full-time clerkship positions.

Many individual federal courts throughout the country also have their own programs designed to increase awareness of the work of the federal judiciary among students in their community. For example, the Eastern District of Wisconsin offers two programs in cooperation with the Eastern District of Wisconsin Bar Association. The first—Kids, Courts, and Citizenship—is a program designed to expose Milwaukee school children to federal court and careers in law. Students spend a day touring the courthouse, observing hearings, attending and participating in naturalization ceremonies, acting as mock jurors, and meeting judges and attorneys. The second—the Law Day Civics Bowl—is a competition for high school students held in the ceremonial courtroom on Law Day. Students compete to answer questions from the civics test that is administered by U.S. Citizenship and Immigration Services.

As another example, in the Northern District of Georgia, Magistrate Judges participate in several programs designed to promote knowledge of and interest in the judiciary among students. One judge participates in a program sponsored by the Atlanta Bar Association that pairs high school students with judges and other law professionals for a six-week summer internship program. As part of the Journey to Judge program, federal and state judges travel to local high schools to share with students their journey to the bench, including the struggles they may have encountered, in the hopes of inspiring those students to consider careers in the law. Federal judges in the Northern District of Georgia are also involved in a third-grade reading program that pairs judges, lawyers, and law students with inner-city elementary students for reading tutoring. Recognizing the correlation between illiteracy and incarceration, the program's participants strive not only to improve reading skills, but to foster a love for reading and a passion for learning.

The Eastern District of California, Yosemite Division, offers several outreach programs targeted to students living in rural areas served by the court. The court, in cooperation with the Federal Bar Association, sponsors an annual Law Day Yosemite, during which approximately 150 students from rural areas come to Yosemite Valley to celebrate the importance of the rule of law and equal rights in our country. The court also sponsors mock trial demonstrations and programs specifically designed for students.

The diversity committee is currently in the process of compiling a list of these types of programs to be circulated to other judges and courts interested in implementing similar programs.

Diversity in the FMJA

The FMJA is, of course, committed to full and active participation by as many Magistrate Judges as possible in its own activities, committee work, and leadership. Many committees are chaired by judges of diverse backgrounds, and the association itself has had two presidents who are distinguished African-American judges: U.S. Magistrate Judges Charles B. Day and Karen Wells Roby.

Former Past President Charles B. Day

Judge Charles B. Day, a U.S. Magistrate Judge for the District of Maryland since 1997, served as president of the FMJA from 2007 to 2008. He is the first African-American Magistrate Judge for the District of Maryland and the second person of color to serve in this position in the Fourth Circuit Court of Appeals.

In addition to serving as a president of the FMJA, Judge Day has held many positions of leadership. He is chair-elect of the National Conference of Federal Trial Judges for the American Bar Association (ABA). He is a former co-chair of the ABA's Race and Racism in the Criminal Justice System Committee and has served on the ABA Criminal Justice Section Council. He has chaired the Maryland State Bar Association's Leadership Academy and the Alan J. Goldstein Inns of Court and was vice chair of the Maryland State Court's Commission on Racial and Ethnic Fairness in the Judicial Process.

The FMJA and its diversity committee believe that increasing diversity among judicial interns and clerks will ensure that all facets of the judiciary, not just judges, are representative of the community the court serves as well as increase the pool of interested and qualified candidates for the federal bench.

Judge Day is an active member of many professional organizations and has served on the board of directors of various civic, charitable, and religious organizations, including Habitat for Humanity, Montgomery County Chapter. Judge Day has been on several missionary trips to Romania to build churches, to Mexico and West Virginia to help build several homes for the needy, to Kenya to build walls around a facility for refugee women, and he travels yearly to the Dominican Republic as part of a medical/construction faith-based mission effort.

Immediate Past President Karen Wells Roby

The FMJA's Immediate Past President Judge Karen Wells Roby has served as a U.S. Magistrate Judge for the Eastern District of Louisiana for the past 15 years. In addition to her work with the FMJA, she is heavily involved with the ABA. She currently serves as co-chair of its Litigation Section's Diversity and Inclusion Committee and formerly served as co-chair of the section's Alternative Dispute Resolution Committee.

Judge Roby is passionate about educating law students and young people about civic education, careers in the law, and the judiciary. She is the coordinating judge for JTBF's Louisiana State Bar Association's High School Intern Program, a three-week intensive simulation law school program held each summer in New Orleans for high school students interested in the law. Judge Roby has served as coordinating judge for her district's Open Doors to Federal Court Program, a day-long civics education program held in the dis-

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Occasionally, Judge Carter is called upon to investigate allegations of sanctionable conduct such as spoliation of evidence. Fortunately, such issues arise infrequently.

Some civil matters handled by the Magistrate Judge require significant judicial resources. Currently, Judge Carter is assigned to a large multidistrict litigation (MDL) matter involving antitrust claims against several pharmaceutical companies. The number of motions and the complexity of some of the discovery issues means a disproportionate amount of time must be poured into the case. It is not unusual that a small percentage of cases will consume the largest percentage of judicial resources.

Given their heavy criminal and civil dockets, the District Judges also refer certain civil dispositive matters to the Magistrate Judges in Chattanooga for a report and recommendation. These matters include Social Security disability appeals, ERISA disability appeals, and motions for default judgment.

Judge Carter also has his own docket of consent cases, cases over which he presides to entry of judgment with consent of all the parties. Consent cases cover the full spectrum from simple personal injury cases to more complicated actions brought under federal statutes.

As you can see, Judge Carter performs many varied tasks. His duties are largely determined by the needs of the District Judges. Working as a team, the District Judges and Magistrate Judges timely and efficiently administer justice in the Chattanooga division. ⊙

Katharine McCallie Gardner graduated summa cum laude from Indiana University School of Law at Indianapolis in 1991. She clerked for Hon. H. Ted Milburn on the Sixth Circuit for two years upon graduation and has been Judge Carter's career law clerk since his appointment to the bench in 1999. She is a past president of the Chattanooga FBA Chapter.

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trict court, and has served as the former president of the Louisiana Center for Civic Education's board of directors. In April 2013, Judge Roby served on a panel of national leaders, including retired U.S. Supreme Court Justice Sandra Day O'Connor, on the topic of civil education. She teaches a semester-long trial advocacy skills class at Tulane University Law School.

In August 2012, as a faculty member of Lawyers/Judges Without Borders, Judge Roby traveled to Nairobi, Kenya, with a group of federal judges and attorneys to bring U.S. best practices in the areas of case management and trial procedures to Kenyan magistrates, police prosecutors, and criminal defense counsel.

Conclusion

The work of the FMJA's Committee on Diversity provides an important means of promoting the long-term success of and confidence in the federal judiciary and, particularly, the Magistrate Judge system. The FMJA is committed to continuing to develop practical and innovative ways to promote the appointment of diverse Magistrate Judges of the highest quality and ethics and the full and equal participation of persons of diverse backgrounds in the court system as a whole. ⊙

Marian W. Payson has served as a U.S. Magistrate Judge for the Western District of New York since April 14, 2003. She co-chairs the Federal Magistrate Judges Association's Diversity Committee with Linda T. Walker, U.S. Magistrate Judge for the Northern District of Georgia. Judge Payson is active in various bar associations, having served as a past president of the Greater Rochester Association for Women Attorneys and a Trustee of the Monroe County Bar Association.

Endnote

[1]The FMJA diversity committee members are: Hon. Linda T. Walker (co-chair) (N.D. Ga.); Hon. Marian W. Payson (co-chair) (W.D.N.Y.); Hon. Linda Anderson (S.D. Miss.); Hon. Sonja F. Bivins (S.D. Ala.); Hon. Leo I. Brisbois (D. Minn.); Hon. Nancy Joseph (E.D. Wis.); Hon. Michael J. Newman (S.D. Ohio); Hon. Michael J. Seng (E.D. Cal.); Hon. Craig B. Shaffer (D. Colo.); Hon. Edwin G. Torres (S.D. Fla.); and Hon. Carol Sandra Moore Wells (E.D. Pa.).

by Hon. Michael R. Merz

Habeas Corpus and Magistrate Judges

Two strands of new law in the 1960s led to the creation of the office of U.S. Magistrate Judge. In 1964, Congress passed the Civil Rights Act, prohibiting most importantly racial discrimination in employment. No jury trial right was provided for these cases until 1991. Already, in 1961, the Supreme Court had revivified the Civil Rights Act of 1871[1] by recognizing a private right of action for violations of constitutional rights in *Monroe v. Pape.*[2] Both of these changes added enormously to district court dockets.

The second strand was the Warren Court revolution in criminal procedure. In 1963, *Miranda v. Arizona,*[3] on custodial interrogations, was still three years in the future, but *Mapp v. Ohio,*[4] incorporating the exclusionary rule into the Fourteenth Amendment, and *Gideon v. Wainwright,*[5] providing appointed counsel for all felony defendants, were already on the books. The Supreme Court could not directly enforce its new law and needed an instrument the district courts could use. Modern *habeas corpus* was thus born on March 18, 1963, when *Fay v. Noia,*[6] *Townsend v. Sain,*[7] and *Sanders v. United States*[8] were handed down. As a result of those decisions, a convicted state criminal defendant could often obtain a fresh evidentiary hearing in federal court, preserve issues for federal decision absent a "deliberate bypass" of a state procedure, and file repeatedly in the absence of any *res judicata* effect. Unsurprisingly, the *habeas* filings in district courts skyrocketed.

To provide assistance to District Judges in handling all these new cases without creating more Article III judgeships, the Congress in 1968 passed the Magistrates Act.[9] In 1976, to remove doubts about Magistrate Judge authority in prisoner cases, Congress amended 28 U.S.C. § 636(b)(1)(B) to confirm that authority for both *habeas corpus* and conditions of confinement cases.

Habeas corpus and prisoner conditions of confinement cases form a large part of the duties of many Magistrate Judges. In many districts, including the Southern District of Ohio where I have sat for almost 30 years, *habeas corpus* cases are automatically assigned to a Magistrate Judge upon filing.

Habeas corpus is, of course, an ancient remedy. In *Habeas Corpus from England to Empire,* Paul Halliday describes in rich detail the use of the writ in cases from 1500 to 1800. But the metes and bounds of the contemporary writ have been picked out in great detail by the tension between the great liberalizing sweep of the 1963 decisions and the efforts of later justices—and of Congress in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—to be more deferential to state court administration of criminal law.

Since 1976, *habeas corpus* practice has been guided by the Rules Governing § 2254 Cases. The *habeas* rules have a much more open texture than, say, the civil rules, and *habeas* practice suffers from a lack of coherent theory. Nonetheless, the rules provide a useful outline.

A *habeas* case begins with the filing of a petition in which a prisoner identifies the conviction under which he is confined and his claims as to why his imprisonment is unconstitutional. The petition is required to give some data on the procedural history of the case—court of conviction, history of any appeals or collateral attacks, and so forth. Because of expanded electronic reporting of appellate decisions, a Magistrate Judge can sometimes determine at the initial pleading stage that the case is without merit by consulting directly what the state court held. For example, if the state courts have decided all of a petitioner's claims on the merits, those decisions are entitled to federal court deference unless they are "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[10]

If the case cannot be decided on the basis of the petition and any reported state appellate decisions, the Magistrate Judge must order the state attorney general to "show cause" for the imprisonment by filing an answer (formerly called a return of writ) which raises any affirmative defenses to the petition and provides the court with the state court record. The petitioner is then given an opportunity to file a reply (formerly called a traverse) to the answer.

When the pleadings are complete, the case is usually ripe for decision. The *habeas* rules allow for discovery upon a showing of good cause. The record filed by the warden can be expanded in appropriate circumstances. The *habeas* rules also provide for an evidentiary hearing, but the scope for these hearings is much reduced from its 1963 scope by the AEDPA and the Supreme Court's decision in *Cullen v. Pinholster.*[11]

As Justice Robert H. Jackson foresaw in *Brown v. Allen,*[12] granting relief is rare, probably because most state trial and appellate judges now serving absorbed the Warren Court revolution as part of

Hon. Michael R. Merz graduated from Harvard College (1967) and the Harvard Law School (1970). He has been a judge since 1977 and is the 2013 recipient of the American Bar Association's Robert Yegge Award for Outstanding Contribution to Judicial Administration. Eschewing the law, his sons choreograph classical ballet and design cellphones.

their law school education. If the district court denies relief, it must also decide if the petitioner should be allowed to appeal; certificates of appealability are granted only if the district court believes its conclusions are "debatable among reasonable jurists."

The process just outlined describes how noncapital *habeas* cases, which form the vast bulk of the *habeas corpus* work of the district courts, are decided. In those states with active death penalty prosecutions, however, capital convictions are inevitably subjected to *habeas* review. Assignment of these cases to Magistrate Judges is rare, but I have had the privilege of managing more than 50 of them since 1995. (At present, the Southern District of Ohio has the second-largest capital *habeas* docket in the country.)

For these cases, Congress has provided funding for two attorneys for each petitioner, in contrast to the *pro se* status of most noncapital petitioners. Often the cases are staffed by public defenders committed to abolishing the death penalty. Pleadings run to hundreds of pages each and state court records to thousands of pages. Almost always there are claims of ineffective assistance of counsel in the state courts, prosecutorial misconduct, sometimes juror misconduct, and always trial court error. Claims are often imaginative because a claim not made in the district court will never become "clearly established" Supreme Court precedent. Analysis is deeply complicated by the presence of a separate sentencing or mitigation stage of the trial. Virtually every appeal draws a published circuit court opinion, and the Supreme Court hears more capital cases than any other type. (In almost 37 years on the bench, I have had only one case, a capital *habeas* case, reach the Court. In *Bobby v. Bies*,[13] they unanimously rejected my decision on a mental disability issue.)

Habeas corpus has a venerable history, protects liberty at its most fundamental level, and provides practitioners with an intricate body of law to master and, if they are fortunate, to improve. Magistrate Judges are privileged to be assigned this work which, for me, far exceeds in its fascination issuance of search warrants or hearing motions to compel discovery. ⊙

Endnotes

[1]42 U.S.C. § 1983.
[2]*Monroe v. Pape*, 365 U.S. 167 (1961).
[3]*Miranda v. Arizona*, 384 U.S. 436 (1966).
[4]*Mapp v. Ohio*, 367 U.S. 643 (1961).
[5]*Gideon v. Wainwright*, 372 U.S. 335 (1963).
[6]*Fay v. Noia*, 372 U.S. 391 (1963).
[7]*Townsend v. Sain,* 372 U.S. 293 (1963).
[8]*Sanders v. United States,* 373 U.S. 1 (1963).
[9]28 U.S.C. § 631, *et seq.*
[10]28 U.S.C. § 2254(d)(2).
[11]*Cullen v. Pinholster,* 563 U.S. ___, 131 S. Ct. 1388 (2011).
[12]*Brown v. Allen*, 344 U.S. 443 (1953).
[13]*Bobby v. Bies*, 556 U.S. 825 (2009).

by Hon. Arthur J. Boylan

A Magistrate Judge Reflects on Mediating the National Football League Lockout

In early April 2011, the Hon. Susan Richard Nelson, U.S. District Judge for the District of Minnesota, ordered the parties in the case of *Tom Brady v. National Football League* to enter court-supervised mediation.

Plaintiffs' class action complaint alleged violations of federal antitrust laws and, among other remedies, sought injunctive relief against the National Football League and each of its teams. Plaintiffs' action was commenced following a league-wide lockout of players by owners of each of the NFL's teams. The case immediately drew nationwide media attention.

Judge Nelson had been appointed to the Article III bench in December 2010. While she had only served as a District Court Judge for a few months, Susan Nelson was no stranger to big cases. Prior to her appointment, she had served as a Magistrate Judge for more than 10 years. Those years saw plenty of complex cases on her docket. In private practice as well, she had seen her share of such disputes. Perhaps the most notable was a landmark case brought against big tobacco. In that case, Judge Nelson and her team of plaintiffs' counsel, while in the middle of the jury trial, were successful in reaching settlement in the multimillion dollar litigation that they had brought on behalf of the State of Minnesota.

But it was during her tenure as a Magistrate Judge that she truly earned a well-deserved reputation as someone who could settle cases. Her prowess at achieving settlements, even in the most difficult cases, was due in no small part to her absolute refusal to consider any controversy as one that was impossible to settle. So, when *Brady v. NFL* hit her desk, one of the first things the parties learned was that Judge Nelson expected each side to engage in settlement talks and to seriously approach the court-ordered mediation in good faith and with a commitment to making it work.

The commitment to engage in settlement talks did not come easy. Just a few weeks before, the league and players had spent 17 long days under the supervision of the director and deputy director of the Federal Mediation and Conciliation Service. Their attempt to resolve their differences failed miserably. The lockout and lawsuit quickly followed. Additionally, neither side in this dispute could be described as a stranger to high-stakes litigation. Both sides came before the court with an army of highly paid and skillful litigation counsel. They were lawyers who were hired to litigate, not necessarily to settle. And, now, the Judge was telling both sides that despite their earlier failures, she was insisting that they return to the negotiation table.

The long hours of failed talks in Washington, D.C., had left both sides bitter and suspicious of the other sides' motives. Distrust and perhaps a bit of dislike was evident in the parties' pleadings and arguments brought before the court. Neither side was anxious to return to the settlement table. Nor did they share the confidence of Judge Nelson that mediation was the appropriate course to follow.

Despite their doubts, both sides recognized the court's resolve. Accordingly, the parties advanced names of nationally recognized mediators for appointment. The qualifications of the suggested nominees were impressive. Each had national reputations in the field. But Judge Nelson had another thing in mind entirely.

Before her Article III appointment, Judge Nelson had been the Magistrate Judge assigned to a different case involving the NFL. Upon her elevation to Article III status, the assignment of that case fell to me. Through that assignment, I had become familiar with at least some of the attorneys representing the league. In Judge Nelson's opinion, that familiarity gave me a head start in conducting the mediation she was about to order. More importantly, beyond that familiarity, there was confidence that I shared with Judge Nelson—forged during our years together serving as Magistrate Judges and confirmed in her work as a District Judge—that the District of Minnesota's appointment of Magistrate Judges to serve as alternative dispute resolution neutrals, pursuant to the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §653, had resulted in the creation of a roster of mediators whose experience was very likely unmatched in the private sector. Appointing an experienced Magistrate Judge who had mediated literally thousands of cases would, in Judge Nelson's view, serve the parties well.

By April 2011, my experience in litigation stretched over nearly 35 years. Sitting as Minnesota's Chief U.S. Magistrate Judge, I had served on that bench for close to 15 years. Before federal service, I had been a state District Court Judge, serving on Minnesota's general jurisdiction trial court for more than 10 years. I also had the experience of being in private practice as a litigator in a small town law office. That kind of practice gave me plenty of opportunities to represent both plaintiffs and defendants. Being in a small town firm allowed me to benefit from the wide experience lawyers from smaller practices are able to gain.

Experience as a private litigator, a general jurisdiction trial

Hon. Arthur J. Boylan retired from the federal bench in January 2014 after having served as the Chief Magistrate Judge for the U.S. District Court for the District of Minnesota. Since retiring from the bench, he has opened a law firm, limiting his practice to alternative dispute resolution, mediation, and arbitration. His office is in Minneapolis, and he can be reached at www.arthurjboylanadr.com.

judge, and a federal Magistrate Judge serves one well only if you're willing to do your homework in each case. A successful mediator, just as a successful trial judge, must be a quick study. To be effective, a judge or mediator must have a command of the facts, law, and issues that each case brings. In the NFL mediation, my study began by following Judge Nelson's suggestion that I meet with each party for one full day prior to the time the joint sessions would begin.

Know Your Judge

Judge Susan Nelson was instrumental in the parties being able to achieve successful resolution. She insisted the parties engage in mediation. She supported my role as a mediator. Most importantly, while the mediation was ongoing, Judge Nelson attended to addressing the parties' dispositive motions. She did so in a firm and decisive manner. Also, while I was assigned the mediator's role, Magistrate Judge Jeanne Graham attended to adjudicating the parties' nondispositive motions.

Prior to that initial meeting and the joint sessions that followed, each party submitted an *ex parte* confidential letter concerning their settlement posture. Like all good lawyers, each side made sure that I had an opportunity to learn about the facts and law as part of their presentation. Each party appeared before me as scheduled and was confident, given our initial meeting, that I was informed on the facts, the law, and the host of complicated issues that needed to be resolved.

The scope of the mediation, necessarily, focused not only on the issues raised in the class-action complaint, but also on the full scope of the future employment relationship between the players and the NFL member clubs and the process by which any agreements could be confirmed and ratified.

The mediation sessions began on April 12, 2011, and ended with a successful resolution of the lockout and a full complement of NFL games being played that fall. The final agreement between the parties resulted in a 10-year collective bargaining agreement on Aug. 4, 2011. That document runs more than 300 pages in length. The scope of the agreement covers a variety of topics, including NFL player contracts, the college draft, rookie compensation, veteran free agency, and salary caps.

Despite the complexity of the final agreement and length of time it took to reach that agreement, the process was not entirely different from other mediations that I've seen. There are some common lessons.

Judge Nelson's and Judge Graham's hard work in ensuring that the parties' litigation proceeded in an orderly manner was an important component in the eventual successful resolution. I've often heard it said that the best tool to reaching a successful settlement is to have a firm trial date. Judge Nelson's and Judge Graham's willingness to resolve the parties' disputes in a timely manner gave notice that in the absence of the parties reaching an agreement, decisions would be made for them. Uncertainty on how a judge may decide an issue, together with the knowledge that the judge is one who is diligent in arriving at and announcing decisions, are important tools in a successful mediation.

Do Your Homework

A mediator has to be a quick study. Successful mediations are arrived at when the parties are confident that the neutral party has a good understanding of the facts, law, and issues. In addition, the mediator must be a good listener. A mediator has to be aware of the motivations driving the parties' positions. Knowing each party's needs and how those can be fulfilled by successfully resolving the case are important ingredients to successful settlements.

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settlement conference with the judge who will consider the merits of the case for fear that if the case does not settle, something that the party says or does at the conference may negatively affect the judge's opinion about that party or about that party's litigation position. A settlement conference with a Magistrate Judge who will not be deciding the case eliminates that concern. As is often said about a trip to Las Vegas, "What happens at the conference stays at the conference." So, if the case does not settle, the parties can be secure in the knowledge that nothing will be said to the District Judge about what anyone said at the conference that "poisons the well" in further proceedings with the District Judge. That allows the parties to be more open with the Magistrate Judge during the mediation and increases the chances that the Magistrate Judge can help the parties reach a reasonable settlement.

Because there are fewer trials and more settlements, courts that develop a settlement database are also uniquely positioned to assist the parties in reaching a reasonable settlement. In our court, the Magistrate Judges created and maintain a settlement database of cases that appeared with frequency, such as employment discrimination, civil rights, personal injury, and consumer credit. By tracking the major characteristics of a settlement, including the settlement terms, the plaintiff's initial demand, the defendant's initial offer, the plaintiff's itemization of damages, the stage of the litigation, and brief comments from the judge, we were able to help parties determine whether the settlement proposals being made were consistent with other similar cases. Because of the large volume of cases, we were able to provide useful guidance to the parties on the appropriate settlement range.

Magistrate Judges are also in a good position to settle *pro se* lawsuits. *Pro se* cases in federal court comprise a significant percentage of the court's caseload. These cases can be difficult to resolve without adjudication because *pro se* litigants often do not comprehend the litigation process and may have unrealistic expectations about the likely outcome and monetary value of their case. An experienced Magistrate Judge can facilitate a settlement by explaining the litigation process and reasonable settlement terms.

In our court, we also developed a settlement assistance program, in which volunteer lawyers were appointed to represent *pro se* litigants for the sole purpose of representing them in a settlement conference. This program has been successful in assisting *pro se* litigants, in providing defense counsel with an attorney with whom to negotiate, and in enabling the Magistrate Judge to preside at the settlement conference without the *pro se* looking to the judge to be "his" attorney in the process. This court-based program has further reduced the amount of motions and trials in *pro se* cases.

Magistrate Judge Settlement Conferences Help Put a Positive Face on the Judiciary

Many clients are frustrated by our court system because they never have their day in court. Too often, their cases are terminated without the client even seeing a judge or appearing before a jury. Clients are frustrated by the expense and delay that often accompanies litigation, as well as its impersonal nature.

A Magistrate Judge–led settlement conference can make going to court a positive experience for clients. In the settlement conference, parties can work with their lawyers and the judge to settle their case. Clients have control over their decision to settle; they can, save money, and obtain certainty and closure regarding their dispute. Clients can walk out with a positive feeling toward our legal system if their case is settled. They also feel they have had their day in court because they actively participate in the process. At the conclusion of a successful settlement conference, I oftentimes request the parties to mark their calendars for a year from the settlement and to write me a letter if they regretted settling the case. In my years on the bench, I never received a letter from a client expressing regret that he or she settled.

Conclusion

Courts should be encouraged to use Magistrate Judges to conduct settlement conferences. This is an effective use of judicial resources that can create tremendous benefits for the parties, their counsel, and the court. Magistrate Judges are in a unique position to determine the proper timing of a settlement conference. They can help parties to control their own destiny, save money and bring about a judicial system that is responsive to parties' needs in a day and age of few trials. ⊙

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Patience

We spent 25 full days in settlement talks. If you add the 17 days that the parties spent before the Federal Mediation and Conciliation Service, one quickly sees that resolution in this particular matter was not quickly achieved. That is true in many cases, both big and small. A mediator has to be willing to stick with it until the matter is finally resolved. Being willing to do so is a strong signal to the parties that they, too, should continue to talk with a view toward reaching a resolution. Never be satisfied with simply saying, "at least we narrowed the gap." A mediator's job is only successful if he or she is able to bring full resolution to the dispute leading to a stipulation of dismissal. Only if the court is allowed to focus on all of the other important matters on the docket is there "success."

Have Decision-makers at the Table

Amazing things can happen when opposing sides to a dispute come face to face. Often times, despite the ill-will that litigation engenders, the parties find that when they have the ability to talk to each other, they have much in common. In the case of *Brady v. National Football League*, it was a shared love and respect for the game. Those sentiments were expressed both during official negotiation sessions and during the "after hours" socializing that was part of the process. That mutual responsibility that both sides felt of preserving the game of football helped drive an eventual bargain. It allowed both sides to see the importance of reaching an agreement, even if that meant yielding on significant points in contention. ⊙

INDIVIDUAL PRACTICES IN CIVIL CASES[1]

KATHARINE H. PARKER, UNITED STATES MAGISTRATE JUDGE

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I. Communications with Chambers.

a. **Letters.** In general, communications with the Court should be by letter.

Represented Parties. Letters to be filed under seal, *ex parte* settlement letters, proposed case management plans, reports on conferences pursuant to Federal Rule of Civil Procedure 26(f) or letters otherwise containing sensitive or confidential information should be emailed to Chambers as a .pdf (but not .pdf/A) attachment to Parker_NYSDChambers@nysd.uscourts.gov. E-mails shall state in the subject line: (1) the caption of the case, including the lead party names and docket number; and (2) a brief description of the content of the communication. Parties shall not include substantive communications in the body of the e-mail; such communications shall be included only in the attached letter. Confidential information should be clearly indicated as such in the letter. All other categories of letters must be filed electronically on ECF. In *pro se* cases, counsel must file the proposed case management plan via ECF. Counsel must serve the *pro se* party with a paper copy of any document that is filed electronically or emailed and must separately file a proof of service with the Court.

Pro Se Parties. By Standing Order, a *pro se* party must mail all communications with the Court to the Pro Se Intake Unit located at 500 Pearl Street, Room 200, New York, NY 10007. A *pro se* party may not call Chambers or send any document or filing directly to Chambers. Submissions requiring immediate attention should be hand-delivered to the Pro Se Intake Unit. Unless the Court orders otherwise and except for the Proposed Case Management Plan, all communications with the Court will be docketed upon receipt; such docketing shall constitute service on any user of the ECF system. If any other party is not a user of the ECF system (*e.g.,* if there is another *pro se* party in the case), a *pro se* party must send copies of any filing to the party and include proof of service

[1] **Requests for reasonable accommodations on account of disability with respect to the Court's rules or in connection with any proceeding before Judge Parker may be emailed to Parker_NYSDChambers@nysd.uscourts.gov.**

affirming that he or she has done so. Copies of correspondence between a *pro se* party and opposing parties shall not be sent to the Court.

Any **nonincarcerated** *pro se* party who wishes to participate in electronic case filing ("ECF") must file a Motion for Permission for Electronic Case Filing, available in the Pro Se Intake Unit or at http://nysd.uscourts.gov/file/forms/motion-for-permission-for-electronic-case-filing-for-pro-se-cases.

Any **nonincarcerated** *pro se* party who wishes to receive documents in their case electronically (by e-mail) instead of by regular mail may consent to electronic service by filing a Pro Se (Nonprisoner) Consent & Registration Form to Receive Documents Electronically, available in the Pro Se Intake Unit or at http://nysd.uscourts.gov/file/forms/consent-to-electronic-service-for-pro-se-cases.

Page Limit. Whether filed electronically or not, letters may not exceed 3 single-space pages in length (exclusive of exhibits). Letters solely between parties or their counsel or otherwise not addressed to the Court may not be filed on ECF or otherwise sent to the Court (except as exhibits to an otherwise properly filed document).

b. **Letter-Motions**. Letter motions may be filed by ECF in accordance with the S.D.N.Y. Local Rules and the S.D.N.Y. Electronic Case Filing Rules and Instructions. In particular, parties shall file as letter-motions all requests for adjournments, extensions, pre-motion conferences (including pre-motion conferences with respect to discovery disputes) and requests for a settlement conference. Letter motions are limited to 3 single-space pages (not including exhibits).

c. **Hand Deliveries.** Hand-delivered mail should be left with the Court Security Officers at the Worth Street entrance of 500 Pearl Street and may not be brought directly to Chambers. Hand deliveries are continuously retrieved from the Worth Street entrance by Courthouse mail staff and then forwarded to Chambers. If the hand-delivered letter is urgent and requires the Court's immediate attention, ask the Court Security Officers to notify Chambers that an urgent package has arrived that needs to be retrieved by Chambers staff immediately.

d. **Docketing, Scheduling and Calendar Matters.** For docketing, scheduling and calendar matters, call Chris Aiello, the Courtroom Deputy, at (212) 805-0234/0235 between 9:00 a.m. and 5:00 p.m.

e. **Faxes.** Prior approval of Chambers is required before sending any fax. Faxes must not exceed three pages and must be submitted to Chambers at (212) 805-7932. All faxes must simultaneously be faxed or delivered to all parties.

f. **Requests for Adjournments or Extensions of Time.** All requests for adjournments or extensions of time must be filed on ECF as letter-motions. (If a request contains sensitive or confidential information, it may be submitted by .pdf via e-mail in lieu of being filed electronically.) The letter-motion must state: (1) the original date(s); (2) the number of previous requests for adjournment or extension; (3) whether these previous requests were granted or denied; and (4) whether the adversary consents and, if not, the reasons given by the adversary for refusing to consent. If a conference must be rescheduled, counsel shall propose at least two alternative dates that fall in consecutive weeks. Absent good cause, any request for extension or adjournment shall be made ***at least 48 hours*** before the deadline or scheduled appearance.

g. **ECF.** In accordance with the Electronic Case Filing Rules and Instructions, counsel are required to register promptly as ECF filers and to enter an appearance in the case. The pertinent instructions are available on the Court website, at http://www.nysd.uscourts.gov/ecf_filing.php. Counsel are responsible for updating their contact information on ECF, should it change, and they are responsible for checking the docket sheet regularly, regardless of whether they receive an ECF notification of case activity. For questions about ECF rules and procedures, please contact the ECF help desk at (212) 805-0800.

II. Pre-Trial Practice.

a. **Initial Case Management Conference.** Except for Complex Cases and *Pro Se* Cases, parties must confer and then email a Report of Rule 26(f) Conference and Proposed Case Management Plan to the Court one week before the Initial Case Management Conference as a .pdf attachment consistent with Paragraph I(a) above. A template form for the Report of Rule 26(f) Conference and Proposed Case Management Plan is available at http://nysd.uscourts.gov/ judge/Parker.

Complex Cases. Parties must confer and email the Court no later than one week before the Initial Case Management Conference, an Initial Report that includes the parties' positions on the applicable topics included on the "Initial Pretrial Conference Checklist for Complex Cases" at Appendix A. The parties also must submit by email a joint Proposed Civil Case Management Plan and Scheduling Order.

Pro Se Cases. The parties each must submit their Case Report and Proposed Case Management Plan for *Pro Se* Cases one week before the scheduled conference in conformance with the procedures in Section I above. The parties shall use the form Proposed Case Management Plan template for *Pro Se* Cases found at http://nysd.uscourts.gov/ judge/Parker.

Attendance. Lead counsel for the parties are expected to attend the Initial Case Management Conference. Reasonable accommodations will be made for parties

or their counsel who cannot attend in person on account of disability. Additionally, an **incarcerated party** who is unable to attend this or other conferences, may be able to participate by telephone. If appropriate, the Court's scheduling order will outline the procedures for participation by telephone.

b. **Discovery Disputes.** Parties shall follow Local Rule 37.2 with the following modifications. Any party wishing to raise a discovery dispute with the Court must first confer in good faith with the opposing party, in person or by telephone, in an effort to resolve the dispute. If this meet-and-confer process does not resolve the dispute, the party may submit an ECF letter-motion to the Court or, if applicable, to the Pro Se Intake Clerk, no longer than 3 single-space pages, explaining the nature of the dispute and requesting a conference. Such letter ***must include a representation that the meet-and-confer process occurred***, including when and whether it was in person or over the telephone. Any responsive letter should be submitted within three business days after submission of the letter-motion.

   Parties shall keep in mind Rule 1 of the Federal Rules of Civil Procedure, which requires the Court and the parties to construe, administer, and employ the rules of procedure to secure the just, speedy, and inexpensive determination of every action. Parties also shall keep in mind Rule 26(b)(1) of the Federal Rules of Civil Procedure, which provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Discovery motions should address these rules to the extent applicable.

c. **Confidentiality Stipulations and Orders.** In cases where confidential information will be exchanged, the parties must utilize the Court's model Stipulation and Proposed Protective Order found at http://nysd.uscourts.gov/judge/Parker; provided, however, the parties may apply for a protective order that differs from the Court's model by submitting a letter request via ECF and attaching the proposed order showing in a blackline comparison how the proposed order differs from the Court's model. The letter should explain why the modifications are needed and note any disagreements between the parties regarding the modifications from the Court's model.

d. **Electronic Discovery.** The parties are encouraged to utilize the model Joint Electronic Discovery Submission and Proposed Order, as appropriate, found at http://nysd.uscourts.gov/judge/Parker. This model may be modified to the extent appropriate

III. Motions.

a. **Conferences of Counsel Before Filing Motions Under Rule 12(b) or (c).** Except in cases involving *pro se* parties, if a motion pursuant to Fed. R. Civ. P. 12(b) or 12(c) is contemplated, the plaintiff or counterclaimant must indicate whether it wishes to amend the subject pleading before motion practice, and the parties must consider in good faith a stipulation permitting such amendment. If the parties are unable to reach a resolution, counsel for the moving party shall include the following statement in the notice of motion: "This motion is made following the conference of counsel, which took place on [date]. Plaintiff [or Counter Claimant] declined an opportunity to amend."

b. **Pre-Motion Conferences.** For motions concerning discovery disputes, *see* Section II(c) above. A pre-motion conference is required for all other motions except (i) motions that are required by the Federal Rules of Appellate Procedure or the Federal Rules of Civil Procedure to be made by a certain time, (ii) motions by litigants in actions where a party is incarcerated and *pro se*, (iii) motions for reconsideration, (iv) motions for a new trial, (v) motions *in limine*, (vi) motions to dismiss habeas corpus petitions, and (vii) motions for judgment on the pleadings and motions to dismiss in social security cases.

   Letters requesting a pre-motion conference should summarize the basis of the motion and follow the procedures for communicating with the Court set forth in Section I. Letters may not exceed 3 pages. Within 3 business days of receipt of the letter, each opposing party may submit a written response of no more than 3 pages. The Court will, as soon as possible thereafter, hold the pre-motion conference. The filing of a request for a pre-motion conference to dismiss prior to the Answer stays the time for the filing of an Answer until after the conference is held or until further order of the Court.

c. **Memoranda of Law.** The typeface, margins and spacing of motion papers must conform to Local Civil Rule 11.1. Unless prior permission has been granted, memoranda of law in support of and in opposition to motions are limited to 25 pages and reply memoranda are limited to 10 pages. Memoranda of 10 pages or more shall contain a table of contents and a table of authorities, neither of which shall count against the page limit. Sur-reply memoranda will not be accepted without prior permission of the Court.

   All moving papers, letter-motions, and letters filed on ECF or emailed to chambers must be in ***searchable PDF form***. **Additionally, to the extent citing unreported cases, parties are requested to use Westlaw citations whenever possible.**

d. **Redactions and Filing Under Seal.** All Confidential Materials filed with the Court may be redacted or filed under seal only as the Court directs upon appropriate application by either party.

To avoid the unnecessary filing of documents under seal, counsel for the parties will discuss, in good faith, the need to file Confidential Materials under seal. If the parties agree in writing that a particular document that has been designated Confidential Material shall not be filed under seal, that document can be filed without redaction and such filing will not be a breach of any Stipulation of Confidentiality.

Any party wishing to file in redacted form any pleading, motion, memorandum, exhibit, or other document, or any portion thereof, based on a party's designation of information as Confidential, must make a specific request to the Court by letter explaining the reasons for seeking to file that submission under seal and addressing the request in light of the Court of Appeals' opinions in Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110 (2d Cir. 2006) and Bernstein v. Bernstein Litowitz Berger & Grossman LLP, 814 F.3d 132 (2d Cir. 2016). If a request for redactions is based on another party's designation of information as Confidential, the parties shall confer and jointly submit the request for redactions.

The letter request to file under seal must be filed on ECF and sent via email to parker_nysdchambers@nysd.uscourts.gov. The e-mailed letter request must include as attachments: (1) one full set of the motion papers or other relevant filings with the Confidential Materials highlighted (*i.e.*, highlighting those words, phrases, or paragraphs for which the party seeks redaction); and (2) only those pages, clean and unredacted, that contain Confidential Materials for which the parties seek to be filed under seal. If the pages to be filed under seal exceed 25 pages, the requesting party shall submit to the Court an electronic disc containing the pages that the party requests to file under seal. The disc shall be sent to the Court within one business day of the request.

Simultaneous with the request to file under seal, the party making the filing shall file the proposed redacted version of the submission on ECF.

If the Court approves the filing under seal, no further submissions shall be required. If the Court denies, in whole or in part, the motion for filing under seal, the party who made the submission shall be required to file the unredacted submission on ECF. The Court will file under seal any clean and unredacted pages for which the Court has approved redactions.

e. **Oral Argument on Motions.** Parties may request oral argument when the motion has been fully briefed. This request should be made by letter in accordance with the procedures set forth in Section I.

Junior members of legal teams representing clients are invited to argue motions they have helped prepare and to question witnesses with whom they have worked. Firms are encouraged to provide this opportunity to junior attorneys for training purposes. This court is amenable to permitting a number of lawyers to argue for one party if this creates an opportunity for a junior lawyer to participate. The ultimate decision of who speaks on behalf of the client is for the lawyer in charge of the case, not for the court.

f. **Proposed Stipulations and Orders.** Except as otherwise provided above, parties should e-mail proposed stipulations and orders that they wish the Court to sign to the Orders and Judgments Clerk at judgments@nysd.uscourts.gov in accordance with the ECF Rules and Instructions.

g. **Nothing in my Individual Practices supersedes a specific time period for filing a motion specified by statute or Federal Rule -- including but not limited to Fed. R. Civ. P 50, 52, 54, 59, and 60, and Fed. R. App. P. 4 -- where failure to comply with the specified time period could result in forfeiture of a substantive right.**

IV. Pretrial Procedures.

Joint Pretrial Orders. After the close of discovery, the Court will file a Scheduling Order scheduling a pre-trial conference and containing instructions for the parties' Proposed Joint Pretrial Order. In general, except in *pro se* cases, a Joint Pretrial Order shall include: (1) the full caption of the action; (2) the name, address, telephone number and email of each principal member of the trial team, and an identification of each party's lead trial counsel; (3) a brief statement identifying the basis for subject matter jurisdiction, and, if that jurisdiction is disputed, the reasons therefore; (4) a list of each claim and defense that will be tried and a list of any claims and defenses asserted in the pleadings that are not to be tried; (5) an identification of the governing law for each claim and defense that will be tried and a brief description of any dispute regarding choice of law; (6) the number of days estimated for trial and whether the case is to be tried with or without a jury; (7) a list by each party of its trial witnesses that it, in good faith, expects to present, with an indication of whether the witnesses will testify in person or by deposition and the general and the general subject area of the witness's testimony; (8) a statement as to how and when the parties will give notice to each other of the order of their trial witnesses; (9) a list by each party of exhibits that it, in good faith, presently expects to offer in its case in chief, together with any specific objections thereto; (10) all stipulations or statements of fact or law on which the parties have agreed; (11) a proposed schedule by which the parties will exchange demonstratives that the parties intend to use at trial, notify each other of any objections thereto, consult with each other regarding those objections and notify the Court of any remaining disputes; and (12) all other matters that the Court may have ordered or that the parties believe are important to the efficient conduct of the trial, such as bifurcation or sequencing of issues to be tried. For bench trials, the parties also will be required to submit proposed findings of fact and statements of law.

In ***pro se* cases**, no Joint Pretrial Order is needed. Instead, within 30 days after the completion of discovery each party shall file its own Pretrial Statement. The *pro se* party's Pretrial Statement need take no particular form, but must be concise and contain: (1) a statement of the facts the party hopes to prove at trial; (2) a list of all documents or other physical objects that the party plans to put into evidence at trial; and (3) a list of the names and addresses of all witnesses the party intends to have testify at trial. The Statement must be sworn by the party to be true and accurate based on the facts known by the party. The party must file an original Statement with the *Pro Se* Office (*see* Section I(a)) and serve a copy on all other parties or their counsel if represented. The original Statement must indicate the date a copy was mailed to the other party or that party's attorney.

V. Settlement Conferences

The Court believes the parties should fully explore settlement at the earliest practical opportunity. Early consideration of settlement allows the parties to avoid the substantial cost, expenditure of time, and uncertainty that are typically a part of the litigation process. Even for those cases that cannot be resolved, early consideration of settlement can provide the parties with a better understanding of the factual and legal nature of their dispute and streamline the issues to be litigated.

The following are the procedures applicable to Settlement Conferences:

a. ***Confidential.*** All settlement conferences are "off the record" and strictly confidential. All communications relating to settlement may not be used in discovery and will not be admissible at trial.

b. ***Magistrate Judge's Role.*** The magistrate judge functions as a mediator, attempting to help the parties reach a settlement.

c. ***Pre-Conference Telephone Call.*** The Court will schedule a telephone call with the parties prior to the conference to discuss issues pertinent to the conference, after which a settlement conference will be scheduled.

d. ***Ex Parte Settlement Conference Summary Form and Letter.*** Unless otherwise directed by the Court, no later than 7 days before the Settlement Conference, each party must complete the Court's Settlement Conference Summary Form found at http://nysd.uscourts.gov/ judge/Parker. Each party also must provide the Court with a letter, not to exceed three pages, summarizing the issues in the case, the settlement value of the case and rationale for it, case law authority relevant to settlement discussions, and any other facts that would be helpful to the Court in preparation for the conference. Parties may attach exhibits to their letters to the extent they believe the exhibits would aid settlement discussions. The Settlement Conference Summary Form and letter should be emailed to Parker_NYSDChambers@nysd.uscourts.gov. Alternatively, these documents may be faxed to the Court with prior approval of Chambers.

e. ***Exchange of Demand/Offer.*** If the plaintiff has not already made a settlement demand, such a demand shall be communicated to the opposing party no later than 14 days prior to the conference. If it has not already done so, the opposing party shall respond to any demand no later than 7 days prior to the conference.

f. ***Attendance.*** The parties – not just the attorneys – must attend the Settlement Conference in person. In the event personal attendance is a hardship, a party may make a written request no later than one week in advance of the conference to attend by phone. Each party must supply its own interpreter, if required. Corporate parties or labor unions must send the person with decision-making authority to settle the matter to the conference. Where liability insurance is involved, a decision-making representative of each carrier must attend unless specifically excused by the Court. Where any government agency is a party, counsel of record must be accompanied by a knowledgeable representative from the agency. In addition, in cases where the Comptroller of the City of New York has authority over settlement, the Assistant Corporation Counsel must make arrangements in advance of the conference for a representative of the Comptroller either to attend the conference or to be available by telephone to approve any proposed settlement.

g. ***Consequences of Non-Compliance with Attendance Requirement.*** If a party fails to comply with the attendance requirements, that party may be required to reimburse all the other parties for their time and travel expenses and may face other sanctions.

h. ***Conference Location.*** Unless advised otherwise by the Court, the conference will take place in Courtroom 17D at 500 Pearl Street.

VI. Courtesy Copies

a. **Filings**: The filing party shall submit a courtesy copy of motion papers, letter-motions, or other filings to the Court only when the filing exceeds 75 pages (including exhibits). Courtesy copies should be placed in well-organized three-ring binder(s). Where appropriate, the binder(s) shall be separated by tab dividers preceded by an exhibit list. Courtesy copies must be provided no later than one business day after the filing.

b. **Settlement Conference Materials:** A courtesy copy of *Ex Parte* Settlement Conference Summary Forms and Letters shall be submitted to the Court if the exhibits to the Letter exceed 10 pages. Courtesy copies must be provided no later than one business day after submission of the Form and Letter.

Appendix A

INITIAL PRETRIAL CONFERENCE CHECKLIST FOR COMPLEX CASES

1. Proportionality assessment of "the needs of the case, amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues" (*see* Rule 26(b)(2)(C) (iii)).

2. Possible limitations on document preservation (including electronically stored information).

3. Appropriateness of initial disclosures pursuant to Rule 26(a)(1). Is there some readily identifiable document or category of documents that should be produced immediately in lieu of initial disclosures?

4. Possibility of a stay or limitation of discovery pending a dispositive motion.

5. Preliminary issues that are likely to arise that will require court intervention.

6. Discovery issues that are envisioned.

7. Proposed discovery including:

    A. limitations on types of discovery beyond those in the Rules (*i.e.*, waiver of interrogatories, requests for admission, expert depositions);

    B. limitations on scope of discovery;

    C. limitations on timing and sequence of discovery;

    D. limitations on restoration of electronically-stored information;

    E. agreement to allow depositions of trial witnesses named if not already deposed;

    F. preservation depositions; and

    G. foreign discovery and issues anticipated.

8. Schedule (as appropriate and possibly excluding public agency cases) including:

    A. date(s) for completion of discovery, including a protocol and schedule for electronic discovery;

    B. date(s) for dispositive motions;

    C. date(s) for exchange for expert reports;

D. date(s) for exchange of witness lists; and

E. date (s) for Joint Preliminary Trial Reports and Final Joint Trial Reports.

9. Issues to be tried, including ways in which issues can be narrowed to make trial more meaningful and efficient; as well as whether there are certain issues as to which a mini-trial would be helpful.

10. Bifurcation.

11. Class certification issues.

12. Whether the parties recommend that expert discovery precede or follow any summary judgment practice.

13. Settlement/mediation and the timing of discussions about settlement.

14. Pleadings, including sufficiency and amendments, and the likelihood and timing of amendments.

15. Joinder of additional parties and the likelihood and timing of joinder of additional parties.

16. Expert witnesses (including necessity or waiver of expert depositions).

17. Damages (computation issues and timing of damages discovery).

18. Final pretrial order (including possibility of waiver of order).

19. Possible trial-ready date.

20. Court logistics and mechanics (*e.g.*, communication with the court, streamlined motion practice, pre-motion conferences, etc.).

Appendix B

DEFAULT JUDGMENT PROCEDURE

1. Prepare an Order to Show Cause for default judgment and make the Order returnable before Judge Parker. Leave blank the date and time of the conference. Judge Parker will set the date and time when she signs the Order.
2. Provide the following supporting papers with the Order to Show Cause:
   A. An attorney's affidavit setting forth:
      i. The basis for entering a default judgment, including a description of the method and date of service of the summons and complaint;
      ii. The procedural history beyond service of the summons and complaint, if any;
      iii. Whether, if the default is applicable to fewer than all of the defendants, the Court may appropriately order a default judgment on the issue of damages prior to resolution of the entire action; and
      iv. The proposed damages and the basis for each element of damages, including interest, attorney's fees, and costs.
   B. A memorandum of law setting forth:
      i. Choice of law;
      ii. The elements of each cause of action as to which default judgment is sought, with supporting legal authority;
      iii. For each defendant and for each cause of action as to which default judgment is sought, an analysis demonstrating that the facts pled in the complaint support the conclusion that the relevant defendant is liable with respect to that cause of action;
      iv. The legal authority supporting each category of damages requested; and
      v. If applicable, legal authority for why an inquest into damages would be unnecessary.
   C. A proposed order of default judgment.
   D. Copies of all of the pleadings.
   E. A copy of the affidavit of service of the summons and complaint.
   F. A Certificate of Default from the Clerk of Court.
3. Email the Order to Show Cause and supporting papers to the Orders and Judgments Clerk (judgments@nysd.uscourts.gov) for initial review and approval. After the Orders and Judgments Clerk approves the Order to Show Cause, the Clerk will forward the Order to Chambers.
4. If Judge Parker signs the Order, the party must serve a conforming copy of the Order and supporting papers on the defendant as soon as possible.

5. Within 3 days after Judge Parker signs the Order, the party must also file the supporting papers on ECF
6. Prior to the return date, take the proposed judgment to the Orders and Judgments Clerk (Room 210, 500 Pearl Street) for the Clerk's approval. The proposed judgment, including all damages and interest calculations, must be approved by the Clerk prior to the conference and then brought to the conference for the Judge's signature.

INDIVIDUAL PRACTICES IN CIVIL CASES[1]
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Introduction

Cases come before magistrate judges in one of two ways: for one or more specific purposes pursuant to an order of reference by the assigned district judge, or, for all purposes on consent of the parties. Magistrate judges in this District schedule trials in civil consent cases for firm dates, rather than using a trailing trial calendar or requiring counsel to be available for trial on short notice. Because magistrate judges rarely try criminal cases, the firm trial dates are unlikely to change to accommodate criminal trials. Should counsel jointly wish to consent to have Judge Lehrburger hear their case for all purposes, the necessary form is at http://www.nysd.uscourts.gov/judge/Lehrburger. Unless otherwise ordered by Judge Lehrburger, matters before him, whether for all purposes or by specific reference, shall comply with the following practices.

I. Communications with Chambers

A. Letters. In general, communications with the Court should be by letter. Except as provided below, all letters should be filed electronically on ECF (i.e., Electronic Case Filing), without email or other copy to Chambers**.**

1. Represented Parties. The following types of letters should be emailed to Chambers as a .pdf attachment:

[1] Requests for reasonable accommodations on account of disability with respect to the Court's practices and rules or in connection with any proceeding before Judge Lehrburger may be emailed to Chambers.

- Letters that will be filed by counsel under seal;
- Ex parte settlement letters;
- Letters otherwise containing confidential information.

In pro se cases, counsel for the represented party must serve the pro se party with a paper copy of any legal document that is filed on ECF or emailed to the Court and must separately file proof of service. Letters filed on ECF or sent to Chambers by counsel for a represented party shall be sent to the pro se party's email address, so long as permission is granted by the pro se party. If permission is withheld, or email is otherwise unavailable, counsel for the represented party shall mail a copy of the letter to the pro se party and indicate so in its letter to the Court.

2. **Unrepresented Pro Se Parties.** By Standing Order, a pro se party must mail all communications with the Court to the Pro Se Intake Unit located at 500 Pearl Street, Room 200, New York, NY 10007. A pro se party may not call Chambers or send any document or filing directly to Chambers. Submissions requiring immediate attention should be hand-delivered to the Pro Se Intake Unit. Unless the Court orders otherwise, all communications with the Court will be docketed upon receipt; such docketing shall constitute service on any user of the ECF system. If any other party is not a user of the ECF system (*e.g.,* if there is another pro se party in the case), a pro se party must send copies of any filing to that party and include proof of service affirming that he or she has done so. Copies of correspondence between a pro se party and opposing parties should not be sent to the Court.

   Any **non-incarcerated pro se** party who wishes to participate in electronic case filing ("ECF") must file a Motion for Permission for Electronic Case Filing, available in the Pro Se Intake Unit or at http://www.nysd.uscourts.gov/file/forms/motion-for-permission-for-electronic-case-filing-for-pro-se-cases. Any non-incarcerated pro se party who wishes to receive documents in their case by email instead of by regular mail may consent to electronic service by filing a Pro Se (Non-prisoner) Consent & Registration Form to Receive Documents Electronically, available in the Pro Se Intake Unit or at: http://www.nysd.uscourts.gov/file/forms/consent-to-electronic-service-for-pro-se-cases.

3. **Page Limit for Letters.** Letters may not exceed 3 single-space pages in length (exclusive of exhibits).

4. **Courtesy Copies of Letters.** If exhibits to letters exceed 10 pages, a courtesy copy of the entire letter should be delivered to the Court.

A separate rule applies to letter motions as set forth under the Motions section below.

5. **Letters Between Parties.** Letters solely between parties or their counsel or otherwise not addressed to the Court may not be filed on ECF or otherwise sent to the Court (except as exhibits to an otherwise properly filed document).

B. **Hand Deliveries.** Hand-delivered mail should be left with the Court Security Officers at the Worth Street entrance of 500 Pearl Street and may not be brought directly to Chambers. If the hand-delivered letter is urgent and requires the Court's immediate attention, ask the Court Security Officers to notify Chambers that an urgent package has arrived that needs to be retrieved immediately by Chambers staff.

C. **Faxes.** Prior approval is required before sending any fax. Faxes must not exceed 3 pages and must be submitted to chambers at (212) 805-7934. All faxes must simultaneously be faxed or delivered to all parties.

D. **Docketing, Scheduling and Calendar Matters.** For docketing, scheduling and calendar matters, call the Courtroom Deputy at (212) 805-0248 between 9:00 a.m. and 4:00 p.m.

E. **Telephone Calls.** For procedural or administrative matters that do not request a ruling from the Court, counsel may call Chambers.

F. **Requests for Adjournments or Extensions of Time.** All requests for adjournments or extensions of time must be filed on ECF as letter motions. (If a request contains sensitive or confidential information, it may be submitted by .pdf via e-mail in lieu of being filed electronically.) The letter motion must state: (i) the original date(s); (ii) the number of previous requests for adjournment or extension of the matter at issue; (iii) whether those previous requests were granted or denied; and (iv) whether all parties consent, and if not, the reasons given for refusing to consent. If the adjournment concerns a conference to be rescheduled, the letter motion must also provide multiple dates when all counsel are available. Absent good cause, any request for extension or adjournment shall be made at least 48 hours before the deadline or scheduled appearance.

G. **ECF.** In accordance with the S.D.N.Y. Electronic Case Filing Rules and Instructions, counsel are required to register as ECF filers and to enter an appearance in the case. Instructions are available on the Court website, at http://www.nysd.uscourts.gov/ecffiling.php. Counsel are responsible for checking the docket sheet regularly, regardless of whether they receive an ECF notification of case activity. For questions about ECF rules and procedures, contact the ECF help desk at (212) 805-0800.

II. Case Management and Discovery

A. **Initial Case Management Conference.** The Court will issue an order setting a date for the initial case management conference. Except in Pro Se Cases, the parties must confer and then file a joint Report of Rule 26(f) Conference and Proposed Case Management Plan and Scheduling Order no later than one week before the initial case management conference. The parties should use the template form for the Report of Rule 26(f) Conference and Proposed Case Management Plan and Scheduling Order available at: http://www.nysd.uscourts.gov/judge/Lehrburger. In **pro se** cases, the parties may each submit its own Report and Proposed Case Management Plan and Scheduling Order if conferring is not feasible.

Lead counsel for the parties are expected to attend the Initial Case Management Conference. Reasonable accommodations will be made for parties or their counsel who cannot attend in person on account of disability. An **incarcerated party** who is unable to attend this or other conferences will be allowed to participate by telephone or video conference.

B. **Electronic Discovery.** The parties are encouraged to use the model Joint Electronic Discovery Submission and Proposed Order found at http://www.nysd.uscourts.gov/judge/Lehrburger.

C. **Confidentiality Stipulations and Orders.** In cases where confidential information will be exchanged, the parties may submit a proposed confidentiality stipulation and order. Any such proposed stipulation and order must contain provisions consistent with the Court's rule governing Redactions and Filings Under Seal set forth below under Motions.

D. **Discovery Disputes.** Parties shall follow Local Rule 37.2 with the following modifications. Any party wishing to raise a discovery dispute with the Court must first confer in good faith with the opposing party, in person or by telephone, in an effort to resolve the dispute. If this meet-and-confer process does not resolve the dispute, the party may submit an ECF letter motion to the Court or, if applicable, to the Pro Se Intake Clerk, no longer than 3 single-space pages, explaining the nature of the dispute and requesting a conference. Such letter must include a representation that the meet-and-confer process occurred, including when and whether it was in person or over the telephone. Any responsive letter should be submitted within 3 business days following submission of the letter motion. The Court retains discretion to rule on the dispute based on the parties' letter submissions, with or without a conference. If any party believes that more formal briefing is warranted, that party must make a separate application to the court explaining why more formal briefing is warranted.

Parties shall keep in mind Rule 1 of the Federal Rules of Civil Procedure, which requires the Court and the parties to construe, administer, and employ the rules of procedure to secure the just, speedy, and inexpensive determination of every action. Parties also shall keep in mind Rule 26(b)(1) of the Federal Rules of Civil Procedure, which provides that "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Discovery motions should address these rules to the extent applicable.

III. Motions

A. All motions and moving papers filed on ECF or emailed to chambers shall be in **searchable PDF** form.

B. **Letter Motions**. Letter motions may be filed via ECF if they comply with the S.D.N.Y. Local Rules and the S.D.N.Y. Electronic Case Filing Rules and Instructions. Letter motions are limited to 3 single-space pages (not including exhibits). Any responsive letter should be submitted within 3 business days following submission of the letter motion. If exhibits to any letter motion or responsive letter exceed 10 pages, a courtesy copy of the entire filing should be delivered to the Court no later than the day following ECF filing. Parties must file as letter motions the following requests:

- Requests for adjournments or extensions of time;
- Requests for pre-motion conferences;
- Requests for a settlement conference.

C. **Motions Under Rule 12(b) or (c).** Except in cases involving pro se parties, if a motion pursuant to Fed. R. Civ. P. 12(b) or 12(c) is contemplated, the moving party must so inform the plaintiff or counterclaimant. The plaintiff or counterclaimant must then indicate whether it wishes to amend the subject pleading before motion practice, and the parties must consider in good faith a stipulation permitting such amendment. If the parties are unable to reach a resolution, the moving party shall include the following statement in the notice of motion: "This motion is made following the conference of counsel, which took place on [date]. Plaintiff [or Counter Claimant] declined an opportunity to amend."

D. **Pre-Motion Conferences.** For motions concerning discovery disputes, see Section II.D above. A pre-motion conference with the Court is required for all other motions except for (i) motions by incarcerated pro se litigants,

(ii) motions for reconsideration, (iii) motions for a new trial, (iv) motions in limine, and (v) required by the Federal Rules of Appellate Procedure or the Federal Rules of Civil Procedure to be made by a certain time.

Letters requesting a pre-motion conference should summarize the basis of the motion and may not exceed 3 pages single-spaced. Within 3 business days following submission of the requesting letter, each opposing party may submit a written response of no more than 3 pages. The Court will, as soon as possible thereafter, hold the pre-motion conference. The filing of a request for a pre-motion conference to dismiss prior to the Answer stays the time for the filing of an Answer until after the conference is held or until further order of the Court.

E. Memoranda of Law. The typeface, margins and spacing of motion papers must conform to Local Civil Rule 11.1. Unless prior permission has been granted, memoranda of law in support of and in opposition to motions are limited to 25 pages and reply memoranda are limited to 10 pages. Memoranda of 10 pages or more shall contain a table of contents and a table of authorities, neither of which shall count against the page limit. Sur-reply memoranda will not be accepted without prior permission of the Court. To the extent citing unreported cases, parties are requested to use Westlaw citations whenever possible.

F. Courtesy Copies. Courtesy copies of motions should not be submitted to Chambers on a rolling basis. Instead, no later than 3 business days after a motion (other than a letter motion) is fully briefed, the movant shall submit to Chambers one courtesy copy of all motion papers, except that in cases where the movant is proceeding **pro se**, the courtesy copy of the motion papers shall be submitted to the Pro Se Intake Clerk. When motion papers are voluminous, courtesy copies should be placed in well-organized and indexed three-ring binder(s). For all motions, oppositions, and replies containing multiple items of documentary evidence, the evidence must be divided into exhibits, separated by tab dividers, and preceded by an exhibit list.

G. Redactions and Filing Under Seal.

1. Parties should comply with the District's ECF Privacy Policy (http://www.nysd.uscourts.gov/operations/egovtact042005.pdf). Parties may redact information proscribed by the Privacy Policy without seeking Court approval.

2. All other redactions require Court approval as follows. Any party wishing to file any document under seal or in redacted form shall (1) file on ECF a redacted copy of the filing, and (2) separately submit to the Court an unredacted copy by email, and also, if longer than 10 pages, by delivery to the Court. If the papers being

submitted are a fully-briefed motion in compliance with the Court's rule on submission of motions, the unredacted copies should be submitted to the Court at that time (not on a rolling basis beforehand).

Within 5 business days of the ECF filing of the redacted document(s), the parties must confer in good faith as to whether any or all of the redacted material may or must be filed without redaction. If the parties reach agreement that all redacted material may or must be unredacted, the parties shall file on ECF unredacted copies of the previously redacted documents and so inform the Court.

If the parties cannot agree to unredact all redacted material, then, within 3 business days of the parties' meet and confer, the party seeking to preserve confidentiality must make a specific request to the Court by letter explaining the reasons for seeking to file the material under seal and addressing the request in light of the Court of Appeals' opinions in *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006) and *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132 (2d Cir. 2016). Any sealing request shall include the requesting party's proposed redactions. If more than one party seeks to preserve confidentiality, the parties shall confer and submit a joint letter. Any party opposing the request to file under seal must submit a responding letter within 3 business days after submission of the letter by the party seeking to preserve confidentiality.

If the Court directs that any previously redacted material be unredacted, the party who submitted the previously redacted document shall within 3 business days after the Court's unredaction order file on ECF the documents complying with the Court's order.

H. Oral Argument. Parties may request oral argument when the motion has been fully briefed and courtesy copies are submitted to chambers. The request should be made by letter. Whether oral argument will be held remains in the Court's discretion.

I. Proposed Stipulations and Orders. Except as otherwise provided above, parties should email proposed stipulations and orders that they wish the Court to sign to the Orders and Judgments Clerk at judgments@nysd.uscourts.gov in accordance with the ECF Rules and Instructions. Courtesy copies need not be sent to chambers.

J. Specific Time Periods Provided by Federal Rules. Nothing in the Court's Individual Practices supersedes a specific time period for filing a

motion specified by statute or Federal Rule -- including but not limited to Fed. R. Civ. P 50, 52, 54, 59, and 60, and Fed. R. App. P. 4 -- where failure to comply with the specified time period could result in forfeiture of a substantive right.

IV. Settlement Procedures

See Settlement Procedures For Magistrate Judge Robert W. Lehrburger, posted at http://www.nysd.uscourts.gov/judge/Lehrburger.

V. Pretrial Procedures

The following procedures apply to those cases where the parties have consented pursuant to 28 U.S.C. 636(c) to have all proceedings, including trial, before Magistrate Judge Lehrburger. Absent such consent, the parties should refer to the individual practices of the district judge.

A. Joint Pretrial Orders in Civil Cases.

1. Unless otherwise ordered by the Court, within 30 days after the date for the completion of discovery in a civil case or, if a dispositive motion has been filed, within 30 days after a decision resolving the motion, the parties shall jointly prepare and submit to the court for its approval a Proposed Pretrial Order.

2. In appropriate cases, the Court may be willing to dispense with portions of the Pretrial Order, if both sides consent, in order to secure the just, speedy and inexpensive determination of every action. *See* Federal Rule of Civil Procedure 1. The parties should discuss such requests with each other and then with the Court sufficiently in advance so that the Proposed Pretrial Order will be filed within the time frames described above.

3. The Proposed Pretrial Order shall be filed by ECF, and two courtesy copies shall be delivered to Chambers.

B. Contents of the Proposed Pretrial Order.

1. **Caption:** The full caption of the action.

2. **Counsel:** The name, address, telephone number and email of each principal member of the trial team, and identification of each party's lead trial counsel.

3. **Subject Matter Jurisdiction:** A brief statement identifying the basis for subject matter jurisdiction, and, if that jurisdiction is disputed, the reasons therefore. Such statement shall include

citations to all statutes relied on and relevant facts as to citizenship and jurisdictional amount.

4. **Claims and Defenses:** A list of each claim and defense that will be tried and a list of any claims and defenses asserted in the pleadings that are not to be tried. Where applicable, the statements shall identify citations to relevant statutes relied on.

5. **Law:** Identification of the governing law for each claim and defense that will be tried and a brief description of any dispute regarding choice of law.

6. **Damages:** With respect to each claim remaining to be tried, a statement and calculation of the damages claimed, broken down by element or category (e.g., lost profits, back wages, medical costs, etc.), and a description of any other relief sought.

7. **Length of Trial:** The number of days estimated for trial. If the parties do not agree, each party shall give its estimate and the basis for that estimate.

8. **Fact-Finder:** Whether the case is to be tried with or without a jury. If a jury trial, whether the parties agree to a non-unanimous verdict pursuant to Federal Rule of Civil Procedure 48.

9. **Stipulations:** Any agreed-upon stipulations or agreed statements of fact or law.

10. **Witness Lists:** A list by each party of its trial witnesses that it, in good faith, expects to present on its case in chief, with a statement of the general subject area(s) of the witness's testimony and an indication of whether the witnesses will testify in person or by deposition.

11. **Witness Order:** A statement as to how and when the parties will give notice to each other of the order of their trial witnesses.

12. **Depositions:** Designation by each party of deposition testimony to be offered in its case, referencing page numbers, with any cross-designations and objections by any other party. If there is no objection or cross-designation, the Court will deem the opposing party to have waived any such objection or cross-designation.

13. **Exhibits:** A list by each party of exhibits to be offered in its case. For any exhibit as to which there is an objection, the party objecting must briefly specify, next to the listing for that exhibit, the nature of the party's objection (e.g., "authenticity," "hearsay," "Rule 403"). Any objection not listed shall be deemed waived. Exhibits not

produced during discovery or otherwise provided to other parties prior to trial likely will not be allowed for any purpose.

14. **Demonstratives:** A proposed schedule by which the parties will exchange demonstratives that the parties intend to use at trial, notify each other of any objections thereto, consult with each other regarding those objections and notify the Court of any remaining disputes.

15. **Other Issues:** All other matters that the Court may have ordered or that the parties believe are important to the efficient conduct of the trial, such as bifurcation or sequencing of issues to be tried.

C. **Additional Pretrial Filings in Civil Cases.** Unless otherwise ordered by the Court, the following shall be filed at the same time as the proposed joint pretrial order:

1. **Jury Cases.**

a. Each party must file a **Trial Memorandum of Law** addressing each issue of law that the party expects to arise at or before trial.

b. The parties must jointly prepare and submit proposed **Jury Materials** consisting of:

- proposed **voir dire** questions to be asked of prospective jurors;
- proposed **jury instructions** (with each instruction separately numbered and beginning on a separate page); and
- a proposed **verdict form**.

c. To the extent a party objects to another party's requested voir dire questions, jury instructions, or proposed verdict form, that party must (i) set forth the grounds for the objection and (ii) if applicable, propose an alternative (all in the same document so that the Court can compare the parties' respective proposals).

d. All jury instructions, objections, and alternative proposals must include citation to supporting authority.

e. In addition to filing on ECF the voir dire questions, requests to charge, and/or verdict sheets, electronic copies must also

be submitted to the Court as Microsoft Word documents and sent via email to: Lehrburger_NYSDChambers@nysd.uscourts.gov.

2. Non-Jury Cases.

a. Each party must file a **Trial Memorandum of Law** identifying the issues, summarizing facts and applicable law, and addressing any evidentiary issues.

b. The Court may also ask each party to file **Proposed Findings of Fact and Conclusions of Law** before and/or after trial.

c. In addition to filing on ECF, these materials should also be submitted to the Court as Microsoft Word documents and sent via email to: Lehrburger_NYSDChambers@nysd.uscourts.gov.

D. Motions *in Limine*. Each party shall file and serve any motions *in limine* at the same time as the proposed pretrial order. Within two weeks of filing the proposed pretrial order, each party shall file and serve its opposition to any motion *in limine*. There shall be no replies for motions *in limine*.

E. Pro Se Cases. In pro se cases, the parties are not required to prepare joint pretrial filings (but may do so jointly if feasible). Instead, within 30 days from the date for the completion of discovery in a civil case or, if a dispositive motion has been filed, within 30 days of a decision resolving the motion, the represented party(ies) shall submit the pretrial materials set forth in sections IV.A, B, C and D above. The pro se party shall file its own Pretrial Statement. The pro se party's Pretrial Statement need take no particular form, but must be concise and contain:

1. a statement of the **facts** the party hopes to prove at trial;

2. a list of all documents or other physical objects that the party plans to put into **evidence** at trial; and

3. a list of the names and addresses of all **witnesses** the party intends to have testify at trial and the general subject matter of each witness's expected testimony.

The Pretrial Statement must be sworn or affirmed by the pro se party to be true and accurate based on the facts known by the party. The pro se party must file an original Pretrial Statement with the Pro Se Office and serve a copy on all other parties or their counsel if represented. The original Pretrial Statement must indicate the date a copy was mailed to the other party or that party's attorney.

VI. Trial Procedures

A. Voir Dire. The Court will conduct all voir dire.

B. Time.

1. The Court encourages use of timed trials, with each party allotted a set amount of time for presentation of all evidence and cross-examination, and such time to be allotted as that party chooses.

2. Trial days generally will run from 9:00 a.m. to 4:00 p.m. The Judge will be available to meet with counsel from 9:00 a.m. to 9:30 a.m. and at the conclusion of each day. Testimony will begin at 9:30 a.m. A one-hour lunch recess generally will be taken starting sometime between 12:00 and 1:00.

C. Witnesses.

1. No later than the end of each trial day, counsel must notify each other and the Court of witnesses to be called the following trial day. The parties may agree to earlier notification.

2. Absent a contrary ruling made before the start of a witness's direct testimony, cross-examination in a civil case may go beyond the scope of direct to avoid making the witness return to testify in the opposing party's case. However, to the extent cross-examination exceeds the scope of the direct pursuant to this rule, counsel should not ask leading questions (unless the witness is hostile or otherwise associated with the opposing party).

3. When a party's case commences, the party is expected to have witnesses available to fill the trial day. Witnesses may be taken out of order if the next witness is unavailable. If a party does not have a witness available to testify, the Court may preclude testimony or deem that party to have rested. Any requests to schedule a witness out of order and/or for a particular day must be made by a letter application that states the opposing party's position and must be sent as soon as counsel is aware of the limited availability of that witness. Absent good cause, untimely applications will be denied.

D. Exhibits.

1. Counsel must make sure that all exhibits are redacted in compliance with Federal Rule of Civil Procedure 5.2. If there is a particular need not to redact, the party seeking to introduce the exhibit must file a motion *in limine* with the Court.

2. Counsel must provide two courtesy copies of each exhibit to the Court (one for the Judge; the other for the Law Clerk) before using it at trial. The Court/Law Clerk copies of pre-marked exhibits should be assembled sequentially in a 3-ring binder, or in separate manila folders labeled with the exhibit numbers and placed in a suitable container for ready reference. Voluminous exhibits may be provided on a thumb drive or equivalent.

3. Counsel are responsible for maintaining custody of all original exhibits. The Court does not retain them, and the Courtroom Deputy is not responsible for them.

E. Court Reporter.

1. Prior to trial, counsel should provide the court reporter with spelling of proper names, places, scientific or medical terms, and other words peculiar to the case that are likely to arise during trial.

2. When reading from depositions or documents, the reader should proceed slowly enough for the court reporter to record what is being said and should cite the applicable page and line number.

3. When referring to an exhibit, cite it by number or letter so that the record is clear as to what is being discussed.

F. Objections and Sidebars.

1. Counsel shall make objections simply, in one or two words, unless the Court requests further explanation.

2. Sidebars during jury trials are discouraged. Counsel are expected to anticipate any problems that may require argument and raise those issues with the Court in advance of the time the jury will be present to hear evidence.

* * *

February 7, 2018

INDIVIDUAL PRACTICES OF MAGISTRATE JUDGE BARBARA MOSES

Chambers
Daniel Patrick Moynihan Courthouse
500 Pearl Street, Room 740
New York, NY 10007
Telephone: (212) 805-0228

Courtroom
Daniel Patrick Moynihan Courthouse
500 Pearl Street, Courtroom 20A
Courtroom Deputy: Kevin Snell

Civil cases come before magistrate judges in two ways: (i) for one or more specific purposes, pursuant to an order of reference by the assigned district judge, or (ii) for all purposes, on consent of the parties, pursuant to 28 U.S.C. § 636(c). When a district judge approves an all-purposes consent form signed by counsel, the magistrate judge assumes the role of the district judge. The right to a jury trial is preserved and any appeal is directly to the Court of Appeals.

It is the uniform practice of the magistrate judges in this district to schedule civil trials for firm dates, rather than using a trailing trial calendar or requiring counsel to be available for trial on short notice. Additionally, because magistrate judges rarely try criminal cases, such firm trial dates are unlikely to be changed to accommodate criminal trials. Should the parties wish to have Judge Moses hear their case for all purposes, the necessary form is available at: http://nysd.uscourts.gov/judge/Moses.

Unless otherwise ordered by Judge Moses, the following practices are applicable to all civil matters conducted before her:

I. Communications with Chambers

A. Letters. Except as otherwise provided below, communications with the Court should be by letter. Letters that are informational in nature and do not request relief (for example, status updates requested by the Court) should be filed via ECF using the "letter" option, listed under "other documents."

B. Letter-Motions. Letter-motions, as permitted by Local Civil Rule 7.1(d) and section 13.1 of the Electronic Case Filing Rules & Instructions, should be filed via ECF using the "letter-motion" option, listed under "motion." In particular, parties should file as letter-motions all requests for pre-motion conferences, adjournments, extensions, excess pages, oral argument, and settlement conferences. Requests for other types of non-dispositive relief listed in section 13.1 may also be made by letter-motion.

C. Page Limits; Courtesy Copies; Service. Absent advance permission from the Court, letters and letter-motions may not exceed four pages in length, exclusive of attachments, which should be kept to a minimum. Please do not try to cheat

the page limit by splitting a request for relief into two separate four-page letters. If a letter or letter-motion includes attachments (regardless of number or length), a courtesy copy marked as such must be delivered to chambers by mail, overnight courier, or hand delivery. The courtesy copy should bear the ECF header generated at the time of electronic filing and include protruding tabs for the attachments. In *pro se* cases, letters and letter-motions filed via ECF must also be served on the *pro se* party. Counsel shall indicate the mode of service in the letter to the Court and shall also file a proof of service via ECF.

D. Confidential Letters. *Ex parte* settlement letters, letters or letter-motions to be filed under seal, and letters or letter-motions otherwise containing confidential or sensitive information should be delivered to chambers by mail, overnight courier, or hand delivery in lieu of being filed electronically. Delivery by fax or email, if necessary, requires advance permission from the Court. If service on other parties is required, service shall be accomplished by means no slower than the delivery to chambers. Counsel shall indicate the mode of service in the letter to the Court and shall also file a proof of service via ECF.

E. Hand Delivery. Hand deliveries should be left with a Court Security Officer at the Worth Street entrance of the Daniel Patrick Moynihan Courthouse. If the matter requires the Court's immediate attention, ask the Court Security Officer to notify chambers that an urgent delivery has arrived.

F. Letters or Emails between Parties. Copies of correspondence between the parties or their counsel shall not be sent to chambers or filed on ECF except as exhibits to otherwise properly-filed documents.

G. Telephone Calls. For docketing, scheduling, and calendar matters, or to request permission to submit letters by fax or email, counsel may call chambers at 212-805-0228. Otherwise, telephone calls are permitted only for urgent matters requiring immediate attention.

H. Pro Se Parties. All letters and other communications to the Court from *pro se* parties must be submitted to the *Pro Se* Intake Unit, not directly to chambers.

II. Motions

A. Requests for Adjournments or Extensions. Requests to adjourn a court conference or other court proceeding (including a telephonic court conference) or to extend a deadline must be made by letter-motion, after consultation with all affected parties, and must state: (1) the original date of the conference or proceeding; (2) the number of previous requests for adjournment or extension; (3) whether those requests were granted or denied; (4) the reason for the present request; (5) whether all affected parties consent; and (6) if not, the reasons given for refusing. If the requested adjournment or extension affects any other scheduled dates, a proposed Revised Scheduling Order must be attached.

All requests for extension of a deadline must be made in advance of the deadline to be extended. Absent unforeseeable emergencies, all requests for adjournment of a court conference or other court proceeding (including a telephonic court conference), must be made at least four days in advance of the proceeding to be adjourned, and must include at least two proposed dates, on which all counsel are available, for the adjourned proceeding.

B. **Discovery Motions.** No discovery dispute will be heard unless the moving party (including a non-party seeking relief from a subpoena) has first conferred in good faith with the adverse party or parties, in person or by telephone, in an attempt to resolve the dispute. An exchange of letters or email alone does not satisfy this requirement. Counsel must respond promptly and in good faith to a request from another party to meet and confer in accordance with this paragraph.

If the parties have met and conferred but cannot resolve their dispute, the moving party must request a pre-motion discovery conference with the Court, by letter-motion, as required by Local Civil Rule 37.2. The letter-motion must succinctly set forth the basis of the dispute and the relief sought, certify that the required in-person or telephonic conference took place in accordance with this paragraph, and state: (1) the date, time, and duration of the parties' conference; (2) the names of the counsel who participated; and (3) the position of any relevant adverse party as to each contested issue. None of these requirements may be satisfied by attaching copies of correspondence between counsel.

C. **Summary Judgment Motions**. Strict compliance with Fed. R. Civ. P. 56(c) and Local Rule 56.1 is required. The moving party shall provide all other parties with an electronic copy, in Microsoft Word format, of the moving party's Statement of Material Facts pursuant to Local Civil Rule 56.1. An opposing party shall reproduce each paragraph of the moving party's Statement of Material Facts, with the opposing party's response directly beneath. As required by Local Civil Rule 56.1(d), each statement of undisputed material fact and response thereto shall be followed by a citation to the specific evidentiary material that supports the statement or response, *e.g.*, "Smith Deposition Tr. 3:15-4:20," or "Jones Interrog. Resp. No. 18." General references to a "transcript," "interrogatory responses," or the like are inadequate. Similarly, the parties are to append to their motion papers the specific evidentiary material upon which they rely and no more. If a party wishes to submit entire deposition transcripts, that party must (i) highlight the portions cited in their Statement of Material Facts or response, and (ii) tab the relevant pages in the courtesy copies submitted pursuant to Part II.G below.

D. **Pre-Motion Conferences.** For motions other than discovery motions, pre-motion conferences are not required, but may be requested by letter-motion where counsel believe that an informal conference with the Court may obviate the need for the motion or reduce the issues in dispute.

E. **Briefing Schedule on Letter-Motions**. Unless the Court has ordered otherwise or the parties have agreed to a different briefing schedule, any opposition to a

letter-motion shall be filed within four days of the moving letter, and any reply shall be filed within two days of the opposition. If the parties have agreed to a different briefing schedule, they must so inform the Court, either in the moving letter or as soon as agreement is reached. If the letter-motion requests emergent or expedited relief, opposing counsel are advised to file any opposition as promptly as possible.

F. **Briefing Schedule on Formal Motions**. Unless the Court has ordered otherwise or the parties have agreed to a different briefing schedule, opposition and reply papers with respect to formal motions will be due in accordance with Local Civil Rule 6.1. The parties are strongly encouraged to agree on a reasonable briefing schedule before the moving papers are filed. If the parties have agreed to such a schedule, they must so inform the Court, either in the moving party's notice of motion or by letter as soon as agreement is reached. Should the parties thereafter agree to modify their briefing schedule, they must promptly inform the Court of the new schedule by letter.

G. **Courtesy Copies.** Courtesy copies of all formal motion papers, marked as such, must be delivered to chambers promptly after filing. Courtesy copies should bear the ECF header generated at the time of electronic filing and include protruding tabs for any exhibits. Bulky materials should be neatly bound, or placed in 3-ring binders, with appropriate dividers.

H. **Memoranda of Law.** Unless advance permission has been granted, principal memoranda of law are limited to 25 pages, and reply memoranda are limited to 10 pages. Memoranda exceeding 10 pages must include a table of contents and a table of authorities, neither of which shall count against the page limit. The Court expects parties to adhere strictly to the typeface, margin and spacing requirements of Local Civil Rule 11.1(b).

I. **Requests to File Materials Under Seal.** Filing under seal requires permission of the Court. Unless otherwise ordered, any party wishing to file a document or portion thereof under seal must do the following things on or before the date on which the relevant brief, declaration or other document is due: (1) serve a complete and unredacted copy of the document on all other parties; (2) file a redacted copy of the document via ECF, from which the material claimed to require confidential treatment has been removed or concealed; (3) make a specific request to the Court by letter, delivered directly to chambers, explaining the need to withhold the material at issue from the public record notwithstanding the strong presumption of public access to "judicial documents" under the First Amendment and the common law. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-21 (2d Cir. 2006). The letter should include as attachments (a) one complete and unredacted copy of the document, as served on the other parties, and (b) one copy of each page sought to be withheld or redacted, marked to show the material claimed to require confidential treatment (e.g., highlighted to show the words, phrases, or paragraphs sought to be redacted). The parties are cautioned that the designation of documents as "confidential" for discovery

purposes does not, without more, justify a sealing order. If a sealing request is based on another party's designation of documents or information as "confidential," the parties shall confer and jointly submit the request for sealing.

If the Court approves the request for filing under seal, chambers will file the complete and unredacted document under seal. If the Court does not approve the request, chambers will file the complete and unredacted document on ECF or provide further instructions to the filing party.

J. Oral Argument on Motions. Parties may request oral argument at the time their motion papers are filed. The Court will determine whether to hear argument and will advise the parties of the argument date and time.

III. Pretrial Procedures

A. Applicability. The procedures set out below apply only to cases in which the parties have consented pursuant to 28 U.S.C. § 636(c) to have all proceedings before Judge Moses, including trial.

B. Joint Pretrial Order. Unless the Court has ordered otherwise, the parties shall submit to the Court for its approval a Joint Pretrial Order within 30 days after the date for the completion of discovery, or, if a summary judgment motion has been filed, within 30 days after the decision on the motion. The proposed Joint Pretrial Order shall be signed by all parties and include the following:

1. The full caption of the action.

2. The names and addresses of trial counsel, together with their office and cellular telephone numbers, fax numbers, and email addresses.

3. A brief statement by plaintiff as to the basis of subject matter jurisdiction, and a brief statement by each other party as to the presence or absence of subject matter jurisdiction, including citations to all statutes relied on and relevant facts as to citizenship and jurisdictional amount.

4. A brief summary by each party of the claims and defenses that party has asserted which remain to be tried, including citations to all statutes relied on but without recital of evidentiary matter.

5. With respect to each claim remaining to be tried, a brief statement listing each element or category of damages sought with respect to that claim and a calculation of the amount of damages sought with respect to such element or category.

6. A statement by each party as to whether the case is to be tried with or without a jury, and the estimated number of trial days needed.

7. Any stipulations or agreed statements of fact or law.

8. A list by each party of the witnesses whose testimony is to be offered in that party's case in chief, indicating whether such witnesses will testify in person or by deposition. Absent extraordinary circumstances a party may not call as a witness in its case in chief any person not listed in the Joint Pretrial Order.

9. A designation by each party of deposition testimony to be offered in that party's case in chief, together with any cross-designations or objections by any other party. For each designation as to which there is an objection, the party objecting must briefly specify the nature of the objection (*e.g.*, "hearsay," "Rule 403"). Any cross-designation or objection not made will be deemed waived. Absent extraordinary circumstances a party may not offer in its case in chief any deposition testimony not listed in the Joint Pretrial Order.

10. A list by each party of exhibits to be offered in its case in chief. Each exhibit shall be pre-marked (plaintiff to use numbers, defendant to use letters). For each exhibit as to which there is an objection, the party objecting must briefly specify the nature of the objection (*e.g.*, "hearsay," "Rule 403"). Any objection not listed shall be deemed waived. Absent extraordinary circumstances, a party may not offer in its case in chief any exhibit not listed in the Joint Pretrial Order.

C. Filings Prior to Trial. Unless otherwise ordered by the Court, each party shall file, 15 days before the date of commencement of trial (or 30 days after the filing of the final pretrial order if no trial date has been fixed):

1. In jury cases: proposed *voir dire* questions, requests to charge, and a proposed verdict sheet.

2. In nonjury cases: a statement of the elements of each claim or defense involving such party, together with a summary of the facts that will be relied upon to establish each element. If the parties believe it would be useful they may also file pretrial memoranda, limited to 25 pages.

3. In all cases: motions addressing any evidentiary or other issues which should be resolved in *limine*.

D. Marking Exhibits for Trial. At the commencement of trial, each party must provide each other party, and the Court, with a tabbed binder or binders containing courtesy copies of its trial exhibits and deposition designations.

Issued December 1, 2017

INDIVIDUAL PRACTICES OF MAGISTRATE JUDGE STEWART D. AARON

Chambers

Daniel Patrick Moynihan Courthouse
500 Pearl Street, Room 703
New York, NY 10007
Telephone: 212-805-0274

Courtroom

Daniel Patrick Moynihan Courthouse
500 Pearl Street, Courtroom 11C
New York, NY 10007

Unless otherwise ordered by Judge Aaron, civil matters before him shall be conducted in accordance with the following practices.[1] These practices are applicable to cases before Judge Aaron if the matter is within the scope of the District Judge's order of reference or if the parties consent to have the case before Judge Aaron for all purposes pursuant to 28 U.S.C. § 636(c). Should the parties wish to have Judge Aaron hear their case for all purposes, the necessary form is available at: www.nysd.uscourts.gov/file/forms/consent-to-proceed-before-us-magistrate-judge.

I. Communications With Chambers

A. Letters. In general, communications with the Court should be by letter, by electronic case filing ("ECF"), without email or other copy to Chambers. Letters may not exceed 3 pages in length, exclusive of attachments, which should be kept to a minimum.

B. Confidential Letters. *Ex parte* settlement letters, letters to be filed under seal or letters otherwise containing sensitive or confidential information that a party does not wish to appear on the docket should be sent to the Court by email to Aaron_NYSDChambers@nysd.uscourts.gov as a .pdf attachment with a copy simultaneously e-mailed to all counsel. Any such email should state clearly in the subject line: (1) the caption of the case, including the lead party names and docket number; and (2) a brief description of the contents of the letter. Parties shall not include substantive communications in the body of the email; such communications shall be included only in the body of the letter.

C. Telephone Calls. For docketing, scheduling and calendar matters, counsel may call Chambers at 212-805-0274 between 9:00 a.m. and 4:00 p.m. Otherwise, telephone calls are permitted only for urgent matters requiring immediate attention.

D. Pro Se Parties. By Standing Order, a pro se party must mail all communications with the Court to the Pro Se Intake Unit located at 500 Pearl Street, Room 200, New York, NY 10007. A pro se party may not call Chambers or send any document or filing directly to Chambers. Submissions requiring immediate

[1] Requests for reasonable accommodations on account of disability with respect to these rules may be sent by email to Aaron_NYSDChambers@nysd.uscourts.gov.

attention should be hand-delivered to the Pro Se Intake Unit. Any non-incarcerated pro se party who wishes to participate in ECF must file a Motion for Permission for Electronic Case Filing, available in the Pro Se Intake Unit or at: www.nysd.uscourts.gov/file/forms/motion-for-permission-for-electronic-case-filing-for-pro-se-cases. Any non-incarcerated pro se party who wishes to receive documents by email instead of by regular mail may consent to electronic service by filing a Pro Se (Non-Prisoner) Consent & Registration Form to Receive Documents Electronically, available in the Pro Se Intake Unit or at: www.nysd.uscourts.gov/file/forms/consent-to-electronic-service-for-pro-se-cases.

E. **Requests for Adjournments or Extensions of Time.** Requests to adjourn a court conference or court proceeding (including a telephonic court conference) or to extend a deadline must be made by letter-motion, after consultation with all affected parties, and must state: (1) the original date of the conference, proceeding or deadline; (2) the number of previous requests for adjournment or extension; (3) whether these previous requests were granted or denied; (4) the reason for the present request; (5) whether all affected parties consent; and (6) if not, the reasons given for refusing. If the requested adjournment or extension affects any other scheduled dates, a proposed Revised Scheduling Order must be attached.

All requests for extension of a deadline must be made in advance of the deadline to be extended. Absent unforeseeable emergencies, all requests for adjournment of a court conference or other court proceeding (including a telephonic court conference) must be made at least 72 hours in advance of the proceeding to be adjourned, and must include at least two proposed dates, on which all counsel are available, for the adjourned proceeding.

F. **Hand Deliveries.** Where permitted by these Rules, hand-deliveries should be left with the Court Security Officers at the Worth Street entrance of 500 Pearl Street and may not be brought directly to Chambers. If the hand-delivery is urgent and requires the Court's immediate attention, ask the Court Security Officers to notify Chambers that an urgent package has arrived that needs to be retrieved immediately by Chambers staff.

II. Motions

A. **Discovery Motions.** No discovery dispute shall be heard unless the moving party (including a non-party seeking relief from a subpoena) has first conferred in good faith with the adverse party or parties by telephone or in person in an effort to resolve the dispute. An exchange of letters or email alone does not satisfy this requirement. Counsel must respond promptly and in good faith to any request from another party to confer in accordance with this paragraph.

If the parties have met and conferred but cannot resolve their dispute, the moving party must request a pre-motion discovery conference with the Court, by letter-motion, as required by Local Civil Rule 37.2. The letter-motion must certify

that the required in-person or telephonic conference took place between counsel for the relevant parties. The letter-motion must also state: (1) the date and time of such conference; (2) the approximate duration of the conference; (3) the names of the attorneys who participated in the conference; (4) the adversary's position as to each issue being raised (as stated by the adversary during the in-person or telephone conference); and (5) that the moving party informed the adversary during the conference that the moving party believed the parties to be at an impasse and that the moving party would be requesting a conference with the Court. None of these requirements may be satisfied by submitting copies of correspondence between counsel.

B. **Pre-Motion Conferences.** For motions other than discovery motions, a pre-motion conference is not required. A pre-motion conference may be requested by letter-motion where counsel believes that an informal conference with the Court may obviate the need for the motion or reduce the issues in dispute.

C. **Briefing Schedule on Letter-Motions.** Unless the Court has ordered otherwise or the parties have agreed to a different briefing schedule, any opposition to a letter-motion shall be filed within three business days of the moving letter, and any reply shall be filed within one business day of the opposition. If the parties have agreed to a different briefing schedule, they must so inform the Court, either in the moving letter or as soon as agreement is reached. If the letter-motion requests emergent or expedited relief, opposing counsel are advised to file any opposition as promptly as possible.

D. **Briefing Schedule on Formal Motions.** Unless the Court has ordered otherwise or the parties have agreed to a different briefing schedule, opposition and reply papers with respect to formal motions will be due in accordance with Local Civil Rule 6.1. The parties are strongly encouraged to agree on a reasonable briefing schedule before the moving papers are filed. If the parties have agreed to such a schedule, they must so inform the Court, either in the moving party's notice of motion or by letter as soon as agreement is reached. Should the parties thereafter agree to modify their briefing schedule, they must promptly inform the Court of the new schedule by letter.

E. **Memoranda of Law.** The typeface, margins and spacing of motion papers must conform to Local Civil Rule 11.1. Unless prior permission has been granted, memoranda of law in support of and in opposition to motions are limited to 25 pages, and reply memoranda are limited to 10 pages. Memoranda of 10 pages or more shall contain a table of contents and a table of authorities.

F. **Courtesy Copies.** One courtesy copy of all formal motion papers, marked as such, shall be submitted to Chambers promptly after filing. Courtesy copies should bear the ECF header generated at the time of electronic filing and include protruding tabs for any exhibits. Bulky materials should be neatly bound, or placed in 3-ring binders, with appropriate dividers.

G. Redactions and Filing Under Seal. Filing under seal requires permission of the Court. Unless otherwise ordered, any party wishing to file a document or portion thereof under seal must do the following on or before the date on which the relevant brief, declaration or other document is due: (1) serve a complete and unredacted copy of the document on all other parties; (2) file a redacted copy of the document via ECF, from which the material claimed to require confidential treatment has been removed or concealed; (3) make a specific request to the Court by letter, sent by hand delivery to chambers, explaining the need to withhold the material at issue from the public record notwithstanding the strong presumption of public access to "judicial documents" under the First Amendment and the common law. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-21 (2d Cir. 2006). The letter should include as attachments: (a) one complete and unredacted copy of the document, as served on the other parties, and (b) one copy of each page sought to be withheld or redacted, marked to show the material claimed to require confidential treatment (*e.g.*, highlighted to show the words, phrases or paragraphs sought to be redacted). The parties are cautioned that the designation of documents as "confidential" for discovery purposes does not, without more, justify a sealing order. If a sealing request is based on another party's designation of documents or information as "confidential," the parties shall confer and jointly submit the request for sealing.

If the Court approves the request for filing under seal, the parties must file redacted copies via ECF and the unredacted copies under seal. If the Court does not approve the request, Chambers will file the complete and unredacted document on ECF or provide further instructions to the filing party.

The pendency of an application to seal does not affect any deadlines that may have been set by the Court.

H. Oral Argument on Motions. Parties may request oral argument by letter. The Court will determine whether argument will be heard and, if so, will advise counsel of the argument date and time.

Junior members of legal teams representing clients are invited to argue motions they have helped prepare. Firms are encouraged to provide this opportunity to junior attorneys for training purposes. The Court is amenable to permitting a number of lawyers to argue for one party if this creates an opportunity for a junior lawyer to participate. The ultimate decision of who speaks on behalf of the client is for the lawyer in charge of the case, not for the Court.

III. Pretrial Procedures

A. Applicability. The procedures set out below apply only to cases in which the parties have consented pursuant to 28 U.S.C. § 636(c) to have all proceedings before Judge Aaron, including trial.

B. Joint Pretrial Order. Unless otherwise ordered by the Court, the parties shall submit to the Court for its approval a Joint Pretrial Order within 30 days after the

date for the completion of discovery, or, if a summary judgment motion has been filed, within 30 days after the decision on the motion. The proposed Joint Pretrial Order shall be signed by all parties and include the following:

1. The full caption of the action.

2. The names, addresses, telephone numbers (both office and cellular) and email addresses of each principal member of the trial team.

3. A brief statement by plaintiff (or, in a removed case, by defendant) as to the basis of subject matter jurisdiction, and a brief statement by each other party as to the presence or absence of subject matter jurisdiction, including citations to all statutes relied on and relevant facts, such as citizenship and jurisdictional amount.

4. A brief summary by each party of the claims and defenses that party has asserted that remain to be tried, including citations to all statutes relied on, but without recital of evidentiary matter.

5. With respect to each claim remaining to be tried, a brief statement listing each element or category of damages sought with respect to such claim and a calculation of the amount of damages sought with respect to such element or category.

6. A statement by each party as to whether the case is to be tried with or without a jury, and the anticipated number of trial days needed.

7. Any stipulations or agreed to statements of fact or law.

8. A statement by each party as to the witnesses whose testimony is to be offered in its case in chief, indicating whether such witnesses will testify in person or by deposition. Absent extraordinary circumstances, a party may not call as a witness in its case in chief any person not listed in the Joint Pretrial Order.

9. A designation by each party of deposition testimony to be offered in that party's case in chief, referencing page and line numbers, with any cross-designations and objections by any other party. If there is no objection or cross-designation, the Court will deem the opposing party to have waived any such objection or cross-designation. Absent extraordinary circumstances, a party may not offer in its case in chief deposition testimony that is not listed in the Joint Pretrial Order.

10. A list by each party of exhibits to be offered in its case in chief. Each exhibit shall be pre-marked (plaintiff to use numbers, defendant to use letters). For each exhibit as to which there is an objection, the party objecting must briefly specify, next to the listing for that exhibit, the nature of the party's objection (*e.g.*, "authenticity," "hearsay," "Rule

403"). Any objection not listed shall be deemed waived. Absent extraordinary circumstances, a party may not offer in its case in chief any exhibit not listed in the Joint Pretrial Order.

11. A proposed schedule by which the parties will exchange demonstrative exhibits that the parties intend to use at trial, notify each other of any objections thereto, consult with each other regarding those objections and notify the Court of any remaining disputes.

12. All other matters that the Court may have ordered or that the parties believe are important to the efficient conduct of the trial.

C. Filings Prior to Trial. Unless otherwise ordered by the Court, each party shall file 15 days before the date of commencement of trial if such a date has been fixed (or 30 days after the filing of the final pretrial order if no trial date has been fixed):

1. In jury cases, requests to charge and proposed voir dire questions, and where applicable, a proposed special verdict form.

2. In nonjury cases, proposed findings of fact and statements of law. If the parties believe it would be useful, they also may file in nonjury cases pretrial memoranda, limited to 25 pages.

3. In all cases, motions addressing any evidentiary or other issues which should be resolved *in limine*.

D. Marking Exhibits for Trial. At the commencement of trial, each party must provide each other party, and the Court, with a tabbed binder or binders containing courtesy copies of its trial exhibits and deposition designations.

Contact Information

Hon. Katharine H. Parker
Organization: United States District Court, Southern New York

Phone: (212) 805-0234
Fax: (212) 805-0389
Website: http://www.nysd.uscourts.gov

Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
Courtroom: 17D
New York, New York 10007-1312
New York County
U.S.A.

Position:

United States Magistrate Judge, since November 04, 2016

Education:

Fordham University School of Law, New York, New York, United States of America, 1992
J.D.
Honors: cum laude; Order of the Coif
Law Review: Fordham Law Review

Duke University, Durham, North Carolina, United States of America, 1989
B.A.
Honors: cum laude

Admitted:

Connecticut, 1992

New York, 1993

U.S. District Court District of Connecticut, 1993

U.S. District Court Southern District of New York, 1993

U.S. District Court Eastern District of New York, 1993

U.S. Court of Appeals 11th Circuit

U.S. Court of Appeals 1st Circuit

U.S. Court of Appeals 2nd Circuit

U.S. Court of Appeals 3rd Circuit

U.S. Court of Appeals 6th Circuit

U.S. District Court Northern District of New York

U.S. District Court Western District of New York

U.S. Supreme Court

Narrative:
Katharine Parker is a savvy strategist who assists companies with a wide range of complex employment law matters in and out of court. Clients recognize her for the value that "lies in the proactive, practical advice she provides" and praise her for being a "wonderful confidant."

Katharine has led the defense of numerous class, collective and single-plaintiff actions. These cases have included defense of discrimination and harassment allegations, discriminatory pay practices, wage and hour disputes, background check matters, breach of contract issues, claims asserting wrongful denial of employee benefits and alleged breaches of fiduciary duties in the management of retirement plans, among many other types of employment and employee benefit disputes.

She has successfully resolved many complex matters, saving clients money and sparing them reputational damage. When resolution is not possible, she is a zealous advocate who has won dismissal of cases through motion practice and defended cases through trials and hearings.

Katharine has an active counseling practice as well. Clients seek her out for advice on complex employment law compliance questions because of her ability to listen to and understand their needs. She develops practical solutions for her clients to help them achieve their business goals. She assists with hiring and background procedures, pay equity assessments, reductions-in-force, leave policies and administration, complex accommodation questions, affirmative action and diversity plans, and defense of government investigations and audits.

Companies also call upon Katharine to investigate claims of harassment, discrimination and other misconduct of high-level executives, partners and directors.

Published Works:
Garcia Revisited, The Age Discrimination in Employment Act's Application to Appointed State Court Judges, 59 Fordham Law Review 403-22, December, 1990

Classes/Seminars Taught:
The Use of Demonstrative Evidence and the Strategy of the Motion in Limine, 36th Annual Institute on Employment Law

Honors:
Super Lawyers, 2007 - 2008

"Nation's Most Powerful Employment Attorneys- Up-and-Comers'" Human Resources Executive, Lawdragon

Best Lawyers in America, 2011 - 2017

New York City YWCA Academy of Women Achievers

New York State Bar Association, Empire State Counsel, 2012 - 2013

US Legal 500: Labor & Employment: Workplace & Employment Counseling, 2012 - 2013

New York Super Lawyers, 2008 - 2015

New York City Bar Association, Jeremy G. Epstein Award (for pro bono service)

Girl Be Heard, Fairy Godmother Award (for pro bono service)

The Legal 500 United States: Labor and Employment: Workplace and Employment Counseling, 2012 - 2016

Past Positions:
U.S. District Court, Connecticut, Hon. Warren W. Eginton, Clerk, 1992 - 1993

Proskauer's labor and Employment Law, Partner

Affiliations:
American Bar Association, Member

New York State Bar Association, Member

Federal Bar Council, Member

New York City Bar Association, Member

College of Labor and Employment Lawyers, Fellow

This constitutes the most current information Thomson Reuters Westlaw has on record for this listing. If you wish to update this information, please use the "Update Your Profile" link under Related Tools.

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Contact Information

Hon. Robert W. Lehrburger
Organization: United States District Court, Southern New York

Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
Courtroom: 18D
New York, New York 10007-1312
New York County
U.S.A.

Phone: (212) 805-0248
Fax: (212) 805-0389
Website: http://www.nysd.uscourts.gov

Position:

United States Magistrate Judge, since November 08, 2017

Education:

New York University School of Law, New York, New York, United States of America, 1989
J.D.
Honors: American Jurisprudence Awards for Unfair Trade Practices and Political Theory of the U.S. Constitution; Order of the Coif
Law Review: New York University Law Review

Brown University, Providence, Rhode Island, United States of America, 1985
B.A.
Honors: magna cum laude

Admitted:

New York, 1990

Massachusetts, 1990

District of Columbia, 1990

U.S. Court of Appeals Federal Circuit, 1990

U.S. Supreme Court, 1990

U.S. District Court Southern District of New York

U.S. District Court Eastern District of New York

U.S. Court of Appeals 2nd Circuit

U.S. Court of Appeals 5th Circuit

Published Works:

3 Key Issues To Consider Before Choosing An Ad Slogan, November 2013

Co-Author, "3 Key Issues To Consider Before Choosing An Ad Slogan", Law360, November 19, 2013

9 Questions to Ask in Suing a Rival for False Advertising, November 2013

Author, "9 Questions to Ask in Suing a Rival for False Advertising", Corporate Counsel, November 14, 2013

American Needle v. National Football League, January 2010

"Clearing the Way to Work Effectively With Outside Litigation Counsel", GC New York, February 11, 2010

Clearing the Way to Work Effectively With Outside Litigation Counsel, February 11, 2010

Court of Appeals Limits Unauthorized Use Of Celebrity Names In Artistic Works, May, 2003

Court Says "Compare To" Claims Are Actionable, September 21, 2009

Federal Circuit Raises Stakes In False Patent Marking Cases, January 2010

Federal Circuit Reinvigorates the Written Description Requirement, April 09, 2010

FTC Drops Bomb on Pom: Finds Ads Touting Health Benefits of Pomegranates Unsubstantiated and False, January 2013

FTC Finalizes New Rules Governing Testimonials, October 2009

FTC Releases Final Guides for "Green" Marketing and Environmental Claims, October 2012

FTC Unveils Stricter Guidelines for Green Marketing, October 07, 2010

Put Up Your Dukes: Supreme Court Hands Advertisers New Weapons to Fight Spurious Class Actions, June 2011

Putting the Brakes on National Class Actions: The Ninth Circuit Substantially Limits The California Supreme Court's Tobacco II Decision, January 2012

Author, "Shopping for a False Advertising Forum", GC New York, November 13, 2006

Supreme Court Clarifies Standing For False Advertising Cases, March 2014

Supreme Court Nixes Aereo TV, Holding That Internet Streaming of Broadcast TV to Subscribers Violates Copyright Law, June 2014

The "Cannibal Cop" and Protection of Computerized Data, December 08, 2015

The Daubert Rule and Consumer Surveys, Spring, 2002

The Truth Hurts: Two Circuits Now Recognize That Consumer Surveys Cannot Be Used to Dispute Unambiguous Advertising Claims, August 2011

U.S. Supreme Court Unanimously Decides American Needle v. National Football League, May 25, 2010

Past Positions:
Commercial Division of New York Supreme Court, Mediator

Council of Better Business Bureaus, Arbitrator

Pro Bono Activities:
Special Assistant to the New York City's Corporation Counsel

Affiliations:
Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, Former Member

New York State Bar Association Section of Commercial and Federal Litigation, Member

American Bar Association Sections of Litigation and Intellectual Property, Member

Fraternities/Sororities:
Phi Beta Kappa

This constitutes the most current information Thomson Reuters Westlaw has on record for this listing. If you wish to update this information, please use the "Update Your Profile" link under Related Tools.

End of Document

Moses, Barbara

United States Magistrate Judge
Southern District of New York

Chambers address:
United States Courthouse
500 Pearl Street, Room 920
New York, NY 10007

Phone: (212) 805-0228

Barbara Moses was sworn in as a United States Magistrate Judge for the Southern District of New York on December 23, 2015.

Judge Moses graduated from Dartmouth College in 1978, *magna cum laude*, and from Harvard Law School in 1982, *cum laude*. Between college and law school she worked as a radio reporter in New England. After receiving her law degree, Judge Moses clerked for Chief Judge Vincent L. McKusick of the Maine Supreme Judicial Court. She then joined the San Francisco office of Orrick, Herrington & Sutcliffe, where she became a litigation partner in 1990. In 1992, Judge Moses moved to Orrick's New York office, and in 2002 she joined the New York firm now known as Morvillo, Abramowitz, Grand, Iason & Anello, where she continued to practice in the field of securities and business litigation.

From 2009 through 2011, in addition to her private practice, Judge Moses taught a full-year, first-year course in Lawyering at NYU Law School. From 2011 through 2015 she directed the Constitutional and Civil Rights Litigation Clinic at Seton Hall Law School, where she also taught Professional Responsibility.

Judge Moses has been a director of the New York County Lawyers' Association since 2007. From 2013 to 2014 she served as NYCLA's 59th President, and from 2004 to 2006 she chaired the NYCLA Federal Courts Committee, which honored her with the David Y. Hinshaw Award in 2015. Judge Moses is also a member of the American Bar Association, the New York State Bar Association, and the American Law Institute.

Courtroom Deputy: Kevin Snell
Law Clerks: Jenna Cohen, Harold David Leslie

Contact Information
Hon. Stewart D. Aaron
Organization: United States District Court, Southern New York

Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
Courtroom: 11C
New York, New York 10007-1312
New York County
U.S.A.

Phone: (212) 805-0274
Fax: (212) 805-0389
Website: http://www.nysd.uscourts.gov

Position:
United States Magistrate Judge, since November 27, 2017

Education:
Syracuse University College of Law, Syracuse, New York, United States of America, 1983
J.D.
Honors: summa cum laude

Cornell University, Ithaca, New York, United States of America, 1980
B.S.

Admitted:
New York, 1984

U.S. Supreme Court, 1984

U.S. Court of Appeals 2nd Circuit

U.S. District Court

U.S. Tax Court

U.S. Court of Appeals 4th Circuit

U.S. Court of Appeals 9th Circuit

U.S. District Court Southern District of New York

U.S. District Court Eastern District of New York

Published Works:
"Considerations Surrounding Motions in Limine.", New York Law Journal, April 2007

Contract Formation Under New York Law: By Choice or Through Inadvertence, Syracuse Law Review, August 2015

For M&A Attys, A Warning On Inadvertent Disclosure, Appellate Law360, Banking Law360, Insurance Law360, Legal Ethics Law360, Mergers & Acquisitions Law360, New York Law360, Real Estate Law360, and Securities Law360, June 15, 2016

"Inside The Minds: Securities Litigation.", Aspatore Books, Publishers of C-Level Business Intelligence, October 2005

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Stewart D. Aaron and Robert C. Azarow "Delaware Court Denies Attorneys' Fees for Alleged Dodd-Frank Disclosure Deficiencies", The Harvard Law School Forum on Corporate Governance and Financial Regulation, July 18, 2014

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Stewart D. Aaron "Forward: Crisis in the Judiciary", New England Law Review, Volume 47, Issue 3, 2013

Stewart D. Aaron "Importance of a Writing Under New York Law", New York Law Journal, April 26, 2013

Stewart D. Aaron "Reflections on 9/11 and the Law", New York Law Journal, September 09, 2011

Stewart D. Aaron "Rule 10b-5 Liability of Secondary Actors: Second Circuit Rejects Creator Theory and Adopts Attribution Requirement in Pacific Investment Management Co. v. Mayer Brown", Bloomberg Law Reports, Vol. 4, No. 26, July 2010

Supreme Court Clarifies Liability for Statements of Opinion Under Section 11 of the Securities Act, Arnold & Porter Advisory, March 26, 2015

Supreme Court to Decide Applicable Tolling Rule for the Securities Act's Statute of Repose, Advisory, April 20, 2017

"The Realities and Economics of Civil Litigation in Federal Court and Its Impact on Litigation Management.", Bloomberg Law Reports, Vol. 2, No. 25, June 2008

Classes/Seminars Taught:
"Best Practices for Expert Witnesses in Federal and State Court Business Litigation", New York State Bar Association Commercial and Federal Litigation 2014 Spring Meeting, Lenox, MA, May 02, 2014 - May 04, 2014

"Commencing an Action in Federal Court", Winning Cases in Federal Court, NYCLA Committee on the Federal Courts, New York, NY, June 18, 2014

"Fourth Circuit Adopts Strict Standard for Pleading Scienter in Securities Fraud."

"In re: Initial Public Offering Securities Litigation."

"Second Circuit Rejects Bar on "Foreign-Cubed" Securities Lawsuits."

"Securities Class Action Litigation", Fundamentals of US Securities Law: What Canadian Lawyers Need to Know, Toronto, ON, March 26, 2015

"Welcome Remarks", Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System, October 18, 2013

Honors:
AV-Rated Attorney

Best Lawyers Commercial Litigation, 2013 - 2018

Best Lawyers in America for Commercial Litigation, 2013 - 2015

Chambers USA: America's Leading Lawyers for Business for Litigation: Securities, 2009 - 2011

Chambers USA Litigation: General Commercial, 2016 - 2017

Chambers USA Litigation: Securities, 2009 - 2011

New York Super Lawyers Business Litigation, 2006 - 2016

The Legal 500 US Corporate & Finance: Investment Funds - Alternative/Hedge Fund Formation, 2007

The Legal 500 US Financial Services: Litigation, 2012 - 2014

The Legal 500 US, Volume 1: Corporate & Finance for Investment Funds: Alternative/Hedge Fund Formation, 2007

Top 100 Super Lawyer, New York - Metro, 2012 - 2016

Past Positions:
Arnold & Porter Kaye Scholer LLP, Partner

Affiliations:
Association of the Bar of the City of New York, Chair, Litigation Committee

Federal Bar Council, Member

Federal Legislation Committee, Chair

National Center for State Courts, Member, Lawyers Committee

New York American Inn of Court, Member

New York City Bar, Member, Entertainment Committee

New York City Bar, Past Chair, Litigation Committee

New York County Lawyers' Association (NYCLA), Past President

New York State Bar Association (NYSBA), Member, House of Delegates

NY Chief Judge’s Commercial Division Advisory Council, Member

NYCLA, Member, Board of Directors

NYCLA Committee on the Federal Courts, Past Chair

NYCLA Executive Committee, Member

NYCLA Task Force on Judicial Independence, Member

NYSBA Committee on Federal Legislation, Past Chair

The Legal Aid Society, Member, Board of Directors

US District Court for the Southern District of New York, Mediator

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The New York American Inn of Court Planning Committee

Vilia B. Hayes

Vilia B. Hayes is a senior counsel at Hughes Hubbard & Reed LLP, and her practice concentrates on counseling and litigation in the areas of employment law, product liability, insurance and commercial litigation. She is also Chair of the Pro Bono Committee, and supervises a wide range of cases in state, federal and immigration court. Ms. Hayes graduated from Marymount College with a B.A. degree (Psychology, with Honors) in 1972. She received her law degree in 1980 from Fordham University School of Law (cum laude), where she served as Associate Editor on the Fordham Law Review. Prior to joining Hughes Hubbard, Ms. Hayes served as Law Clerk to the Honorable Charles L. Brieant, United States District Judge for the Southern District of New York (1980-1981). She has been active in various professional associations, including as past President of the Federal Bar Council, and is currently on the Board of Lawyers Committee for Civil Rights Under Law, Legal Momenum and JALBCA.

Tom Brown

Tom has over 20 years of complex commercial, employment and trust and estates litigation experience. He has handled a broad range of commercial and employment cases, involving allegations of fraud, breach of fiduciary duty, breach of contract, breach of employment covenants, theft of trade secrets, discrimination and more. Tom has also represented executors, trustees and beneficiaries in numerous trust disputes and will contests.

Tom has successfully litigated multiple cases to verdict before juries, judges and arbitrators. He has also argued appeals in both state and federal courts. He has handled all aspects of pre-trial strategy and discovery, including taking depositions throughout the Unites States and abroad.

Tom regularly advises corporations and individuals on litigation and litigation avoidance strategy. He has also conducted a Foreign Corrupt Practices Act investigation in Central America and the United States.

Prior to founding Morea Schwartz Bradham Friedman & Brown LLP, Tom was a clerk for The Honorable Max Rosenn on the United States Court of Appeals for the Third Circuit, a Partner at Fensterstock & Partners LLP and a partner at Orans, Elsen, Lupert & Brown LLP.

Walter Ricciardi

Walter Ricciardi joined Paul Weiss as a partner in June 2008 and has extensive experience defending a broad variety of investigations conducted by the U.S. Securities and Exchange Commission and other regulatory authorities. Additionally, he has extensive experience conducting internal investigations for public companies and directors, including investigations related to accounting issues.

Prior to joining Paul, Weiss in June 2008, Walter was the Deputy Director of the SEC's Division of Enforcement, where he supervised many of the Commission's most significant investigations related to financial fraud, insider trading, and investment adviser, broker-dealer and mutual fund

compliance issues. In April 2004, Walter was appointed to run the SEC's Boston office, which was responsible for enforcement and examination programs for the New England region. He was appointed as Deputy Director of the SEC's Division of Enforcement in October 2005, and his duties included managing the enforcement efforts of the Commission's eleven regional offices.

Prior to joining the SEC, Walter spent 20 years with PricewaterhouseCoopers ("PwC") and its predecessor, Coopers & Lybrand, where he was in charge of defending the firm's litigation and regulatory matters. While at PwC, he was elected by his partners to serve on the firm's board, which is responsible for overseeing the management of the firm. He was also elected to serve on the Global Oversight Board of the PwC global organization.

Since joining Paul, Weiss, he served a three-year term from 2012 to 2014, on the Public Company Accounting Oversight Board's Standing Advisory Group ("SAG"). The role of the SAG is to assist the Board in reviewing existing auditing and related professional practice standards and evaluating proposed standards, and to recommend to the Board new or amended standards.

As an Adjunct Professor at New York University School of Law, Walter teaches a seminar on issues in SEC enforcement. Walter is recognized as a leading individual for securities regulation enforcement in Chambers USA (2013-2015), for Securities: Shareholder Litigation in The Legal 500 (2012) and was chosen by his peers for The Best Lawyers in America (2011-2016) for corporate governance law, securities litigation and securities regulation.

Annika K. Martin

Annika K. Martin is a partner in the New York office of Lieff Cabraser Heimann & Bernstein, and has represented plaintiffs since 2005 in environmental, mass tort, and consumer protection cases.

For the past six years, Annika has been representing individuals, property owners, and business owners across the Gulf Coast in class action litigation against BP, Transocean,

Halliburton, and the other companies responsible for the blowout on the Deepwater Horizon oil rig on April 20, 2010, which resulted in the worst oil spill in U.S. history. Annika was deeply involved in negotiating, implementing, and gaining court approval for the economic and medical settlements with BP that promise to fully compensate hundreds of thousands of victims of the tragedy.

Annika serves as court-appointed Pro Se Liaison counsel in *In re New England Compounding Pharmacy Products Liability Litigation*, MDL 2419, the Multidistrict Litigation arising out of the 2012 meningitis outbreak caused by contaminated medication manufactured by New England Compounding Pharmacy (NECC) and administered to tens of thousands of patients nationwide. An initial settlement valued at $200 million has been reached.

An active member of the legal community, Annika serves as the Co-Vice Chair of the Class Action Litigation Group and on several committees within the American Association for Justice, including Amicus Curiae, Legal Affairs, Publications, and Public Education. Cofounder of CLEF's Complex Litigation E-Discovery Forum, Annika is also a working group co-captain for

Women En Mass, and Steering Committee member for the Sedona Conference Working Group 1 (Electronic Discovery Retention and Production). Annika also led drafting teams for the Duke Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality and the Sedona Conference's Principles on Proportionality. Annika also speaks and writes regularly on issues of class actions, mass torts, and e-discovery.

Annika is fluent in Swedish and conversational in French, Spanish, and Dutch.

Mark S. Pincus

Mark S. Pincus is the founder and Managing Member of Pincus Law LLC, where his practice focuses on business litigation, employment litigation, and employment negotiations for growing companies, entrepreneurs, and executives. Active in the legal community, Mark currently is serving his second term as Membership Chair of the New York American Inn of Court and previously served as a Vice President. Mark also serves on the Federal Bar Council's Membership, Public Service, First Decade, and Employment Litigation committees, co-chaired the Federal Bar Council's 2017 Fall Bench and Bar Retreat, and provides federal procedural advice to *pro se* plaintiffs through the Eastern District of New York's FedPro clinic. A graduate of Cornell University and the Fordham University School of Law, where he served as Notes & Articles Editor of the *Fordham Law Review*, Mark previously practiced at Cahill Gordon & Reindel LLP and Edward V. Sapone, LLC. In each year since 2014, Mr. Pincus has been selected as a Rising Star in the New York Metro Edition of *Super Lawyers* for Business Litigation and Employment Litigation. He also was part of the Inn historical trial team that won an Outstanding Program award from the American Inns of Court for 2015-16.

Rebecca L. Orel

Rebecca Orel is a Litigation Associate at Paul, Weiss. From January 2016 through October 2017, Rebecca was the Habeas Law Clerk for the U.S. District Court for the Eastern District of New York, where she worked with Chief Judge Dora Irizarry and former Chief Judge Carol Amon, among others. Prior to her clerkship, Rebecca was an Associate at Paul, Weiss from 2013 to 2016, where she was also a Summer Associate in 2012. Rebecca received her J.D. from Columbia Law School in 2013 where she was a Harlan Fiske Stone Scholar and an Executive Managing Editor of the Columbia Human Rights Law Review. She received her B.A., summa cum laude, in History from the University of Pennsylvania in 2010.

Alejo Cabranes

Alejo Cabranes is an associate in Hughes Hubbard & Reed's Litigation department. He assists in the representation and defense of corporate and individual clients in criminal, civil, and regulatory matters. Alejo maintains an active pro bono practice that has included representation of a prisoner in Section 1983 litigation, post-conviction investigation and litigation related to coerced police confessions in homicide investigations, representation of undocumented juvenile immigrants, and representation of federal prisoners in executive clemency petitions.

He is a member of the Federal Bar Council and serves on its Public Service Committee.