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Peretz v. United States: Magistrates Perform Felony Voir Dire

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Peretz v. United States: Magistrates Perform Felony Voir Dire

In the twenty-four years since Congress passed the Federal Magistrates Act,[1] courts and commentators have debated the scope of magistrates' duties.[2] Responding to judicial interpretation of the "additional duties" clause of the Act[3] and the increasing caseload of the federal courts, Congress twice amended the Act.[4] Through these changes Con-

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1. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968) (current version at 28 U.S.C. §§ 631-639 (1988)). Congress passed the Magistrates Act to assist district judges in their judicial duties and to offset increasing caseloads in the federal courts. *See* Christopher E. Smith, *Who Are the U.S. Magistrates?*, 71 JUDICATURE 143, 143 (1987). Subject to specified controls, magistrates may perform almost all tasks of a district judge "except trying and sentencing felony defendants." *Id.* One of the chief benefits the system derives from magistrates is the "prompt disposition of cases in the court." H.R. REP. No. 1609, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172.

2. *See, e.g.*, McCarthy v. Bronson, 111 S. Ct. 1737, 1739 (1991); Gomez v. United States, 490 U.S. 858, 860-62 (1989), *rev'g* United States v. Garcia, 848 F.2d 1324, 1328 (2d Cir. 1988); United States v. Raddatz, 447 U.S. 667, 669 (1980); United States v. Musacchia, 900 F.2d 493, 501 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991); United States v. France, 886 F.2d 223, 227 (9th Cir. 1989), *aff'd by an equally divided Court*, 111 S. Ct. 805 (1991); United States v. Ford, 824 F.2d 1430, 1437 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1034 (1988); Jack B. Streepy, *The Developing Role of the Magistrate in the Federal Courts*, 29 CLEV. ST. L. REV. 81, 92 (1980); Raymond B. Bolanos, Note, *Magistrates and Felony Voir Dire: A Threat to Fundamental Fairness?*, 40 HASTINGS L.J. 827, 844-53 (1989); Reinier H. Kraakman, Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1058-61 (1979); Thomas J. Platt, Comment, *The Expanding Influence of the Federal Magistrate*, 14 J. MARSHALL L. REV. 465, 488-89 (1981).

3. The "additional duties" clause provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3) (1988). In Wingo v. Wedding, 418 U.S. 461 (1974), the Supreme Court ruled that the Magistrates Act's additional-duties clause does not permit magistrates to conduct evidentiary hearings on federal habeas corpus petitions. *Id.* at 472. Federal appellate court decisions also had interpreted this clause narrowly. Bolanos, *supra* note 2, at 841 (citing Ellis v. Buckhoe, 491 F.2d 716, 717 (6th Cir. 1974); Ingram v. Richardson, 471 F.2d 1268, 1271 (6th Cir. 1972); Rainha v. Cassidy, 454 F.2d 207, 208 (1st Cir. 1972)).

4. In 1976, Congress completely revised the additional-duties clause. Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729, 2729 (current version at 28 U.S.C. § 636(b) (1988)); *see* H.R. REP. No. 1609, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6169. The amendments delineated the pretrial matters that were delegable to magistrates. 90 Stat. at 2729; *see* 28 U.S.C. § 636(b)(1). These additions also included specific provisions for de novo review of the magistrate's findings. 90 Stat. at 2729; *see* 28 U.S.C. § 636(b)(1)(C). Despite its clarification of a magistrate's role, Congress retained the nebulous provision that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 90 Stat. at 2729; *see* § 636(b)(3). Further expanding magistrates' roles, Congress amended the Act in 1979 to allow, with the parties' consent, entry of judgment in a civil matter. Act of Oct. 10, 1979, Pub. L. No. 96-82, 93 Stat. 643, 643-44 (1979) (current version at 28 U.S.C. § 636(c)(1) (1988)). At the same time, Congress, expanding criminal jurisdiction of the Act, granted magistrates the right to try and sentence defendants in federal misdemeanor trials. 93 Stat. at 645-46; *see* 18 U.S.C. § 3401(a) (1988). The 1979 amendments also set more stringent standards for magistrate selection. 93 Stat. at

gress expanded magistrates' powers to include "conduct[ing] any or all proceedings in a jury or nonjury civil matter and order[ing] the entry of judgment" if the parties consent.[5] Magistrates also may preside over jury selection in criminal misdemeanor trials, but only if the defendant consents in writing.[6] Defending its broad interpretations of the "additional duties" clause since these amendments, the Supreme Court has noted that its decisions comport with congressional intent and are consistent with the structural provisions[7] of Article III of the United States Constitution.[8] Yet, the Court only recently faced directly the question whether the "additional duties" clause[9] of the Federal Magistrates Act encompassed jury selection by a magistrate in a felony trial if the defendant consented.

In *Peretz v. United States*[10] a bare majority[11] of the Justices decided that the "additional duties" clause of the Act permits federal magistrates to conduct voir dire[12] in felony trials.[13] The majority concluded that the defendant's constitutional right to an Article III judge[14] at jury selection was a personal right subject to waiver.[15] Moreover, it concluded that, although aspects of structural rights were present, these rights were not implicated sufficiently to threaten the structural protections built into Article III.[16] According to the *Peretz* Court, the defendant's waiver, to-

644-45; *see* 28 U.S.C. § 631; *see also* Bolanos, *supra* note 2, at 841-44 (discussing the amendments to the Federal Magistrates Act).

5. 28 U.S.C. § 636(c)(1).

6. 18 U.S.C. § 3401(a).

7. United States v. Raddatz, 447 U.S. 667, 681-82 (1980).

8. Article III of the Constitution provides, in pertinent part:

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

U.S. CONST. art. III, § 1.

9. 28 U.S.C. § 636(b)(3); *see supra* note 3.

10. 111 S. Ct. 2661 (1991).

11. Justice Stevens wrote the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter joined. *Id.* at 2663.

12. Voir dire is "the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

13. *Peretz*, 111 S. Ct. at 2671.

14. Article III judges possess the protections afforded by Article III of the Constitution—life tenure and guaranteed salary. U.S. CONST. art. III, § 1; *see* Ralph U. Whitten, *Consent, Caseload, and Other Justifications for Non-Article III Courts and Judges: A Comment on* Commodities [sic] Futures Trading Commission v. Schor, 20 CREIGHTON L. REV. 11, 12 (1986).

15. *Peretz*, 111 S. Ct. at 2669.

16. *Id.* The structural protections of Article III "safeguard[] the role of the Judicial

gether with the absence of noteworthy structural threats, permitted the magistrate to proceed with voir dire.[17] This holding, in the face of previous Supreme Court decisions interpreting the Magistrates Act, represents a significant expansion of Court-sanctioned magisterial powers.[18]

This Note examines *Peretz* by reviewing the evolution of the Federal

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Branch in our tripartite system." Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986). Such structural protections are not subject to waiver because they "serve institutional interests that the parties cannot be expected to protect." *Id.* at 851. Although the Article III provision for an impartial adjudicator, or a judge with life tenure and undiminishable salary, constitutes a personal right subject to waiver, it implicates structural concerns as well. *Peretz*, 111 S. Ct. at 2669; *see also Schor*, 478 U.S. at 849-50 (holding that Article III, § 1, although mainly construed to protect personal rights, also safeguards the overall system of checks and balances).

Two exceptions to Article III permit Congress to create "tribunals" whose officials lack the tenure and salary protections of their Article III counterparts. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64-68, 80-83 (1982). These exceptions developed from the concept that Article III power did not form the basis for legislative courts' jurisdiction; rather, Congress, in the exercise of its general powers, confers jurisdiction. Williams v. United States, 289 U.S. 553, 565 (1933); *see also* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545-46 (1828) (explaining the development of legislative courts); J. Anthony Downs, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1038-42 (1985) (describing exceptions to Article III courts). The two exceptions are legislative courts and Article III adjuncts.

Legislative courts are: (1) courts for United States territories; (2) military courts; and (3) "public rights" courts. *Northern Pipeline*, 458 U.S. at 64-67. The "public rights" doctrine applies only to matters "arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.' " *Id.* at 67-68 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)). Thus, "public rights" courts decide matters usually within the executive or legislative prerogative. *Id.* at 68. This doctrine developed from the principles of sovereign immunity and separation of powers. Because these matters could have been determined exclusively by legislative or executive departments, Congress' decision to allow a legislative court or administrative agency to determine these matters vitiates any constitutional objections. *Id.* at 68-69.

An Article III adjunct's power "derives from the [A]rticle III court, in which jurisdiction and control remain vested." Downs, *supra*, at 1042. The adjunct assists the federal district judges in a variety of ways. For example, "assessors" compute damages and "masters" conduct factfinding. Eric M. Wagner, *Magistrate Trials: The New Hierarchy of Class 2 Adjuncts and Article III Judges*, 58 ST. JOHN'S L. REV. 559, 566 n.23 (1984). Agencies created to adjudicate congressionally created federal rights, such as the United States Employees' Compensation Commission, are also adjuncts. *Id.* at 566 n.27. Adjuncts are divided into two categories. While Class One adjuncts aid in adjudicating specific rights created by Congress, Class Two adjuncts assist the court in general matters permeating all substantive law. *Id.* at 566-67. Magistrates resemble adjuncts because magistrates "assist in the adjudication of constitutional rights." *Id.* at 567.

17. *Peretz*, 111 S. Ct. at 2671.

18. *Id.* (Marshall, J., dissenting). Voicing objections to the waiver of Article III protections in a strong dissent, Justice Marshall opined that a defendant could not waive his right to voir dire conducted by an Article III judge merely by consenting. *Id.* (Marshall, J., dissenting). Justices White and Blackmun joined Justice Marshall's dissent; Justice Scalia dissented separately. *See id.* at 2677-80 (Scalia, J., dissenting).

Magistrates Act and the prior cases that construed it.[19] The Note analyzes the majority and dissenting opinions in *Peretz*, focusing on the various policy considerations that support and discourage magistrate-conducted felony voir dire.[20] Although the Court interpreted its most important holding prior to *Peretz*, *Gomez v. United States*,[21] as basing a magistrate's disqualification to conduct voir dire on the lack of defendant's consent,[22] the *Peretz* Court ignored a substantial portion of its previous opinion in *Gomez* and instead relied on circuit court opinions.[23] The majority also casually dismissed the major constitutional issue of whether magistrate-conducted felony voir dire violates the structural protections of Article III by overemphasizing the personal rights aspect of the Article.[24]

The government charged Peretz and a codefendant with importing four kilograms of heroin.[25] During the pretrial conference, at which counsel represented Peretz, the district judge received consent from Peretz's lawyer to select the jury before a federal magistrate.[26] The magistrate again asked Peretz's lawyer if he had his client's consent before proceeding with jury selection.[27] At trial, the defendants neither asked the judge to review any of the magistrate's rulings nor raised objections to the conduct of the voir dire.[28] The jury convicted Peretz, but acquitted his codefendant.[29]

On appeal, Peretz contended that assignment of jury selection to the magistrate constituted reversible error.[30] The United States Court of Ap-

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19. *See infra* notes 81-147 and accompanying text.

20. *See infra* notes 170-234 and accompanying text.

21. 490 U.S. 858 (1989).

22. *Peretz*, 111 S. Ct. at 2667.

23. The difficulty inhering in reliance on lower courts is the Court's virtual readiness to ignore direct precedent from a case decided by the Court only two years before, and to evade analysis of the *Gomez* opinion itself. *See infra* notes 160-69 and accompanying text.

24. *See infra* notes 197-209 and accompanying text.

25. *Peretz*, 111 S. Ct. at 2663.

26. *Id.* When the judge asked whether jury selection before the magistrate was acceptable, Peretz's counsel replied, " 'I would love the opportunity.' " *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* Peretz maintained that the Court's holding in United States v. Gomez, 490 U.S. 858 (1989), required reversal of his conviction. *Peretz*, 111 S. Ct. at 2663. In *Gomez* defendants Gomez and Chavez-Tesina, indicted for multiple felonies involving cocaine distribution, were convicted after a jury trial in which the magistrate selected the jury. *Gomez*, 490 U.S. at 860-61. Defense counsel had objected to delegation of jury selection to the magistrate both before jury selection commenced and when he appeared before the district judge. *Id.* at 860. The court of appeals had held that the delegation violated neither the Federal Magistrates Act nor Article III of the Constitution. United States v. Garcia, 848 F.2d 1324, 1330-33 (2d Cir.

peals for the Second Circuit disagreed.[31] Relying on *United States v. Musacchia*,[32] an earlier Second Circuit decision interpreting *Gomez*, the court affirmed the conviction, holding that explicit consent to magistrate-conducted voir dire constituted waiver of the defendant's right to have an Article III judge conduct jury selection.[33]

Resolving a conflict among the circuits,[34] the Supreme Court upheld the Second Circuit court's decision, reasoning that the "additional duties" clause of the Magistrates Act permits magistrates to conduct voir dire if the defendant consents.[35] This result, the majority concluded, was consistent with Article III's guarantee of a life-tenured, salaried judge.[36] The *Peretz* Court first inspected its earlier holding in *Gomez*, noting that the issue there had been narrow:[37] " 'whether presiding at the selection of a jury in a felony trial *without the defendant's consent*' " is among the

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1988), *rev'd sub nom.* Gomez v. United States, 490 U.S. 858 (1989). A unanimous Supreme Court concluded, however, that such delegation was impermissible. *Gomez*, 490 U.S. at 876; *see infra* note 130.

31. *Peretz*, 111 S. Ct. at 2663.

32. 900 F.2d 493 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991). In *Musacchia* the defendants had been convicted of conspiracy to defraud the United States by willfully failing to pay gasoline excise taxes. *Id.* at 495. They had neither consented nor objected to magistrate-conducted voir dire, and failed to raise the issue until after the verdict had been entered. *Id.* at 501. The Second Circuit, withholding decision until after the Supreme Court decided *Gomez*, construed *Gomez* as failing to create a jurisdictional bar to magistrate-conducted voir dire. *Id.* at 503. Thus, the *Musacchia* court concluded that objections to delegating jury selection to a magistrate could be waived in the same way as the defense of lack of personal jurisdiction. *Id.* The Second Circuit also noted the conflict among circuits in interpreting *Gomez*. *Id.* at 502. The dissent, however, read *Gomez* as applicable to all cases in which no express consent had been given. *Id.* at 504 (Lasker, J., dissenting).

33. *Peretz*, 111 S. Ct. at 2669.

34. Before and after *Gomez*, the courts of appeals arrived at differing conclusions regarding delegation of jury selection to magistrates. On the one hand, three circuit courts favored magistrate-conducted voir dire. In United States v. Ford, 824 F.2d 1430 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1034 (1988), the Fifth Circuit held that magistrate-conducted voir dire constituted harmless error when the defendant had failed to object. *Id.* at 1438-39. Later, the Third Circuit, in Government of the Virgin Islands v. Williams, 892 F.2d 305 (3d Cir. 1989), decided that, absent objection by the defendant, delegating voir dire to a magistrate presented no constitutional difficulties. *Id.* at 310. Similarly, the First Circuit held that an objection to magistrate-conducted voir dire must be raised or it is waived; otherwise, permitting a magistrate to preside over jury selection is not plain error. United States v. Lopez-Pena, 912 F.2d 1542, 1545-48 (1st Cir. 1989). On the other hand, the Ninth Circuit interpreted the Act differently in United States v. France, 886 F.2d 223 (9th Cir. 1989), *aff'd by an equally divided Court*, 111 S. Ct. 805 (1991). The *France* court concluded that, by failing to object to magistrate-conducted voir dire, the defendant did not waive her right to appellate review. *Id.* at 226. The Supreme Court granted certiorari to resolve this conflict among the circuit courts. Peretz v. United States, 111 S. Ct. 781 (1991).

35. *Peretz*, 111 S. Ct. at 2668.

36. *Id.* at 2669.

37. *Id.* at 2664-65.

additional duties federal judges may assign to magistrates.[38] Recognizing the importance of the magistrate's role in the federal court system,[39] the Court outlined the considerations underlying the *Gomez* decision: the interpretation of statutes to avoid constitutional issues,[40] the lack of an express de novo review provision, and the absence of legislative history mentioning magistrate conduct of voir dire without the defendant's consent.[41]

The Court distinguished *Gomez* from *Peretz* on the basis of consent.[42] The majority reasoned that because the defendant's consent removed constitutional concerns about its breadth, the Federal Magistrates Act merited a broad construction.[43] The *Peretz* Court placed scant emphasis on Congress' failure to enumerate voir dire as a magisterial duty because magistrate-conducted voir dire would be a conditional power, contingent upon consent, rather than a general authorization depriving every defendant of choice.[44] The "additional duties" clause, the Court held, invited innovation in improving the judicial process.[45] Consent, the majority concluded, also moves felony voir dire supervision into the realm of comparable enumerated duties that a magistrate may assume with consent under the Act.[46]

The *Peretz* Court relied on lower federal court decisions to analyze the Magistrates Act.[47] After citing several circuit court decisions that had refused to apply *Gomez* when the defendant consented,[48] the Court adopted the balancing test articulated by the United States Court of Ap-

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38. *Id.* at 2664 (quoting United States v. Gomez, 490 U.S. 858, 860 (1989) (emphasis added by *Peretz* Court)).

39. *Id.* at 2665.

40. *Id.* The Court construed the right to an Article III judge as a personal and waivable—rather than a structural and nonwaivable—protection. *Id.* at 2665-66 n.6.

41. *Id.* at 2666. Moreover, the duties that could be performed without the defendant's consent were minor, and not comparable to voir dire in a felony trial. *Id.*

42. *Id.* at 2667.

43. *Id.*

44. *Id.*

45. *Id.* at 2667-68. In the course of its analysis, the Court ignored a large part of the *Gomez* opinion. Addressing the legislative history recited in *Gomez*, the *Peretz* Court glossed over the bulk of the history and instead pointed to one letter mentioned briefly. *Id.* at 2668 n.11. For a further discussion of *Gomez*, see *infra* notes 125-40 and accompanying text.

46. *Peretz*, 111 S. Ct. at 2668. These "consensual duties" include conducting proceedings in a jury or nonjury civil matter and rendering judgment, 28 U.S.C. § 636(c)(1) (1988), and trying criminal misdemeanor cases, 18 U.S.C. § 3401(b) (1988).

47. *See Peretz*, 111 S. Ct. at 2667-68.

48. *Id.* at 2668 (citing United States v. Musacchia, 900 F.2d 493 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991); United States v. Wey, 895 F.2d 429 (7th Cir.), *cert. denied*, 110 S. Ct. 3283 (1990)).

peals for Third Circuit in *Government of the Virgin Islands v. Williams*:[49] reading the "additional duties" clause broadly achieves a balance between the policy behind the Federal Magistrates Act and the criminal defendant's interests in retaining the right to withhold consent to magistrate-conducted jury selection.[50] After analyzing the Federal Magistrates Act, the Court concluded that magistrate-conducted felony voir dire constituted an additional duty under the Act only if the defendant consented.[51] If the defendant sensed injury, the Court reasoned, the burden was on him to object.[52]

Turning to a constitutional analysis, the majority held that although a defendant in a criminal trial may have a right to have an Article III judge conduct voir dire, this right ceases to exist if the defendant "has raised no objection to the judge's absence."[53] The Court analogized the defendant's right to the presence of an Article III judge to other "basic rights of criminal defendants . . . subject to waiver": the right to public trial, the right to be present at all stages of the proceeding, and the right to be free from unlawful search and seizure.[54] Because a structural protection under Article III cannot be waived,[55] the Court next addressed whether delegating voir dire to magistrates impermissibly affects Article III's structural protections.[56] Relying on *United States v. Raddatz*,[57] in

49. 892 F.2d 305, 311 (3d Cir. 1989).

50. *Peretz*, 111 S. Ct. at 2668. The Court believed that this reading struck the balance intended by Congress and assisted in experimentation to enlarge magistrates' roles and improve the judicial process. *Id.*; *see, e.g.*, H.R. REP. NO. 1609, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172. Congress explained that the "additional duties" clause included such functions as reviewing default judgments, accepting jury verdicts, and completing administrative tasks so that Article III judges can perform "vital and traditional adjudicatory functions." *Id.*

51. *Peretz*, 111 S. Ct. at 2667; *see* 28 U.S.C. § 636(b)(3) (1988).

52. *Peretz*, 111 S. Ct. at 2668-69. The Court thus equated silence with an affirmative grant of consent. *Id.*

53. *Id.* at 2669.

54. *Id.* The Court did not distinguish between waiver of nonconstitutional rights, which are basic to the criminal justice system, and waiver of constitutional rights. *See id.* Noting that constitutional rights are subject to waiver, the Court stressed that constitutional rights in civil and criminal cases may be forfeited by failure to assert the right. *Id.*

55. *See supra* note 16. Under Article III, § 2, subject matter jurisdiction is also a structural protection that cannot be waived because of the institutional interests served. *Peretz*, 111 S. Ct. at 2676 (Marshall, J., dissenting). The structural protections of an independent judiciary, however, do not require the judge to play every role in a trial; Article III is satisfied so long as the judge "renders the final judgment" in a given case. Note, *Federal Magistrates and the Principles of Article III*, 97 HARV. L. REV. 1947, 1949 (1984). The process of "rendering the final judgment" is not so easily satisfied. Article III requires that "the entire process take[s] place under the district court's total control and jurisdiction." United States v. Raddatz, 447 U.S. 667, 681 (1980). This "process" must also include "the availability of meaningful judicial review." *Peretz*, 111 S. Ct. at 2677 (Marshall, J., dissenting).

56. *Peretz*, 111 S. Ct. at 2669.

which the central issue was a suppression hearing for which the Act provided de novo review,[58] the Supreme Court concluded that because the district court retained total control over the delegation process, no danger of transferring Article III jurisdiction to a non-Article III tribunal existed.[59] Accordingly, the *Peretz* Court concluded that the de novo review provision in the Federal Magistrates Act is applicable only when a party objects to the magistrate's findings,[60] although the statute itself fails to provide for de novo review by a judge of magistrate-conducted voir dire.[61] Because nothing in the Act precludes judicial review of magistrate-conducted findings in jury selection if a defendant objects, the absence of an enumerated provision was not problematic.[62] Even though the Court recognized that judicial review of a magistrate's decisions about jury selection would be difficult due to juror credibility issues and biases, which would be hard to detect later, the majority reasoned that other proceedings employing de novo review were subject to similar problems.[63]

In a sharp dissenting opinion,[64] Justice Marshall attacked the majority's reasoning on statutory and constitutional grounds. Arguing that "the absence or presence of consent" was completely "irrelevant to the Federal Magistrates Act's prohibition upon magistrate jury selection in a felony trial,"[65] Marshall contended that the matter simply involved conventional statutory interpretation of the "additional duties" clause.[66] He emphasized that a unanimous Court in *Gomez* had found, based on the absence of a specific reference to jury selection in the statute itself or in its legislative history, that the "additional duties" clause did not encompass jury selection.[67] Justice Marshall reasoned that two grounds supported the *Gomez* Court's holding that judges should retain power over jury selection. First, because it specifically defined magistrates' authority to preside over misdemeanor and civil trials, Congress implicitly ex-

57. 447 U.S. 667 (1980). The Court in *Raddatz* upheld the constitutionality of 28 U.S.C. § 636(b)(1)(B), which allowed a magistrate to conduct evidentiary hearings and provided for de novo review by an Article III judge. *Raddatz*, 447 U.S. at 684.

58. *Raddatz*, 447 U.S. at 672-74.

59. *Peretz*, 111 S. Ct. at 2669-70.

60. *Id.* at 2670.

61. *Id.*

62. *Id.* at 2671.

63. *Id.* The Court pointed out that magistrates' rulings in suppression hearings often hinge upon the credibility of witnesses. *Id.*

64. *Id.* (Marshall, J., dissenting). Justices White and Blackmun joined Justice Marshall's opinion. *Id.* (Marshall, J., dissenting).

65. *Id.* (Marshall, J., dissenting).

66. *Id.* at 2672 (Marshall, J., dissenting).

67. *Id.* at 2672-74 (Marshall, J., dissenting).

cluded felony voir dire from the realm of magisterial duties.[68] Second, the absence of an express provision for judicial review of magistrate jury selection in felony cases implied Congress's intention that this function remain nondelegable.[69] Justice Marshall worried that the majority's reliance on Congress's failure to preclude review did not answer the question satisfactorily. This conclusion not only failed to designate a process for judicial review, but also failed to address the unfeasibility of meaningful review of jury selection.[70]

Justice Marshall also voiced constitutional objections,[71] rebuking the majority for dismissing a major constitutional problem merely by invoking the defendant's consent.[72] Noting the *Raddatz* Court's conclusion that "delegation of Article III powers to a magistrate is permissible only if the ultimate determinations on the merits of delegated matters are made by the district judge,"[73] Justice Marshall emphasized the lack of a provision for judicial review of jury selection in the Federal Magistrates Act.[74] As Justice Marshall stressed, the *Gomez* Court concluded that the possibility of meaningful judicial review of magistrate-conducted jury selection was highly questionable.[75] Thus, according to Justice Marshall, the majority allowed waiver of an "unwaivable" structural protection.[76]

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68. *Id.* at 2672 (Marshall, J., dissenting). Justice Marshall also noted the Court's recognition of jury selection as an essential component of a trial. *Id.* He noted that the effects of jury selection pervade the entire trial process. *Id.* at 2672-73 n.2 (Marshall, J., dissenting).

69. *Id.* at 2673 (Marshall, J., dissenting).

70. *Id.* at 2673-74 (Marshall, J., dissenting). The *Gomez* Court had expressed doubts that any meaningful judicial review of a magistrate's jury selection was possible, because a transcript could not recapture the essence of voir dire. Gomez v. United States, 490 U.S. 858, 874-75 (1989). Although the Court in *Raddatz* solved a similar problem of witness credibility by stressing that the judge simply could rehear the witness, United States v. Raddatz, 447 U.S. 667, 680-81 (1980), jurors, alerted to the existence of a problem, might become defensive or mask their prejudices in a second questioning. *Gomez*, 490 U.S. at 875 n.29.

71. *Peretz*, 111 S. Ct. at 2675 (Marshall, J., dissenting).

72. *Id.* at 2671-72 (Marshall, J., dissenting).

73. *Id.* at 2677 (Marshall, J., dissenting) (citing *Raddatz*, 447 U.S. at 683).

74. *Id.* (Marshall, J., dissenting). Hence, the Act did not guarantee an Article III judge the final decision.

75. For a discussion of problems surrounding judicial review of jury selection, see *supra* note 70.

76. *Peretz*, 111 S. Ct. at 2674 (Marshall, J., dissenting). The dissent also questioned whether *Raddatz* and Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986), remain good law. *Peretz*, 111 S. Ct. at 2677 (Marshall, J., dissenting). In *Raddatz* the Court held that the district judge could delegate Article III powers to a magistrate only if the judge made the ultimate determinations of these matters. *Raddatz*, 447 U.S. at 683. Although the majority contended that magistrate-conducted voir dire met the *Raddatz* standard because the district court exercised total control and jurisdiction over the process, *Peretz*, 111 S. Ct. at 2669-70, *Raddatz* required the opportunity for meaningful judicial review—which was only debatably feasible with magistrate-conducted felony voir dire. *Id.* at 2677 (Marshall, J., dissenting). Similarly, upholding an Article I tribunal's performance of traditional Article III

Justice Scalia agreed with Justice Marshall's interpretation of the Act: Congress's specification of authority to conduct magisterial duties in civil and misdemeanor trials and inclusion of explicit consent provisions suggested that Congress intentionally excluded from the Act magisterial authority to preside over felony trials.[77] The majority's reasoning misapplied constitutional principles, Justice Scalia concluded.[78] Although the majority "solved" any constitutional difficulties by asserting that the district court ultimately controlled "the decision whether and to what extent magistrates will be used,"[79] Justice Scalia wrote, Article III demanded that "none of the Branches will *itself* alienate its assigned powers."[80]

The decision in *Peretz* represents the culmination of a long line of cases offering conflicting interpretations of the Federal Magistrates Act from the time of its inception. In 1968 Congress created the position of United States Magistrate to replace United States Commissioners[81] and to assist district judges with their judicial duties.[82] Unlike the commissioners, however, magistrates were required to be members of the bar,[83] and much like judges, received a salary, irreducible during a fixed, eight-year term.[84] Although Congress remained free to cancel the salary protection[85] and thereby threaten intrabranch structural safeguards,[86] the appointment of magistrates by the district judges in the courts in which they served alleviated some of the Article III concerns.[87]

The original version of the Federal Magistrates Act allowed magis-

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powers, the *Schor* Court, emphasized the availability of de novo review. *Schor*, 478 U.S. at 853. The *Peretz* Court also upheld delegation of Article III powers, but the requisite provisions for "meaningful judicial review were nonexistent." *Peretz*, 111 S. Ct. at 2677 (Marshall, J., dissenting).

77. *Peretz*, 111 S. Ct. at 2679 (Scalia, J., dissenting).

78. *Id.* (Scalia, J., dissenting).

79. *Id.* (Scalia, J., dissenting).

80. *Id.* at 2680 (Scalia, J., dissenting). In effect, once a power is assigned to a branch, the branch must assume full responsibility for it. The intrabranch protections that concerned Justice Scalia assure impartiality in judicial decisionmaking and instill public confidence in the judiciary. Downs, *supra* note 16, at 1036. See *infra* notes 197-209 and accompanying text for a discussion of intrabranch structural protections.

81. Smith, *supra* note 1, at 143.

82. *Id.*

83. *Id.* at 143 n.2.

84. 28 U.S.C. § 634(b) (1988) (prohibiting salary reduction during a term in office); *see* Bolanos, *supra* note 2, at 830 n.11.

85. 28 U.S.C. § 634(b).

86. Bolanos, *supra* note 2, at 830 n.11; *see also* Downs, *supra* note 16, at 1033 (noting that the lack of protection for magistrates' tenure and salary fall short of the Article III protection for district court judges).

87. 28 U.S.C. § 631(a) (1988).

trates to try minor criminal offenses.[88] The Act also contained an "additional duties" clause whereby a majority of a district court's judges could assign magistrates additional duties not inconsistent with the Constitution and laws of the United States.[89] In 1976 Congress amended the Federal Magistrates Act[90] in response to *Wingo v. Wedding*,[91] a Supreme Court decision that held that a magistrate could not conduct evidentiary hearings on a petition for federal habeas corpus.[92] Congress's 1976 amendment divided the Act into four parts.[93] The first part of the statute provided that magistrates could hear and rule on nondispositive pretrial matters; this part provided for judicial review when the magistrate's order was clearly erroneous as a matter of law.[94] Magistrates also could decide dispositive pretrial matters[95] subject to de novo review by a district court judge.[96] The second part allowed judges to appoint a special master in civil cases.[97] The "additional duties" clause constituted the third part.[98] Finally, in the fourth part, Congress authorized magistrates

88. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107, 1116 (1968) (current version at 18 U.S.C. § 3401 (1988)). The legislative history indicates that Congress meant specifically to confine magistrate jurisdiction to minor offenses and, in fact, excluded "certain misdemeanors, which as a matter of sound congressional policy, ought to be tried in the U.S. district courts." H.R. REP. No. 1629, 90th Cong., 2d Sess. 22 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4265. For a treatment of the development of the Federal Magistrates Act, see Peter G. McCabe, *The Federal Magistrates Act of 1979*, 16 HARV. J. ON LEGIS. 343, 345-64 (1979).

89. 82 Stat. at 1116 (current version at 28 U.S.C. § 636(b) (1988)); *see, e.g.*, United States v. Ford, 824 F.2d 1430, 1432 n.10 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1034 (1988).

90. Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729, 2729 (current version at 28 U.S.C. § 636 (1988)).

91. 418 U.S. 461 (1974).

92. *Id.* at 472.

93. *Ford*, 824 F.2d at 1433.

94. 28 U.S.C. § 636(b)(1)(A). These pretrial matters excepted motions for injunctive relief; for judgment on the pleadings; for summary judgment; to dismiss or quash an indictment or information made by the defendant; to suppress evidence in a criminal case; to dismiss or permit maintenance of a class action; to dismiss for failure to state a claim upon which relief can be granted; and to involuntarily dismiss an action. *Id.*

95. *Id.* § 636(b)(1)(B).

96. *Id.* § 636(b)(1).

97. *Id.* § 636(b)(2). A "special master" is a referee, auditor, examiner, or assessor appointed by the court in which an action is pending. FED. R. CIV. P. 53(a). A master may perform all duties included in the order of reference from the judge, including regulating proceedings, requiring the production of evidence, and ruling on the admissibility of evidence. *Id.* 53(c).

98. 28 U.S.C. § 636(b)(3). Congress created this clause to encourage "innovative experimentations" in magistrate assignments to other matters and administrative functions. H.R. REP. No. 1609, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172. Congress contrasted the "business" matters assigned to magistrates with the "vital and adjudicatory" roles reserved for judges. *Id.* For example, Congress enumerated certain duties not necessarily included in "the broad category of 'pretrial matters' " that judges may delegate to

to conduct civil trials, but only with the express consent of the parties.[99]

Various interpretations of these statutory provisions typified the cases comprising the background of *Peretz*. In *Mathews v. Weber*[100] the Supreme Court decided that a magistrate could, as an additional duty, conduct preliminary review, hear arguments, and prepare recommended decisions in Social Security benefits cases.[101] Addressing concerns voiced by representatives of the Justice Department when called as witnesses that Congress might improperly "delegate to magistrates duties reserved by the Constitution to Article III judges,"[102] the Court stressed that matters referable to a magistrate were those in which delegation is "not inconsistent with the Constitution and laws of the United States."[103] The Court also emphasized that a magistrate could act only under a judge's supervision and that the judge must retain authority to make final decisions.[104] In authorizing the delegation, the Court emphasized the administrative nature of the process, the ease of reviewing the record, and the parties' participation.[105]

Later, in *United States v. Raddatz*,[106] the Court addressed the constitutionality of allowing a magistrate to conduct pretrial evidentiary suppression hearings.[107] The petitioner in *Raddatz* was indicted for unlawfully receiving a firearm. Evidence at the suppression hearing revealed that when police arrived at the scene on August 8, 1976, they observed Raddatz standing over the victim, Jimmy Baston, who was bleeding from the head.[108] After the officers arrested Raddatz for illegal use of a weapon and gave him his *Miranda* warnings, Raddatz said that he had been in a family dispute with Baston and that he had brought the gun in case Baston's friends attempted to interfere. The state filed

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magistrates; then, Congress declared that administrative duties may be delegated so that judges will have time for their "traditional adjudicatory duties." *Id.*

99. 28 U.S.C. § 636(c).

100. 423 U.S. 261 (1976).

101. *Id.* at 271-72.

102. *Id.* at 269.

103. *Id.* at 270.

104. *Id.*

105. *See id.* at 271. The Court especially noted that the Article III judge maintained control of the process through the power of judicial review. *Id.* at 270.

106. 447 U.S. 667 (1980).

107. The magistrate's authority to conduct evidentiary suppression hearings stemmed from 28 U.S.C. § 636(b)(1)(B), which provides that a judge may designate a magistrate to conduct evidentiary hearings. *Raddatz*, 447 U.S. at 673. The Court also addressed whether the provisions for review satisfied Article III structural protections. *Id.* at 677-80.

108. United States v. Raddatz, 592 F.2d 976, 977-78 (7th Cir. 1979), *rev'd*, 447 U.S. 667 (1980).

charges against Raddatz.[109] Later, on November 19, 1976, agents from the Bureau of Alcohol, Tobacco, and Firearms questioned Raddatz at his home regarding the gun used in the crime; the gun also had been used in another crime.[110] Relating a different version of the events than the one he gave on the day of the fight, Raddatz said that he had seized the gun from Baston during the fight. He claimed to have no knowledge of the gun's origins. On January 12, 1977, Raddatz requested another meeting with the agents. There, he retracted his previous stories and claimed that he obtained the gun from his half-brother.[111] At the suppression hearing, Raddatz claimed that the agents induced him to incriminate himself with promises of "cooperation" by law enforcement if he told them about the gun.[112]

The district court referred the hearing of the motion to suppress this evidence to a magistrate.[113] Finding that the respondent had made these statements knowingly, the magistrate's report recommended denial of the motion to suppress.[114] After Raddatz filed objections to this report, a district judge considered the transcript of the hearing before the magistrate, including "the parties' proposed findings of fact, conclusions of law, and supporting memoranda."[115] After reading the magistrate's recommendation and hearing oral arguments of counsel, the judge denied the motion to suppress.[116] The court of appeals reversed the defendant's conviction, holding that while the statute[117] allowing magistrates to conduct suppression hearings was constitutional, to satisfy due process requirements, the judge personally must hear the testimony when credibility was crucial to the outcome.[118]

In the Supreme Court, Chief Justice Burger, writing for the majority, held that de novo review constituted a de novo determination, not a de novo hearing; nothing required a judge to rehear testimony himself.[119] Turning to the petitioner's constitutional objections, the Court held the statute to be within the bounds of Article III because a judge maintained

109. *Id.* at 977.

110. *Id.* at 979.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. 28 U.S.C. § 636(b)(1) (1988) (providing for de novo review).

118. *Raddatz*, 592 F.2d at 981.

119. United States v. Raddatz, 447 U.S. 667, 676 (1980). In a de novo hearing, the judge must rehear actual testimony himself. *Id.*

control of the process and rendered the final decision.[120] Moreover, the statute satisfied due process requirements.[121] Although a suppression hearing may determine the outcome of the trial—as many pretrial matters may—the Court recognized that the judge's role as the "ultimate decisionmaker,"[122] along with his broad discretion to accept, reject, or rehear personally the magistrate's findings, removed the danger of an erroneous determination by the magistrate.[123] The statute, the Court held, thus permitted the judge to accept questions of credibility the magistrate decided without hearing the witness.[124]

In 1989, the Court in *Gomez v. United States*[125] considered for the first time the issue of jury selection by a magistrate in a felony trial. In *Gomez* the defendants had been charged with distribution of cocaine.[126] They raised objections to magistrate-conducted voir dire when the district judge made the delegation and when trial commenced.[127] The defendants were convicted.[128] On appeal, they contended that the magistrate had no power to conduct voir dire and jury selection.[129] The Second Circuit affirmed and held that Congress intended the "additional duties" clause to be construed broadly.[130]

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120. *Id.* at 681.

121. Because a motion to suppress requires the judge to hear the challenged testimony, Raddatz contended that the Act violates due process by allowing the magistrate to hear testimony and the judge to decide whether to suppress that testimony. *Id.* at 677.

122. *Id.* at 680.

123. *Id.* Anticipating many of his dissenting arguments in *Peretz*, Justice Marshall wrote one of the dissents in *Raddatz*. *Id.* at 694 (Marshall, J., dissenting). Justice Marshall contended that when the issue involved credibility and could not be determined by review of the "cold record," due process required the judge himself to hear the testimony. *Id.* (Marshall, J., dissenting). Justice Marshall rested his argument on the foundation that " 'the one who decides must hear.' " *Id.* at 696 (Marshall, J., dissenting) (quoting Morgan v. United States, 298 U.S. 468, 481 (1936)). Because there is a high risk of error in judicial determinations based on the written record (especially when demeanor and impressions are important, as in issues of credibility), the judge is bound to hear the testimony. *Id.* (Marshall, J., dissenting).

124. *Id.* at 680.

125. 490 U.S. 858 (1989).

126. *Id.* at 860.

127. *Id.* at 860-61.

128. *Id.* at 861.

129. *Id.*

130. United States v. Garcia, 848 F.2d 1324, 1329-30 (2d Cir. 1988), *rev'd sub nom.* Gomez v. United States, 490 U.S. 858 (1989). In *Garcia* the Second Circuit held that jury selection by a magistrate was within the scope of 28 U.S.C. § 636(b)(3) (1988). *Garcia*, 848 F.2d at 1332-33. The court noted that, even though jury selection was a trial rather than a pretrial matter, the House Report contemplated experimentation beyond duties categorized as pretrial. *Id.* at 1329 (citing H.R. REP. No. 1609, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172). The defendant first maintained that delegation violated Article III. Analyzing the constitutionality of the delegation, the court examined the structural guarantees of Article III, § 1 (separation of powers). *Id.* at 1330. The court concluded that because

Framing the issue as "whether presiding at the selection of a jury in a felony trial without the defendant's consent is among those 'additional duties' [delegable to a magistrate],"[131] the Supreme Court granted certiorari.[132] A unanimous Court held that "Congress did not intend the additional duties clause to embrace [the] function [of jury selection]."[133] The Court based its finding on statutory interpretation and legislative history,[134] holding that duties performed under a general authorization

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delegation occurred within one branch, the statute violated no structural protections. *Id.* at 1331. In its discussion of structural protections, the Second Circuit failed to consider Congress's ability to change magistrates' pay. *Id.* at 1330-32.

The second constitutional challenge was " 'the right [of litigants] to have claims decided before judges who are free from potential domination by other branches of government.' " *Id.* at 1332 (quoting United States v. Will, 449 U.S. 200, 218 (1980)). The Court held that the point at which the trial begins and constitutional rights attach varies; each individual case and the particular rights involved determine the variation. *Id.* Moreover, de novo review satisfies the requirement that a member of the federal judiciary preside. *Id.* The dissent argued that the significance of voir dire on the outcome of the trial precluded a magistrate's authorization to conduct jury selection. *Id.* at 1337 (Oakes, J., dissenting). For a discussion of *Garcia*, see Recent Case, 102 HARV. L. REV. 533, 533-39 (1988).

131. *Gomez*, 490 U.S. at 860.

132. Gomez v. United States, 488 U.S. 1003 (1989); *see also Gomez*, 490 U.S. at 862 (detailing the Court's grant of certiorari). The Court granted certiorari in part to resolve a conflict among the circuits. For instance, although some circuits agreed with *Garcia*, several circuits had announced conflicting decisions. In United States v. Peacock, 761 F.2d 1313 (9th Cir.), *cert. denied*, 474 U.S. 847 (1985), the United States Court of Appeals for the Ninth Circuit held that although jury selection constituted an integral part of the trial, *id.* at 1319, delegation of voir dire did not conflict with Article III protections, as long as de novo review was available, *id.* at 1318. Moreover, magistrate-conducted voir dire aided trial efficiency, *id.* at 1318-19.

In United States v. Ford, 824 F.2d 1430 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1034 (1988), the United States Court of Appeals for the Fifth Circuit held that jury selection was not a duty Congress intended to delegate to magistrates. *Id.* at 1438. Because the defendant in *Ford* failed to object and because the trial was fair, however, the court affirmed the decision, *id.* at 1439; but it noted that it did not imply thereby that consent would cure the error, *id.* at 1439 n.60. Supporting its reasoning, the court suggested that the 1968 legislative struggle over petty offenses had no meaning if felonies were included. *Id.* at 1435. Congress carefully excluded certain misdemeanors from the definition of "minor offenses" and devoted considerable time to justifying the reasons behind allowing magistrates to try "minor offenses." H.R. REP. No. 1629, 90th Cong., 2d Sess. 22 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4263-65; *see infra* notes 166-67 and accompanying text. Similarly, the *Raddatz* Court's distinction between trial and pretrial would have been superfluous if the Court intended to include functions such as jury selection in the category of permissibly delegable pretrial matters. *Ford*, 824 F.2d at 1435. For a discussion of *Raddatz*, see *supra* notes 106-24 and accompanying text.

133. *Gomez*, 490 U.S. at 875-76. The holding fails to mention the presence or absence of consent. *Id.*

134. The Court's settled policy is to avoid statutory interpretation that implicates constitutional issues if a "reasonable alternative interpretation poses no constitutional question." *Id.* at 864. The Court noted that the only mention of jury selection in the legislative history occurs in one letter. *Id.* at 875-76 n.30. The letter, from the Chief Judge of the District of

should relate to enumerated duties.[135] Because Congress carefully defined the grant of authority to magistrates in civil and minor criminal cases, the Court concluded, Congress "implicitly withheld" this authority for felony trials.[136] The Court stressed Congress's emphasis on delegation of subsidiary matters so that judges could concentrate on trial.[137] Finally, the absence of a provision for review indicated that Congress did not intend jury selection to be delegated; careful review provisions for other "dispositive" pretrial matters supported the *Gomez* Court's conclusion.[138] The Court did not believe that Congress would include review provisions for other pretrial matters, but would require no review for jury selection—not even the less stringent clearly erroneous standard for nondispositive pretrial matters.[139] The Court also rejected petitioner's harmless error argument, reasoning that error never could be harmless when a court officer exceeded his jurisdiction.[140]

Conflicting circuit court decisions construing *Gomez* set the stage for *Peretz*. In *United States v. France*[141] the United States Court of Appeals for the Ninth Circuit, applying *Gomez* retroactively, held that the district judge could not delegate voir dire to a magistrate.[142] The defendant's failure to object did not change this decision for two reasons. First, the court noted that the *Gomez* Court failed to base its holding on petitioner's objection. Moreover, prior to *Gomez*, the Ninth Circuit court had established a "wall" of decisions allowing magistrate-conducted voir dire, so that any objection would have been futile from the defendant's standpoint.[143]

In contrast, the United States Court of Appeals for the Third Cir-

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Oregon, suggested that magistrates select juries only in civil trials with the parties' consent. *Id.*

135. *Id.* at 864.

136. *Id.* at 872.

137. *Id.* at 872-73. Furthermore, jury selection, the Court wrote, constituted an integral part of trial. *Id.* at 873; *see, e.g.*, Lewis v. United States, 146 U.S. 370, 374 (1892) (emphasizing the importance of jury selection to trial); United States v. Manfredi, 722 F.2d 519, 524 (9th Cir. 1984) (holding that for purposes of the Speedy Trial Act, 18 U.S.C. § 3161(c) (1988), trial in a jury case "commences" with voir dire).

138. *Gomez*, 490 U.S. at 874. The Court questioned whether any meaningful review of voir dire could be achieved because of the subjectivity of the process: "[O]nly words can be preserved for review; no transcript can recapture the atmosphere of the voir dire which may persist throughout the trial." *Id.* at 874-75.

139. *Id.*

140. *Id.* at 876. The Court noted that a defendant has the right to "have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." *Id.*

141. 886 F.2d 223 (9th Cir. 1989), *aff'd by an equally divided Court*, 111 S. Ct. 805 (1991).

142. *Id.* at 228.

143. *Id.* at 227-28.

cuit, in *Government of the Virgin Islands v. Williams*,[144] held that a magistrate could conduct jury selection as long as the defendant did not object.[145] In *Williams* the defendant neither consented nor objected to magistrate-conducted voir dire.[146] The court interpreted *Gomez* as allowing waiver of the right to have an Article III judge preside at voir dire, even with implied consent.[147] Thus, lower federal courts prior to *Peretz* tended to interpret powers granted under the Federal Magistrate Act broadly; the Supreme Court, however, had declined to extend powers much beyond those enumerated in the Act.

In contrast to these lower court decisions, *Peretz* expands magisterial powers. By focusing on the defendant's responsibility to object or consent,[148] the *Peretz* Court retreated from the meticulous statutory analysis[149] and emphasis on Article III structural protections found in previous cases.[150]

Peretz cannot represent an extension of the *Raddatz* decision because fundamental differences separate the two cases. Because *Raddatz* involved an express amendment to the Federal Magistrates Act,[151] the Court in that case did not expand the Act under the "additional duties" clause.[152] Likewise, a suppression hearing, which was the subject of the *Raddatz* Court's decision, involves a defined pretrial motion under an

144. 892 F.2d 305 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 2211 (1990).

145. *Id.* at 310-11.

146. *Id.* at 306.

147. *Id.* at 311. The Third Circuit also employed a balancing test, weighing the interests of the criminal defendant against the underlying policies of the Federal Magistrates Act. Because Congress intended the Act to relieve district judges of subordinate and ministerial duties, the additional-duties clause, the court reasoned, provided an excellent forum for experimentation in delegating duties to magistrates. *Id.* Although this policy must be balanced against a criminal defendant's right to the presence of an Article III judge, the Third Circuit held that deference to the defendant's choice achieved "the best of both possible worlds." *Id.* This balancing test furthered the policy behind the Act and still protected the defendant's constitutional rights. *Id.* The court also interpreted a defendant's "indifference," or lack of objection to the delegation, as consent. *Id.* Defending its interpretation, the court emphasized that magistrate-conducted voir dire would not injure the defendant, since magistrates are well-qualified to select a jury. *Id.* *Compare* Clark v. Poulton, 914 F.2d 1426, 1433-34 (10th Cir. 1990) (holding magistrate's power under the Act is a jurisdictional issue not subject to waiver) *with* United States v. Wey, 895 F.2d 429, 431 (7th Cir.) (holding subject matter jurisdiction not involved in jury selection, so that right is subject to waiver), *cert. denied*, 110 S. Ct. 3283 (1990) *and* United States v. Lopez-Pena, 912 F.2d 1542, 1549 (1st Cir. 1989) (holding that defendant's failure to object to magistrate-conducted voir dire resulted in waiver of his right to have an Article III judge preside over jury impanelment).

148. *Peretz*, 111 S. Ct. at 2668-69.

149. *See, e.g.*, Gomez v. United States, 490 U.S. 858, 864 (1989).

150. *See, e.g.*, United States v. Raddatz, 447 U.S. 667, 678 (1980).

151. *Id.* at 674; *see* 28 U.S.C. § 636(b)(1)(B) (1988).

152. *Raddatz*, 447 U.S. at 681-83.

express statutory provision.[153] Conversely, the role of jury selection in a trial, the subject of the *Peretz* decision, far from being a dispositive pretrial motion covered under the Act, generally is considered part of the trial itself.[154] Finally, the *Raddatz* Court resolved Article III separation-of-powers problems by relying on the statutory provision for de novo review.[155] This standard of review assured that the Article III judge made the final determination and that structural safeguards remained intact.[156] The *Peretz* Court, however, confronted the case's structural Article III difficulties by noting that judicial review is not banned—the defendant presumably may obtain review if she objects.[157] Unfortunately, this argument is weak because the Court did not cure Congress's failure to mention a review standard by "finding inherent power to review by a constitutionally adequate standard."[158] This tactic fails to address congressional intent behind the absence of a review standard.[159]

The *Peretz* Court also departed significantly from its unanimous ruling in *Gomez*. Even though the *Gomez* Court framed the issue for consideration as the determination of permissible magistrate conduct "without the defendant's consent,"[160] the consent issue received sparse treatment throughout the remainder of the *Gomez* opinion.[161] In fact, the *Gomez* Court's actual holding noticeably lacked the slightest mention of consent.[162] In *Peretz*, however, the Court dwelt on the importance of the defendant's consent throughout its entire opinion.[163] In *Gomez* the

153. *See* 28 U.S.C. § 636(b)(1)(B).

154. *E.g.*, United States v. Ford, 824 F.2d 1430, 1435 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1034 (1988).

155. *Raddatz*, 447 U.S. at 681-82; *see* 28 U.S.C. § 636(b)(1)(C).

156. *Raddatz*, 447 U.S. at 681-82.

157. *Peretz*, 111 S. Ct. at 2670-71.

158. *Ford*, 824 F.2d at 1437.

159. *Id.* The absence of adequate judicial review implies that Congress did not intend the delegation of voir dire. *Peretz*, 111 S. Ct. at 2673 (Marshall, J., dissenting). Even if the district judge applied de novo review rather than a lesser standard, the possibility of meaningful judicial review remains doubtful. *Id.* (Marshall, J., dissenting). Absence of adequate or meaningful judicial review means that the Article III judge may not control the final decision, so that structural protections are threatened. *Id.* at 2677 (Marshall, J., dissenting).

160. Gomez v. United States, 490 U.S. 858, 860 (1989).

161. *Id.* at 863-76; *see also* United States v. France, 886 F.2d 223, 227 (9th Cir. 1989) (holding defendant's consent not the basis of the *Gomez* decision), *aff'd by an equally divided Court*, 111 S. Ct. 805 (1991).

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

163. *Peretz*, 111 S. Ct. at 2663-71. Consent is important to the Article III "personal right" to an independent and impartial adjudicator because this Article III provision, unlike structural protections, is waivable. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849 (1986); *see also supra* note 16 and accompanying text (discussing Article III protections). Because the defendant in *Gomez* objected to delegation of voir dire to the magistrate, the issue of waiver of Article III personal rights was not present. *Gomez*, 490 U.S. at 860.

Court, following its settled policy, interpreted the statute to avoid a constitutional conflict.[164] On the one hand, the *Gomez* Court carefully inspected the legislative history of the statute to determine that Congress did not intend such an expansion of magistrates' powers, thereby avoiding unnecessary constitutional interpretation.[165] The *Peretz* Court, on the other hand, virtually invited constitutional debate by interpreting the statute to prompt such debate;[166] it also largely ignored and circumvented the legislative history on the subject,[167] with the exception of one letter.[168] Therefore, *Peretz* represents not only an expansion of magistrates' duties beyond those contemplated by previous cases, but also a style of engendering constitutional debate in statutory analysis rather than avoiding constitutional adjudication.[169]

The analysis of the *Peretz* majority also presents questionable logic and numerous inconsistencies. In its statutory interpretation, the majority, as Justice Marshall noted in dissent, failed to consider the illogic of Congress creating a separate section under the Act for misdemeanors,[170] yet wholly excluding any reference to participation in felony trials.[171] Title 18 of the United States Code sets out magistrates' specific criminal trial jurisdiction.[172] Although this section deals extensively and specifi-

164. *See Gomez*, 490 U.S. at 864.

165. *See id.* at 865-74.

166. *See Peretz*, 111 S. Ct. at 2669.

167. The majority ignored the congressional debate over the 1968 amendments regarding which "minor offenses" magistrates could try. The *Peretz* Court failed to mention that Congress drew a line beyond which certain misdemeanors should be tried not by magistrates, but by district judges, as a matter of "sound congressional policy." H.R. REP. NO. 1629, 90th Cong., 2d Sess. 22 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4265. The Court also ignored Congress's characterization of the purpose of magistrates—to aid the business of the courts in order to give judges more time for "their vital and traditional adjudicatory duties." H.R. REP. NO. 1609, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172.

168. *Peretz*, 111 S. Ct. at 2668 n.11. This letter was noted briefly in *Gomez*. *Gomez*, 490 U.S. at 875 n.30 (citing H.R. REP. NO. 1609, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6169). The letter, from the Chief Judge of the District of Oregon, suggested that magistrates could conduct voir dire, probably only with the consent of the parties and in civil cases. *Id.* The letter also displayed a callous attitude toward the validity of assignment of jury selection and methods of implementation and review of the jury selection. *Id.* (citing *Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. 39-40 (1975)).

169. The Court in *Gomez*, for example, stressed the policy that the Supreme Court should interpret a federal statute to avoid constitutional issues "if a reasonable alternative interpretation poses no constitutional question." *Gomez*, 490 U.S. at 864. Instead of deciding that felony voir dire was a nondelegable duty, thereby avoiding Article III structural difficulties, the *Peretz* Court rejected the *Gomez* Court's interpretation and invited constitutional debate. *See Peretz*, 111 S. Ct. at 2669-71.

170. 18 U.S.C. § 3401 (1988).

171. *Peretz*, 111 S. Ct. at 2672 (Marshall, J., dissenting).

172. 18 U.S.C. §§ 3401-3402 (1988).

cally with misdemeanors that magistrates may handle at trial, Congress did not authorize any magisterial authority in felony trials.[173] This result proves especially puzzling if one considers that most commentators consider felony trials to commence with jury selection.[174] Moreover, Congress expressly reserved some misdemeanors[175] for Article III judges to adjudicate because such crimes were left more properly to judges with life tenure and guaranteed salary.[176] As the United States Court of Appeals for the Fifth Circuit observed in *United States v. Ford*,[177] the careful debate and delineation of which misdemeanor and civil matters could be referred to magistrates would be surplusage if Congress intended to grant a broad general power—such as would include all felony trials, not to mention misdemeanors and civil matters—under the "additional duties" clause.[178]

The Court also paid scant attention to the purpose behind the Federal Magistrates Act: to help Article III judges with routine and pretrial duties so that the judges could perform their vital adjudicatory functions.[179] Although it observed that jury selection may affect the outcome of the trial in the same way as other pretrial matters,[180] the *Peretz* Court did not lend due credence to the vital adjudicatory role that jury selection plays in felony trials.[181] Even if voir dire were classified as pretrial, jury selection more pervasively affects the entire trial process than, for

173. *See id.* § 3401.

174. *Peretz*, 111 S. Ct. at 2672-73 n.2 (Marshall, J., dissenting). Jury selection is "an organic part of the trial process." J. C. Loy, United States v. Ford: *United States Magistrates Not Empowered to Preside Over Jury Selection in Felony Cases*, 62 TUL. L. REV. 1485, 1489 (1988). The judge's presence impresses the jury with the seriousness of the proceedings; attorneys also educate the judge about the case during voir dire. *Id.* Moreover, because the accused has constitutional rights (such as the right to a speedy trial, to confront witnesses, to counsel, and to public proceedings) during jury selection, voir dire logically is part of the trial itself. *Id.* at 1487; *see also* Recent Case, *supra* note 130, at 539 (noting that because voir dire plays the critical role of assuring an impartial jury, jury selection deserves the ultimate protection of an Article III judge).

175. For examples of misdemeanors reserved for trial by judges, see 18 U.S.C. § 210 (1988) (offering to procure appointive public office); *id.* § 242 (depriving of rights under color of law); *id.* § 1304 (broadcasting lottery information); *id.* § 2234 (exceeding authority in executing warrant).

176. H.R. REP. NO. 1629, 90th Cong., 2d Sess. 22 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4264-65.

177. 824 F.2d 1430 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1034 (1988). See *supra* note 132 for a discussion of *Ford*.

178. *Ford*, 824 F.2d at 1434-35.

179. H.R. REP. NO. 1609, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172.

180. *Peretz*, 111 S. Ct. at 2669.

181. *Id.* at 2672 (Marshall, J., dissenting). See *infra* notes 182-83 and accompanying text for a discussion of felony jury selection as a part of the trial itself.

example, a suppression hearing.[182] Logically, then, Congress would have included a "pretrial" procedure such as felony jury selection with the other dispositive pretrial motions in the Act[183] rather than relegating voir dire, which can affect the entire trial more so than the dispositive motions enumerated in the Act, to the "additional duties" clause. These considerations point to jury selection as an adjudicatory function in a felony trial. The *Peretz* majority glossed over this entire question.[184]

Another illogical part of the majority's opinion regarding statutory interpretation stems from Congress's careful delineation of the express consent provisions for misdemeanor[185] and civil trials in the Federal Magistrates Act.[186] Both parties in a civil trial must consent before the magistrate can hear the case.[187] Even misdemeanor consent requires a writing.[188] As the dissent contended, it would be irrational for Congress, if it had intended to include felony jury selection as a delegable duty, to emphasize consent in these instances, but provide no guidelines for felony trial voir dire.[189] The majority also made much of the comparable quality of misdemeanor trial supervision and felony jury selection; however, the comparability is clear only to the majority.[190] If the duties were so comparable, it follows that jury selection would have been included in the list of delegable duties under section 636(b)(1)(B).[191]

Likewise, Congress, in its 1976 amendments to the Act, meticulously distinguished between dispositive and nondispositive pretrial mat-

182. *See generally* United States v. Rivera-Sola, 713 F.2d 866, 872-74 (1st Cir. 1983) (examining both suppression hearing and jury selection criteria). The jury sits through the entire trial; it constitutes the heart of the trial—determining guilt or innocence. A suppression hearing, in contrast, simply determines whether evidence is admissible. *Id.*

183. 28 U.S.C. § 636(b)(1)(B) (1988).

184. *See Peretz*, 111 S. Ct. at 2670-71.

185. *See* 18 U.S.C. § 3401(b) (1988).

186. *See* 28 U.S.C. § 636(c)(1). The delineation of guidelines for consent ensures that consensual reference of voir dire to a magistrate is voluntary. Platt, *supra* note 2, at 483-86.

187. 28 U.S.C. § 636(c)(1). After the clerk of court locates an available magistrate, the judge or magistrate must again inform the parties that they are free to withhold their consent. *Id.* § 636(c)(2).

188. 18 U.S.C. § 3401(b).

189. *Peretz*, 111 S. Ct. at 2673 (Marshall, J., dissenting).

190. *Id.* at 2667. Although the majority concluded that supervising civil and misdemeanor trials is comparable to presiding over jury selection in a *felony* trial, the court neither alluded to any of the comparable qualities nor supported its statement in any way. *Id.* Conviction of misdemeanors triable by magistrates may result in imprisonment, 18 U.S.C. § 3401(b), and felony convictions may be enforced with significant periods of incarceration. *See, e.g.*, Gomez v. United States, 490 U.S. 858, 861 (1989). Civil trials, of course, do not involve the threat of imprisonment.

191. *Peretz*, 111 S. Ct. at 2673 (Marshall, J., dissenting). 28 U.S.C. § 636(b)(1)(B) details the dispositive pretrial motions delegable to magistrates.

ters, and provided for methods of judicial review in both cases: a de novo standard for the former and a clearly erroneous standard for the latter.[192] For nondispositive pretrial motions, the judge can reconsider the magistrate's rulings when the magistrate's order is "clearly erroneous or contrary to law."[193] In the case of hearings, applications for post-trial relief, and dispositive pretrial motions—such as motions for injunctive relief, for summary judgment, and for dismissal for failure to state a claim upon which relief can be granted—the judge must make a de novo determination of any findings to which objection is made.[194] The *Peretz* Court made much of the fact that no statutory provisions bar review, and therefore that the defendant presumably could have obtained review if he had objected.[195] Such reasoning, however, neatly evades logic: why, if Congress spent so much time in promulgating these rules, did it mention neither jury selection nor a standard of review? Such a question is particularly pertinent in light of the special difficulties jury selection presents for de novo review.[196]

The *Peretz* Court's failure to address the question of review permitted it to dodge the issue of whether delegating felony voir dire to a magistrate violated the structural protections of Article III[197] and instead to base its constitutional discussion on waiver of the personal right to an impartial Article III adjudicator.[198] This reasoning is circular: because consent alleviates Article III's protection of personal rights, the *Peretz* Court reasoned, Article III's nonwaivable structural protections are not implicated and the question of adequate review merits little consideration. Moreover, the reasoning rests on an unproven presumption that consent cures all defects.[199] The independent judiciary, under Article III, section 1, provides the following protections: (1) individual rights; (2) structure of the government, or separation of powers; (3) intrabranch protections; (4) the judiciary's role in regulating the federal government's relationship with the states; and (5) the judiciary itself.[200] An independent judiciary protects individuals' rights because only judges

192. 28 U.S.C. § 636 (b)(1).

193. *Id.* § 636(b)(1)(A).

194. *Id.* § 636(b)(1).

195. *Peretz*, 111 S. Ct. at 2670-71.

196. *See* Gomez v. United States, 490 U.S. 858, 874-75 (1989); Recent Case, *supra* note 130, at 538. Meaningful review of a magistrate's decisions at voir dire is almost impossible because "a judge must be physically present to detect juror bias." *Id.* Requestioning not only makes jurors defensive, but also reduces the efficiency of the magistrates. *Id.*

197. *See Peretz*, 111 S. Ct. at 2669.

198. *See id.*

199. *See id.*

200. Downs, *supra* note 16, at 1035-37.

"insulated from the formal political process can preserve those rights against popular causes" and guarantee citizens their constitutional rights.[201] Through tenure and salary requirements, the structural protections insulate judges from domination by other branches.[202] Intrabranch protections assure impartiality in judicial decisionmaking despite disapproval by judicial colleagues. Article III's protection of judicial independence also prevents presidential or congressional intrusions on state sovereignty "under the guise of judicial decision."[203] Finally, an independent judiciary affords protection to the judiciary itself by instilling public confidence in, and attracting qualified people to, the judiciary.[204] In light of all of these protections, the argument that the right to an Article III judge can be waived is based on an "incomplete interpretation of Article III."[205] For example, a litigant rests her consent on her interpretation of her personal rights; she has no interest in the structural protections, such as separation of powers, enumerated above.[206] Moreover, review provisions fail to solve the problem because "reduced judicial impartiality will seldom result in measurable injury to the litigant."[207] Article III structural protections thus shield the litigant from virtually undetectable injury occurring throughout the trial, as well as blatant injury.[208] Consent also does not protect later litigants' interests affected by binding decisions rendered by a magistrate.[209]

The Court's constitutional analysis therefore exhibits marked inconsistencies. In addressing the defendant's Article III structural argument, the majority contended that the possibility of de novo review cures any problems.[210] The Court, however, failed to consider the theory that Article III problems can arise intrabranch.[211] Because there is a great danger that a judge could not conduct meaningful review of jury selection,[212] the likelihood of magistrates usurping judicial authority intrabranch seems

201. *Id.* at 1036.

202. *Id.*

203. *Id.* at 1037. The states evidenced great mistrust of federal power during the time Article III was drafted. *Id.*

204. *Id.*

205. *Id.* at 1059.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Peretz*, 111 S. Ct. at 2671. In *Raddatz* Justice Marshall had considered the possibility that any comparable law not providing expressly for judicial review might be unconstitutional in itself. *See* United States v. Raddatz, 447 U.S. 667, 711-12 (1980) (Marshall, J., dissenting).

211. *Peretz*, 111 S. Ct. at 2680 (Scalia, J., dissenting). In other words, one branch should not alienate its own assigned powers. *Id.* (Scalia, J., dissenting).

212. *Id.* at 2673 (Marshall, J., dissenting).

great. As Justice Marshall pointed out, the Article III judge may effectively lose control by not rendering the final decision.[213]

The *Peretz* Court's constitutional analysis and treatment of consent dismantled the notions of consent, waiver, and Article III structural protections articulated earlier in *Commodity Futures Trading Commission v. Schor*.[214] The *Schor* Court expressed a rigid test for consent in delegating Article III powers to non-Article III tribunals: if Article III structural principles are implicated, the parties cannot "cure the constitutional difficulty" by consent.[215] The factors the Court considered in deciding whether a delegation to a non-Article III tribunal threatened the "institutional integrity of the Judicial Branch"[216] were "the extent to which the 'essential attributes of . . . judicial power' are reserved to Article III courts[,] . . . the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the . . . importance of the right to be adjudicated," and the reasons behind Congress's departure from Article III requirements.[217] In contrast, the *Peretz* Court, essentially ignoring these factors, held that Article III structural protections were not implicated because review by the district judge was available.[218] Whereas the *Schor* Court determined that consent could not waive Article III structural protections, and developed a test to determine whether these institutional safeguards were threatened,[219] the *Peretz* Court portrayed consent as a "cure-all."[220] The only "test" the *Peretz* majority used to examine whether magistrate-conducted felony voir dire violated structural protections was whether judicial review was available.[221] Expanding the significance of consent and diminishing the importance of Article III protections, the *Peretz* Court departed significantly from *Schor* and left the future of that opinion in question.

Finally, the *Peretz* Court never addressed the fact that, after *Wingo*,[222] Congress quickly amended the Act[223] because the Court disallowed a function Congress had intended magistrates to perform; how-

213. *Id.* (Marshall, J., dissenting).

214. 478 U.S. 833 (1986). In *Schor* the Court determined whether the Commodity Exchange Act's grant to the Commodity Futures Trading Commission of the power to entertain state law counterclaims in reparations proceedings violated Article III. *Id.* at 835-36.

215. *Id.* at 850-51.

216. *Id.* at 851.

217. *Id.* (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)).

218. *Peretz*, 111 S. Ct. at 2669-71.

219. *Schor*, 478 U.S. at 850-52.

220. *Peretz*, 111 S. Ct. at 2669.

221. *Id.* at 2669-71.

222. For a discussion of Wingo v. Wedding, 418 U.S. 461 (1974), see *supra* note 3.

ever, Congress made no such move after *Gomez* when the Supreme Court failed to delegate jury selection. The logical inference is that Congress, satisfied that the Court had interpreted correctly congressional intent, felt no need to make revisions or clarifications.

Despite Justice Marshall's insight into the impetus behind the Federal Magistrates Act,[224] several flaws pervaded his argument as well. First, in discussing the legislative history of the Federal Magistrates Act, Justice Marshall did not address congressional encouragement of innovative experimentation.[225] Moreover, as recognized by Justice Marshall, one letter submitted during the legislative hearings did mention magistrates presiding over jury trials; yet the letter also referred to "perhaps only . . . civil trials" and betrayed the writer's callousness as to form of review.[226]

Another haunting question that Justice Marshall never answered involves the framing of the issue in *Gomez*: he never addressed why the *Gomez* Court phrased the question so narrowly.[227] The majority in *Peretz* merely had to step through the hole created by this narrow approach; although they may have widened it, it was the *Gomez* Court that made the opening.

Because Justice Scalia analyzed the jurisdictional posture of the claim at length,[228] he paid little heed to the actual issues, other than to agree with Justice Marshall. His observation, however, that Article III structural protections implicate intrabranch usurpation is compelling.[229] For instance, magistrates' positions are not public appointments but rather are merit-based;[230] thus, allowing magistrate-supervised felony

223. Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729, 2729-30 (current version at 28 U.S.C. § 636(b) (1988)).

224. See *supra* notes 3-6 and accompanying text for a discussion of the history of the Act.

225. *See* H.R. REP. NO. 1609, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172.

226. *See Peretz*, 111 S. Ct. at 2674 (Marshall, J., dissenting); Gomez v. United States, 490 U.S. 858, 875 n.30 (1989). See *supra* note 168 for a discussion of this letter in the legislative history.

227. *See Gomez*, 490 U.S. at 859-60. The issue in *Gomez* was "whether presiding at the selection of a jury in a felony trial without the defendant's consent is among those 'additional duties' [of a magistrate]." *Id.*

228. *See Peretz*, 111 S. Ct. at 2678-79 (Scalia, J., dissenting). Justice Scalia determined that the question of improper delegation did not implicate subject matter jurisdiction. *Id.* at 2678 (Scalia, J., dissenting). Thus, although Peretz had forfeited his right to advance challenges to the magistrate, the Court had discretion to "overlook" the trial forfeiture. Noting that this claim involved forfeiture by definition (because if Peretz had objected, the magistrate would not have been assigned), Justice Scalia determined that the Court properly exercised its discretion to hear the case. *Id.* at 2679 (Scalia, J., dissenting).

229. *Id.* at 2680 (Scalia, J., dissenting).

230. Smith, *supra* note 1, at 144.

voir dire places too much power in the judges who appoint magistrates. Therefore, because Article III's structural component protects the judiciary intrabranch in part to assure unbiased judicial decision making despite pressure from judicial colleagues, delegation of felony voir dire offends Article III. By placing district judges in a position to influence the outcome of voir dire over which the judge herself does not preside, magistrate-conducted felony jury selection distorts intrabranch protections.

Peretz implicates a variety of significant policy questions. An obvious result will be lighter caseloads for federal judges.[231] In 1986 magistrates handled 445,575 matters for the federal courts,[232] and courts increasingly have delegated judicial tasks to magistrates since that time.[233] Before *Peretz* circuit courts interpreting *Gomez* already were delegating felony jury selection to magistrates.[234] The *Peretz* decision only can increase that trend which poses grave Article III questions and possibly allows non-Article III judges increasingly to assume inherently judicial roles.

Proliferation of this trend, however, may leave the legal system to face the development of a two-tiered federal judiciary.[235] Poorer citizens who cannot afford to wait for a judge may consent to a magistrate presiding at jury selection.[236] Dismantling the entire Article III system through consensual reference creates a further danger behind the Federal Magistrates Act.[237] Included in the dangers of such a development is the possibility that magistrates are less capable overall than judges.[238] Moreover, continued efforts to utilize fully the magistrate system may eradicate any notion of true consent because of constant official "channeling" into the system to lighten the caseload.[239]

Although the Court did not address due process concerns, the *Peretz*

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231. This result conforms with the purpose of the Act. See *supra* notes 3-6 for a discussion of the history of the Federal Magistrates Act.

232. Smith, *supra* note 1, at 143; *see also* Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 911-12 (1990) (estimating the number of judicial proceedings over which magistrates presided in 1987 to be 500,000).

233. *See* Bolanos, *supra* note 2, at 827.

234. *See, e.g.*, Government of the Virgin Islands v. Williams, 892 F.2d 305, 311-12 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 2211 (1990); United States v. Peacock, 761 F.2d 1313, 1319 (9th Cir.), *cert. denied*, 474 U.S. 847 (1985). Actually, however, felony case filings represent a fairly small portion of the district court caseload, so the time savings in delegating jury selection in felony trials to magistrates is not terribly significant. Loy, *supra* note 174, at 1490.

235. Bolanos, *supra* note 2, at 837 n.38.

236. *Id.*

237. Wagner, *supra* note 16, at 581.

238. Bolanos, *supra* note 2, at 837 n.38.

239. *Id.* at 838. Other problems with consensual reference include the possibility of judi-

decision may affect a defendant's due process rights. The three factors the Court has considered determinative of due process were: (1) the private interests implicated, (2) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards, and (3) public interest and administrative burdens.[240] The administrative burden falls by allowing a magistrate to conduct voir dire; however, constant appeals from magistrates' decisions might lessen these savings. Public interest may favor judges retaining control of voir dire: avoiding a two-tiered system is a prime benefit. Finally, the risk of an erroneous determination in magistrate-conducted voir dire is fairly high, especially in light of the aforementioned difficulties with judicial review.[241] The private interests are high because jury selection is often outcome determinative.[242] Hence, *Peretz* may restrict a litigant's right to due process.[243]

Finally, *Peretz* may offend the judicial system's fundamental fairness. Under this analysis, magistrate jury selection in felony trials undermines the system.[244] For example, if increasing numbers of litigants choose non-Article III magistrates to determine their cases, the system's "reliability and integrity" could be threatened by "non-article III judicial officers delivering unreliable judgments."[245] The main argument supporting this position is that magistrates can enter judgment in federal misdemeanor trials but not in felony trials because this practice would undermine fundamental fairness.[246] Fundamental fairness in trials ensures the integrity of judgments, and hence the reliability of the sys-

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cial coercion through routine referral of judicial duties to magistrates and pressure on the litigants to consent. Kraakman, *supra* note 2, at 1050-51.

240. United States v. Raddatz, 447 U.S. 667, 677 (1980).

241. *Peretz*, 111 S. Ct. at 2673 (Marshall, J., dissenting). See *supra* notes 194-96 and accompanying text for discussion of problems with judicial review.

242. United States v. France, 886 F.2d 223, 225 (9th Cir. 1989), *aff'd by an equally divided Court*, 111 S. Ct. 805 (1991).

243. *See* Marla Eisland, Note, *The Federal Magistrates Act: Are Defendants' Rights Violated When Magistrates Preside Over Jury Selection In Felony Cases?*, 56 FORDHAM L. REV. 783, 793-96 (1988). According to Eisland, due process requires application of the balancing test if the defendant does not consent. *Id.* at 794.

244. Bolanos, *supra* note 2, at 855. This analysis, however, presupposes that magistrates are less competent than judges. *Id.*

245. *Id.* at 854-55. Thus, simply because the litigants retained their personal right to Article III adjudication through the consent requirement, the system itself remains vulnerable. *Id.*

246. *Id.*; *see* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 202 (1983). One of the most important aspects of the judicial process is how it appears to the community. The system must maintain community respect for fairness of processes and reliability; continued delegation of judiciary functions to magistrates may undermine the perception of Article III judges' reliability. *Id.*

tem.[247] Thus, magistrate jury selection, as part of a felony trial, likewise should not be allowed.

The consequences of *Peretz* may not be immediately deleterious; however, erosions in constitutional guarantees, although slight at first, may become larger. *Peretz*, for example, may be expanded to include implied, rather than simply express, consent. In fact, the majority's holding leaves room for just such an interpretation.[248] Therefore, *Peretz* significantly expands the magistrate's power under the Federal Magistrates Act. The majority accomplished this expansion by ignoring controlling Supreme Court precedent and legislative history. The Court manipulated Article III doctrine by evading structural protection arguments. It also misconstrued and overemphasized the *Gomez* Court's discussion of consent. *Peretz* thus marks the beginning of an expansion of magistrate authority, often at the expense of litigants' rights and constitutional protections, and without regard to whether consent to this authority is express or implied.

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247. Bolanos, *supra* note 2, at 854.

248. *See Peretz*, 111 S. Ct. at 2671. The Court held that "permitting a magistrate to conduct the voir dire in a felony trial when the defendant raises no objection is entirely faithful to the congressional purpose in enacting and amending the Federal Magistrates Act." *Id.* (footnote omitted). Thus, the Court did not limit its holding to the situation in which the defendant expressly consents, as did the defendant in *Peretz*. *Id.* at 2663. The language in the holding thus suggests that implied consent also may waive the right to an Article III judge. *See id.* at 2671.