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Federal Magistrate Court of Appeals: Whether Magistrate Judge Disposition of Section 2255 Motions Under Consent Jurisdiction Is Statutorily and Constitutionally Permissible

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Federal Magistrate Court of Appeals:
Whether Magistrate Judge
Disposition of Section 2255 Motions
Under Consent Jurisdiction Is
Statutorily and Constitutionally
Permissible

Corey J. Hauser*

Abstract

For decades the Supreme Court has balanced the tension between judicial efficiency and adherence to our constitutional system of separation of powers. As more cases were filed in federal courts, Congress increased the responsibilities and power given to magistrate judges. The result is magistrate judges wielding as much power as district judges. With post-conviction relief under § 2255, magistrate judges take on a whole new role—appellate judge—reviewing and potentially overturning sentences imposed by district judges.

This practice raises two concerns. First, did Congress intend to statutorily give magistrate judges this power? The prevailing interpretation is that § 2255 motions are civil, not criminal, proceedings able to be disposed of by magistrates. Still, at least one circuit court has disagreed, holding that § 2255 motions are criminal proceedings, incapable of magistrate disposition.

* J.D. Candidate, May 2021, Washington and Lee University School of Law. Thank you to Professor Joan M. Shaughnessy for all of her advice and support in writing this Note. Thank you to the *Washington and Lee Law Review* Editorial Board for their thoughtful edits. Finally, a special thanks to Alanna, my parents, and my sister, whose love and support drive all that I do.

Second, even if magistrate judges have statutory jurisdiction to decide § 2255 motions, does the practice violate separation of powers? When magistrate judges determine the validity of district judge-imposed sentences, non-Article III judges are given final say on whether an Article III judge sentenced an individual correctly.

This Note argues magistrate judge disposition of § 2255 motions is statutorily and constitutionally impermissible. It recommends that Congress limit magistrate judge power in § 2255 motions to issuing reports and recommendations, reviewed by district court judges. This recommendation achieves the twin aims of judicial efficiency and constitutionality, protecting the Judiciary, and the People, from intra-branch encroachment.

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I. Introduction

That inflexibility and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence.¹

This quote, from Alexander Hamilton’s Federalist No. 78, explains the independence Article III judges must have to ensure fairness and impartiality for litigants. Built into Article III of the Constitution are certain protections—independence among the three branches of government, life tenure, and the inability for Congress to diminish the salary of judges.² At the same time, our crowded judicial system depends on many non-Article III adjuncts to promote efficiency. As Justice Sotomayor said, “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

Magistrate judges have become an important part of the federal judiciary. Since their inception, Congress and the courts have continued to expand magistrate judge power. Most

1. THE FEDERALIST NO. 78, at 572 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

2. U.S. CONST. art. III, § 1.

3. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938–39 (2015).

expansions provide, however, that district courts must “check” magistrate judge power. For example, magistrate judges may decide dispositive motions in civil cases.⁴ But the district court must review and adopt that recommendation before it is binding on the litigants⁵—ensuring that a district judge, with the protections of Article III, enters final judgment in the case.

Consent jurisdiction under 28 U.S.C. § 636(c) does away with those protections.⁶ Section 636(c) allows magistrate judges to adjudicate any jury or nonjury “civil matter” so long as the parties consent.⁷ This means that a magistrate judge may enter final judgment in a case without review by a district judge.⁸ While this system is facially troubling, in the context of habeas corpus petitions under 28 U.S.C. § 2255, it is inapposite of statutory and constitutional principles.

Section 2255 allows a prisoner to move for a sentencing reduction in the district that sentenced him—even though he can no longer appeal to a circuit court.⁹ These motions require the reviewing judge (the one adjudicating the motion) to decide whether the sentencing judge (typically the trial judge in the case) was correct in her determination. When magistrate judges adjudicate these motions, a non-Article III adjunct is put in the awkward position of determining whether a district judge was correct in her sentence. And because consent jurisdiction permits the magistrate judge to enter final judgment, the district judge has no ability to review the magistrate’s decision. That system turns the relationship between magistrate and district judges on its head because district judges appoint and

4. 28 U.S.C. § 636(b)(1)(B).

5. *Id.* § 636(b)(1)(C).

6. *See id.* § 636(c)(1) (codifying “consent jurisdiction” for magistrate judges).

7. *See id.* (establishing that the court may remedy a violation by vacating, setting aside, or correcting the movant’s sentence).

8. *See id.* (permitting magistrate judges, once consent is obtained, to “order the entry of judgment”); § 636(c)(3) (stating that an aggrieved party may only take appeal “to the appropriate United States court of appeals from the judgment of the magistrate judge”).

9. *See id.* § 2255 (allowing movants to collaterally attack criminal proceedings).

supervise magistrate judges.¹⁰ Put plainly, a magistrate judge reviewing a § 2255 motion is like you giving your boss a quarterly review, instead of your boss giving you one.

This practice raises two concerns *vis à vis* § 2255 motions. First, as a matter of statutory interpretation, is a § 2255 motion a “civil matter” capable of adjudication by a magistrate judge under § 636(c)? Second, supposing § 2255 motions fall within the jurisdictional language of § 636(c), does a magistrate judge reviewing and vacating a district judge’s earlier sentence violate principles of separation of powers?

A circuit split currently exists as to whether § 2255 motions fall within a magistrate judge’s jurisdiction under § 636(c).¹¹ While § 2255 is technically separate from traditional habeas corpus relief,¹² it shares many of the same characteristics of a habeas proceeding.¹³ Habeas corpus is a petition used to bring a person before a court to determine the legality of that person’s confinement.¹⁴ Because of the similarities between § 2255 and traditional habeas corpus, some courts have concluded § 2255 motions, like habeas petitions, are civil proceedings.¹⁵ Other courts have taken the opposite position, classifying § 2255 motions as criminal proceedings.¹⁶ This classification is important because magistrate judges can only adjudicate “civil

10. See 28 U.S.C. § 631 (describing the appointment, qualifications, and tenure of magistrate judges).

11. Compare *United States v. Johnston*, 258 F.3d 361, 366 (5th Cir. 2001) (holding that § 2255 motions fall within § 636(c) jurisdiction), and *United States v. Bryson*, 981 F.2d 720, 723 (4th Cir. 1992) (concluding that magistrate judges may adjudicate § 2255 motions where the criminal case was a misdemeanor), with *Brown v. United States*, 748 F.3d 1045, 1068 (11th Cir. 2014) (avoiding the constitutional issue and ruling § 2255 proceedings are not civil matters for purposes of § 636(c)(1)).

12. See Ira P. Robbins, *Magistrate Judges, Article III, and the Power to Preside over Federal Prisoner Section 2255 Proceedings*, 2002 FED. CTS. L. REV. 2, V.A.1 (“Although similar in purpose, § 2254 and § 2255 have distinguishing features . . .”); see also 28 U.S.C. § 2241 (codifying general habeas corpus relief); *id.* § 2254 (permitting collateral attack of state court-imposed sentences that violate the Constitution, laws, or treaties of the United States).

13. See Robbins, *supra* note 12, at V.A.3 (“§ 2255 is analogous to § 2254.”).

14. *Habeas Corpus*, BLACK’S LAW DICTIONARY (11th ed. 2019).

15. See *infra* notes 141–146 and accompanying text.

16. See *infra* notes 156–160 and accompanying text.

matter[s]” under § 636(c).¹⁷ Courts also look to the text and legislative history of § 636(c), to determine whether the drafters intended “civil matter” to include habeas and § 2255 motions.¹⁸

Assuming § 2255 motions fall within magistrate judges’ statutory jurisdiction, the practice still raises Article III separation of powers concerns.¹⁹ Separation of powers ensures that (1) individuals have their cases heard by a judge free from the control of another branch of government and (2) the essential attributes of judicial power remain with Article III judges.²⁰ When a magistrate judge adjudicates a § 2255 motion, she sits as a quasi-appellate judge, reviewing and potentially overturning a decision made by a district judge.²¹ This situation turns reviewability²² on its head and divests the district courts of Article III power, causing some courts to rule the practice unconstitutional.²³

Recently, however, the Supreme Court decided that party consent can go a long way to diminish, if not cure, separation of powers concerns.²⁴ If litigant consent cures, magistrate judges can continue adjudicating § 2255 motions under § 636(c) so long as both parties consent. But if consent cannot diminish or cure this violation, then the practice violates separation of powers

17. See *infra* Part III.B.2.

18. See 28 U.S.C. § 636(c)(1) (“[A] 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” (emphasis added)).

19. See *United States v. Johnston*, 258 F.3d 361, 367 (5th Cir. 2001) (raising the constitutional issue).

20. See *id.* (explaining why the doctrine of separation of powers applies to the judicial branch).

21. See *infra* notes 309–310 and accompanying text.

22. Reviewability is the idea that magistrate judge determinations are subject to “district court review and control.” *Johnston*, 258 F.3d at 371; see § 636(b)(1)(C) (giving district courts *de novo* review of reports and recommendations prepared by magistrate judges); § 636(c)(4) (permitting district courts to vacate civil matter references to magistrate judges for good cause).

23. See *Johnston*, 258 F.3d at 372 (holding that consensual reference of a § 2255 motion to a magistrate judge violates the doctrine of separation of powers).

24. See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1946 n.10 (2015) (concluding that a bankruptcy judge may dispose of a state law claim if all parties consent).

and district courts must change the way magistrate judges participate in § 2255 proceedings.

Part II of this Note provides background on magistrate judges and habeas corpus relief under § 2255. Part III introduces the circuit split over whether § 2255 motions are “civil matters” under § 636(c) jurisdiction. Part III then classifies § 2255 motions as either criminal, civil, or a hybrid proceeding, and determines whether they are a “civil matter” under § 636(c). Part IV analyzes the Supreme Court’s jurisprudence on Article III separation of powers, including its most recent decision in *Wellness International Network, Ltd. v. Sharif*.²⁵ Part IV also discusses three lower court cases which have addressed whether magistrate judges may constitutionally adjudicate § 2255 motions. Part IV then provides a framework for determining whether litigant consent can cure any separation of powers concerns. Finally, this Note concludes by recommending that Congress limit magistrate judges to issuing reports and recommendations reviewed by a district judge on § 2255 motions.²⁶

II. *Overview of the Magistrate Judge System and § 2255 Proceedings*

Magistrate judges trace their roots to the United States Commissioner System of the late eighteenth century.²⁷ The qualifications and duties of magistrate judges have changed much since this early system.²⁸ This Part discusses the history of magistrate judge statutes, the expansion of the magistrate judge system, and the methods used by district courts to assign them cases. Part II.D then explains the history of habeas corpus and the development of 28 U.S.C. § 2255.

A. *United States Commissioners*

Congress originally permitted “any person having authority from a circuit court . . . which authority . . . any circuit

25. 135 S. Ct. 1932 (2015).

26. See *infra* note 362 and accompanying text.

27. See *infra* note 29 and accompanying text.

28. See *infra* Part II.B.

court . . . may give to one or more *discreet persons learned in the law*” to take bail in criminal cases.²⁹ This use of non-Article III adjudicators, appointed by the circuit courts, set the stage for the creation of the United States Commissioner System.³⁰ Congress formally established the United States Commissioner System in 1896.³¹ From the start, the jurisdictional scope of these adjuncts was in question.³² Many courts took the view that commissioner jurisdiction was equivalent to that of a justice of the peace.³³ This meant commissioners were limited to adjudicating non-civil cases, holding probable cause hearings, issuing search and arrest warrants, setting bail, and trying petty offenses.³⁴

The commissioner system operated this way for nearly one-hundred years.³⁵ Then in the 1960s, Congress decided it was time for major changes to the commissioner system because of a lack of formal procedures in hearings, a limited jurisdictional scope, and only 30 percent of commissioners lacking any formal

29. Act of Mar. 2, 1793, ch. 22, § 4, 1 Stat. 333 (emphasis added). There was no formal education requirement for these adjudicators and the qualifications were left to the discretion of the circuit courts. *Id.*

30. See Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565, 566 (discussing the reasons for creating the new commissioner system).

31. See PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM, FED. BAR ASS’N 7 n.4 (2014), <https://perma.cc/P8BG-A76D> (PDF) (explaining the origins of magistrate judges).

32. See *id.* at 9 (contrasting “U.S. Commissioners” with “park commissioners”). Congress better explained park commissioner duties compared to U.S. Commissioners. See *id.* (stating that park commissioners were able to “hear and determine petty offenses on designated federal territories, national parks, and roads”).

33. See *United States v. Maresca*, 266 F. 713, 720 (S.D.N.Y. 1920) (limiting commissioner authority to “arresting, imprisoning or bailing offenders against laws of the United States” (internal quotations omitted)).

34. See Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 AM. J. LEGAL HIST. 1, 1–2 (1970) (describing the four major functions of U.S. Commissioners).

35. See Andrew Chesley, Note, *The Scope of United States Magistrate Judge Authority After Stern v. Marshall*, 116 COLUM. L. REV. 757, 761 (2016) (discussing several reasons why Congress enacted the Federal Magistrates Act of 1968).

legal training.³⁶ As a result, the Judicial Conference of the United States asked the Administrative Office of U.S. Courts to draft new legislation.³⁷ This legislation overhauled the qualifications and jurisdictional reach of these new federal magistrates and replaced the commissioner system.³⁸

B. *Jurisdictional Expansion*

The Federal Magistrate Judge Act of 1968 required magistrate judges to be “a member in good standing of the bar of the highest court of a State for five years.”³⁹ Aside from codifying these formal qualifications, Congress expanded magistrate judge jurisdictional authority by authorizing them to try and enter final judgment in minor criminal offenses.⁴⁰ Congress also gave district courts room to expand the use of magistrate judges, allowing magistrates to conduct other “additional duties” as determined by the district courts.⁴¹ A few years later, Congress formalized magistrate judge compensation, setting their pay at 75 percent of a district

36. See *Hearings on U.S. Commissioner System Before the Subcomm. on Improvements in the Judicial Machinery of the S. Comm. on the Judiciary*, 89th Cong. 15–18 (1965) (statement of F. Archie Meatyard Jr., U.S. Comm’r, Bethesda, MD) (justifying Congress changing the qualifications, salary, and role of commissioners).

37. See MCCABE, *supra* note 31, at 9–10 (describing the events prompting the drafting of the new legislation). The Judicial Conference is the “federal judiciary’s policymaking body.” *Id.* at 9.

38. See Federal Magistrate Judge Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107, 1108 (codified as amended at 28 U.S.C. § 636(a)) (providing the new law as drafted by the Administrative Office of U.S. Courts).

39. 28 U.S.C. § 631(b)(1).

40. While many district courts permitted commissioners to conduct petty offense trials, there was no statutory authorization for this, resulting in only 70 percent of commissioners exercising this power. Lindquist, *supra* note 34, at 2.

41. See 28 U.S.C. § 636 (listing the jurisdiction and powers given to magistrate judges); Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. LEGIS. 343, 349 (1979) (discussing three basic duties of federal magistrate judges under the 1968 Act). These categories are: (1) all the previous power of U.S. Commissioners; (2) the “trial and disposition of minor criminal offenses”; and (3) “additional duties” to assist district judges. *Id.* In the third category was “preliminary review of prisoner habeas corpus petitions.” *Id.*

judge.⁴² In 1988, Congress, feeling generous, increased magistrate and bankruptcy judges' salary to 92 percent of the salary of a district judge.⁴³

From the beginning, the jurisdictional scope of magistrate judge authority was challenged. One question involving habeas corpus that was resolved by the Supreme Court was whether magistrate judges could preside over evidentiary hearings in habeas cases.⁴⁴ The Court held this power was beyond the scope of magistrate judge authority.⁴⁵ Congress, in response, gave magistrate judges that power in 1976.⁴⁶

In 1979, Congress once again increased magistrate judge jurisdiction.⁴⁷ The 1979 Act added what has become known as "consent jurisdiction" to Title 28.⁴⁸ Section 636(c) enables magistrate judges to, "upon consent of the parties, . . . conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . ."⁴⁹ If the parties consent, the only check by the district court is, in extraordinary circumstances, for good cause, or on the judge's own motion, to vacate the reference order to the magistrate judge.⁵⁰ Once a magistrate judge enters final judgment under § 636(c), a litigant

42. See McCabe, *supra* note 31, at 12 (discussing the failure of the 1968 Act to fix magistrate judge compensation).

43. See Judiciary Appropriations Act of 1988, Pub. L. No. 100-202, § 408, 101 Stat. 1329-26, 27 (Dec. 22, 1987) (finalizing the salary change).

44. See *Wingo v. Wedding*, 418 U.S. 461, 472 (1974) (deciding the issue based on the Court's interpretation of the "additional duties provision" of the Act), *superseded by statute*, Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636(b)).

45. See *id.* at 472-73 ("Magistrates are prohibited only from conducting the actual evidentiary hearing.").

46. See Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636(b)) (authorizing magistrate judges to conduct "all evidentiary hearings").

47. Federal Magistrates Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (codified as amended at 28 U.S.C. § 636(c)).

48. *Id.*

49. 28 U.S.C. § 636(c)(1).

50. See *id.* § 636(c)(4) (codifying the district court's "control" mechanisms to check magistrate judge power).

must take any appeal directly to the court of appeals.⁵¹ Since the 1979 Act, Congress has not statutorily changed the jurisdictional scope of magistrate judges.

Over time, however, courts have expanded the power of magistrate judges. For example, the Supreme Court increased magistrate judge involvement in criminal cases in *Peretz v. United States*.⁵² In *Peretz*, the Court confronted the issue of whether a magistrate judge may conduct jury selection in a felony case with a defendant's consent.⁵³ The Court said the practice is constitutional because the district court retained supervision over the entire process.⁵⁴ The rationale was that "[t]he decision whether to empanel the jury whose selection a magistrate has supervised . . . remains entirely with the district court."⁵⁵

Similarly, in *United States v. Raddatz*,⁵⁶ Justice Blackmun and a majority of the Court permitted a magistrate judge to preside over a suppression hearing in a felony trial and issue a report and recommendation to the district judge on the issue.⁵⁷

51. See *id.* § 636(c)(3) (instructing parties to file appeal within the parameters set forth in the Federal Rules of Civil Procedure); FED. R. CIV. P. 73(c) (stating the time and terms to file an appeal).

52. 501 U.S. 923 (1991).

53. See *id.* at 924–25 (analyzing the matter under the “additional duties” provision of the United States Code). This provision states: “A magistrate judge 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).

54. See *Peretz*, 501 U.S. at 937 (noting that separation of powers was not at issue because of this supervision by the district court). The Court later expanded the holding of *Peretz* to allow a defendant's counsel to provide consent for a magistrate judge to conduct voir dire. See *Gonzalez v. United States*, 553 U.S. 242, 253 (2008) (“[A] magistrate judge may preside over jury examination and jury selection only if the parties, or the attorneys for the parties, consent. Consent from an attorney will suffice.” (emphasis added)).

55. *Peretz*, 501 U.S. at 937 (internal quotations and citations omitted). The Court said, “[b]ecause the entire process takes place under the district court's *total control and jurisdiction*, there is no danger that use of the magistrate involves a constitutional attempt to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts.” *Id.* (emphasis added) (internal quotations and citations omitted).

56. 447 U.S. 667 (1980).

57. See *id.* at 680–81 (“We conclude that the due process rights claimed here are adequately protected . . .”). Magistrate judges may issue Reports

Justice Blackmun stressed that because the district court supervised the entire process and ultimately made the final determination whether to adopt the recommendation, no constitutional concerns were present.⁵⁸ As will be discussed later, the Court has been willing to expand magistrate judge involvement only where there is direct supervision and reviewability by the district court.

C. Assignment of Cases to Magistrate Judges

The expansion by Congress and the Supreme Court of magistrate judge jurisdiction has led district courts to change the way magistrate judges receive their assignments.⁵⁹ Magistrate judges disposed of 17,112 civil cases under § 636(c) jurisdiction from September 2017–September 2018.⁶⁰ One small but important factor that determines how much power a magistrate judge has is how the district courts assign them cases.

The assignment of cases, where consent jurisdiction is possible, varies widely.⁶¹ Previously, most district courts used

and Recommendations (R&Rs) on any evidentiary issue. 28 U.S.C. § 636(b)(1)(B) (stating that magistrate judges must “submit to a judge of the court proposed findings of fact and recommendations for the disposition”).

58. See *Raddatz*, 447 U.S. at 687 (Blackmun, J., concurring)

[T]he handling of suppression motions invariably remains completely in the control of the federal district court. The judge may initially decline to refer any matter to a magistrate. When a matter is referred, the judge may freely reject the magistrate’s recommendation. He may rehear the evidence in whole or in part. He may call for additional findings or otherwise “recommit the matter to the magistrate with instructions.” (citation omitted).

59. See MCCABE, *supra* note 31, at 24 (referencing a 1983 General Accounting Office report encouraging district courts to use magistrate judges more).

60. THE FEDERAL BENCH—ANNUAL REPORT, ADMIN. OFF. OF THE U.S. CTS. (2018), perma.cc/7W9S-SF2B (PDF).

61. See MCCABE, *supra* note 31, at 44 (discussing the method of assignment of civil cases); 18 BRUCE A. CARROLL, THE ROLE, DESIGN, AND GROWING IMPORTANCE OF UNITED STATES MAGISTRATE JUDGES 42–46 (Edwin Mellen Press ed., 2004) (categorizing the ways district courts assign cases to magistrate judges). Carroll breaks the categories down into the random method, rotating method, a paired system, a chief magistrate system, a district judge system, and other miscellaneous methods. *Id.* at 42.

some type of pairing system to assign cases to magistrate judges.⁶² This randomly pairs a magistrate judge and district judge together for a particular case.⁶³ A variation of that system pairs magistrate judges with a particular district judge for a definite time period—say six months.⁶⁴ Both systems allow magistrate judges to directly handle pre-trial matters and any matters the district judge refers to them.⁶⁵

In contrast, the system now used in many district courts, adds magistrate judges to the random assignment system—directly assigning them civil cases.⁶⁶ If the parties do not consent to the magistrate judge,⁶⁷ a district judge is reassigned.⁶⁸ This direct assignment of § 2255 motions to magistrate judges continues in many district courts,⁶⁹ despite the Magistrate Judge Committee suggesting it is not appropriate to directly assign § 2255 motions to magistrate judges.⁷⁰

62. See MCCABE, *supra* note 31, at 44 (describing the two types of pairing systems).

63. *Id.*

64. See *id.* (noting that district courts assign cases to both a district judge and her paired magistrate).

65. See *id.* (discussing the benefits and drawbacks of the system).

66. See *id.* (“The Magistrate Judge is the presiding judge on a case and handles all case management and pretrial proceedings.”); CARROLL, *supra* note 61, at 42 (stating that a case is reallocated once it goes beyond the magistrate judge’s jurisdiction).

67. See 28 U.S.C. § 636(c)(1) (permitting a magistrate judge to “conduct all proceedings” related to a civil case once the parties consent).

68. See MCCABE, *supra* note 31, at 44 (noting that this direct assignment system has been successful in “expediting the disposition of cases”). For better or worse, more parties now consent to magistrate judge disposition under this system. See *id.* (attributing this increase to litigants’ desire for a more expedited trial schedule).

69. See, e.g., Williams v. Spaulding, No. 18-cv-11554, 2019 WL 2107275, at *6 (D. Mass. May 14, 2019) (magistrate judge directly assigned); Rivera-Rivera v. United States, No. Cr. 08-0204, 2015 WL 3965962, at *4 (D.P.R. June 30, 2015) (same).

70. See COMM. ON THE ADMIN. OF THE MAGISTRATE JUDGE SYS. OF THE JUD. CONF., SUGGESTIONS FOR UTILIZATION OF MAGISTRATE JUDGES 8 (2013) (emphasizing the precarious position of magistrate judges when required to enter final judgment on § 2255 motions). The Committee said magistrate judges should submit reports and recommendations on § 2255 motions. *Id.* This is discussed in more detail, *infra* Part V.B.

Direct assignment has had the effect of magistrate judges adjudicating cases, including § 2255 motions, at a higher rate than the paired system.⁷¹ This is because most parties will consent to the magistrate judge’s jurisdiction. Under the paired system, a district judge would have to refer the case to a magistrate, who would then obtain the parties’ consent. That extra hurdle kept § 2255 motions in front of a district judge more than direct assignment.

D. Habeas Corpus and the History of § 2255

“The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.”⁷² While on the minds of the Framers during the founding of the Republic,⁷³ the writ of habeas corpus traces its origins to England where it was used to enforce Magna Carta.⁷⁴ Originally, English citizens were unable to use the writ as a way to secure their rights—rather, the Monarchy used it to control lords and barons who enforced the law.⁷⁵ Slowly courts began

71. Compare ADMIN. OFF. OF THE U.S. CTS., 2019 STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, tbl.M-5 (showing 17,817 civil cases terminated under § 636(c) jurisdiction), and ADMIN. OFF. OF THE U.S. CTS., 2018 STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, tbl.M-5 (revealing 17,113 civil cases terminated under § 636(c) jurisdiction), with ADMIN. OFF. OF THE U.S. CTS., 2010 STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, tbl.M-5 (reporting only 12,470 civil cases terminated by magistrate judges under § 636(c) jurisdiction).

72. *Boumediene v. Bush*, 553 U.S. 723, 739 (2008).

73. *Id.*; see THE FEDERALIST NO. 84 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The establishment of the writ of habeas corpus . . . [is] perhaps [a] greater securit[y] to liberty and republicanism than any it [the Constitution] contains.”).

74. See 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 112 (1926) (noting how habeas corpus eventually became a way to enforce Magna Carta’s promise and prevent false imprisonment); see also MAGNA CARTA cl. 39, reprinted in J.C. HOLT, MAGNA CARTA 461 (2d ed. 1992) (“No free man shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the land.”).

75. See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 585 (2008) (explaining that kings and queens used the writ as a check on the power of lords and barons).

issuing writs to seek information about the legality of a prison to hold one of the king or queen's subjects.⁷⁶

By the early seventeenth century, chaos erupted in England when The House of Commons passed a statute condemning "imprison[ment] without any cause."⁷⁷ King Charles I, in response, defied the statute and dissolved Parliament.⁷⁸ When Parliament reconvened, they passed The Act of 1640 which "expressly authorized use of the writ to test the legality of commitment by command or warrant of the King or the Privy Council."⁷⁹ After more unrest, Parliament reaffirmed its commitment to liberty and passed the Habeas Corpus Act of 1679 which established a procedural scheme for issuing writs of habeas corpus and vested the courts with the power to grant those writs.⁸⁰ Parliament was clear that the 1679 Act even gave courts which *lacked criminal jurisdiction*, like the court of common pleas, the power to grant writs.⁸¹ Ultimately, this procedural scheme and common law authority became the basis of early American habeas relief.⁸²

Article I, Section 9 of the United States Constitution provides, "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the

76. See 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1341, at 237 (3d ed. 1858) ("[F]or it is said, that the king is entitled, at all times, to have an account, why the liberty of any of his subjects is restrained.").

77. Petition of Right, 3 Car. 1, ch. 1 (1627), *reprinted in* 5 Statutes of the Realm 23, 24 (1963).

78. See W. HALL & R. ALBION, A HISTORY OF ENGLAND AND THE BRITISH EMPIRE 328 (3d ed. 1953) (detailing the King's response to the legislation passed by the House of Commons).

79. *Boumediene*, 553 U.S. at 742 (citing The Act of 1640, 16 Car. 1, ch. 10, *reprinted in* 5 Statutes of the Realm, at 110).

80. See Habeas Corpus Act of 1679, 31 Car. 2, ch. 2 (codifying only the *procedural* scheme for bringing a habeas petition).

81. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 80–81 (1807) ("Whence does the court of common pleas derive this power? Not from its criminal jurisdiction; for it has none. Not from any statute But from the great protective principle of the common law . . .").

82. See Halliday & White, *supra* note 75, at 583 (discussing the import of the statute into the Suspension Clause of the Constitution and state habeas statutes).

public Safety may require it.”⁸³ The Suspension Clause is a unique part of the Constitution because it comes almost unedited from English law.⁸⁴ The Framers chose to include only the limits on suspending the writ in the Constitution—there was no affirmation of it—because each state already provided for the right.⁸⁵ This meant that at the inception of the United States, habeas corpus proceedings were left to the states to administer.⁸⁶

That system did not last long. In the late eighteenth century, Congress granted federal courts the ability to grant writs of habeas corpus in the Judiciary Act of 1789.⁸⁷ The 1789 Act vested the Supreme Court with jurisdiction to review state supreme court decisions on habeas petitions.⁸⁸ As the federal judiciary grew, Congress gave district courts original jurisdiction to hear “all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”⁸⁹

More key changes came about in the creation of the modern habeas statutes in 1948. The Judicial Conference of Senior Circuit Judges drafted the legislation that created 28 U.S.C.

83. U.S. CONST. art. I, § 9, cl. 2.

84. See Halliday & White, *supra* note 75, at 583 (“Unlike other parts of the Constitution, in which English practices—for instance, impeachment or writs of election—were transformed to serve a new constitutional design, the Suspension Clause carried the writ of habeas corpus out of English practice and into American law with little additional jurisprudential baggage.”).

85. See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 128–31 (1980) (“The chief concern . . . was over the power to suspend.”).

86. See Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 65 (2012) (“In the United States, as in England, the common law writ continued to operate . . . at the state level . . .”).

87. See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (providing courts with the statutory authorization to adjudicate habeas corpus petitions); *Bollman*, 8 U.S. (4 Cranch) at 95 (describing the right as a “great constitutional privilege” supporting federal court jurisdiction).

88. See Judiciary Act of 1789, § 25, 1 Stat. at 85–87 (permitting review under writ-of-error when the decision of the state supreme court is “repugnant to the constitution, treaties or laws of the United States”).

89. *United States v. Hayman*, 342 U.S. 205, 211 (1952).

§ 2255.⁹⁰ Section 2255 was created to provide federal prisoners relief as broad as habeas corpus.⁹¹ Today, § 2255 motions are a form of post-conviction relief because jurisdiction for these motions lies in the court that sentenced the movant, rather than in their district of confinement.⁹²

Until 1976, courts applied the Federal Rules of Civil Procedure to § 2255 motions.⁹³ Then, the Supreme Court requested the promulgation of the *Rules Governing Section 2255 Proceedings in the United States District Courts*.⁹⁴ In drafting these rules, the advisory committee chose a mixture of civil and criminal rules to govern the proceedings.⁹⁵ Justifying this mixture, the advisory committee noted that while a § 2255 motion appears to be a civil proceeding, it is simply a step in the movant's criminal proceeding.⁹⁶ This explanation has sparked much debate over the proper classification of § 2255 motions.⁹⁷

90. See Act of Sept. 14, 1922, ch. 206, § 2, 42 Stat. 837, 838–39 (establishing the Conference); see also 28 U.S.C. § 331 (describing the Conference as one who examines the condition of business in the federal courts and recommends legislation to Congress).

91. See Brendan W. Randall, *United States v. Cooper: The Writ of Error Coram Nobis and the Morgan Footnote Paradox*, 74 MINN. L. REV. 1063, 1074–75 (1990) (discussing the legislative history of § 2255); *Judicial Conference Committee on Habeas Corpus Procedure to Chairmen of House and Senate Judiciary Committees*, 79th Cong. (1945) (statement of Chief Justice Stone) (“As a remedy, [§ 2255] is intended to be as broad as habeas corpus.”).

92. See Act of June 25, 1948, ch. 646, § 2255, 62 Stat. 869, 967 (codified as amended 28 U.S.C. § 2255) (“[M]ay move *the court which imposed the sentence* to vacate, set aside or correct the sentence.” (emphasis added)).

93. See, e.g., *Helfin v. United States*, 358 U.S. 415, 418 n.7 (1959) (applying the civil time to appeal to a § 2255 motion).

94. See Rules Governing 28 U.S.C. § 2254 Cases and § 2255 Proceedings, 425 U.S. 1167, 1169, 1181–87 (1976) (describing the purpose of the rules and the scope of the advisory committee's work). Congress later approved the promulgated rules with only minor changes. See Act of Sept. 28, 1976, Pub. L. No. 94-426, §§ 1, 2, 90 Stat. 1334, 1334–35 (1976) (codified as amended 28 U.S.C. foll. § 2255).

95. See Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. foll. § 2255 (providing the district courts with guidance on matters such as when to conduct hearings and what burden of proof applies).

96. See *infra* note 147 and accompanying text.

97. See *infra* Part III.A.

III. Magistrate Judge Statutory Authority Over § 2255 Motions

As discussed, consent jurisdiction permits magistrate judges to enter final judgment only in civil matters.⁹⁸ This raises the question whether § 2255 motions are civil matters under § 636(c) consent jurisdiction. The courts of appeals are split on this issue.⁹⁹ To resolve the issue, courts must consider (1) whether § 2255 motions are civil, criminal, or hybrid proceedings, and (2) which of these three classifications fall within the term “civil matter?”

A. Circuit Split on Statutory Authority

In *Brown v. United States*,¹⁰⁰ the Eleventh Circuit considered whether § 636(c) statutorily permits magistrate judges to adjudicate § 2255 motions.¹⁰¹ Brown was found guilty of violating 18 U.S.C. § 2422(b), which makes it a crime to persuade an individual under the age of eighteen to engage in sexual activity.¹⁰² He was found to be a career offender under the U.S. Sentencing Guidelines and was sentenced to 235 months in prison.¹⁰³ Brown later filed a § 2255 motion arguing, among other things, that the district court’s determination that he was a career offender was incorrect.¹⁰⁴ Brown and the

98. See 28 U.S.C. § 636(c)(1) (“[A] 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” (emphasis added)).

99. See *supra* note 11 and accompanying text.

100. 748 F.3d 1045 (2014).

101. See *id.* at 1047 (deciding the issue on statutory grounds despite the appeal objecting to the constitutionality of the practice).

102. *Id.*; see 18 U.S.C. § 2422(b).

103. *Brown*, 748 F.3d at 1048; see U.S. SENT’G GUIDELINES MANUAL § 4B.1.1(a) (U.S. SENT’G COMM’N 2020) (defining “career offender” as one who (1) was at least eighteen years old when he committed the instant offense; (2) that offense is a felony crime of violence or controlled substance offense; and (3) the defendant has two prior felony convictions for violence or controlled substance offenses).

104. See *Brown*, 748 F.3d at 1048 n.5 (“Brown claimed that he was wrongfully sentenced as a career offender because his conviction under 18 U.S.C. § 2422(b) was not a crime of violence in light of intervening Supreme Court and Eleventh Circuit case law . . .”).

Government consented to a magistrate judge adjudicating the motion.¹⁰⁵ Once Brown consented, and without an evidentiary hearing, the magistrate judge denied his motion.¹⁰⁶

The Eleventh Circuit granted review and first addressed whether § 2255 motions fall under § 636(c) jurisdiction.¹⁰⁷ After a thorough examination of the legislative history, the court said there was no “indication in the legislative history of the 1979 Act that Congress intended that § 636(c) reach habeas corpus or § 2255 proceedings—or even that it considered that such a situation might occur.”¹⁰⁸

The Government offered the syllogism that because habeas corpus statutes, like § 2254 are civil, and because § 2254 and § 2255 are analogous proceedings, it follows that § 2255 is a civil proceeding.¹⁰⁹ The court disagreed. It found that § 2255 is not analogous to habeas relief.¹¹⁰ While magistrate judges can enter final judgment in § 2254 matters under § 636(c),¹¹¹ § 2255 proceedings are a “distinct procedural avenue,” and do not share the same substantive characteristics as other habeas

105. *Id.* at 1048.

106. *See id.* (concluding that the motion failed to state a basis for granting relief). Brown’s subsequent motion for reconsideration was also denied by the magistrate judge. *Id.*

107. *See id.* at 1050–55 (considering the statutory issue to avoid the constitutional questions presented). The court decided the issue on statutory grounds to comply with “[p]rinciples of constitutional avoidance.” *Id.* at 1072. This counsels courts to “consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail.” *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005).

108. *Brown*, 748 F.3d at 1056.

109. *See id.* at 1060 (arguing that the similarities between the proceedings compel the court to find § 2255 motions are civil proceedings and thus a “civil matter” under § 636(c)).

110. *See id.* at 1059–60 (“[A] § 2255 motion ‘is not a habeas corpus proceeding’” (quoting *United States v. Hayman*, 324 U.S. 205, 220 (1952))).

111. *Id.* at 1060–61; *see, e.g.*, *Sinclair v. Wainwright*, 814 F.2d 1516, 1522 (11th Cir. 1987) (authorizing magistrate judge disposition of § 2254 motions under § 636(c) jurisdiction); *Farmer v. Litscher*, 303 F.3d 840, 845 (7th Cir. 2020) (same).

statutes.¹¹² These differences mean § 2255 motions cannot be civil proceedings just because their origins trace back to habeas relief.¹¹³

The court justified this interpretation by citing the advisory committee note to the *Rules Governing Section 2255 Proceedings* which classifies § 2255 motions as criminal.¹¹⁴ The advisory committee based its determination on the legislative history of the 1948 statute, which first created § 2255.¹¹⁵ The advisory committee said that because of the remedies available under § 2255,¹¹⁶ a magistrate judge would be able to directly resentence or order the release of a movant convicted of a felony.¹¹⁷ Those remedies are not civil and fall outside the civil matters scope of § 636(c).¹¹⁸ Section 2254, on the other hand, has a more indirectly administered remedy, requiring a federal judge to issue an order directing the state court to release or modify the movant's sentence.¹¹⁹ Thus, the federal court cannot

112. See *Brown v. United States*, 748 F.3d 1045, 1061 (2014) (noting that while these statutes are procedurally similar in application, the relief given is much different).

113. See *id.* (“[W]e must canvas the history of § 2255 to divine its true nature.”).

114. See *id.* at 1062–63 (relying on the statement that § 2255 motions are another step in a movant's criminal proceedings).

115. See S. REP. NO. 80-1256, at 2 (1948) (“Since the motion remedy *is in the criminal proceeding*, [§ 2255] affords the opportunity and expressly gives the broad powers to set aside the judgment and to discharge the prisoner or resentence him or grant a new trial . . .” (emphasis added) (internal quotation and citation omitted)).

116. See 28 U.S.C. § 2255 (permitting the reviewing judge to “vacate, set aside or correct the sentence”).

117. See *Brown*, 748 F.3d at 1064 (“[T]he § 2255 proceeding does not conclude until the relief ordered has been completed.” (citing *United States v. Futch*, 518 F.3d 887, 894 (11th Cir. 2008))).

118. See *United States v. Hadden*, 475 F.3d 652, 665 (4th Cir. 2007) (“Thus, although the proceeding [§ 2255] is technically civil in nature, the remedy entered pursuant to the proceeding is often technically criminal in nature, as it relates directly to the prisoner's criminal punishment.” (internal citations omitted)).

119. See, e.g., *Williams v. Jones*, No. 03-cv-201, 2010 WL 3834580, at *1 (E.D. Okla. Sept. 29, 2010) (granting the movant's § 2254 motion and ordering the State of Oklahoma to release petitioner from custody).

order relief directly.¹²⁰ This meant under § 2255, magistrate judges are directly involved in felony sentencing, another jurisdictional and constitutional issue in and of itself.¹²¹

For these reasons, the *Brown* court found that § 2255 proceedings are not civil matters for purposes of consent jurisdiction.¹²² But the court was clear that there was no definite answer on whether § 2255 is a criminal or civil proceeding.¹²³ That it could be both, bolsters the argument to exclude it from § 636(c) jurisdiction.¹²⁴ One might argue that finding statutory jurisdiction lacking was only a way for the court to avoid the constitutional separation of powers concern addressed later in the opinion.¹²⁵ Either way, the court was clear—magistrate judge’s cannot statutorily adjudicate § 2255 proceedings under § 636(c).¹²⁶

In *United States v. Johnston*,¹²⁷ the Fifth Circuit reached the opposite conclusion, despite holding magistrate judge adjudication of § 2255 motions violates constitutional separation of powers.¹²⁸ In determining whether § 2255 motions are civil matters, the court said that § 2255 is “generally construed” as being civil.¹²⁹ Still, the court recognized that

120. *See id.* (requiring the state court to issue an order releasing the movant).

121. *See Brown*, 748 F.3d at 1067 (“[A]llowing a magistrate judge to enter final judgment on a § 2255 motion would upset a federal criminal conviction, and Congress has never authorized magistrate judges . . . to try federal felony offenses.”).

122. *See id.* at 1068 (“[W]e hold that a § 2255 proceeding is not a civil matter so as to avoid Article III concerns.”).

123. *See id.* (“Whether § 2255 is a ‘civil proceeding’ that a magistrate judge can decide is ambiguous.”).

124. *See id.* (noting that only entirely civil proceedings should fall under § 636(c) jurisdiction).

125. *See id.* (invoking the doctrine of constitutional avoidance as one reason for its holding).

126. *See supra* note 122 and accompanying text.

127. 258 F.3d 361 (5th Cir. 2001).

128. *See id.* at 366 (“[A] § 2255 proceeding is a civil matter over which Congress intended magistrate judges to exercise jurisdiction upon consent of the parties.”); see also *infra* Part IV.C, for a more in-depth discussion of the facts of *United States v. Johnston* and the court’s constitutional analysis.

129. *See id.* at 365 (referring to § 2255’s relationship to other habeas relief).

§ 2255 is distinct from traditional habeas corpus and does have qualities of a criminal proceeding.¹³⁰ But the opinion emphasized that courts should not place “undue importance” on the advisory committee’s note that § 2255 motions are a step in the movant’s criminal proceeding.¹³¹ After reviewing the text and legislative history of § 636(c), the court held that § 2255 proceedings are civil matters capable of magistrate judge disposition.¹³²

B. *Resolving the Split*

A two-step analysis can determine whether magistrate judges may adjudicate § 2255 motions under § 636(c). First, are § 2255 motions criminal, civil, or hybrid proceedings?¹³³ Second, which of those classifications did Congress intend to be a “civil matter” under § 636(c)?¹³⁴

1. *Classification of § 2255 Motions*

Several arguments support § 2255 motions being classified as civil proceedings. First, § 2255 is in Title 28 of the United States Code, which applies to civil proceedings, unlike Title 18 which applies to criminal proceedings.¹³⁵ Second, as the Supreme Court stated, because § 2255 is analogous to § 2254, and § 2254 proceedings are civil, § 2255 proceedings must also

130. *See id.* (“On the other hand, we have at times suggested that § 2255 motions are conceptually distinguishable from habeas proceedings . . .”).

131. *See id.* at 365–66 (noting that classifying § 2255 motions “remains highly dependent on the proceedings’ context” (internal quotations and citations omitted)); *infra* note 147 and accompanying text.

132. *See Johnston*, 258 F.3d at 366 (“In light of that statutory framework and legislative intent, we hold 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.”).

133. *See infra* Part III.B.1.

134. *See infra* Part III.B.2.

135. *See Robbins*, *supra* note 12, at V.A.3 (arguing that because § 2255 is in Title 28, Congress intended it to be civil). This argument fails because the Office of the Law Revision Counsel (OLRC), not Congress, classifies every public law and “determine[s] where it should go into the Code.” *See About Classification of Laws to the United States Code*, OFF. OF THE L. REVISION COUNS., perma.cc/8U3D-DN2J.

be civil.¹³⁶ Third, as a historical matter, since § 2255 is a form of habeas relief—tracing its roots to England—and the power to grant habeas writs originated in courts that only exercised civil jurisdiction, § 2255 motions must be civil proceedings.¹³⁷ Fourth, Federal Rule of Appellate Procedure 4(a), which governs appeals in civil cases¹³⁸ is the appellate rule used in § 2255 proceedings.¹³⁹

Taken together, however, these characteristics only confirm § 2255 motions are *procedurally* civil.¹⁴⁰ None of these characteristics look at the substance of the rights being adjudicated. This means § 2255 can still be *substantively* criminal, despite being *procedurally* civil.

Courts have focused on these procedural aspects in classifying § 2255 motions as independent civil proceedings.¹⁴¹ In *Baker v. United States*,¹⁴² the Eighth Circuit determined that a § 2255 motion attacks a criminal conviction but is not a continuation of it.¹⁴³ The court said a § 2255 motion was “a

136. See *Williams v. United States*, 984 F.2d 28, 29 (2d Cir. 1993) (finding § 2255 is a civil proceeding); Robbins, *supra* note 12, at V.A.3 (analyzing whether § 2255 motions are civil or criminal). *But see supra* note 135 and accompanying text.

137. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 80–81 (1807) (noting that when the writ was established in England, courts lacking criminal jurisdiction had power to issue the writ).

138. See FED. R. APP. P. 4(a)(1)(A) (“In a civil case . . . notice of appeal . . . must be filed . . . within 30 days after entry of judgment or order appealed from.”).

139. See Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. foll. § 2255, Rule 11 (stating the applicable rule governing the time to file an appeal); *Williams*, 984 F.2d at 29 (applying rule 4(a) to a § 2255 motion).

140. See *supra* notes 135–139 and accompanying text.

141. See *Heflin v. United States*, 358 U.S. 415, 418 n.7 (1959) (“For a motion under § 2255, like a petition for a writ of habeas corpus . . . is not a proceeding in the original criminal prosecution but an independent civil suit.”). The Court made this classification, however, before the advisory committee notes to the *Rules Governing Section 2255 Proceedings* stated § 2255 was part of the movant’s criminal proceeding. See 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 622 (4th ed. 2013) (noting criticism over the civil classification of § 2255).

142. 334 F.2d 444 (8th Cir. 1964).

143. See *id.* at 447 (holding that because a § 2255 motion is a civil proceeding the movant had no right to court-appointed counsel).

special civil rather than a criminal proceeding.”¹⁴⁴ Likewise, the Third Circuit concluded that a motion to vacate sentence under § 2255 is “not a proceeding in the original criminal prosecution but an independent civil suit.”¹⁴⁵ Despite recognizing the criminal aspects of § 2255, the Seventh Circuit explained that a § 2255 motion “is a step in a criminal proceeding yet is, at the same time, civil in nature and subject to the civil rules of procedure.”¹⁴⁶

By contrast, the advisory committee who drafted the *Rules Governing Section 2255 Proceedings*, said § 2255 motions are “a further step in a movant’s criminal case and not a separate civil action.”¹⁴⁷ The committee believed Congress explicitly left out a filing fee in § 2255 “to recognize . . . the nature of a § 2255 motion as being a continuation of the criminal case.”¹⁴⁸ The Senate Report supplementing the Bill that enacted § 2255 supports the advisory committee’s statements. The report noted that a motion brought under § 2255 is a “criminal proceeding” because the *remedy* afforded is criminal.¹⁴⁹

Indeed, the remedies under § 2255 differ from those available under traditional habeas relief.¹⁵⁰ Unlike § 2254, § 2255 remedies are broader in scope and are more directly

144. *Id.* at 447.

145. *Jenkins v. United States*, 325 F.2d 942, 944 (3d Cir. 1963).

146. *United States v. Balistrieri*, 606 F.2d 216, 221 (7th Cir. 1979) (concluding that § 2255 is an independent civil proceeding).

147. *See* Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. foll. § 2255, Rule 11 advisory committee’s note (explaining the differences between § 2255 and traditional habeas relief).

148. *See id.* at Rule 3 n.1 (“This is a change from the practice of charging §15 and is done to recognize specifically the nature of a § 2255 motion as being a continuation of the criminal case . . .”).

149. *See* S. REP. NO. 96-74, at 1–3 (1948) (differentiating between the procedural and substantive aspects of § 2255).

150. *Compare* 28 U.S.C. § 2255 (permitting the judge to directly order the appropriate relief), *with* 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4268.4 (3d ed. 2007)

Grant of a writ of habeas corpus [under § 2254] need not result in the unconditional release of the prisoner. It may do so, but much more commonly the prisoner will be ordered discharged unless the prisoner is retried within a reasonable time which may be specified in the order.

administered by the reviewing judge.¹⁵¹ This is because, under § 2254, a federal judge may only order the state court to release the movant—the federal judge cannot directly order his release.¹⁵² Under § 2255, however, the reviewing judge may order the relief directly and release the movant or resentence him.¹⁵³ Thus, because the remedy in a § 2254 motion is only a civil order,¹⁵⁴ it is more like a civil proceeding. Section 2255, by contrast, must be different since the district judge administers the remedy directly by amending the original sentencing order.¹⁵⁵

Some courts have said this remedial scheme proves that § 2255 motions are criminal proceedings. For example, the Second Circuit held that a § 2255 motion is not an independent civil proceeding.¹⁵⁶ Similarly, the Ninth Circuit classifies § 2255 proceedings as criminal.¹⁵⁷ In *United States v. Cook*,¹⁵⁸ the Tenth Circuit noted that while a § 2255 motion has the “characteristics of a writ of habeas corpus,”¹⁵⁹ it is not a habeas proceeding, but is merely a “continuation of the original criminal action.”¹⁶⁰

151. See 28 U.S.C. § 2255 (authorizing the reviewing judge to vacate and resentence the movant).

152. See *WRIGHT ET AL.*, *supra* note 150, § 4268.4 (stating the federal court is limited to ordering the state court to act); *supra* note 119 and accompanying text.

153. See 3 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 635 (4th ed. 1995) (noting that not only may the judge resentence the movant based on the success of a § 2255 motion, she may also resentence the movant on “other counts that were not challenged by the motion”).

154. *Cf.* 28 U.S.C. § 1447(d) (permitting a district court to remand a case for want of jurisdiction which orders the state court to take back jurisdiction).

155. See *supra* note 147 and accompanying text.

156. See *Williams v. United States*, 984 F.2d 28, 29 (2d Cir. 1993) (concluding that because § 2255 is not civil, the procedure set out in Federal Rule of Civil Procedure 58 for entry of judgment does not apply). Rule 58 sets out the procedure for entry of judgment by district courts in civil proceedings. FED. R. CIV. P. 58.

157. See *United States v. Martin*, 226 F.3d 1042, 1047 n.7 (9th Cir. 2000) (emphasizing “it is now clear” that § 2255 motions are a further step in the movant’s criminal proceeding).

158. 997 F.2d 1312 (10th Cir. 1993).

159. *Id.* at 1316 n.3.

160. *Id.* at 1315 n.1.

In short, § 2255 includes remedies comparable to the sentencing phase of a criminal case while proceeding through the courts like a civil proceeding.¹⁶¹ A proper resolution, then, is to classify § 2255 motions as hybrid proceedings that are both civil and criminal. In *United States v. Means*,¹⁶² the Sixth Circuit did just that.¹⁶³ The court made no categorical classification of § 2255 motions because aspects of the proceeding point to it being both civil and criminal.¹⁶⁴ The court acknowledged the civil procedural posture and criminal remedies the statute affords.¹⁶⁵ Even though this hybrid classification is doctrinally opaque, it is the proper classification of a proceeding that courts so often disagree about.¹⁶⁶ Thus, the answer to the first question is that § 2255 motions are hybrid proceedings with criminal and civil characteristics.

2. Definition of “Civil Matter” Under § 636(c)

The hybrid nature of § 2255 makes determining whether the proceeding is a civil matter harder. This is because Congress did not define the term “civil matter” in § 636(c).¹⁶⁷ The scope of the term has instead been left to the courts to decide.¹⁶⁸ When

161. *Cf.* *Harris v. Nelson*, 394 U.S. 286, 293–94 (1969) (“It is, of course, true that habeas corpus proceedings are characterized as ‘civil.’ But the label is gross and inexact. Essentially, the proceeding is unique.” (citations omitted)).

162. 133 F.3d 444 (6th Cir. 1998).

163. *See id.* at 448–49 (“The inescapable fact is that [§ 2255] has characteristics of both [civil and criminal matters], and may properly be categorized as one or the other depending on the context and the reason for making the inquiry.” (citations omitted)).

164. *See id.* at 448–49 (citing *United States v. Nahodil*, 36 F.3d 323, 328 (3d Cir. 1994)) (discussing the countervailing classifications of § 2255 motions).

165. *See id.* at 449 (differentiating between the procedural and substantive aspects).

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

167. *See* 28 U.S.C. § 636(c)(1) (failing to define the term “civil matter” in the statute’s text or accompaniments).

168. *See, e.g.*, *Brown v. United States*, 748 F.3d 1045, 1068 (11th Cir. 2014) (determining whether a § 2255 proceeding is a civil matter).

interpreting a word in a statute, courts generally look to the statute's plain text and then to the legislative history.¹⁶⁹

At the time of drafting, Black's Law Dictionary defined "civil" as "[r]elating to private rights and remedies sought by civil actions as contrasted with criminal proceedings."¹⁷⁰ This indicates Congress chose to limit "civil matter" to cases relating to private rights and remedies.¹⁷¹ Here, motions under § 2255 are not between private parties¹⁷² and do not provide private remedies.¹⁷³ The statutory interpretation canon *expressio unius est exclusio alterius*, or "the expression of one thing excludes the alternatives," also cautions that by only including cases relating to private rights and remedies, Congress deliberately excluded cases with criminal rights and remedies.¹⁷⁴ Taken together, the statute's text suggests § 636(c)

169. See 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2008) (noting that courts are bound to the plain meaning of a word in a statute and only when that term is ambiguous should the intent of the legislators be "gleaned"). Moreover, "[w]here a statutory provision is clear and unambiguous, and not unreasonable or illogical in its operation, a court may not go outside the statute to give it a different meaning." *Id.* But where the relevant legislative history would import a different meaning, courts may consider the legislative history even when the text is unambiguous. See *id.* (discussing the limitations and exceptions to the plain meaning rule).

170. *Civil*, BLACK'S LAW DICTIONARY (5th ed. 1979).

171. See SINGER & SINGER, *supra* note 169, § 47:7 (explaining that when legislators do not define the words in a statute, courts will give that word its "common and ordinary meaning"). One way to determine the common meaning is through a dictionary definition. *Id.*

172. See, e.g., *Brown*, 748 F.3d at 1047 (showing Assistant United States Attorneys representing the *Government's* interests).

173. See *supra* note 118 and accompanying text.

174. See *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) ("[I]f Congress had such an intent, Congress would have made it explicit in the statute . . ."); see also SINGER & SINGER, *supra* note 169, § 47:23 ("[W]here a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions."); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 107 (2012) (explaining uses of the doctrine). *But see* *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("[The interpretive doctrine] has force only when the items expressed are members of an 'associated group or series' . . ." (citation omitted)). The question then becomes, are civil and criminal cases "members of an associated group?" It seems odd to say inclusion of civil would

does not include cases where (1) a private party is adverse to the Government, and (2) a criminal remedy is available.¹⁷⁵ The statute thus clearly excludes criminal proceedings. But the text alone is unclear as to whether Congress meant § 636(c) to include hybrid proceedings that have criminal aspects. Because § 2255 motions are hybrid proceedings, courts must look beyond the text of the statute, to the legislative history, to determine whether § 2255 motions fall under consent jurisdiction.¹⁷⁶

The legislative history of § 636(c) shows Congress did not intend the statute to include hybrid proceedings like § 2255. In the House Conference Report, the committee made repeated reference to “civil actions” and “civil cases.”¹⁷⁷ The Senate Committee likewise said § 636(c) should aid district judges in attending to “a mounting queue of *civil* cases.”¹⁷⁸ The justification given for expanding jurisdiction was “[i]f . . . civil cases are forced out of court as a result, they [litigants] lose all their procedural safeguards.”¹⁷⁹ Thus, the repeated use of the word “civil” and absence of “criminal” in the legislative history shows Congress’ intent to limit § 636(c)(1) to purely civil proceedings.¹⁸⁰ This history also never discusses a back log of criminal cases or prisoner petitions, showing Congress never even considered criminal proceedings or habeas when enacting the statute.¹⁸¹

also imply criminal because Congress often separates them. *See, e.g.*, 28 U.S.C. §§ 1251–5001 (statutes applicable only in civil contexts); 18 U.S.C. §§ 3001–3772 (statutes applicable only in criminal cases).

175. *See supra* notes 170–174 and accompanying text.

176. *See* SINGER & SINGER, *supra* note 169, § 45:2 (stating that even the most carefully drafted statute is subject to multiple interpretations depending on the facts involved). When there is a genuine uncertainty about the statute’s meaning, even if a word would ordinarily be unambiguous, court “must consider the particular problem the legislature was addressing, prior legislative considerations of the problem, the act’s legislative history, operation, and administration, and even preexisting common law.” *Id.*

177. *See* H.R. CONF. REP. NO. 96-444, at 1–3 (1979), *as reprinted in* 1979 U.S.C.C.A.N. 1487, 1487–89 (using the terms synonymously).

178. S. REP. NO. 96-74, at 3 (1979), *as reprinted in* 1979 U.S.C.C.A.N. 1469, 1470–72 (emphasis added).

179. *Id.* at 4.

180. *See supra* note 174 and accompanying text.

181. *See supra* notes 177–179 and accompanying text.

Despite this legislative history, courts cite Congress' goal of increasing litigant access to federal courts to justify a broad interpretation of "civil matter," to include § 2255 motions.¹⁸² The Fifth Circuit said, to give proper effect to Congress' goals, "civil matter" should be interpreted in the broadest, rather than narrowest sense.¹⁸³ This broad reading provides the increased access to courts and reduced caseloads—goals Congress set out to achieve when drafting the statute.¹⁸⁴

But this approach reads into the statute proceedings Congress never considered.¹⁸⁵ Prisoner petitions and other criminal proceedings are never mentioned in the legislative history and were, by all indications, not even on the minds of § 636's drafters.¹⁸⁶ And increasing access to courts for federal habeas petitioners would not have been on their minds since courts are the only venue where prisoners can seek such relief.¹⁸⁷ Thus, Congress' reason for expanding jurisdiction—litigants choosing alternative dispute resolution—cannot occur in § 2255 proceedings.¹⁸⁸

In the end, however, a § 2255 proceeding should not be a "civil matter." The text of § 636(c)¹⁸⁹ and its legislative history¹⁹⁰ show that while Congress did intend to increase litigants' access

182. See, e.g., *United States v. Johnston*, 258 F.3d 361, 366 (5th Cir. 2001) (interpreting civil matters under § 636(c) broadly to include § 2255 motions).

183. See *id.* at 366 (advocating for judicial efficiency by expanding the scope of § 636(c) jurisdiction).

184. See *id.* (describing Congress' two goals in enacting § 636(c)).

185. See *United States v. Lewis*, 991 F.2d 322, 324 (6th Cir. 1999) ("This rationale reads too much into what was *not* said by the legislative history . . .").

186. See *Brown v. United States*, 748 F.3d 1045, 1066 (11th Cir. 2014) (stating that the Senate drafted the bill to encourage litigants to remain in federal court rather than seeking alternative dispute resolution systems); *supra* note 179 and accompanying text.

187. See *Brown*, 748 F.3d at 1066 ("Of course, federal prisoners seeking postconviction relief via § 2255 cannot resolve their claims outside the courthouse.").

188. Compare *Johnston*, 258 F.3d at 366 (justifying § 2255 falling under § 636(c) because it increases access to federal courts), with *Brown*, 748 F.3d at 1066 (explaining that § 2255 motions were never in danger of being moved to alternative dispute resolution).

189. See *supra* notes 169–174 and accompanying text.

190. See *supra* notes 177–187 and accompanying text.

to federal courts, it did not intend to make the jurisdictional statute a catch all for § 2255 motions and other criminal proceedings.¹⁹¹

*IV. Constitutionality of Magistrate Judge Disposition of
§ 2255 Motions*

Even if § 2255 motions fall within § 636(c) jurisdiction, Congress has violated the doctrine of separation of powers by allowing magistrate judges to adjudicate these proceedings. The unique posture by which a magistrate judge reviews a decision made by a district judge implicates broad separation of powers concerns.¹⁹² This Part of the Note will first review Supreme Court jurisprudence on Article III separation of powers. Then the Note will discuss how lower courts have dealt with constitutional challenges to magistrate judges adjudicating § 2255 motions. Finally, this Part will determine whether magistrate judge adjudication of § 2255 motions violates the doctrine of separation of powers and whether party consent can cure this violation.

A. The Supreme Court and Article III Separation of Powers

The Supreme Court began its Article III separation of powers doctrine by establishing a framework to evaluate the constitutionality of Congress giving Article III power to a non-Article III judge.¹⁹³ This is known as the legislative court

191. See *Brown*, 748 F.3d at 1066 (“We doubt that by amending § 636 to allow magistrate judges to enter final judgment in civil matters, Congress also implicitly amended the habeas corpus chapter of Title 28 to allow magistrate judges to enter final judgment.”).

192. See *id.* at 1070

This is so [separation of powers concerns] because a magistrate judge entertaining such a motion [§ 2255] would create an ironic situation whereby non-Article III magistrate judges review and reconsider the propriety of rulings by Article III district judges, but do not themselves have to worry about review by the district court. (internal quotation and citation omitted).

193. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63–64 (1982) (establishing the framework).

doctrine.¹⁹⁴ Justice Brennan enumerated three categories of cases in which Congress may delegate to non-Article III adjudicators:¹⁹⁵ (1) cases in territories where no state operates as sovereign, (2) cases adjudicated by military tribunals, and (3) cases involving public rights.¹⁹⁶ Public rights cases are those “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.’”¹⁹⁷ Scholars describe the creation of the legislative court doctrine as the shift in the Supreme Court from a formalistic to a more “pragmatic” approach to separation of powers.¹⁹⁸

Ultimately, this tripartite framework was eliminated and replaced with an even more pragmatic approach in *Commodity Futures Trading Commission v. Schor*.¹⁹⁹ The CFTC adopted a regulation allowing the agency to adjudicate common law counterclaims that “ar[ose] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.”²⁰⁰ Schor filed a claim with the CFTC against his broker, Conti, for violating the Commodity Exchange Act.²⁰¹ Conti answered, denied the allegation, and counterclaimed for the debt balance on Schor’s account (a common law claim).²⁰² An Administrative Law Judge (ALJ) heard the case and ruled against Schor.²⁰³ In response, Schor challenged the statutory

194. See Richard B. Saphire & Michael E. Solimine, *Shoring up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B. U. L. REV. 85, 91 (1988) (describing the doctrine as an effort “to preserve the integrity of [A]rticle III while accommodating Congress’s need for flexibility in the exercise of its enumerated powers”).

195. *N. Pipeline Constr. Co.*, 458 U.S. at 70.

196. *Id.* at 64–70.

197. *Stern v. Marshall*, 564 U.S. 462, 489 (2011) (quoting *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932)).

198. See Saphire & Solimine, *supra* note 194, at 105 n.149 (describing the majority’s approach in *Northern Pipeline*).

199. 478 U.S. 833 (1986).

200. *Id.* at 837.

201. *Id.*

202. *Id.* at 838.

203. See *id.* (dismissing Schor’s claim and granting Conti’s counterclaim for the debt balance).

authority of the ALJ over the counterclaim.²⁰⁴ The Court of Appeals for the District of Columbia Circuit reversed and dismissed Conti's counterclaim, holding that the ALJ's adjudication of it violated Article III separation of powers.²⁰⁵

The Supreme Court granted certiorari.²⁰⁶ Justice O'Connor, writing for the majority reversed, holding that the ALJ had statutory and constitutional authority to adjudicate the common law counterclaim.²⁰⁷ Justice O'Connor rejected the categorical approach taken by the Court in *Northern Pipeline* and instead adopted a balancing test, considering "the degree to which a grant of judicial power to a non-[A]rticle III court actually impinged upon [A]rticle III values."²⁰⁸ This test focused on the threat adjudication by an non-Article III judge had on Article III independence and on a litigant's right to have her case heard by a judge free from influence by another branch of government.²⁰⁹ The Court, however, was clear that Article III "does not confer on litigants an absolute right to the plenary consideration of every . . . claim by an Article III court."²¹⁰

The Court also addressed waiver and consent.²¹¹ Justice O'Connor noted that, like other individual constitutional rights,

204. *See id.* (arguing that the CFTC's rule giving the ALJ his authority was broader than what Congress authorized in the enabling act).

205. *See id.* at 839 (raising the constitutional issue *sua sponte* before oral argument).

206. *Id.* at 841.

207. *See id.* at 843 ("[T]he broad grant of power in § 12a(5) clearly authorizes the promulgation of regulations providing for adjudication of common law counterclaims arising out of the same transaction as a reparations complaint because such jurisdiction is necessary, if not critical, to accomplish the purposes behind the reparations program.").

208. *Saphire & Solimine, supra* note 194, at 121 (synthesizing the test adopted in *Schor*); *see Schor*, 478 U.S. at 848.

209. *See id.* ("Article III, § 1, serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government.").

210. *Id.*

211. *See id.* (stating that independent and impartial adjudication by an Article III judge serves as a personal constitutional protection and is subject to waiver).

the right to an Article III adjudicator is subject to waiver.²¹² Here, Schor asked Conti, who originally filed in district court, to bring its counterclaim before the CFTC.²¹³ This amounted to a waiver of Schor's right to have the common law claim proceed before an Article III judge.²¹⁴ Even though this waiver mooted individual constitutional concerns, the Court said litigants cannot waive structural constitutional violations.²¹⁵ This statement, however, was dicta because the Court concluded this case presented no structural violation.²¹⁶

Justice Brennan dissented with Justice Marshall.²¹⁷ They said that the ALJ's jurisdiction was an encroachment on Article III power.²¹⁸ The dissent preferred keeping the rule from *Northern Pipeline* and limiting non-Article III adjudication to "[the] exceptions we have recognized for territorial courts, courts-martial, and administrative courts . . . based on certain exceptional powers bestowed upon Congress by the Constitution."²¹⁹ Justice Brennan criticized the majority's balancing test because it compares functionalist goals, the benefits of which are immediate, against separation of powers

212. *See id.* at 848–49 (comparing waiver of an Article III judge to waiver of a jury trial).

213. *See id.* at 849–50 (noting that Schor could have proceeded in the district court).

214. *See id.* at 850 (reiterating that Schor was the one who asked Conti to dismiss the district court case in favor of the bankruptcy judge adjudicating it).

215. *See id.* at 850–51 (“To the extent that this structural principle [separation of powers] is implicated in a given case, the parties *cannot* by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2.” (emphasis added)).

216. *See id.* (concluding the ALJ did not infringe on Article III independence when he adjudicated Conti's counterclaim).

217. *Id.* at 859 (Brennan, J., dissenting).

218. *See id.* at 860 (“The separation of powers and the checks and balances that the Framers built into our tripartite form of government were intended to operate as a ‘self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam))).

219. *Id.* at 861.

protections, the benefits of which manifest over time.²²⁰ Citing a mid-nineteenth century case, the dissent said, “Congress may not ‘withdraw from Article III judicial cognizance any matter *which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.*’”²²¹

Nor should consent cure individual or structural constitutional concerns, the dissent added, because these “interests served by Article III are coextensive.”²²² Justice Brennan believed a litigant may “[n]ever waive his right to an Article III tribunal where one is constitutionally required” and because structural and individual constitutional concerns are intertwined, consent to an individual violation cannot be imputed to a structural violation.²²³

Schor was the standard until 2011, when the Court decided *Stern v. Marshall*.²²⁴ There, Chief Justice Roberts moved the Supreme Court’s legislative court doctrine back to the formalistic era of *Northern Pipeline*.²²⁵ The Court addressed the issue of whether Article III permits a bankruptcy court to enter final judgment on a litigant’s state law counterclaim.²²⁶ A majority held it did not.²²⁷ Like *Northern Pipeline*, the Court rejected the notion that the exercise of Article III power by a non-Article III judge does not raise separation of powers

220. *See id.* at 863 (“[T]he Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case.”).

221. *Id.* at 862 (quoting *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855)).

222. *Id.* at 867.

223. *See id.* (arguing party consent is irrelevant to separation of powers analysis).

224. 564 U.S. 462 (2011).

225. *See id.* at 469 (relying on the tripartite framework from *Northern Pipeline* to hold the bankruptcy judge lacked constitutional authority to adjudicate the state law claim).

226. *See id.* at 482 (adding that the bankruptcy judge did have statutory jurisdiction).

227. *See id.* (“Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie’s counterclaim, Article III of the Constitution does not.”).

concerns.²²⁸ Here, the bankruptcy judge was impermissibly exercising Article III power when it entered final judgment on the state law counterclaim.²²⁹ This case did not fit into any of the three *Northern Pipeline* exceptions which permit congressional delegation of judicial power.²³⁰ The Court stated that even though district courts appoint and refer cases to bankruptcy judges, there was a lack of sufficient supervision and control to cleanse the delegation of its separation of powers concerns.²³¹

B. Wellness International Network, Ltd. v. Sharif

In 2015, the Supreme Court decided *Wellness International Network, Ltd. v. Sharif*.²³² In a bankruptcy proceeding, Wellness, a creditor of Sharif's, filed a five-count complaint alleging Sharif unlawfully concealed property.²³³ Count V of the complaint sought a declaratory judgment, under state law, that the assets held in trust were Sharif's property subject to the bankruptcy estate.²³⁴ The district court denied Sharif's motion to file supplemental briefing on whether the bankruptcy court was constitutionally able to enter final judgment on the state law claim.²³⁵ On appeal, the Seventh Circuit held the bankruptcy court violated separation of powers by adjudicating the state law claim.²³⁶

The Supreme Court took up the issue of whether Article III permits a bankruptcy judge to adjudicate a state law claim if the

228. *See id.* at 486 (rejecting the argument that “the bankruptcy judge was acting merely as an adjunct of the district court” (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–72 (1982))).

229. *See id.* at 487 (rejecting Vickie Lynn Marshall's assertion that this case falls into the “public rights” exception).

230. *Id.*

231. *See id.* at 501 (“[I]t does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remains.”).

232. 135 S. Ct. 1932 (2015).

233. *Id.* at 1940.

234. *Id.* at 1941.

235. *Id.*

236. *Id.* at 1941–42.

parties consent to jurisdiction.²³⁷ Justice Sotomayor, writing for the majority, held that no separation of powers violation occurred because the litigants consented to the bankruptcy judge's jurisdiction over the state law claim.²³⁸ Relying on *Schor*, the Court said that the right to an Article III adjudicator was partially "a personal right" and thus "subject to waiver."²³⁹ Still, the Court recognized a structural separation of powers component that consent cannot cure.²⁴⁰ In the end, however, Sharif's consent waived his personal right to have an Article III judge adjudicate his case²⁴¹ and that consent reduced structural separation of powers concerns to a *de minimis* level.²⁴² This is the complete opposite of Justice Brennan's conclusion in *Schor* that because structural and individual constitutional concerns are so interwoven, consent cannot be a factor in whether a separation of powers violation occurred.²⁴³

In making this determination, the majority applied the *Schor* factors.²⁴⁴ First, the Court reasoned that because district

237. *Id.* at 1939. The Court also looked to whether consent must be express. *Id.* at 1947. In this part of the opinion, the Court determined implied consent is enough. *See id.* at 1948 ("The implied consent standard . . . supplies the appropriate rule for adjudications by bankruptcy courts . . ."). A litigant's consent must still be knowing and voluntary but is sufficient where "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case." *Id.* (internal quotation and citation omitted).

238. *See id.* at 1944–45 ("[W]e conclude that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts.").

239. *Id.* at 1944 (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986)).

240. *See infra* note 242 and accompanying text.

241. *See Wellness*, 135 S. Ct. at 1945 n.10 ("Consent provides, if not complete, at least very considerable reason to doubt that the tribunal poses a serious threat to the ideal of federal adjudicatory independence." (quoting Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 *IND. L.J.* 291, 303 (1990))).

242. *See id.* (reiterating that consent cannot cure a structural violation, if one occurs, but can act to mitigate the occurrence of a structural violation).

243. *See supra* note 222 and accompanying text.

244. *See Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015).

judges appoint and have the ability to remove bankruptcy judges,²⁴⁵ enough supervision and control exists to cleanse the delegation of Article III power away from the district court.²⁴⁶ Additionally, the scope of the bankruptcy judge's jurisdiction was limited.²⁴⁷ That jurisdiction only extends to "a narrow class of common law claims as an *incident* to the bankruptcy courts' primary, and unchallenged, adjudicative function."²⁴⁸

The Court did not discuss the second *Schor* factor, moving directly to why Congress expanded bankruptcy judge jurisdiction.²⁴⁹ In analyzing this third factor, the Court noted that the congressional concerns which drove the legislature to expand bankruptcy jurisdiction was not "in an effort to aggrandize itself or humble the Judiciary."²⁵⁰ Congress' reason for expanding bankruptcy judge power was to reduce the burden

The Court must weigh [1] 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, [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III. (internal quotation and citation omitted).

245. *See id.* at 1945 (describing the mechanisms in place for district court supervision and review).

246. *See id.* ("[T]he 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 in place." (internal quotations and citation omitted)).

247. *See id.* (noting that the bankruptcy courts possess "no free-floating authority").

248. *Id.* (internal quotation and citation omitted).

249. *See id.* (moving directly from the discussion of the district court's control to the reasoning behind Congress expanding bankruptcy judge jurisdiction).

250. *See id.* (finding no separation of powers danger in allowing bankruptcy judges to adjudicate *Stern* claims with the parties' consent because the control and power remained vested in the district court).

on Article III judges.²⁵¹ In the end, none of the *Schor* factors suggested a separation of powers violation.²⁵²

After applying the *Schor* factors, the Court returned to consent.²⁵³ The majority reiterated that “*Northern Pipeline* established only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, *without consent* of the litigants”²⁵⁴ In each case where the Supreme Court found a violation of a separation of powers, it involved a party being forced to litigate “involuntarily before a non-Article III court.”²⁵⁵ Here, because the parties consented, those same concerns were not present, reducing any Article III concerns.²⁵⁶

Chief Justice Roberts dissented, explaining that the majority’s conclusion was improper because it confused individual constitutional safeguards with structural safeguards.²⁵⁷ While a litigant may consent to an Article III violation that affects her personal right, she cannot “by consent cure the [structural] constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations

251. *See id.* at 1946 (“Congress could choose to rest the full share of the Judiciary’s labor on the shoulders of Article III judges Instead, Congress has supplemented the capacity of district courts through the able assistance of bankruptcy judges.”).

252. *See id.* (concluding that, taken together, the factors show the district court retained its Article III power).

253. *See id.* at 1946–47 (distinguishing *Stern* and *Northern Pipeline* because in both cases the litigants had not consented to a non-Article III adjudicator).

254. *Id.* at 1946 (internal quotation omitted).

255. *See id.* at 1947 (referencing *Northern Pipeline* and *Stern*).

256. *See id.* at 1944 (“[The] 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.’” (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985))).

257. *See id.* at 1956 (Roberts, C.J., dissenting) (noting that *Schor* recognized both a personal right to an Article III judge subject to waiver and a structural protection to Article III that litigants cannot waive).

imposed by Article III.”²⁵⁸ The “structural” protections Chief Justice Roberts discusses are those limitations that “serve institutional interests”²⁵⁹—including the protections afforded to Article III judges by the Constitution.²⁶⁰ Because of these safeguards, “Congress may not confer power to decide federal cases and controversies upon judges who do not comply with the structural safeguards of Article III.”²⁶¹ Chief Justice Roberts’ view is that litigant consent can never diminish or somehow avoid structural safeguards.²⁶²

C. Constitutional Concerns Addressed by Lower Courts

While the Supreme Court has not addressed the constitutional concerns related to consent jurisdiction and § 2255 proceedings, various circuit courts have. The Fourth Circuit in *United States v. Bryson*²⁶³ took up the issue of whether magistrate judges can adjudicate § 2255 motions in misdemeanor cases.²⁶⁴ There, the magistrate judge who adjudicated the § 2255 motion was also the sentencing judge in Bryson’s case.²⁶⁵ The court held a magistrate judge can enter final judgment in a § 2255 motion under § 636(c) *when they are the sentencing judge*.²⁶⁶ The magistrate judge, however, failed to obtain consent from Bryson during the § 2255 proceeding and

258. *Id.* (internal quotations omitted) (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850–51 (1986)).

259. *See id.* (discussing the importance of these protections to the Constitution and comparing them to structural safeguards that pertain to the legislative and executive branches).

260. *See id.* (reiterating the constitutional protections afforded to Article III judges and their importance to a system of separation of powers).

261. *Id.* at 1951.

262. *See id.* at 1959 (“But the fact remains that Congress controls the salary and tenure of bankruptcy judges, and the Legislature’s present solicitude provides no guarantee of its future restraint.”).

263. 981 F.2d 720 (4th Cir. 1992).

264. *See id.* at 723 (“The issue now presented is whether the magistrate judge’s jurisdiction over the misdemeanor case included the jurisdiction over the § 2255 motion.”). Under 18 U.S.C. § 3401, magistrate judges may conduct trials and impose sentences in misdemeanor cases. 18 U.S.C. § 3401.

265. *Bryson*, 981 F.2d at 721–22.

266. *See id.* at 724 (“With the explicit consent to do so, a magistrate judge can decide the § 2255 motion on the merits.”).

thus the denial of his motion was reversed on appeal.²⁶⁷ The court said separation of powers concerns were minimal here because the magistrate judge only reviewed his own sentence.²⁶⁸ This is unlike the situation in the next two cases, where a magistrate judge reviewed determinations made by district judges in felony cases.

The Fifth Circuit in *Johnston*, was first to address magistrate judge disposition of § 2255 motions where a district judge presided over the original felony trial.²⁶⁹ There, the movant alleged that the district court made a procedural error in relying on certain testimony to determine his sentence.²⁷⁰ Both *Johnston* and the Government consented to proceed before a magistrate judge.²⁷¹ That magistrate denied *Johnston*'s motion, which he appealed.²⁷² The Fifth Circuit addressed the issue of whether “the delegation of the duty to a magistrate judge offends the principles of Article III.”²⁷³

The court began by noting that consent or waiver by the litigants “does not eliminate the constitutional concerns” linked to delegating § 2255 proceedings to a magistrate judge.²⁷⁴ Structural concerns protect an independent judiciary and ensure co-equality among the three branches of government.²⁷⁵

267. *See id.* (noting that Bryson’s consent was clear for the magistrate to sentence him, but not for the magistrate to enter final judgment in his § 2255 motion). The court also rejected the Government’s argument that consent in the initial proceeding could extend to the subsequent § 2255 motion. *See id.* (refusing to expand the definition of “sentencing” under 18 U.S.C. § 3401(b) to include § 2255 motions).

268. *See supra* note 265 and accompanying text.

269. *See United States v. Johnston*, 258 F.3d 361, 363 (5th Cir. 2001) (raising the issue *sua sponte*).

270. *Id.* *Johnston* also argued his conviction was unconstitutional because the Government engaged in improper conduct during the trial. *Id.*

271. *Id.*

272. *See id.* (noting that there was confusion about whether *Johnston* was filing a notice of appeal or moving for a certificate of appealability).

273. *See id.* at 366. (“[W]e must still determine whether delegating those [§ 2255] proceedings to magistrate judges comports with the strictures of Article III.”).

274. *Id.* at 366–67.

275. *See id.* at 367 (distinguishing between the personal right to have an Article III judge preside over a case and the structural principles designed to keep Article III power vested in Article III judges).

These concerns contrast with individual concerns related to having a case heard by an independent Article III judge.²⁷⁶ The structural concern implicated here, is a magistrate judge sitting in a quasi-appellate capacity reviewing a district judge's prior determination.²⁷⁷ The court explained that run-of-the-mill civil cases only require a magistrate to adjudicate issues between the parties.²⁷⁸ Section 2255 motions, on the other hand, "do[] not easily comport with the average civil case or even another quasi-civil proceeding" because magistrate judges act more like an appellate judge evaluating whether a district judge's sentence was proper.²⁷⁹

More than just the reviewability issue, other aspects of magistrate judges adjudicating § 2255 motions troubled the court. First, magistrate judges need not defer to the district judge's prior determinations.²⁸⁰ This allows the supervisee (the magistrate judge) to effectively supervise the supervisor (the district judge).²⁸¹ And recognizing the criminal characteristics of a § 2255 motion, the court stressed that even if a magistrate judge could constitutionally review and modify a civil order or misdemeanor sentence by a district judge, they could never modify or vacate a sentence imposed in a felony case.²⁸²

Indeed, permitting a magistrate judge to dispose of § 2255 motions "encroaches upon a district court's exclusive felony trial domain."²⁸³ This is different than in *Peretz*, where a magistrate

276. *See id.* ("[T]he only matter before us is whether the delegation of the § 2255 motion pursuant to § 636(c) offended the structural guarantees of Article III.").

277. *See id.* at 368 (discussing the complexities a § 2255 motion presents compared to a run-of-the-mill civil proceeding).

278. *See id.* (minimizing the constitutional impact in ordinary civil cases).

279. *See id.* (referring to magistrate judges reviewing a district judge's determination).

280. *See id.* at 369 (implying that review under § 2255 is de novo).

281. *See id.* (emphasizing that this scheme moots the argument that because the district court supervises magistrate judges, the essential attributes of judicial power remain vested in Article III).

282. *See id.* (explaining that having a magistrate judge embroiled in a felony criminal case is alone an Article III violation).

283. *Id.* at 370.

judge supervised voir dire in a felony trial.²⁸⁴ There, the Supreme Court permitted the practice because it was ultimately left to the district judge's *final* determination whether to empanel the magistrate judge-selected jury.²⁸⁵

The final thing troubling the court was the lack of district court review and supervision once a magistrate judge enters final judgment.²⁸⁶ Section 636(c) treats magistrate judges less as adjuncts under the supervision of Article III judges and more like they are independent of Article III control.²⁸⁷ This is because any appeal would go directly to the court of appeals for that circuit. For these reasons, the court held the practice was unconstitutional for violating the doctrine of separation of powers.²⁸⁸

The *Brown* court likewise addressed these constitutional concerns, but instead decided that magistrate judges lack statutory authority to adjudicate § 2255 motions.²⁸⁹ The court began at the founding, noting the importance an independent judiciary meant to the survival of the Republic.²⁹⁰ The Framers built into the Constitution a system of checks and balances that “defines the power and protects the independence of the Judicial Branch.”²⁹¹ The importance of this system is to keep judicial

284. See *Peretz v. United States*, 501 U.S. 923, 937 (1991) (doing so under the “additional duties” provision of § 636).

285. See *id.* (holding so because the district court had the final say on empaneling the magistrate judge’s selected jury).

286. See *United States v. Johnston*, 258 F.3d 361, 370 (5th Cir. 2001) (noting the posture of § 2255 motions turns reviewability on its head).

287. See *id.* (explaining that unlike a district judge reviewing a magistrate judge’s determination (like in *Peretz*), a magistrate judge reviews an Article III judge’s rulings).

288. See *id.* at 372 (“[W]e conclude that the consensual delegation of § 2255 motions to magistrate judges violates Article III of the Constitution.”).

289. See *Brown v. United States*, 748 F.3d 1045, 1068 (11th Cir. 2014) (“[W]e hold that a § 2255 proceeding is not a civil matter so as to avoid Article III concerns.”).

290. See *id.* at 1069 (describing separation of powers as “essential” in framing the Constitution); THE FEDERALIST NO. 78, at 428 (Alexander Hamilton) (E.H. Scott ed., 1898) (“[Separation of powers ensures an] independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.”).

291. See *Brown*, 748 F.3d at 1069 (quoting *Stern v. Marshall*, 564 U.S. 462, 482–83 (2011)).

power vested in Article III judges.²⁹² When magistrate judges enter final judgment in civil matters, they exercise Article III power and do not serve as mere adjuncts of the district courts.²⁹³ Moreover, “[t]he fact that the parties consent to a magistrate . . . does not . . . obviate the Article III concerns.”²⁹⁴

Aside from the court’s facial concern with § 636(c), it discussed the unique separation of powers implication when magistrate judges adjudicate § 2255 motions.²⁹⁵ The court objected to the quasi-appellate nature of this review and noted the hindrance it has on the district court’s reviewability and control.²⁹⁶ With this in mind, the court emphasized the lack of supervision by the district courts, noting a hallmark of the magistrate judge system is district court review and supervision, not magistrate judge independence.²⁹⁷ Because a final order by a magistrate judge under consent jurisdiction is only reviewable by the circuit court, the district court is stripped of its supervision beyond constitutional limits.²⁹⁸ Even though the court ultimately declined to rule on the constitutional question, the sentiment was clear—magistrate judge adjudication of § 2255 motions under § 636(c) is not constitutionally permissible.²⁹⁹

292. *See id.* (discussing the Supreme Court’s holding in *Stern*).

293. *See id.* (“Instead, magistrate judges exercise the judicial Power of the United States, despite the fact that they lack Article III protections.” (internal quotations and citation omitted)).

294. *Id.* at 1070.

295. *Id.*

296. *See id.* at 1070–71 (“It is axiomatic that non-Article III judges may not revise or overturn Article III judgments.”).

297. *See id.* at 1071 (relying on the rules for filing appeals of § 636(c) judgments for support).

298. *See id.* at 1071–72 (noting the limited appellate review of judgments made under § 636(c) jurisdiction). This lack of review reduces the district court’s control at the end of the proceeding, divesting the court of its Article III control. *Id.*

299. *See id.* at 1072 (invalidating the practice on statutory grounds).

D. Can Magistrate Judges Constitutionally Dispose of § 2255 Motions?

It is important to state that this Note is not suggesting § 636(c) is facially unconstitutional.³⁰⁰ Rather, § 636(c) jurisdiction is unconstitutional when used to adjudicate § 2255 motions.³⁰¹ Magistrate judge review of § 2255 motions concern more than a non-Article III adjudicator exercising Article III power.³⁰² Here, a non-Article III judge has the final word on whether an Article III judge's prior determination is correct. This situation ignores the characteristics that distinguish Article III judges and protects them from encroachment by the other branches.³⁰³ It also shifts reviewability and supervision away from Article III and into the hands of the magistrate judge.³⁰⁴

1. The Schor Factors Test

The factors from *Schor*, as applied by the majority in *Wellness*, show magistrate judge adjudication of § 2255 proceedings violates separations of power.³⁰⁵ First, Article III judges retain very little supervision over the adjudication of § 2255 motions by magistrate judges.³⁰⁶ The only review of a magistrate judge's final order is a discretionary appeal to the court of appeals for the circuit in which the district sits.³⁰⁷ Even though district courts retain power *ex ante* to appoint and refer § 2255 motions to magistrates, once a magistrate judge enters a

300. *But see id.* at 1068 (“At the outset, we harbor serious concerns as to the facial constitutionality of § 636(c).”).

301. *See United States v. Johnston*, 258 F.3d 361, 372 (5th Cir. 2001) (holding that the practice violates Article III separation of powers).

302. *See Brown v. United States*, 748 F.3d 1045, 1070 (11th Cir. 2014) (noting the unique separation of powers concerns involved).

303. *See supra* note 260 and accompanying text.

304. *See Johnston*, 258 F.3d at 370 (describing how magistrate judges now review the district court judge).

305. *See supra* note 244 and accompanying text.

306. *See supra* note 281 and accompanying text.

307. *See Johnston*, 258 F.3d at 370 (discussing the appeal procedure once a magistrate judge entered the final order); 28 U.S.C. § 636(c)(3) (providing the same appeal structure as if a district judge enters the final order).

final order, the district court lacks all review.³⁰⁸ Ironically, it is the magistrate judge who is given the power to review the Article III judge,³⁰⁹ turning reviewability on its head and further removing the district judge from the proceeding.³¹⁰

Second, as discussed,³¹¹ the right to post-conviction relief under § 2255 is a “fundamental precept to liberty.”³¹² Because habeas corpus is so vital, it cannot be suspended unless it falls into a narrow exception and is approved by Congress.³¹³ Section 2255 became an important way to enforce that right while addressing the “practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts.”³¹⁴ The enactment of § 2255 did not alter the remedy available to federal prisoners challenging their convictions.³¹⁵ Thus, § 2255 has the same level of importance and fundamentality as any other habeas statute, counseling against delegation of it to non-Article III judges.

Finally, Congress’ reasons for expanding magistrate judge jurisdiction under § 636(c) do not outweigh the significant erosion of Article III power. Congress expanded magistrate judge jurisdiction to allow litigants increased access to federal courts.³¹⁶ The goal of the Federal Magistrates Act of 1979 was to

308. See *supra* note 307 and accompanying text.

309. See *Johnston*, 258 F.3d at 369 (“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 . . .”).

310. See *id.* (criticizing situations where a magistrate judge exercises more control over the district judge).

311. See *supra* Part II.C.

312. See *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) (discussing habeas corpus during the framing of the Constitution).

313. See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

314. See *United States v. Hayman*, 342 U.S. 205, 219 (1952) (providing background on § 2255).

315. See *Hill v. United States*, 368 U.S. 424, 427 (1962) (“[The] remedy [under § 2255 is] exactly commensurate with . . . [what] had previously been available by habeas corpus in the court of the district where the prisoner was confined.”).

316. See *supra* notes 178–179 and accompanying text.

protect individuals from the “vicissitudes of adjudication delay and expense.”³¹⁷ This was because of a “mounting queue of civil cases” building in the district courts.³¹⁸ These legislative goals are weighed against the infringement on Article III power.³¹⁹ Adjudication of § 2255 motions under § 636(c) places a non-Article III magistrate judge in a quasi-appellate capacity, vesting her with Article III power and stripping the Article III court of all review and supervision.³²⁰ Judicial efficiency must give way when a constitutional infringement is this great.³²¹ Taken together, the *Schor* factors suggest delegation of § 2255 motions to magistrate judges impermissibly infringes on Article III power and violates structural separation of powers.

Besides the *Schor* factors, final disposition of § 2255 motions impermissibly involve magistrate judges in felony criminal proceedings.³²² As the court in *Johnston* explained, felony criminal trials and sentencing are the exclusive domain of Article III judges.³²³ Allowing the adjudication of § 2255 motions by magistrate judges to continue “may unwittingly embroil a magistrate judge in the unconstitutional conduct of a felony trial”³²⁴ This situation alone creates a constitutional

317. See S. REP. NO. 96-74, at 4 (1979), as reprinted in 1979 U.S.C.C.A.N. 1469, 1472 (explaining the reasoning for expanding magistrate judge jurisdiction).

318. *Id.*

319. See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1945 (2015) (comparing the goals of Congress in increasing bankruptcy jurisdiction with the constitutional concerns the expansion creates).

320. See *id.* at 1959 (Roberts, C.J., dissenting) (“Of course, it ‘goes without saying’ that practical considerations of efficiency and convenience cannot trump the structural protections of the Constitution.” (citations omitted)).

321. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) (“The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.” (citation omitted)).

322. See *United States v. Johnston*, 258 F.3d 361, 370 (5th Cir. 2001) (noting that one of the troubling parts of magistrate judge disposition of § 2255 motions is their involvement in felony trials). *But cf.* *Peretz v. United States*, 501 U.S. 923, 924–25 (1991) (permitting magistrate judges to supervise felony trial voir dire).

323. See *Johnston*, 258 F.3d at 370 (discussing the separation of powers implications of having a non-Article III judge preside over a felony trial).

324. *Id.* at 369–70.

concern.³²⁵ And permitting magistrate judges to make determinations in felony cases *ex post* does not diminish the interference with Article III.³²⁶ In sum, the *Schor* factors and the degree of involvement in felony cases suggest that magistrate judge adjudication of § 2255 motions under consent jurisdiction violates the doctrine of separation of powers.

2. Consent

Since the *Schor* factors suggest a violation of the doctrine of separation of powers, the question becomes whether consent can diminish or cure this violation. In *Savoca v. United States*,³²⁷ the district court upheld the constitutionality of magistrate judge disposition of § 2255 motions because of party consent.³²⁸ Savoca and his co-conspirator proceeded *pro se*, challenging their sentences as unconstitutional.³²⁹ Savoca separately challenged the circumstances of his conviction.³³⁰ Both consented to jurisdiction under § 636(c).³³¹ In an opinion addressing Savoca's motion to withdraw that consent, District Judge Marrero adopted Magistrate Judge Lisa Margaret Smith's Report and Recommendation (R&R).³³²

Savoca relied on the Fifth Circuit's reasoning in *Johnston* to argue Magistrate Judge Smith's adjudication of his § 2255

325. See *United States v. Dees*, 125 F.3d 261, 267 (5th Cir. 1997) ("We doubt that Article III will permit a non-Article III judge to preside over a felony trial.").

326. See *supra* note 322 and accompanying text.

327. 199 F. Supp. 3d 716 (S.D.N.Y. 2016).

328. See *id.* at 725 ("[T]he structural protections provided by Article III are guaranteed in this instance for all the same reasons they are guaranteed in all other instances of referrals pursuant to § 636(c)(1).").

329. See *id.* at 719 (recognizing their complaints were filed under § 2255).

330. *Id.*

331. *Id.* at 719–20.

332. See *id.* at 719 (denying Savoca's motion to withdraw consent). Magistrate Judge Smith was the magistrate judge that Savoca had consented to. *Id.* It seems odd that a district judge would refer this motion to the same magistrate judge, given Savoca's main argument was that she lacked the constitutional authority to adjudicate his § 2255 motion. See *id.* at 721–22.

motion was unconstitutional.³³³ In her R&R, Magistrate Judge Smith said party consent moots all individual separation of powers concerns.³³⁴ Because Savoca knowingly and voluntarily consented,³³⁵ no separation of powers concerns were present.³³⁶ Judge Smith compared magistrates adjudicating § 2255 motions with magistrates adjudicating § 1983 actions.³³⁷ In making that comparison, her focus was only on separation of powers as it pertains to delegation of Article III power to a non-Article III judge.³³⁸ In fact, she disposed of the true issue (having a magistrate judge review and overturn a district

333. *See id.* (citing the separation of powers argument advanced by the court in *Johnston*).

334. *See id.* at 722 (stating that litigant may waive their personal right to an Article III adjudicator).

335. *Id.* Of relevance is that litigant consent under § 636(c) only needs to be implied. *Cf. Wellness Int'l Network, Ltd., v. Sharif*, 135 S. Ct. 1932, 1948 (2015) (permitting implied consent for bankruptcy claims). Like Savoca, many § 2255 litigants are *pro se* and do not know about the differences or implications of having a magistrate judge adjudicate their motion. *See Lee Kovarsky, Original Habeas Redux*, 97 VA. L. REV. 61, 90 (2011) (finding that, on average, from 1998 to 2007, only 2.1 percent of non-capital prisoners seeking habeas relief had an attorney representing them). This indicates implied consent, even for individual constitutional protections, may be insufficient in the context of § 2255. *See Anderson v. Woodcreek Venture Ltd.*, 351 F.3d 911, 918 (9th Cir. 2003) (“We are similarly troubled by the failure of the magistrate judge and district court judge to ‘advise [Anderson] [the *pro se* litigant] that [she was] free to withhold consent without adverse substantive consequences.’” (citation omitted)).

336. *See Savoca*, 199 F. Supp. 3d at 723 (finding that so long as the parties’ consent and the district court retains supervision over the process, there are no structural implications when a magistrate judge adjudicates a § 2255 motion).

337. *See id.* (citing *Collins v. Foreman*, 729 F.2d 108, 109–10 (2d Cir. 1984) (permitting magistrate judges to enter final judgment in § 1983 actions)). What this comparison ignores is that adjudication of a § 1983 action does not require a magistrate judge to review and potentially overturn an Article III judge’s prior determination. *See supra* note 279 and accompanying text.

338. *See Savoca v. United States*, 199 F. Supp. 3d 716, 723 (S.D.N.Y. 2016) (applying the *Collins* decision in the context of an “Article III ban on the delegation of judicial power to non-Article III judges”).

judge's prior determination) by saying even if the practice is "awkward or ill-advised," it does not violate the Constitution.³³⁹

The R&R concluded that even if structural separation of powers concerns exist, Savoca's consent along with the district court's delegation and supervision, cure any defect.³⁴⁰ Concern over the lack of reviewability was mitigated because appeals are brought to an Article III appellate court.³⁴¹ Thus, there was still review by an Article III judge.³⁴² What this argument fails to acknowledge is circuit review is discretionary, not mandatory.³⁴³ And shifting the reviewability burden to circuit courts does little for judicial efficiency, the primary goal of increased magistrate judge jurisdiction.³⁴⁴ In the end, *Savoca* held the complete opposite of *Johnston* and failed to address the statutory issue resolved in *Brown*. What it does show is how consent affects constitutional implications when magistrates adjudicate § 2255 motions under consent jurisdiction.³⁴⁵

The majority and dissent in *Wellness* agree parties can never fully consent to structural separation of powers

339. See *id.* at 724 n.12 (internal quotations and citation omitted) (noting that the situation did not present itself here because the original sentencing judge had retired from the bench before Magistrate Judge Smith decided the § 2255 motion).

340. See *id.* at 723 (interpreting the *Wellness* majority as permitting consent to cure all separation of powers concerns if there is some supervisory authority by Article III).

341. See 28 U.S.C. § 636(c)(3) (detailing the appeal process from a magistrate judge's final order).

342. See *Savoca*, 199 F. Supp. 3d at 725 ("There is no principled reason to believe this method [circuit court review] is unconstitutional as applied to § 2255 motions but not as applied to other 'civil matters.'").

343. See *supra* note 307 and accompanying text.

344. See S. REP. NO. 96-74, at 3 (1979), as reprinted in 1979 U.S.C.C.A.N. 1469, 1470-72 (discussing how the purpose of § 636(c) was to reduce the "mounting queue of civil cases" in the district courts). The reviewability Magistrate Judge Smith suggests would shift that queue to the circuit courts, or altogether ignore it, which would provide reviewability only in theory. See *Savoca*, 199 F. Supp. 3d at 723 (arguing that the practice is constitutional because Article III still has some review mechanism).

345. See *Savoca*, 199 F. Supp. 3d at 723 (relying on *Wellness* consent to cure any constitutional defects).

violations.³⁴⁶ Still, the majority acknowledges that party consent can diminish a structural violation.³⁴⁷ The dissent, on the other hand, reminded the majority that when the executive and legislative branches consented to bypassing bicameralism and presentment with the line-item veto, the Court invalidated the Act.³⁴⁸ Similarly, the one-house legislative veto was struck down, despite both branches consenting.³⁴⁹ Thus, party consent does not affect whether a *structural* violation occurred.³⁵⁰

Despite the Court's statement in *Wellness* that party consent can diminish separation of powers concerns, consent is unlikely to cure the constitutional violations present when magistrate judges adjudicate § 2255 motions. Having magistrates review and overturn district judge-imposed sentences is a more significant constitutional violation than bankruptcy judges adjudicating a state law claim. In the context of § 2255 motions and consent jurisdiction, district judges retain far less supervision over magistrate judges and Article III power is further removed from the district courts. This means even if consent has some effect on structural separation of powers concerns, the magnitude of the violation here is too great for consent to cleanse it.

346. See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1945 n.10 (2015) (majority opinion) (stating that Sharif's consent is not curing a structural violation, rather his consent "shows . . . why no such violation has occurred"); *id.* at 1956 (Roberts, C.J., dissenting) (explaining that just as consent cannot confer subject-matter jurisdiction on a federal court, consent cannot usurp structural principles of separation of powers); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850–51 (1986) (establishing the rule).

347. See *supra* note 242 and accompanying text.

348. See *Clinton v. City of New York*, 524 U.S. 417, 450 (1988) (invalidating the Line-Item Veto Act for violating structural separation of powers principles).

349. See *I.N.S. v. Chadha*, 462 U.S. 919, 944–45 (1983) (striking down Section 244(c)(2) of the Immigration and Nationality Act for violating separation of powers doctrine).

350. See *Wellness*, 135 S. Ct. at 1955 (Roberts, C.J., dissenting) (reminding the majority "separation of powers does not depend on . . . whether the encroached-upon branch approves the encroachment" (internal quotations and citations omitted)).

V. *Avoiding Statutory and Constitutional Concerns Going Forward*

Given that magistrate judge jurisdiction has gone unchanged since 1979, amending § 636(c) to exclude § 2255 proceedings is unlikely.³⁵¹ The more probable scenario is the Supreme Court granting certiorari in a case involving a challenge to magistrate judge authority to enter final judgment in a § 2255 proceeding. If this happens, the Court should find the practice statutorily and constitutionally impermissible for the reasons previously stated.³⁵² The ideal solution, once the court limits jurisdiction over § 2255 motions, would be to limit magistrate judge involvement in these proceedings to issuing report and recommendations.³⁵³ Other proposed solutions are discussed in Part V.A.

A. *Proposed Solutions*

There are several possibilities for solving the problem of magistrate judge adjudication of § 2255 motions under § 636(c). One of the more radical solutions is to amend the Constitution to permit magistrate judges to exercise Article III power.³⁵⁴ This would provide them with the constitutional protections afforded to Article III judges and alleviate concern over the authority of magistrate judges to enter final judgment in § 2255 proceedings.³⁵⁵ That said, given the difficult amendment

351. See Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (codified as amended at 28 U.S.C. § 636) (providing the last substantive change by Congress to magistrate judge jurisdiction).

352. See *supra* Parts III.B, IV.D.

353. See 28 U.S.C. § 636(b)(1)(B) (permitting a district judge to have a magistrate “submit to a judge of the court proposed findings of fact and recommendations for . . . disposition”).

354. See Benjamin P.D. Mejia, Note, *Magistrates After Arkison & Wellness: The Outer Limits of Consent*, 71 N.Y.U. ANN. SURV. AM. L. 509, 549–50 (2016) (providing proposed amendment language). Mejia suggests language such as “Congress may establish procedures by which Article III judges may appoint Article I judges . . . subject to the control of Article III courts, may exercise Article III judicial power.” *Id.*

355. See *id.* (including life tenure and protection from salary diminution).

process, this solution is unrealistic and would take too long to implement.³⁵⁶

Another solution is to make all magistrate judges district judges. This would alleviate any concern over magistrate judges wielding Article III power since they would now be Article III judges.³⁵⁷ Like the amendment solution, it would be difficult to formally appoint and confirm all currently serving magistrate judges.³⁵⁸ With the backlog of current judicial appointments,³⁵⁹ adding appointees may cause chaos in an already uneconomical and partisan process.³⁶⁰ In the end, this solution will only increase inefficiency and create a “mounting queue” of § 2255 motions in the district courts while Congress resolves the issue.³⁶¹ The pitfalls of these potential solutions show the best way to allow magistrate judges to constitutionally be involved in § 2255 proceedings is to limit them to issuing R&Rs.

B. *Best Approach: Report and Recommendations*

Limiting magistrate judges to issuing R&Rs in § 2255 proceedings preserves the rights of mostly *pro se* litigants, maintains separation of powers, and ensures judicial efficiency. District judges review R&Rs de novo,³⁶² allowing an Article III

356. See Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. REV. 55, 58 (2018) (discussing the difficult process of amending the Constitution).

357. See *United States v. Johnston*, 258 F.3d 361, 367 (5th Cir. 2001) (noting that to comply with separation of powers principles the essential attributes of judicial power must remain with Article III judges).

358. See U.S. CONST. art. II, § 2 (prescribing appointment and confirmation process).

359. See Riley T. Svikhart, “*Major Questions*” as *Major Opportunities*, 92 NOTRE DAME L. REV. 1873, 1891 (2018) (discussing the backlog of President Trump’s judicial nominations).

360. See Carl Tobias, *Filling the Judicial Vacancies in a Presidential Election Year*, 46 U. RICH. L. REV. 985, 988 (2012) (describing the “partisan divisiveness” involved in judicial nominations).

361. See S. REP. NO. 96-74, at 3 (1979), as reprinted in 1979 U.S.C.C.A.N. 1469, 1470–72 (discussing the purpose behind increasing magistrate judge jurisdiction).

362. See 28 U.S.C. § 636(b)(1)(C)

A judge of the court shall make a de novo determination of those portions of the report or specific proposed findings or

judge to supervise and review the magistrate judge. R&Rs also reduce the time a district judge must devote to a case and provides for efficient disposition of § 2255 petitions, consistent with Congress' goals when enacting § 636(c).³⁶³ Many district courts already limit magistrate judge involvement in § 2255 proceedings to issuing R&Rs and have suffered no backlog of § 2255 motions.³⁶⁴ Indeed, the Magistrate Judge Committee prefers that magistrates issue R&Rs in § 2255 proceedings, rather than adjudicate the motions under § 636(c).³⁶⁵

If § 2255 motions are classified as criminal proceedings, R&Rs under § 636(b)(1)(B) can provide an efficient and constitutional way to delegate § 2255 motions to magistrate judges without impermissibly involving them in felony trials and sentencing.³⁶⁶ In short, limiting magistrate judges to issuing R&Rs in § 2255 motions allows Article III judges to retain reviewability and supervision without overburdening the district courts and creating judicial inefficiency.

recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made the magistrate judge.

363. See Mejia, *supra* note 354, at 542 (proposing limiting § 636 jurisdiction to R&Rs because it keeps with Congress' goal of judicial efficiency); Robbins, *supra* note 12, at VI.2 (suggesting R&Rs as a solution because they are only a minor alteration from § 636(c) adjudication).

364. See Robbins, *supra* note 12, at VI.2 (noting that many district courts already exclusively use R&Rs for § 2255 motions and other jurisdictions would be unaffected by limiting magistrate judges in this area).

365. See *supra* note 70 and accompanying text.

366. See § 636(b)(1)(B)

[A] [district] judge may also designate a magistrate judge to conduct hearings . . . to submit to a judge of the court proposed findings of facts and recommendations for the disposition, by a judge of the court, of any motion . . . made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

VI. Conclusion

As § 2255 motions continue to be filed at commensurate levels year-over-year,³⁶⁷ the need for the Supreme Court to give a definite answer on the scope of magistrate judge jurisdiction is imperative. By clarifying whether § 636(c) statutorily and constitutionally allows adjudication of § 2255 motions, the Supreme Court will provide district courts with guidance on how to continue to use magistrate judges. Should the Supreme Court invalidate the practice, Congress or the courts should limit magistrate judge involvement in § 2255 proceedings to issuing R&Rs, achieving judicial efficiency and constitutional compliance.

367. Compare ADMIN. OFF. OF THE U.S. CTS., STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, tbl.C-2 (2019), <https://perma.cc/PXH8-KY2S> (showing 5,335 § 2255 motions were filed in district courts between June 30, 2018 and June 30, 2019), with ADMIN. OFF. OF THE U.S. CTS., STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, tbl.4.4 (2018), <https://perma.cc/W33W-JPVF> (PDF) (reporting that 5,342 § 2255 motions were filed in district courts for fiscal year 2018).