that the values promoted by the Court's adherence to precedent are not contradicted by reliance on a legal fiction.

The majority's opinion has much to commend it, but little of that has anything to do with legislative intent. Rather, the majority's opinion may rest on a firm foundation inasmuch as it applies a neutral legal principle — adherence to precedent — in order to promote the symmetry, consistency, and predictability of federal law. It may be appropriate for the judiciary to pursue such frankly jurisprudential ends. However, if that is what the judiciary seeks to do, it should clearly admit its own intentions. Litigants, the public, and the Court may then debate the merits of those rationales, as applied to the individual case, rather than matching fiction with fiction.

B. Federal Magistrates Act

Voir Dire Jurisdiction. — Over the past decade, the increased number of criminal cases on the federal docket[1] has prompted an expansion of federal magistrates' criminal jurisdiction, particularly with regard to voir dire, or jury selection.[2] Federal magistrates, who are Article I judges, are governed by the Federal Magistrates Act of 1968[3] (FMA). The express language of the FMA does not grant magistrates the power to preside over felony jury selection,[4] but courts have increasingly recognized magistrates' power to do so under the "additional duties" clause,[5] when the parties consent.[6] Even so, the growth

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[1] The number of criminal cases filed annually in the federal district courts increased from approximately 51,000 in 1997 to over 62,000 in 2001. In particular, the number of drug case filings increased 31% between 1997 and 2001. OFFICE OF HUMAN RESOURCES & STATISTICS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD: RECENT TRENDS 17 (2001), *available at* http://www.uscourts.gov/recenttrends2001/20015yr.pdf. As of March 31, 2007, there were 69,697 cases pending on federal district court dockets. OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2007 58 tbl.D (2007), *available at* http://www.uscourts.gov/caseload2007/tables/D00CMar07.pdf.

[2] The terms "jury selection" and "voir dire" are used interchangeably throughout this comment.

[3] 28 U.S.C. §§ 631–639 (2006). The FMA was amended in 1976 to clarify that magistrates have the power to hear habeas corpus cases and prisoner civil rights actions, and in 1979 to permit magistrates to conduct trials in civil cases upon consent of the parties and to preside over misdemeanor cases rather than only petty offense trials. Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 665 (2005).

[4] The FMA grants magistrates full jurisdiction over a series of civil proceedings, but only minimal jurisdiction over minor criminal proceedings. *See* 28 U.S.C. § 636.

[5] 28 U.S.C. § 636(b)(3) ("A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."); *see also* Marla Eisland, *The Federal Magistrates Act: Are Defendants' Rights Violated When Magistrates Preside Over Jury Selection in Felony Cases?*, 56 FORDHAM L. REV. 783, 783–84 (1988) (explaining the relationship between the "additional duties" clause and magistrates' jurisdiction over voir dire).

[6] *See, e.g.*, Grassi v. United States, 937 F.2d 578, 579 (11th Cir. 1991) (holding that magistrates can conduct voir dire in felony cases, provided that parties consent); United States v. Parkin, 917

in magistrates' jurisdiction has not been without controversy. Supreme Court interpretations of the FMA with regard to jury selection by magistrates have been anything but consistent.[7] The Supreme Court has attributed its inconsistent construction of the FMA to the intricacies of parties' consent.[8] Last Term, in *Gonzalez v. United States*,[9] the Supreme Court continued the expansionist trend and held that magistrates may preside over jury selection in criminal trials in which the defendant's counsel consents, even without the personal consent of the defendant.[10] By continuing to use consent as a proxy for constitutionality without delving into the larger constitutional issues or readdressing congressional intent, *Gonzalez* failed to provide answers for critics and parties involved in the jury selection process — judges, magistrates, and defense lawyers. The persistently inconsistent construction of magistrates' criminal jurisdiction to preside over jury selection creates unnecessary confusion that can and should be remedied through a congressional revision of the FMA.

On August 31, 2004, Homero Gonzalez,[11] a Mexican citizen who spoke only Spanish, was charged in the District Court for the Southern District of Texas with conspiracy to possess with the intent to distribute over 1000 kilograms of marijuana.[12] Prior to jury selection, Gonzalez appeared before the court on six occasions — twice before Magistrate Judge Arce-Flores and four times before District Judge Kazen.[13] At the end of the pretrial conference sequence, Magistrate Judge Arce-Flores, conducting the proceedings in English, asked the parties if they

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F.2d 313, 318 (7th Cir. 1990) (same); United States v. Mang Sun Wong, 884 F.2d 1537, 1544 (2d Cir. 1989) (same).

[7] *Compare* Gomez v. United States, 490 U.S. 858, 872 (1989) (holding that the power to preside over jury selection in a felony trial is not one of the "additional duties" that a magistrate may be assigned under the FMA), *with* Peretz v. United States, 501 U.S. 923, 933, 936 (1991) (holding that the delegation of voir dire to magistrates when the parties consent is constitutional under the "additional duties" clause).

[8] *See* MAGISTRATE JUDGES DIV., ADMIN. OFFICE OF THE U.S. COURTS, A CONSTITUTIONAL ANALYSIS OF MAGISTRATE JUDGE AUTHORITY 3 (1993) ("[T]he Court has found diminished constitutional concerns in cases where litigants consent to the magistrate judge's authority. Conversely, if the authority exercised by the magistrate judge is not based upon litigant consent, the Court has frequently read the statutory language narrowly to avoid reaching constitutional issues."). *Compare Gomez*, 490 U.S. at 860 (defense made a timely objection to the delegation of voir dire to the magistrate), *with Peretz*, 501 U.S. at 925 (defense welcomed the delegation to the magistrate).

[9] 128 S. Ct. 1765 (2008).

[10] *Id.* at 1767.

[11] A codefendant, Patrick Leyendecker, was charged along with Gonzalez. Brief of Plaintiff-Appellee at 2, United States v. Gonzalez, 483 F.3d 390 (5th Cir. 2007) (No. 05-40723), 2006 WL 4777879.

[12] *Id.* Gonzalez also faced a related charge for aiding and abetting the possession of marijuana. *Id.* at 2–3.

[13] *See Gonzalez*, 483 F.3d at 391.

consented to having a magistrate judge preside over jury selection.[14] Gonzalez's attorney and the state's counsel consented, but Gonzalez was not asked directly to respond to the question.[15] Magistrate Judge Arce-Flores then asked Gonzalez's attorney whether Gonzalez needed a translator, an offer that the defendant's attorney accepted.[16] Following this colloquy, the magistrate judge supervised the voir dire, District Judge Duplantier presided over the trial, and the jury returned a guilty verdict for all charges against Gonzalez.[17] Gonzalez appealed, claiming that the delegation of voir dire to the magistrate judge without his express, personal consent was erroneous.[18]

The United States Court of Appeals for the Fifth Circuit affirmed Gonzalez's conviction.[19] Writing for a unanimous panel, Judge Jolly held that a felony defendant's right to have a district judge conduct voir dire may be waived through the consent of counsel, thus permitting a magistrate to preside over jury selection.[20] Relying heavily on the factual similarities between Gonzalez's case and *Peretz v. United States*[21] — in which the Supreme Court found the delegation of jury selection to a magistrate with the defendant's consent to be permissible[22] — the court held that Gonzalez's constitutional rights were not violated because "[w]hat suffices for waiver depends on the nature of the right at issue,"[23] and "[t]he nature of the right [Gonzalez gave] up [was] . . . limited, particularly as compared to the other rights [the Fifth Circuit had] held may be waived via counsel."[24]

The Supreme Court affirmed.[25] Writing for the Court, Justice Kennedy[26] held that counsel's consent sufficed to waive a defendant's right to have an Article III judge preside over jury selection, even if the defendant was unaware that a right was being discussed or waived.[27] Pointing to the many pretrial activities, hearings, and motions over which magistrates can preside under the FMA,[28] the Court

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14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.* at 391–92.
18 *Id.* at 392.
19 *Id.* at 394.
20 *Id.*
21 501 U.S. 923 (1991).
22 *Id.* at 933.
23 *Gonzalez*, 483 F.3d at 394 (quoting New York v. Hill, 528 U.S. 110, 114 (2000)) (internal quotation marks omitted).
24 *Id.*
25 *Gonzalez*, 128 S. Ct. at 1772.
26 Justice Kennedy was joined by Chief Justice Roberts and Justices Stevens, Souter, Ginsburg, Breyer, and Alito.
27 *Gonzalez*, 128 S. Ct. at 1767.
28 The Court explained that magistrates can, among other actions:

reasoned that the nonspecific terms of the FMA's "additional duties" clause grant magistrates jurisdictional powers to preside over jury selection.[29] However, the Court emphasized that the jurisdictional powers of magistrates "must not be interpreted in terms so expansive that the [additional duties] paragraph overshadows [the more specific provisions] that go[] before."[30]

The Court noted that consent was of paramount importance in determining a magistrate's jurisdictional powers. It maintained that under *Gomez v. United States*[31] and *Peretz*, "additional duties" include presiding over voir dire if both parties consent, but not if one or more parties object.[32] The Court emphasized that whether a defendant can waive a right in criminal proceedings and whether the waiver requires personal consent depend on the nature of the right, and that the right to have a district judge preside over jury selection differs from other constitutional rights.[33] The decision to have a district judge preside over jury selection is a "tactical decision"[34] rather than a "fundamental choice,"[35] and it therefore may be made by a defendant's attorney, even without the defendant's express consent.[36] Based on this reasoning, the Court concluded that the express consent of counsel suffices for a magistrate to conduct jury selection in accordance with the Constitution.[37]

> [I]ssue orders concerning release or detention of persons pending trial; take acknowledgments, affidavits, and depositions; and enter sentences for petty offenses. They also may hear and determine, when designated to do so, any pretrial matter pending before the district court, with the exception of certain specified motions. Magistrate judges may also conduct hearings and propose recommendations for those motions, applications for post-trial criminal relief, and conditions of confinement petitions. If the parties consent, they may conduct misdemeanor criminal trials and civil trials.

Id. (citations omitted).

[29] *Id.* at 1767–68.

[30] *Id.* at 1768.

[31] 490 U.S. 858 (1989).

[32] *Gonzalez*, 128 S. Ct. at 1768.

[33] *Id.* at 1768–70 (noting that personal consent is required for a guilty plea and for magistrates to preside over trial and sentencing in misdemeanor cases).

[34] *Id.* at 1770 ("Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial.").

[35] *Id.* at 1771.

[36] *See id.* at 1772 ("Although a criminal defendant may demand that an Article III judge preside over the selection of a jury, the choice to do so reflects considerations more significant to the realm of the attorney than to the accused.").

[37] *See id.* at 1770 ("To hold that every instance of waiver requires the personal consent of the client himself or herself would be impractical. . . . As with other tactical decisions, requiring personal, on-the-record approval from the client could necessitate a lengthy explanation the client might not understand at the moment and that might distract from more pressing matters as the attorney seeks to prepare the best defense.").

Justice Scalia concurred in the judgment but wrote separately to voice disapproval of the Court's "tactical-vs.-fundamental test."[38] Justice Scalia claimed that the Supreme Court had asserted only in dicta that there were fundamental rights that defendants had to personally waive.[39] Therefore, he maintained that the use of the terms "tactical" and "fundamental" created confusion because the terms were ambiguous and could apply to a broad range of rights that the Court had not previously specified.[40] Instead of the majority's approach, Justice Scalia suggested "adopt[ing] the rule that . . . all waivable rights (except, of course, the right to counsel) can be waived by counsel."[41] Justice Scalia asserted that it would be better to leave the "matter of placing reasonable limits upon the right of agency in criminal trials to be governed by positive law, in statutes and rules of procedure."[42] A more desirable holding, he wrote, would have been that the consent of Gonzalez's attorney to having a federal magistrate preside over jury selection was effective due to the absence of statutory safeguards or rules of procedure to the contrary.[43]

Justice Thomas dissented.[44] Arguing that *Peretz* was wrongly decided, Justice Thomas maintained that the proper governing precedent was *Gomez*, which established that the FMA's "additional duties" clause did not authorize the delegation of jury selection to magistrates.[45] In applying an erroneous precedent, he contended, the majority wrongly focused on the general question of waiving rights rather than on the specific language of the "additional duties" clause, which is silent on the delegation of jury selection.[46] Because of this incorrect focus, Justice Thomas argued, the Court ignored the remainder of the statute, which enumerates the particular powers that can be delegated to magistrates and requires a defendant's personal consent for delegation in proceedings similar to jury selection, such as the delegation of an entire misdemeanor trial to a magistrate.[47] Justice Thomas concluded that expanding magistrates' powers is problematic because

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[38] *Id.* at 1772–73 (Scalia, J., concurring in the judgment).

[39] *Id.* at 1773 ("Our opinions have sometimes said in passing that, under the Constitution, certain 'fundamental' or 'basic' rights cannot be waived unless a defendant personally participates in the waiver. We have even repeated the suggestion in cases that actually involved the question whether a criminal defendant's attorney could waive a certain right — but never in a case where the suggestion governed the disposition." (citations omitted)).

[40] *Id.* at 1774.

[41] *Id.*

[42] *Id.* at 1775.

[43] *Id.*

[44] *Id.* (Thomas, J., dissenting).

[45] *Id.* at 1776–77.

[46] *Id.* at 1777.

[47] *Id.* at 1777–79.

magistrates do not enjoy the same structural protections from potential threats to their impartiality as Article III judges.[48]

In holding that counsel's consent suffices to grant a magistrate judge the power to preside over jury selection in a felony trial, the Court in *Gonzalez* reached a predictable and pragmatic conclusion given the holding in *Peretz* and the pressing need for more judges to review pretrial matters. However, the Court did not convincingly settle how consent unifies its conflicting interpretations of the FMA in *Gomez* and *Peretz*, nor did it acknowledge that Congress is better equipped than the Court to expand magistrates' criminal jurisdiction. The Court's approach answered the immediate question — whether a defendant must personally consent to a magistrate's jurisdiction over jury selection — but fell short of clearly defining the full scope of magistrates' power over jury selection. If the Supreme Court does not create a more far-reaching rule or request that Congress revise the FMA, defendants will likely continue to call on the Court to interpret the minute details of the FMA. Ironically, the Court has taken an inefficient approach to interpreting an Act that strives to promote judicial efficiency. The Court's shortcomings in *Gonzalez* and the likely infeasibility of its providing a more far-reaching rule reinforce the need for a congressional reform of the FMA that clarifies the scope of magistrates' power to conduct voir dire in criminal proceedings.

Although the *Gonzalez* Court insisted that the precedent governing magistrates' power to conduct voir dire — *Gomez* and *Peretz* — could be easily reconciled around the issue of the defense's consent,[49] the Court did not actually overcome the conflicting statutory interpretations of magistrates' criminal jurisdiction in *Gomez* and *Peretz*. Consent was not central to the Court's decision in *Gomez*, which instead purported to examine congressional intent. The *Gomez* Court only briefly noted the importance of consent[50] to a magistrate's jurisdiction, and it did not limit its holding to instances in which the defense objected to the magistrate's jurisdiction over voir dire, which suggests that the great import the *Gonzalez* Court later attributed to the consent language in *Gomez*[51] was unwarranted. Moreover, *Gomez* expressly concluded that "Congress . . . did not contemplate inclusion of jury se-

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[48] *Id.* at 1781 (noting that Article I judges may be less impartial than Article III judges because Article I judges lack the protections of life tenure and guaranteed salary). The Constitution provides the following protections of impartiality for Article III judges: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

[49] *Gonzalez*, 128 S. Ct. at 1768 (majority opinion).

[50] Gomez v. United States, 490 U.S. 858, 870 (1989) ("A critical limitation on this expanded jurisdiction [of magistrate judges] is consent.").

[51] *See Gonzalez*, 128 S. Ct. at 1768.

lection in felony trials among a magistrate's additional duties."[52] The peripheral position of consent in the *Gomez* Court's opinion and its emphasis on congressional intent as the determinative factor suggest that the issue of consent made little difference in the *Gomez* Court's interpretation of the FMA.

The *Peretz* Court brought consent to the forefront and retreated from *Gomez*'s express limitation of magistrate judges' power. *Peretz* made a magistrate's ability to preside at jury selection contingent upon the defendant's consent to the magistrate's jurisdiction or, in other words, contingent upon the defendant's waiver of the structural protection provided by an Article III judge.[53] Attributing its divergent approach to the principle of constitutional avoidance,[54] the *Peretz* Court dismissed the *Gomez* Court's discussions of congressional intent and the important role of jury selection. Instead it focused on the competency of magistrate judges and structural protections that ensure their impartiality,[55] as well as on the ability of defendants to waive their constitutional rights in other circumstances.[56] Even though the language of the FMA remained the same, then, the Supreme Court expanded the criminal jurisdiction of magistrate judges to permit magistrates to conduct voir dire upon the consent of the parties.

Gonzalez highlighted the preexisting problems in this line of precedent because it both passively validated *Peretz*'s holding that the defense's consent permitted the delegation of voir dire to the magistrate and narrowed the consent requirement, stating that the "additional duties" clause of the FMA did not require the personal consent of the defendant. However, the *Gonzalez* Court should have recognized the fundamental differences in the statutory interpretations in *Gomez* and *Peretz*[57] instead of simply attributing the discrepancy to consent. The Supreme Court's convoluted approach to the inconsistency in its precedent will require continued judicial delineation of magistrates' jurisdiction to conduct voir dire. The *Gonzalez* Court recognized its piecemeal approach in stating that its holding did not apply to the

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[52] *Gomez*, 490 U.S. at 872.

[53] Peretz v. United States, 501 U.S. 923, 933 (1991).

[54] *Id.* at 929–30 (explaining that the Court has a "'settled policy to avoid an interpretation of a federal statute that engenders constitutional issues'" and that *Gomez* implicated this policy because "of the substantial question whether a defendant has a constitutional right to demand that an Article III judge preside at every critical stage of a felony trial" (quoting *Gomez*, 490 U.S. at 864)).

[55] *See id.* at 937–39.

[56] *See id.* at 936. The *Peretz* Court established that "[t]he most basic rights of criminal defendants are . . . subject to waiver," including the right to be present at all stages of the trial, the right to a public trial, and the right against unlawful search and seizure, among others. *Id.*

[57] *Cf. Gonzalez*, 128 S. Ct. at 1779 (Thomas, J., dissenting) ("Where . . . a mistaken interpretation of a statute leaves the Court with no principled way to answer subsequent questions that arise under the statute, . . . the better course is simply to acknowledge and correct the error.").

questions of whether counsel's consent suffices when defendants expressly attempt to override their attorneys' decisions or whether consent can be inferred from counsel's failure to object.[58] The Court's gradual approach focusing on the intricacies of consent sidestepped the concern underlying the constitutionality of the delegation of voir dire to magistrate judges: whether defendants' rights are violated when an Article I judge, who is appointed by the judiciary and who does not enjoy the same protections as Article III judges, rather than an Article III judge, nominated by the President and approved by the Senate, presides over jury selection. *Gonzalez* should have addressed whether the lack of participation by competing branches of government in the appointment system for magistrate judges[59] violates defendants' constitutional rights.

Had the Court considered the constitutional issue, it could have found that, although magistrate judges lack judicial independence in the traditional sense — as Article I judges, they are not granted lifetime tenure nor guaranteed irreducible salaries — they are protected sufficiently by the FMA to allay concerns about their impartiality. For example, magistrates are protected by eight-year terms,[60] granted a fixed salary,[61] and, unless the judicial office to which they are appointed is found to be no longer necessary, can be removed from office only through a vote of the majority of the judges of the district court, and even then only when there is a showing of incompetence, misconduct, neglect of duty, or physical or mental disability.[62] These structural protections to ensure impartiality and the presence of district court judges to oversee the proceedings[63] suggest that violations of defendants' rights are unlikely to result from the delegation of voir dire to magistrates. The very fact that few magistrates' decisions have been challenged suggests that they have been doing their jobs well.[64]

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58 *Id.* at 1772 (majority opinion).

59 The appointment system for magistrates lacks the constitutional protection of the balance of powers because the judicial branch appoints and confirms magistrates without any legislative or executive input. In contrast, the system of appointment for Article III judges balances the powers of the executive, legislative, and judicial branches of government because the executive branch and the legislature handle the nomination and confirmation of judges, respectively.

60 28 U.S.C. § 631(e) (2006).

61 *Id.* §§ 633–634.

62 *Id.* § 631(i).

63 The availability of district court judges to supervise magistrates was one of the central factors in the *Peretz* Court's holding that the waiver of the right to have an Article III judge preside over jury selection was constitutional. *See* Peretz v. United States, 501 U.S. 923, 937–39 (1991).

64 Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 506–07 (2002) ("[A]ppeals from a magistrate's recommendation are not routine: the Federal Judicial Center reported in 1985 that '[p]erhaps the most interesting, and significant finding to emerge . . . is that attorneys do not challenge magistrates' work on dispositive or nondispositive motions as a matter of course.'" (altera-

Both the petitioner in *Gonzalez*[65] and the majority in *Peretz*[66] conceded that magistrates could competently execute judicial tasks.[67]

Moreover, the delegation of voir dire to magistrates may benefit defendants. The flexibility of the appointment process for magistrates allows district courts to increase the number of magistrates on staff if there are more cases on the federal docket,[68] thus providing defendants with speedier and less costly review of pretrial motions.[69] In addition, the availability of magistrates to preside over pretrial proceedings allows district judges to manage the more difficult and complex aspects

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tions in original) (footnote omitted) (quoting CARROLL SERON, THE ROLE OF MAGISTRATES: NINE CASE STUDIES 108 (1985))).

[65] *Gonzalez*, 128 S. Ct. at 1771.

[66] *See Peretz*, 501 U.S. at 928 ("[W]e recognize[] that Congress intended magistrates to play an integral and important role in the federal judicial system. Our recent decisions have continued to acknowledge the importance Congress placed on the magistrate's role. 'Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today's federal judicial system is nothing less than indispensable.'" (citations omitted) (quoting Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989))).

[67] In *Gomez*, the Court distinguished between pretrial, trial, dispositive, and non-dispositive motions to discuss the permissible levels of responsibility for magistrates. *See* Gomez v. United States, 490 U.S. 858, 872–75 (1989). But these distinctions are of little importance because there are safeguards to ensure the competence and judicial independence of magistrates. *See* Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 105 (1995) ("[S]ome may complain that the routine use of magistrate judges for pretrial management would lead to the bureaucratization of the federal judiciary and the transformation of district judges into judicial supervisors. The empirical data on the use of magistrate judges, however, appears to put these concerns to rest. . . . In sum, transfering [sic] pretrial management to magistrate judges, separating substantive and managerial decision-making, and creating clear guidelines for case management promise to restore many of the lost checks on judicial power. These changes pose few risks to the values of judicial independence at the heart of Article III, while reestablishing an important degree of accountability for judicial case management." (footnote omitted)).

[68] Since magistrates do not undergo the congressional confirmation process that district judges face, district judges have appointed a growing number of magistrates in recent years. In 1990, there were 329 full-time magistrates in the federal district courts; by 2007, the number had increased to 505. U.S. COURTS, 2007 JUDICIAL FACTS AND FIGURES, tbl.1.1, *available at* http://www.uscourts.gov/judicialfactsfigures/2007/Table101.pdf. Magistrate Judge Tim Baker notes that nearly half of all judges on the district courts are magistrate judges. Baker, *supra* note 3, at 663 & n.11. Between September 30, 2006, and September 30, 2007, magistrates throughout the country presided over a total of 351 voir dire proceedings. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR, 372–74 tbl.M-3A (2007), *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf.

[69] *Cf.* Baker, *supra* note 3, at 673 (noting that magistrate judges are well suited to preside over settlements, thereby helping parties to avoid the cost and time of litigation). But it is not clear that it will always cost less to have a magistrate judge rather than a district court judge preside over the case. *See* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 509 n.181 (2007) ("Though cost savings are often cited among the reasons for using magistrate judges, I know of no empirical studies comparing the actual costs of using magistrate judges to the costs of using district judges. Even if everything else were constant, however, the salary differential between the two suggests the prospect of at least some savings.").

of cases. When violations of defendants' rights and the competence of magistrates are not of concern, it seems that a defendant can only benefit from a speedy review of court motions, including voir dire, by a competent jurist, regardless of whether the judge was nominated by the President and confirmed by the Senate.

The likely lack of a threat to defendants' rights suggests that the intricacies of consent are not a good proxy for the constitutionality of the delegation of voir dire to magistrates where there is no reason to suspect that magistrates are incompetent. A more efficient approach would be to create a rule permitting the delegation of jury selection to a magistrate in all instances in which the parties consent or fail to object and in which the defendant does not personally and expressly object. Such a rule would have settled most of the questions about delegation of voir dire to magistrates that were left open in *Gonzalez*.[70] Under its current approach, the Supreme Court only opens itself to more piecemeal lawmaking from the bench. Given the constraints of the judiciary and the Court's seeming reticence to reach the constitutional issues at stake under the current statutory text, the proper venue for the clarification of magistrates' power to preside over voir dire, as well as of their broader criminal powers, is Congress.

In light of the institutional competency of magistrates and the overburdened docket of federal courts,[71] it makes sense to expand the criminal pretrial responsibilities of magistrate judges. The different interpretations of the FMA between *Gomez* and *Gonzalez* may reflect the Supreme Court's recognition of the pressing need for a larger federal judiciary. Or perhaps the Supreme Court simply is not sure what additional responsibilities Congress wanted to delegate to magistrates. Either way, the magnitude of the Court's judicial changes to the FMA demonstrates that the judiciary is not the right party to spearhead changes to magistrates' criminal jurisdiction. On the contrary, the interest of the judiciary in having a support staff might create a conflict of interest in the interpretation of the FMA. Moreover, the Supreme Court will always be able to point to the principle of constitutional avoidance to bury itself in statutory interpretation without answering the important constitutional question, which should be the focus of its inquiry. For these reasons, the proper avenue for change is Congress, which should amend the FMA to include a provision specifying magistrates' criminal jurisdiction over jury selection and the kind of consent

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[70] *See Gonzalez*, 128 S. Ct. at 1772 (explaining that the holding did not resolve the question of delegation in instances in which the defendant objected to the delegation over defense counsel's consent or in instances in which the parties failed to object to the delegation).

[71] *See supra* note 1.

required from the defense.[72] Through a revised FMA, Congress can put an end to the Supreme Court's inconsistent interpretations of magistrates' jurisdiction in the realm of jury selection.

C. Immigration and Nationality Act

Voluntary Departure. — Courts deploy the absurdity doctrine to except from an overinclusive rule a case inconsistent with the rule's purpose.[1] Thus, for example, the Supreme Court held in *United States v. Kirby*[2] that police commit no crime when they arrest a mail carrier for murder, despite the plain text of a statute prohibiting the knowing obstruction of the mail.[3] As in *Kirby*, the typical remedy for absurdity is to create an exception: courts acknowledge the general validity of a law, excepting a peculiar case.[4] Last Term, in *Dada v. Mukasey*,[5] the Supreme Court invoked a novel form of the absurdity doctrine[6] to provide relief for aliens granted voluntary departure who were forced to choose between leaving the country and forgoing their right to seek reopening of their removal proceedings or staying and facing sanctions. A five-member majority of the Court saw "untenable conflict" in this choice,[7] holding that aliens must be permitted to withdraw their requests for voluntary departure in order to realize their right to seek reopening.[8] This remarkable remedy — no mere exception, but a new affirmative right — raises a number of positive and normative concerns that undermine the Court's use of absurdity, but the lesson of *Dada* may be that Congress must speak especially clearly

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[72] Such an approach would address the concerns of scholars. *See, e.g.*, Monique Mulcare, *Article III, the Federal Magistrate, and the Power of Consent*, 1992 ANN. SURV. AM. L. 297, 315–17 (proposing that Congress pass a set policy of only accepting waiver by the written consent of the defendant herself). Furthermore, to alleviate any concerns about judicial independence and defendants' rights, any congressional revision of the FMA should include a provision granting district judges the right to review de novo any magistrate judge's jury selection proceedings so that it is made clear that the current standard of judicial oversight is continued under the new law.

[1] Professor Einer Elhauge explains that courts invoke absurdity in two kinds of situations: first, where a statute's application offends universal common sense, and second, where a statute's application conflicts with the legislature's clear enacting preferences, given other statutory language. In either case, the statute's text can be said to be inconsistent with its purposes: either the presumed purpose of every legislature to enact rational laws or the apparent purpose of the enacting legislature to achieve certain outcomes as revealed by the statute. *See* EINER ELHAUGE, STATUTORY DEFAULT RULES 143–48 (2008).

[2] 74 U.S. (7 Wall.) 482 (1869).

[3] *See id.*

[4] See, for example, the situations described in *Kirby* itself. *See id.* at 487.

[5] 128 S. Ct. 2307 (2008).

[6] Although the Court did not use the *terms* "absurdity" or "absurdity doctrine," it did alter the plain text of the statute in question because of "untenable conflict" in light of the statute's purposes. This reasoning is characteristic of the absurdity doctrine.

[7] *Dada*, 128 S. Ct. at 2320.

[8] *Id.* at 2319.