An Empirical Constitutional Crisis: When Magistrate Judges Exercise De Facto Article III Power

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AN EMPIRICAL CONSTITUTIONAL CRISIS: WHEN MAGISTRATE JUDGES EXERCISE DE FACTO ARTICLE III POWER


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ABSTRACT

Magistrate judges within the United States district court system have historically been viewed as a means to alleviate the large caseloads faced by district court judges. Magistrate judges issue Reports and Recommendations (R&Rs), wherein they detail the underlying facts, analyze relevant legal issues, and outline a proposed order for district court judges to follow. While district court judges may reject or modify R&Rs submitted to them, district court judges overwhelmingly adopt R&Rs, even after a purportedly de novo determination. In doing so, this Article posits that constitutionally-appointed district court judges are abrogating their Article III constitutionally required role to magistrate judges with little or no oversight. Analyzing R&Rs considered by United States district court judges for the District of Minnesota from 2017 to 2019, this Article finds that magistrate judge R&Rs are affirmed at abnormally high levels, calling into question the constitutionality of the appointment of magistrate judges and their exercise of Article III judicial power. Based on this empirical data, this Article offers a critical assessment of the merits of the present role of magistrate judges and ultimately argues for the existing system’s elimination.
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INTRODUCTION

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.¹

Judicial power on the federal level is vested in the hands of Article III judges.² The vesting process for Article III judges culminates with the appointment of a judge by the President and the judge’s confirmation by the United States Senate.³ An Article III judge’s appointment and confirmation results in a grant of legal authority foundational to our nation’s judiciary.⁴ Our constitutional system preserves separation of powers by vesting federal judges with their office during “good behavior,” which we have come to understand as lifetime appointments.⁵ These lifetime appointments represent a huge amount of public trust placed in federal judges to execute their offices faithfully and without even a hint of impropriety.⁶ This judicial independence is also protected against improper influence of litigants by requiring judges to recuse themselves from cases in which they have a conflict of interest, financial or otherwise.⁷ To facilitate this recusal, another law requires judges to file financial disclosure forms.⁸

¹ U.S. CONST. art. III, § 1.
² Id.
⁴ See U.S. CONST. art. III, § 1.
⁵ See THE FEDERALIST NO. 78 (Alexander Hamilton).
⁷ See 28 U.S.C. § 455 (requiring judges to disqualify themselves from “any proceeding in which [their] impartiality might be reasonably questioned[,]” along with an enumerated list of defined circumstances requiring recusal).
Unfortunately, the federal courts are increasingly beset by a series of lapses calling into question the independence of judges and the validity of their decisions.\footnote{See, e.g., Joe Palazzolo, Coulter Jones & James V. Grimaldi, \textit{An Amazon Suit Encounters a Snag: A Judge with a Conflict of Interest}, \textit{WALL ST. J.} (Dec. 30, 2021), https://www.wsj.com/articles/an-amazon-suit-encounters-a-snag-a-judge-with-a-conflict-of-interest-11640885221?st=n6uwfe0jsxaxajd&reflink=article_email_share [https://perma.cc/MAK7-7F9V]; James V. Grimaldi, Coulter Jones & Joe Palazzolo, \textit{131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest}, \textit{WALL ST. J.} (Sept. 28, 2019), https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421?mod=article_inline [https://perma.cc/BGJ9-JFML].} For example, United States District Court Judge Liam O’Grady continued ruling in favor of Amazon.com Inc. in a case before him while his wife owned over $20,000 in Amazon stock.\footnote{See Palazzolo et al., \textit{supra} note 9.} Judge O’Grady subsequently admitted he should have recused himself from that case, and the \textit{Wall Street Journal} identified sixty-five other cases in which Judge O’Grady’s wife had investments in the litigants.\footnote{See id.} This is not an isolated incident—the \textit{Wall Street Journal} had previously found that since 2010, 131 federal judges failed to disqualify themselves from 685 cases as required by federal statutes and judicial ethics.\footnote{See Grimaldi et al., \textit{supra} note 9.} In some cases, investments in single companies exceeded $50,000.\footnote{See id.} In response, many litigants have requested that their cases be reopened and assigned to new judges to get a fair hearing before a truly impartial adjudicator.\footnote{See id.}

Perhaps even more troubling, until very recently, these ethical lapses were shielded from public view by keeping judges’ financial disclosures nonpublic and notifying judges when anyone requested to see them, creating an implicit threat that anyone requesting financial disclosures could face negative treatment before those judges.\footnote{See id.} These issues even reach the height of the federal judiciary, with the Supreme Court of the United States experiencing sustained scrutiny of its perceived lack of adherence to any sort of code of ethics.\footnote{See, e.g., Joshua Kaplan, Justin Elliot & Alex Mierjeski, \textit{Clarence Thomas and the Billionaire}, \textit{PROPUBLICA} (Apr. 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-
bipartisan support for reforms to clean up the judiciary’s ethics issues and create more transparency in the judicial process. In response to concerns about these ethical lapses and the related proposals for reform, Chief Justice John Roberts has discouraged any regulation or investigation of the federal courts, asking instead that the American public just trust that the judiciary will clean up its act. Apparently, sunlight is not the best disinfectant, at least for the federal judiciary. In spite of this reluctance from the Chief Justice, a bipartisan bill expanding and strengthening disclosure requirements and requiring online publication of financial disclosures for federal judges, including bankruptcy and magistrate judges, was passed into law in 2022. While we certainly welcome these modest, bare-minimum reforms, we are skeptical that online publication of disclosures alone will meaningfully address the accountability and integrity issues plaguing the federal judiciary.

These judicial lapses create a crisis in the judiciary, implicating constitutional concerns and public confidence in our courts. They present an opportunity to examine all aspects of our federal judicial process, especially in light of its failure to police itself effectively. These concerns go beyond financial conflicts of interest and implicate all aspects of judicial decision-making. This Article hopes


to contribute to that conversation and propose solutions by exploring an oft-ignored part of the federal judiciary—magistrate judges. When magistrate judges wield more power than they are allowed under our Constitution, the fairness and propriety of all aspects of the case are called into question. This Article also hopes to make unique contributions by analyzing empirical data to ascertain whether our district courts are operating constitutionally in their employment of magistrate judges.

The inception of the magistrate judge system and its increasing role within the United States federal court system has created a potential conflict between the judicial authority of Article III judges and their delegation of certain material legal issues to these Article I magistrate judges. This Article posits, based on empirical analysis of Reports and Recommendations (R&R)—a proposed order authored by magistrate judges for district court judges to follow—that the existing role of magistrate judges acts as an alarming circumvention of Article III of the United States Constitution. Our analysis indicates that district court judges are likely not exercising the necessary review over magistrate judges, and thus are not properly fulfilling their constitutional duties. Indeed, an Arizona district court judge was recently chastised by a Ninth Circuit judge for failing to adequately review a magistrate judge’s R&R and instead using a boilerplate “rubberstamp” order to adopt the recommendations.21 Through a case study analyzing the adoption rates of magistrate Report and Recommendations by district court judges over a three-year time period, this Article provides strong evidence of “rubberstamping,” and offers solutions to place our federal court system on more firm constitutional footing.

Part I of this Article provides a foundational discussion of the development and modern framework of Article III judges in the federal court system. Part II reviews the functional nature and evolution of the role of magistrate judges following the enactment of the Federal Magistrates Act of 1968 and critiques the existing magistrate judicial system on a number of grounds. Part III proposes a hypothesis which will be tested in a case study conducted by the authors. Part IV outlines a case study conducted by the authors seeking to identify trends in the R&R system utilized by magistrate judges in the federal court system to substantiate the critique set forth

in Part III. Part V proposes solutions to the existing dilemma, leading to a recommendation that Congress increase the number of district court judges and dissolve the magistrate judge system altogether. Lastly, Part VI proposes subject matter for future studies in this area.

I. ARTICLE III JUDGES

Article III of the Constitution provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”22 In addition to the Supreme Court, other judges established under Article III include the United States district court judges and the United States court of appeals judges.23 Article III judges are distinguishable from other figures referred to as judges in the federal system, including bankruptcy judges, magistrate judges, and administrative judges.24 Congress delegates limited authority to these surrogate judges in order to sidestep the procedural safeguards of Article III and provide more efficient adjudication. Through its demanding requirements for judicial appointment and removal, the Constitution secures two fundamental values: the separation of powers and judicial independence.25

A. Separation of Powers, Checks and Balances, and Judicial Independence

The independence and impartiality of the judiciary is “an inseparable element of the constitutional system of checks and balances,” and the Constitution commands that it be “jealously guarded.”26 For these reasons, Article III provides that judges will remain in office during good behavior, and their salaries may not be reduced after taking office.27 The Good Behavior Clause essentially grants Article III judges life tenure, barring impeachment and

25. See id. at 1050–52.
27. See U.S. CONST. art. III, § 1.
removal. The Founders anticipated that the judiciary would soon create a large body of precedent that would require lengthy and arduous study. The prolonged terms of Article III judges allow them to build the extensive knowledge base that only comes with time and experience. Impeachments must be performed by the House of Representatives and tried by the Senate, which can convict and remove an Article III judge upon a two-thirds vote. Article III judges can only be impeached and convicted for “Treason, Bribery, or other high Crimes and Misdemeanors.”

By protecting judicial compensation and job security from manipulation by the executive or legislative branches, the Constitution seeks to ensure that Article III judges will decide cases by a fair evaluation of the merits, rather than acting in accordance with the desires of the political branches. Though there are some concerns that the appointment process has become too politically motivated, Article III judges are certainly more insulated from political interests than other federal officials, who serve at the will of the President or who must always keep an eye on reelection. Article III judges are also protected from the whims of public opinion, unlike their elected counterparts in many state courts.

The constitutional system not only protects judicial independence, but places checks and balances on judicial power. Instead of allowing the judicial branch to fill its own vacancies, the Framers chose to require the other two branches to cooperate to fill Article III judgeships. The President, then, is responsible for the nomination of Article III judges with the advice and consent of the Senate. This system crafts a delicate balance of powers between the branches while also creating the necessary conditions for judicial independence, so these constitutional strictures should be carefully respected.

29. See THE FEDERALIST NO. 78 (Alexander Hamilton).
30. See id.
33. See, e.g., Jackson, supra note 23, at 977–82.
35. See Jackson, supra note 23, at 970.
36. See id. at 971.
38. See Jackson, supra note 23, at 971.
1. The Development of United States District Judges

At the time of the nation’s founding, it was immediately clear that it was impractical for the Supreme Court to dispose of all federal controversies. One possibility was to entrust the bulk of adjudication to state courts, retaining appellate jurisdiction with the Supreme Court. With their recent experience of a weak federal government under the Articles of Confederation, Congress chose to exercise its power to create “tribunals inferior to the Supreme Court” at the national level.

The Judiciary Act of 1789 resulted from a “compromise between those who preferred a strong central national government, and those who wished to maintain the primacy of state government.” Congress established a three-part court system: the Supreme Court, the circuit courts, and the district courts. The Supreme Court had the Chief Justice and five Associate Justices and functioned as the appellate court with the circuit courts being the primary trial courts. The Justices were also required to “ride the circuit,” meaning they traveled throughout the country and sat on the various circuit courts at appointed times. The states were organized into three circuits, with each circuit court consisting of two Supreme Court Justices and a district judge from the respective district court in that circuit. One federal judge presided over each U.S. district court. The 1789 Act placed district courts throughout

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41. See id. at 1006–07.
42. Id. at 1010–11.
45. See RAGSDALE, supra note 44, at 53 (discussing the Judiciary Act of 1789); Surrency, supra note 44, at 215.
46. Surrency, supra note 44, at 220, 229.
47. See id. at 215.
48. See Judiciary Act, ch. 20, 1 Stat. 73, § 4 (1789).
49. See RAGSDALE, supra note 44, at 53 (discussing the Judiciary Act of 1789).
the states. The thirteen district courts met for four sessions a year and the three circuit courts met for two sessions a year.

There was constant discussion for the need to reform the courts from its establishment in 1789 until about 1850. The dissatisfaction stemmed from the circuit court organization. Since the Justices had the burden of riding circuit, this often made it impossible to hold the circuit courts at the appointed times. This resulted in the business of the circuit courts continuously being pushed to the next scheduled term. Consequently, lawyers and litigants were agitated as their suits were continued time and time again due to the absence of the Justices. There was also frustration with the limited number of federal courts, with the clerk located in one city where all processes had to be filed.

There was an attempt for reform with the Judiciary Act of 1801; however, this legislation was the source of much controversy and was repealed. After the Act was repealed, reorganization of the circuit courts was undertaken. In 1802, the circuit courts were expanded from three courts to six. And in 1807, Congress created the Seventh Circuit Court and added a seventh Justice to the Supreme Court. By 1837, nine new states were admitted to the Union, and Congress passed legislation creating the Eighth and Ninth Circuits. In 1863, the Tenth Circuit Court was created but then abolished in 1866 and recreated in 1929. And the Eleventh Circuit was established in 1981.

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50. See Judiciary Act, ch. 20, 1 Stat. 73, §§ 3–5 (1789).
51. See Judiciary Act, ch. 20, 1 Stat. 73, §§ 2–4 (1789).
52. See Surrency, supra note 44, at 217.
53. See id. at 215.
54. See id. at 217.
55. See id.
56. See id.
57. See id.
58. See id. at 219.
59. See id. at 224.
60. See id. (discussing how the Judiciary Act of 1801 first expanded the circuit courts to six but was then repealed). Thus, it was not until 1802 that the courts were formally expanded to six circuit courts. Id.
61. See id. at 224 n.44.
62. See id. at 225 n.48.
63. See id. at 226 n.51.
64. See id. at 226 n.53.
65. See id. at 226 n.54.
The discontent with the circuit courts continued and culminated into the Circuit Court of Appeals Act of 1891. The 1891 Act shifted the appellate caseload from the Supreme Court to the new courts of appeals. In doing so, the federal district courts became the primary trial courts for the federal court system with the jurisdiction of the circuit courts conferred to the district courts. The 1891 Act abolished the circuit courts appellate jurisdiction, and the circuit courts were eventually abolished entirely in 1911.

II. MAGISTRATE JUDGES

The modern iteration of the magistrate judge system is a fairly recent invention. Fundamentally, Congress sought to establish a flexible and workable system for discretionary use by district judges. In some ways, the experiment has been a success. In 2019, there were 549 full-time and 29 part-time active magistrate judges in the United States. This number has steadily increased over the last thirty years. In 1990, there were only 329 full-time and 146 part-time magistrate judges.

For better or worse, magistrate judges play a prominent role in the administration of justice. The Supreme Court has recognized this, noting that “federal magistrates account for a staggering volume of judicial work” and are “indispensable.” For example, from October 2018 to September 2019, magistrate judges disposed of

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68. See id.
69. See id.
71. See id.
75. See id.
76. See id.
In the criminal context, magistrate judges handled 244,367 felony pretrial matters and conducted 34,964 felony guilty plea proceedings.\(^\text{80}\)

Despite their seeming importance, the United States magistrate judicial system was not contemplated in the Constitution; in fact, the constitutionality of magistrate judges is precarious at best.\(^\text{81}\)

Accordingly, the use of magistrate judges is not without its critics.\(^\text{82}\)

The 2011 Supreme Court decision in *Stern v. Marshall*, as well as subsequent decisions at the circuit court level, have raised a host of issues that highlight the uncertainty regarding the constitutionality of magistrate judges.\(^\text{83}\) Moreover, the proliferation of magistrate judges, combined with the reluctance of district courts to overturn their decisions, raises further questions about whether magistrate judges should be considered inferior officers under the Constitution—i.e., whether the magistrate judge appointment process should continue to be upheld as constitutional.\(^\text{84}\) We consider those, in turn, below.

A. The Creation of Magistrate Judges

The creation of the United States Magistrate Judges began with the Judiciary Act of 1789.\(^\text{85}\) This Act allowed for federal criminal cases to be tried in the circuit and district courts^\(^\text{86}\) and specified “bail for a person accused of committing a federal crime could be set either by a judge of the United States or by a state judge or magistrate.”\(^\text{87}\)

That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States . . . be arrested, and

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\(^{80}\) See id.


\(^{82}\) See id.


\(^{84}\) See infra Section II.B.

\(^{85}\) See Foschio, supra note 43, at 607–08.

\(^{86}\) See id. at 608 (“As a result, the Judiciary Act of 1789, which created a system of federal trial courts, permitted federal criminal cases to be tried in the newly established circuit and district courts, but left matters of arrest and bail to be governed by state law and handled by state judicial officers.”).

imprisoned or bailed . . . for trial before such court of the United States . . . .

With state courts enforcing federal law in the pre-trial stages of the judicial process, a critique surfaced: the Judiciary Act failed to establish a clear-cut delineation between federal and state jurisdiction. Moreover, with the early federal laws being unpopular in some states, the blurring of federal and state jurisdiction led to an inability to rely on state judicial officers to carry out the federal criminal process.

Recognizing the need for a minor federal judiciary, Congress passed legislation in 1793 allowing bail for federal criminal offenses to be taken by:

any judge of the United States, any chancellor, judge of a supreme or superior court, or chief or first judge of a court of common pleas of any state, or mayor of a city in either of them, and by any person having authority from a circuit court, or the district courts of Maine or Kentucky to take bail; which authority, revocable at the discretion of such court, any circuit court or either of the district courts of Maine or Kentucky, may give to one or more discreet persons learned in the law in any district for which such court is holden, where, from the extent of the district, and remoteness of its parts from the usual residence of any of the before named officers, such provisions shall, in the opinion of the court, be necessary.

The “discreet persons learned in the law” led to the development of the United States Commissioners. In 1812, Congress expanded the use of “discreet persons,” authorizing the circuit courts “to appoint such and so many discreet persons, in different parts of the district,

88. See Judiciary Act, ch. 20, § 33, 1 Stat. 91 (1789) (emphasis added).
90. See Foschio, supra note 43, at 608 (“It became apparent soon after passage of the Judiciary Act of 1789 that, because of resistance in some states to federal policies, federal criminal process could not rely solely upon state judicial officers.”); Lindquist, supra note 89, at 5 (“When one considers that many of the early federal laws were extremely unpopular in some of the states (e.g. the excise tax leading to the Whiskey Rebellion and the assessments leading to Fries Rebellion), the need for a minor federal judiciary became apparent.”).
91. See Act of Mar. 2, 1793, ch. 22, § 4, 2 Stat. 333, 334 (emphasis added); see also Lindquist, supra note 89, at 5 (expressing this same idea).
92. See Lindquist, supra note 89, at 5 (“Most writers seem agreed that the above mentioned ‘discreet persons learned in the law’ provided the seed from which United States Commissioners were to develop.”); Foschio, supra note 43, at 608 (“In 1793, Congress authorized the federal circuit courts to appoint ‘one or more discreet persons learned in the law’ to take bail in federal criminal cases.”).
as such court shall deem necessary, to take acknowledgments of bail and affidavits . . . .”93 And in 1817, Congress named these persons “circuit court commissioners” and extended the authority to take depositions in civil cases.94

However, the unpopularity of federal law continued, intensifying with the slave controversy and many segments of the population not agreeing with the federal fugitive slave laws.95 The Fugitive Slave Act of 1793 relied on state and local judges who, in many instances, reflected the dominant attitudes of their respective communities and were not effective administrators of federal law.96 By the 1840s, it was evident there needed to be a minor federal judiciary to enforce federal law with criminal jurisdiction.97 Accordingly, in 1842, the authority of circuit court commissioners expanded to cover the general criminal process.98 The expansion covered “all the powers that any justice of the peace, or other magistrate, of any of the United States may now exercise in respect

93. See Act of Feb. 20, 1812, ch. 25, § 1, 1 Stat. 679, 680–81; Lindquist, supra note 89, at 5–6; see also Foschio, supra note 43, at 608–09 (authorizing appointees “to take acknowledgments of bail and related affidavits according to a fee schedule based on state law”).

94. See Foschio, supra note 43, at 609 (“It was not until 1817 that Congress first officially named them commissioners of the circuit court, and extended to them the authority to take depositions in civil cases.”); Lindquist, supra note 89, at 6 (“Finally, on March 1, 1817, the discreet persons were officially designated ‘circuit court commissioners,’ permitted to take bail and affidavits in civil actions processed by the district courts, and assigned jurisdiction in various maritime matters.”).

95. See Lindquist, supra note 89, at 7 (“By the 1830’s many federal laws again became unpopular in various parts of the country . . . [and, i]n the North, federal fugitive slave laws were exceedingly unpopular with many segments of the population.”).

96. See id.

“The Fugitive Slave Act of 1793 relied primarily upon local magistrates to issue certificates authorizing removal of fugitive slaves . . . [s]ince state and local judicial officers could be expected to reflect the dominant attitudes of their respective communities, it was not very surprising that in many instances the officials were not very effective administrators of federal law . . . .”

Id.

97. See id. at 8 (discussing Dean Roscoe Pound’s comments regarding the decision to create a minor federal judiciary with criminal jurisdiction).

98. See Foschio, supra note 43, at 609 (“Thus, in 1842 Congress authorized circuit court commissioners to exercise general criminal process in federal cases by issuing arrest warrants and holding persons for trial.”).
to offenders for any crime or offense against the United States, by
arresting, imprisoning, or bailing the same.”99

Congress reformed the commissioner system in 1896, replacing
the circuit court-appointed commissioners with “United States
commissioners,” who were now officers of the district courts.100 The
United States commissioners maintained the same powers and duties
as their predecessors.101 But the new system had the district courts
appoint the commissioners to four-year terms, being subject to
removal by the district courts at any time. The commissioners did not
have any minimum qualifications, nor was there a limit on how
many commissioners the courts could appoint.102

Nevertheless, the commissioner system had its downfalls. The
system contained an inadequate compensation system, making it
difficult to attract qualified persons due to the “meager fees.”103
Additionally, since commissioners were not required to be trained in
the law, in 1942, not more than half of the commissioners were
attorneys.104 After over twenty-five years of studies and three years
of comprehensive hearings, the Tydings Subcommittee
recommended the Federal Magistrates Act, becoming law in 1968.105

99. See Act of Aug. 23, 1842, ch. 188, § 1, 2 Stat. 516, 517; Foschio, supra
note 43, at 609.
100. See A Guide to the Legislative History of the Federal Magistrate Judges
magistrate_judge_legislative_history.pdf [https://perma.cc/5FPT-VCEZ] (“In 1896
the Congress replaced the century-old system of circuit court-appointed
commissioners with a new system of ‘United States commissioners’ . . . .”); see also
PETER G. MCCABE, FED. BAR ASS’N, A GUIDE TO THE FEDERAL MAGISTRATE JUDGES
reconstituted the commissioner system, which had developed on a piecemeal
basis.”).
101. See A Guide to the Legislative History of the Federal Magistrate Judges
System, supra note 100, at 2 (describing the new system of United States
commissioners); see also MCCABE, supra note 100, at 3 (describing the new
system of United States commissioners).
102. See McCabe, supra note 100, at 3 (“No minimum qualifications were
specified for commissioners and no limits imposed on the number of commissioners
that the courts could appoint.”).
103. See Foschio, supra note 43, at 612.
104. See id.
105. See Lindquist, supra note 89, at 16 (“[T]he Tydings Subcommittee,
after three years of comprehensive hearings, recommended passage of the Federal
Magistrates Act which became law on October 17, 1968.”); A Guide to the
Legislative History of the Federal Magistrate Judges System, supra note 100, at 5–6
(discussing the comprehensive, exploratory hearings by Senator Joseph D. Tydings
The Federal Magistrates Act of 1968 (FMA) replaced the commissioner system, initially authorizing 542 magistrate positions to take the place of 700 United States commissioners. The FMA created the office of the United States Magistrate, reformed the fee system, and required magistrates to be attorneys. It also authorized the district courts to appoint their magistrates. The district courts were thought to be most qualified to select the best available local attorneys for the positions who would effectively relieve their burden.

Furthermore, the FMA provided magistrates the authority to perform three categories of judicial duties. First, the Act granted authority to exercise all powers previously held by the United States commissioners. Second, it granted the authority over the “trial and disposition of minor criminal offenses.” This authority included “assisting district judges in the conduct of pretrial and discovery proceedings, review of habeas corpus petitions and acting as special masters.” And lastly, it provided magistrates the authority to perform “such additional duties as are not inconsistent with the Constitution and laws of the United States.” Overall, the FMA expanded authority to the magistrate without mandating the assignment of particular duties, allowing each court to determine what duties to delegate to the magistrates.

The expansion of magistrate judge authority under the “additional duties” clause in Section 636 has led to increased

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106. See Foschio, supra note 43, at 614 (“The initial authorization of 542 magistrate positions (82 full-time, 449 part-time and 11 combined positions for part-time referees in bankruptcy and court clerks) replaced more than 700 United States commissioner and national park commissioner positions.”).


108. See id.

109. See id.

110. See id. at 17 (discussing the jurisdictional provisions of the 1968 Act.).

111. See id.; Foschio, supra note 43, at 613 (discussing the consequent changes from the Magistrate’s Act of 1968).


113. See Foschio, supra note 43, at 613 (discussing how the authority granted to magistrates was previously exercised by commissioners).


115. See McCabe, supra note 100, at 2 (“[I]t authorizes each district court to determine what duties to assign to its magistrate judges in order to best meet the needs of the court, its judges, and the litigants.”).
criticism and calls for reform. These two words—"additional duties"—have substantially increased magistrate judge authority. Congress intended this language to allow for flexibility and experimentation, allowing district courts to become more efficient in the process. While this language has certainly accomplished its purpose, it has arguably done so at the expense of the Constitution.

Furthermore, concerns mounted about the "unevenness" in the competence of magistrates due to the appointment process. Some courts were not opening up the magistrate selection process to all candidates, choosing instead to select magistrates based on familiarity. The district court judges were selecting insiders with whom at least one district judge had already established a relationship. To remedy this, in 1979, Congress imposed regulations approved by the Judicial Conference concerning the appointment and reappointment of magistrates. It required public notice of all vacancies and for a merit selection panel of district residents to propose a list of candidates for the district court to select from.

In addition to the merit selection process, the 1979 legislation mandated four minimum qualifications for a magistrate judge:


117. See id. at 760 (discussing the additional-duties clause and the power of district courts to delegate duties to magistrate judges).


119. See id. at 8 (discussing the Federal Magistrate Act of 1979).

120. See id.


122. See McCabe, supra note 100, at 8.

123. See 28 U.S.C. § 631(b)(5) ("No individual may be appointed or reappointed to serve as a magistrate judge under this chapter unless . . . [h]e is selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures shall contain provision for public notice of all vacancies in magistrate judge positions and for the establishment by the district courts of merit selection panels, composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions.").
(1) the candidate be in good standing of the bar of the state in which the district court is located and been a member of the said bar for at least five years;\textsuperscript{124}

(3) the candidate must be younger than seventy years old at the time of the first appointment;\textsuperscript{125}

(4) there cannot be a relation by blood or marriage between the candidate and a judge of the appointing district court;\textsuperscript{126} and

(5) the candidate must be found to be competent to perform the duties of the office by the appointing district court.\textsuperscript{127}

The U.S. Judicial Conference supplemented these criteria with the requirement that the candidate have practices law for at least five years\textsuperscript{128} and be “of good moral character, emotionally stable and mature, committed to equal justice under the law, in good health, patient, courteous, and capable of deliberation and decisiveness when required to act on his or her own reason and judgement.”\textsuperscript{129}

The 1979 legislation also mandated eight-year term limits for full-time magistrate judges and four-year term limits for part-time magistrate judges.\textsuperscript{130} And lastly, it provided the “[r]emoval of a magistrate judge during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability.”\textsuperscript{131} There was minor legislation in 1982 modifying the experience requirement to allow membership in the bar of any

\begin{footnotesize}
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\item[124.] See 28 U.S.C. § 631(b)(1) (“No individual may be appointed or reappointed to serve as a magistrate judge under this chapter unless: He has been for at least five years a member in good standing of the bar of the highest court of a State.”).
\item[125.] See 28 U.S.C. § 631(d) (“[N]o individual may serve under this chapter after having attained the age of seventy years.”).
\item[126.] See 28 U.S.C. § 631(b)(4) (“No individual may be appointed or reappointed to serve as a magistrate judge under this chapter unless . . . [h]e is not related by blood or marriage to a judge of the appointing court or courts at the time of his initial appointment.”).
\item[127.] See 28 U.S.C. § 631(b)(2) (“No individual may be appointed or reappointed to serve as a magistrate judge under this chapter unless . . . [h]e is determined by the appointing district court or courts to be competent to perform the duties of the office.”).
\item[128.] See id.
\item[130.] See 28 U.S.C. § 631(e) (“The appointment of any individual as a full-time magistrate judge shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate judge shall be for a term of four years.”).
\end{itemize}
\end{footnotesize}
state to qualify for the necessary five-years bar membership.\textsuperscript{132} Otherwise, the above-stated system still stands as the current parameters for magistrate judges.\textsuperscript{133}

1. Overview of the Role of Magistrate Judges

A magistrate judge is a generalist—a supplemental judge assisting the district court.\textsuperscript{134} As such, the role of a magistrate judge depends on how the individual district utilizes them, for the FMA “lets each district court determine what duties are most needed in light of local conditions and changing caseloads.”\textsuperscript{135} Therefore, the scope of a magistrate judge’s work varies by district.\textsuperscript{136}

Most magistrates, though, conduct the initial proceedings in both criminal cases and the matters delegated to them by district judges (including evaluating and approving search warrants), try criminal misdemeanor cases, and, with party consent, try civil cases.\textsuperscript{137} For example, it was a magistrate judge who evaluated the underlying evidence and approved the search warrant authorizing the search of former President Trump’s Mar-a-Lago residence in August 2022, as well as the subsequent public release of the warrant, inventory list, and redacted affidavit.\textsuperscript{138} Additionally, the catchall clause adds that a district court judge may assign any “additional duties as are not inconsistent with the Constitution and laws of the United States” to a magistrate judge.\textsuperscript{139} This provision has resulted in a remarkable expansion in magistrate judge authority.\textsuperscript{140} Now, the magistrate judge’s duties have evolved to include “special master


\textsuperscript{133} See 28 U.S.C. § 631.

\textsuperscript{134} See McCabe, supra note 100, at 22, 70.

\textsuperscript{135} See id. at 20.

\textsuperscript{136} See id.


\textsuperscript{139} See 28 U.S.C. § 636(b)(3).

\textsuperscript{140} See Kevin Koller, Deciphering De Novo Determinations: Must District Courts Review Objections Not Raised Before a Magistrate Judge?, 111 Colum. L. Rev. 1557, 1557 (2011) (“Since Congress first enacted the Federal Magistrates Act in 1968, both the size and the scope of the federal magistrate system have steadily grown to the point of ubiquity.”).
proceedings, Social Security appeals, state and federal habeas corpus cases, voir dire, post-trial motions, modification or revocation of supervised release, and naturalization proceedings.”

One of the most important features of the magistrate judge system is the review by a district court judge of a magistrate judge’s decision. This review provides critical due process protection for litigants. When reviewing a magistrate judge’s action, the standard of review a district court judge uses depends on whether a matter is dispositive or not. If a matter is dispositive, the magistrate judge can only issue a Report and Recommendation to the district judge who reviews it under a de novo standard. When the magistrate judge submits an R&R, the district court judge may “accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge.” However, if a matter is not dispositive, the district court will only apply a clearly erroneous or contrary to law standard of review.

District court review is also different in the civil context if both parties consent to the magistrate judge adjudication. Once both parties consent, the magistrate judge essentially acts as the district court judge would, “conduct[ing] any or all proceedings in a jury or nonjury civil matter and order[ing] the entry of judgment in the case . . . .” District court review of these decisions is limited to vacating the delegation, which is only done in “extraordinary circumstances.”

Magistrate judges are also involved in the criminal context. However, there has been a significant amount of backlash in the involvement of magistrate judges in felony guilty plea proceedings—an area that affects criminal defendants, who are some of the most vulnerable members of society. From October 2018 to September

141. See Chesley, supra note 116, at 773.
142. See id. at 796.
143. See Koller, supra note 140, at 1568.
144. See FED. R. CIV. P. 72.
145. See 28 U.S.C. § 636(b). The heightened de novo standard is used if a party objects to the magistrate judge’s determination. Id.
149. See 28 U.S.C. §636(c)(1). The district court must explicitly grant this authority to the magistrate judge. Id.
150. See id.
2019, magistrate judges conducted 34,964 felony guilty plea proceedings.152 Numerous scholars and commentators have addressed this issue and believe that magistrate judges should not have the authority to accept a felony guilty plea.153

Felony guilty plea proceedings are incredibly important to a criminal defendant.154 Because of this, they arguably fall outside a magistrate judge’s jurisdiction. In many ways, the proceeding looks like a felony trial155—something that the Supreme Court explicitly prohibits magistrate judges from overseeing.156 Moreover, felony guilty pleas are more final and dispositive than felony trials because individuals waive their constitutional right to a jury trial, their right to appeal, and significant other rights.157 Because the Supreme Court views guilty pleas as a “grave and solemn act,”158 it is a highly questionable practice for magistrate judges to have this authority.159

154. See Maguire, supra note 153, at 42 (“Since Brady, the Supreme Court has consistently emphasized the elevated importance and responsibility associated with accepting a felony guilty plea. A guilty plea is ‘a waiver of important constitutional rights designed to protect the fairness of a trial.’”).
155. See Gotfryd, supra note 153, at 627, 665 (“In this regard, the acceptance of a felony guilty plea is quite similar to a felony trial . . . .”).
156. See Gomez v. United States, 490 U.S. 858, 871–72 (1989) (“[T]he carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial.”).
157. See Maguire, supra note 153, at 42.
158. See Brady v. United States, 397 U.S. 742, 748 (1970) (“That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized.”).
159. See Maguire, supra note 153, at 54 (“The finality associated with the acceptance of a guilty plea cloaks such a task with a level of importance and responsibility incomparable to any of the enumerated duties in the FMA, thereby disqualifying it from being considered an additional duty under the statute.”).
As a result, such an arrangement violates an individual’s right to appear before an Article III judge and is therefore likely unconstitutional.\footnote{160}{See generally Joshua R. Hall, The FMA and the Constitutional Validity of Magistrate Judges’ Authority to Accept Felony Guilty Pleas, 38 Campbell L. Rev. 131 (2016) (stating that defendants have the right to appear before an Article III judge).}

Recently, the Seventh Circuit held that magistrate judges might not formally accept felony-guilty plea deals—they may only offer a R&R to the district court judge on the matter.\footnote{161}{See United States v. Harden, 758 F.3d 886, 891 (7th Cir. 2014); Brown v. United States, 748 F.3d 1045 (11th Cir. 2014).} Ultimately, the Seventh Circuit decided that the magistrate judge’s acceptance of a guilty plea was too important a task to be delegated to the magistrate judge.\footnote{162}{See Harden, 785 F.3d at 888.} Thus, the practice violated the FMA.\footnote{163}{See generally 28 U.S.C. §636(b) (“A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.”).} Still, whether the district court judge truly conducts a de novo determination or simply gives final effect to the findings and recommendation of the magistrate judge is a decision at the whim of the district court judge.\footnote{164}{See Harden, 785 F.3d at 888.} There are grave constitutional concerns when these procedural safeguards do not truly safeguard a criminal defendant’s rights.\footnote{165}{See Harden, 785 F.3d at 888.}

B. Criticism of the Magistrate Judge System

There are numerous constitutional concerns with the magistrate judge system. Among them are two intertwined but distinct constitutional objections. The first is that magistrate judges are appointed in violation of the Appointments Clause, and the second is that magistrate judges unconstitutionally exercise Article III
powers.\textsuperscript{166} Although these are technically distinct objections, they hinge on the same issues.

1. Appointment Clause Concerns

Given that Article III of the Constitution vests the judicial power of the United States in the Supreme Court and “in such inferior Courts as the Congress may from time to time ordain and establish,” the constitutionality of magistrate judges may seem straightforward.\textsuperscript{167} Yet, magistrate judges are \textit{not} Article III judges; they do not serve lifetime appointments, as Article III requires.\textsuperscript{168} So, if magistrate judges are not Article III judges, what position do they hold in our constitutional structure? The answer to this question comes in two parts: first, magistrate judges are ostensibly inferior officers; and second, magistrate judges are technically not permitted to exercise Article III powers—which will be discussed later.\textsuperscript{169}

The first answer concerns the Appointments Clause of the Constitution, and the oversight performed by district courts is essential to the apparent legality of magistrate judges. Individuals who exercise significant authority on behalf of the United States are deemed “Officers of the United States.”\textsuperscript{170} The ability to take testimony, conduct trials, rule on the admissibility of evidence, and enforce compliance with discovery amounts to exercising significant authority.\textsuperscript{171} Therefore, magistrate judges—like administrative law judges—are officers.\textsuperscript{172} That is significant because the Appointments Clause of the United States Constitution sets forth procedural requirements for appointing officers.\textsuperscript{173}

\textsuperscript{166.} See \textit{infra} Subsections II.B.1, II.B.2.
\textsuperscript{167.} See \textit{U.S. Const. art. III, § 1, cl. 1.}
\textsuperscript{168.} See \textit{id.; A Guide to the Legislative History of the Federal Magistrate Judges System, supra} note 100, at 9 (“The term of office for both full-time and deputy magistrates was set at eight years.”).
\textsuperscript{169.} See \textit{Thomas C. Rossidis, Article II Complications Surrounding Sec-Employed Administrative Law Judges, 90 St. Johns L. Rev. 773, 788 n.119 (2016) (“It is well settled that federal magistrate judges are inferior officers under Article II.”).}
\textsuperscript{170.} See, \textit{e.g.}, Buckley v. Valeo, 424 U.S. 1 (1976).
\textsuperscript{172.} See \textit{also id.}
\textsuperscript{173.} See \textit{U.S. Const. art. II, § 2, cl. 2.3.3}
Under the Appointments Clause, there are two types of officers: principal and inferior. Whether an officer is principal, or inferior depends on whether they have a superior. Specifically, inferior officers “are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” What constitutes sufficient supervision may depend on several factors, including administrative oversight and removal power, but the most significant factor is whether the officer has the “power to render a final decision on behalf of the United States” absent permission by other Executive officers. Magistrate judges, then, are ostensibly inferior officers because district courts conduct administrative oversight, have the power to review magistrate judge decisions, conduct administrative oversight, and remove magistrate judges (though this power is restricted to for cause removal).

Inferior officers, unlike principal officers, do not need to be nominated by the President and appointed with the advice and consent of the Senate. Instead, they may be appointed by the President, courts of law, or the heads of departments, so long as Congress has authorized them to do so. Thus, magistrate judges may be appointed by district court judges. The FMA, at first blush, satisfies the Appointments Clause. But what is constitutional in theory may not be constitutional in practice. As Part V will illustrate, district courts rarely overturn magistrate judge decisions and magistrates may exercise powers reserved to Article III courts in certain situations. Moreover, the statutorily prescribed deference to magistrate judges, and the Supreme Court’s decision in United States v. Raddatz, raise further questions about how much

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174. See U.S. Const. art. II, § 2, cl. 2.
176. See id. at 663.
177. See id. at 665.
178. See Rossidis, supra note 169, at 788 n.119 (“It is well settled that federal magistrate judges are inferior officers under Article II.”). Although magistrate judge decisions are ordinarily reviewed by the district court, see infra Section II.B, district courts rarely overturn these decisions and often grant them the same powers as the district court itself. See infra Subsection IV.D.2.f. As such, whether magistrate judges are truly inferior officers is up for debate.
180. See U.S. Const. art. II, § 2, cl. 2.
181. See id.
supervision magistrate judges—and their decisions—are truly subject to.184

In Raddatz, the Supreme Court held that the FMA and the Constitution do not require an Article III judge to hear witness testimony on a motion to suppress evidence in a federal criminal proceeding—even when determination of the motion turned on issues of demeanor and credibility.185 For the Raddatz court, all that was required was that the Article III judge make a de novo determination; they did not need to conduct a de novo hearing of the evidence.186 But how can an Article III judge make a de novo determination without hearing the evidence, when the evidence itself solely consists of witness testimony and assessing witness credibility? Have generations of lawyers wasted countless hours conducting witness examinations in court rooms so that the jury can assess witness credibility when they could have simply handed a deposition transcript to the jury? Or did the Raddatz court simply allow district courts to abdicate their Article III powers (and, necessarily, their oversight responsibilities) to give magistrate judges the authority to rule on issues that the district court judge simply couldn’t be bothered by?

The answer, it appears, must be the latter. This highlights an inherent problem with the magistrate system: it was created to alleviate the burdens placed on district court judges and those judges dictate what the magistrates preside over and how much supervision they receive. The Raddatz decision allows the district court judges who do not want to, or simply cannot, spend the time necessary to adequately rule on an issue to assign it to a magistrate and summarily affirm their findings under the guise of a de novo determination.187 What is especially frightening about the Raddatz decision is that the evidentiary hearing at issue was dispositive to the question of the defendant’s guilt.188 A criminal defendant should be entitled to an independent determination of the case-dispositive facts by an Article III judge, but the Raddatz court allowed “the district judge to give final effect to the magistrate’s findings on issues of credibility.”189

Evidently, the possibility of supervision is present, but is there really supervision? Do district court judges choose to do more work

185. See id. at 683–84.
186. See id. at 681–82.
187. See id.
188. See id. at 670–72.
189. See id. at 695 (Marshall, J., dissenting).
than they have to? And should the answer simply be: we hope so? With this in mind, the “inferior” status of magistrate judges is a categorization worthy of intense scrutiny.

2. Article III Powers Concerns

At the most fundamental level, the argument against the magistrate judge system is centered on the fact that magistrate judges do not have the protections of Article III judges.190 Magistrate judges do not have lifetime tenure191, and Congress could theoretically reduce their salaries.192 This implicates the independence of the judiciary.193 The importance of this cannot be overstated, as “[Article III] safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts ‘to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating’ constitutional courts.”194

Most of the historical criticism of the magistrate judge system stems from separation of powers concerns.195 Early on, “scholarship questioned the creation of federal magistrates, lamenting their encroachment on matters historically reserved for Article III district judges, and raising the potential separation of power concerns that ensue.”196 As one commentator wrote shortly after the passage of the Federal Magistrates Act of 1979, “[a]ny expansion of magistrate [judge] jurisdiction that risks widespread, routine delegation within the district court threatens a serious erosion of the policies

190. See U.S. CONST. art. III, § 1 (enumerating protections for federal judges, including tenure during good behavior and salary protection).
191. See 28 U.S.C. § 631(e) (enumerating that full-time magistrate judges are appointed for eight-year terms, while part-time magistrate judges serve four-year terms).
194. See Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 850 (1986) (quoting Nat’l Ins. Co. v. Tidewater Co., 337 U.S. 582, 644 (1949)); see also United States v. Dees, 125 F.3d 261, 267 n.6 (5th Cir. 1997) (“The ‘slippery slope’ scenario here is easy to envision. District courts might begin by delegating small felony trials to magistrate judges. . . . Eventually Congress would notice the trend[.]. . . [and] seek to increase the number of magistrate judges.”).
195. See George & Yoon, supra note 121, at 835.
196. See id.
underlying the Article III judicial office.” These questions continue to this day, with at least one commentator arguing that the real question involved in the search of former President Trump’s residence was whether magistrate judges are even constitutionally able to authorize searches without involvement of Article III judges, largely on separation of powers principles.

Today, Congress has effectively sidestepped the Constitution by delegating Article III roles to magistrate judges. For example, in 2000, the Federal Courts Improvement Act (FCIA) granted contempt powers to magistrate judges. In response, at least one commentator has questioned the constitutionality of such a delegation. Mark S. Kende persuasively argues that the summary contempt powers for magistrate judges “violates separation of powers principals and Article III because the magistrate effectively serves as both the prosecutor and the judge at the same time, without the accused’s consent, and the accused isn’t even allowed a lawyer’s representation before being jailed.” Despite this, FCIA remains good law.

Yet, the Supreme Court, in 2011, seemingly stood opposed to extending Article III powers, such as contempt powers, to non-

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199. See 28 U.S.C. § 636(a) (giving magistrate judges the authority to exercise Article III powers).


202. See id. at 569.

203. See 28 U.S.C. § 636 (demonstrating that the statute is enacted and continues to be good law).
Article III judges. The Supreme Court ruled in Stern v. Marshall that bankruptcy courts could not enter final judgment on a state law counterclaim, as they lacked the constitutional authority to do so despite having the statutory authority to do so under the Bankruptcy Act of 1984. Simply put, bankruptcy courts, as non-Article III courts, cannot exercise Article III power. Stern shook the foundation of Article I courts and resurrected numerous separation of powers-style arguments. The decision fueled significant scholarship and writing on the issue of magistrate judge authority as well, with some commentators questioning the very future of the magistrate judge system. Others argued that Stern’s reasoning should not be applied to magistrate judges. But magistrate judges—however useful—are not immune from the strictures of the Constitution and whether they exercise Article III powers, in violation of Stern, is a question that merits further discussion.

Much to Justice Scalia’s dismay, what constitutes an impermissible exercise of Article III powers, according to the Stern Court, depends on whether the Public Rights Exception applies, which, in turn, depends on an array of factors. However, a thorough discussion of each of the factors is unnecessary. What matters for the purposes of this Article is the core of the Public Rights Exception. The exception extends “[o]nly to matters arising between’ individuals and the Government ‘in connection with the performance of the constitutional functions of the executive or

204. See Stern v. Marshall, 564 U.S. 462, 484 (2011) (explaining the Court’s reasoning that there is a system of checks and balances, and judicial decision making should be left to Article III judges).

205. See id. at 502–03 (concluding that the bankruptcy court did not have the authority to enter a final judgment).

206. See id. (holding that judicial power under Article III is only for Article III judicial officers, and does not apply to state bankruptcy court).


208. See id. at 198 (“[T]he outcome in Stern will implicate magistrate courts and force them to reexamine whether the entering of final judgments on state-law claims by magistrate judges is constitutional regardless of litigant consent.”).

209. See Chesley, supra note 116, at 799 (concluding that “it would be a mistake to reduce the flexibility of district courts in assigning duties to magistrate judges in response to Stern v. Marshall”).

210. See Stern, 564 U.S. at 504 (Scalia, J., concurring) (“The sheer surfeit of factors that the Court was required to consider in this case should arouse the suspicion that something is seriously amiss with our jurisprudence in this area.”).
legislative departments . . . that historically could have been
determined exclusively by those’ branches.”211 In other words, “what
makes a right ‘public’ rather than private is that the right is integrally
related to particular Federal Government action.”212 And “[i]f a
statutory right is not closely intertwined with a federal regulatory
program Congress has power to enact, and if that right neither
belongs to nor exists against the Federal Government, then it must be
adjudicated by an Article III court.”213 Accordingly, the bankruptcy
court in Stern “lacked the constitutional authority to enter a final
judgment on a state law counterclaim that [was] not resolved in the
process of ruling on a creditor’s proof of claim.”214

One of the most interesting aspects of Stern is the issue of
litigant consent. Pierce, the respondent, had consented to litigating
his defamation claim in the bankruptcy court but “did not truly
consent” to the resolution of the counterclaim in the bankruptcy
court.215 He did consent to his claim being litigated there, but not to
the counterclaim brought against him; thus, he “did not truly
consent.”216 Consent is, generally, a dispositive factor in the
analysis.217 Yet, in limiting the power of an Article I court, the
majority barely considered litigant consent in its analysis.218 This is
crucial to magistrate judges exercising some of their functions,
specifically in the context of civil trials.219 It appears that, in the
bankruptcy context at least, it is insufficient for litigants to consent to
litigating a counterclaim brought against them.220 Should this be

211. See id. at 485 (majority opinion) (quoting N. Pipeline Constr. Co. v.
212. See id. at 490–91.
213. See id. at 492 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33,
54–55 (1989)).
214. See id. at 503.
215. See id. at 493 (stating that Pierce did not have any other options but to
litigate in Bankruptcy Court if he wished to recover damages).
216. See id. at 493, 495 (“[I]t is hard to see why Pierce’s decision to file a
claim should make any difference with respect to the characterization of Vickie’s
counterclaim.”).
217. See id. at 516 (Breyer, J., dissenting) (indicating that consent is a strong
factor if both parties consented).
218. See id. at 517 (arguing that precedent establishes that consent was given
under the facts of this case).
219. See discussion supra Subsection II.B.1 (discussing magistrate judge
roles and typical duties).
220. See also 28 U.S.C. § 157(b)(1) (“Bankruptcy judges may hear and
determine all cases under title 11 and all core proceedings under title 11 . . . .”).
permissible for magistrate judges in other civil contexts outside of bankruptcy? 221

The **Stern** decision has reverberated through the lower courts and already resulted in two circuit courts reducing the power of magistrate judges, barring them from entering final orders in criminal cases. 222 It appears unclear, however, where **Stern** will ultimately lead. 223 The majority did write that it was a narrow decision, 224 and subsequent cases seem to limit the reach of **Stern**. 225 Yet, **Stern** and its courts of appeals progeny might be a harbinger of things to come—like a reduction in power for magistrate judges or, given the new ideological construction of the Supreme Court, perhaps altogether more sweeping change to the magistrate judge system. 226

Whatever the future may hold, it is important to read **Stern** in the context of the magistrate judge system. 227 Recall that in **Raddatz**, the court allowed district court judges to give final effect to a magistrate’s findings without a true de novo review. 228 And, in that case, those findings were dispositive to the criminal case at issue. 229 Under **Stern**, a non-Article III court cannot enter final judgment in a non-public rights case, including in a criminal case because criminal

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222. See United States v. Harden, 758 F.3d 886, 891 (7th Cir. 2014); Brown v. United States, 748 F.3d 1045, 1045 (11th Cir. 2014).

223. See **Stern**, 546 U.S. at 519 (Breyer, J., dissenting) (expressing doubt at the majority’s opinion that the decision will not change much at all).

224. See id. at 502.

225. See Technical Automation Servs. v. Liberty Surplus Ins., 673 F.3d 399, 407 (5th Cir. 2012) (holding that **Stern**’s reasoning did not apply to the context of magistrate judge authority); Wellness Int’l Network v. Sharif, 575 U.S. 665, 669 (2015) (holding that “Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.”).


227. See **Stern**, 546 U.S. at 516 (Breyer, J., dissenting).

228. See United States v. Raddatz, 447 U.S. 667, 674–76 (1980) (noting that the de novo review is only with respect to the determination made and not a complete rehearing).

229. See id. at 671–72.
cases do not qualify as public rights cases. Yet, magistrate judges—who are not Article III judges—can effectively enter final judgment if the district court judge fails (or refuses) to conduct an adequate, actual de novo review of the magistrate judge’s recommendation. As one recent illustration, Judge Collins of the Ninth Circuit was concerned with this exact issue when he admonished a lower court judge for rubber-stamping a magistrate judge’s R&R without adequate review. Whether a non-Article III judge is permitted to exercise Article III power should not depend on the whims of the district court judge. Indeed, “[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.” Practicality does not, and should not, override the import of the Constitution. Unfortunately, our magistrate judge system toes that line.

But practicality should inform our analysis of the constitutionality of magistrate judges when it comes to litigant consent. Since litigant consent can waive the limitations on who may permissibly exercise Article III judicial power, any informed analysis must consider whether litigants are forced—or, at the very least, encouraged—to consent to having a magistrate judge preside over issues that they ordinarily would not have the authority to preside over. These concerns are not merely theoretical either; with the number of district court judges staying stagnant and the number of cases filed in federal court increasing over the years, the risk of

231. See Raddatz, 447 U.S. at 675–76.

[I]t is important to keep in mind that the underlying issue here is one of constitutional dimension. Where, as here, there are reasons to believe that the requisite review and control by the district judge may not have occurred, principles of avoidance of constitutional concerns provide a further ground for a remand and re-examination [of the district court’s approval of the R&R].

Id.

233. See id. at 674–76.
236. See, e.g., Stern, 564 U.S. at 493.
litigants being coerced to consent to magistrate judge trials is very real.237

Take the Western District of Texas, for example. Judge Alan Albright is the only district judge in that district, but “[a]bout a quarter of the nation’s patent suits are now filed” in his court.238 In the first half of 2021 alone, 489 of the 1,942 cases filed in the United States were filed in Judge Albright’s district.239 That is a lot of cases for one judge to handle, especially when the judge is known for handling disputes quickly.240 In fact, it is too many cases for one judge to handle, and the Western District of Texas was forced to hire a second magistrate judge.241 In other words, the district that is known for its speedy trials has just one district court judge and two magistrate judges.242

But that’s not the only interesting thing about the Western District of Texas. Judge Albright is also known for denying transfer motions, “which has led to the Federal Circuit issuing several mandamus petitions overriding his refusal to transfer cases or accusing him of unnecessary delays.”243 So, not only are there an exorbitantly high number of litigants in Judge Albright’s district but those litigants also struggle to get Judge Albright to allow for a change of venue.244 How, then, are these cases being resolved quickly? The answer is that the two magistrate judges are handling a large number of issues.245 As one practicing attorney put it, “[t]here’s little doubt a lot of the pretrial patent cases and perhaps trademark cases would be handled by this new magistrate.”246 Cases, or at least

241.  See Kass, supra note 238.
242.  See id.
243.  See id.
244.  See id.
245.  See id.
246.  See id.
portions of cases, in the Western District of Texas are inevitably being handed over to magistrate judges.\footnote{See id.}

This raises serious issues about the adequacy of a litigant’s consent, especially in light of Judge Albright’s unwillingness to allow for a change of venue.\footnote{See id.} If litigants are forced to choose between enforcing their right to have their cases tried by Article III judges and resolving their cases in a reasonable amount of time, can they truly consent to having a magistrate judge handle their case? Keep in mind that this example consists of just one district and one specific type of claim; there are overburdened dockets all across the country that raise the same questions.\footnote{See id.; Kristina Davis, Overwhelmed Federal Courts Ask Congress for More Judges, The San Diego Union-Trib. (Feb. 25, 2021), https://www.sandiegouniontribune.com/news/courts/story/2021-02-25/federal-courts-congress-relief [https://perma.cc/MW99-XVT6].}

Statistics show that consent under 28 U.S.C. § 636(c) occupies a significant workload of magistrate judges and is steadily increasing.\footnote{See U.S. District Courts – Civil Consent Cases Terminated by U.S. Magistrate Judges Under 28 U.S.C. § 636(c), U.S. Cts. (Sept. 30, 2013), https://www.uscourts.gov/sites/default/files/statistics_import_dir/Table412_7.pdf [https://perma.cc/SEZ4-8QNH].} In 2011, magistrate judges terminated 13,945 civil cases under consent jurisdiction.\footnote{See id.} Civil consent cases increased, with 15,049 in 2012 and 16,804 in 2013.\footnote{See id.} In an interview, one magistrate judge reported “that he tried twenty-five jury trials pursuant to § 636(c) during his four-year tenure.”\footnote{See Chesley, supra note 116, at 763.} Districts have promoted the use of consent jurisdiction through “one case, one judge” systems\footnote{See Aaron E. Goodstein, The Expanding Role of Magistrate Judges: One District’s Experience, Fed. Law., May/June 2014, at 69, 78.} and pilot programs.\footnote{See Kristen L. Mix, The Roles of U.S. Magistrate Judges in the District of Colorado, Colo. Law., Jan. 2016, at 63, 64.} In “one case, one judge” systems, such as in the Eastern District of Wisconsin, magistrate judges are placed on the civil assignment wheel.\footnote{See Goodstein, supra note 254, at 78.} In doing so, when a civil case is filed, it will be randomly assigned to either a district judge or a magistrate judge.\footnote{See id.} Then, if the parties consent, the case will remain with the magistrate judge, and if the parties do not
consent, it will be reassigned to a district judge. But some of
districts “require the parties to affirmatively opt out of trial before a
magistrate judge rather than opt in.” The requirement to
affirmatively “opt out” effectively further increases the number of
blind consents because parties are much more likely to accept this
assignment and fail to “opt out.” In contrast, parties are much less
likely to “opt in” to such assignment.

Pilot programs have similarly increased consent cases. Similar to the program described in the Eastern District of Wisconsin, Colorado implemented a pilot program in 2014, placing full-time magistrate judges “on the wheel” for random assignments of civil cases, permitting parties in cases drawn to magistrate judges to consent to jurisdiction. Consequently, “consent cases have increased by approximately 500% since 2012,” including an increase in magistrate judges handling “motions relating to evidentiary issues and motions for summary judgment, as well as civil jury and bench trials.”

From this discussion, it is clear that district court supervision
and litigant consent are crucial to the constitutionality of magistrate judges. Yet, what constitutes adequate supervision and consent draws the constitutionality of magistrate judges into question. If our magistrate judge system is constitutional, it is teetering right on the edge.

3. Other Issues

The above concerns are significant with respect to the
magistrate judge system. Commentators have suggested others as
well. For example, some commentators have speculated whether a
magistrate judge can issue a final judgment on third-party intervenor

258. See id.
260. See id.
261. See id. at 995–96.
262. See id. at 998.
263. See Mix, supra note 255, at 64.
264. See id.
265. See id.
266. See id.; see also Welsh, supra note 259, at 995–96.
267. See e.g., Lim, supra note 200, at 986–87.
issues. Others have questioned whether a district court needs to review objections not raised before a magistrate judge, how special issues involving pro se litigants are handled, and whether magistrate judges should be overseeing competency hearings. Still others have suggested there are issues surrounding the lack of diversity on the magistrate judge bench.

The lack of diversity of magistrate judges is alarming, especially as initiatives have increased to bring diversity to the district court bench. Specifically, “[f]rom 2009 to 2016, females on the district court bench increased . . . from 19.4% to 32.6%, and non-white district judges increased . . . from 16.4% to 27.0%.” In stark contrast, there has not been a similar shift for magistrate judges: “During this same period, the number of female magistrate judges increased only by 7.2% and non-whites increased by a paltry 1.2%.” Further illustrating diversity issues, “[i]n 1999, there were 450 full-time magistrate judges” with 348 being men, 102 being women, and 41 non-white. And in 2016, the number of magistrate judges increased to 519 magistrate judges, with 324 being men, 195 being women, and 76 non-white. These numbers represent “only about a 5.5% increase in non-white judges” between 1999 to 2016.

Although this Article focuses on the problematic practice of R&Rs, it is hard to ignore such a stark lack of diversity. Especially as we consider the increased number of magistrate judges and their extensive work within the courts, the lack of diversity posits further

268. See id. (describing the circuit court split on the issue of whether a magistrate judge can issue a final judgment in third-party intervenor issues).
269. See generally Koller, supra note 140 (analyzing the circuit split between the Fourth Circuit and other circuits on this issue).
271. See Jeffrey Manske & Mark Osler, Crazy Eyes: The Discernment of Competence by a Federal Magistrate Judge, 67 LA. L. REV. 751, 751–52 (2007) (discussing competency hearings and issues with having magistrate judges determine competence when they may not have the necessary training to do so).
272. See Jennifer L. Thurston, Black Robes, White Judges: The Lack of Diversity on the Magistrate Judge Bench, 82 L. & CONTEMP. PROBS. 63, 66 (2019) (criticizing the lack of diversity on the magistrate judge bench, especially when compared to the improvements made in diversity in other areas of the judiciary).
273. See id.
274. See id.
275. See id. at 77.
276. See id.
277. See id.
issues within the magistrate system, such as how it may impact the outcome of cases.278

III. HYPOTHESIS

Before analyzing the results of the study, it is important to understand what to look for. As addressed above, magistrate judges occupy a unique position in our constitutional structure.279 Magistrate judges are inferior officers, meaning they can be appointed by district court judges.280 But their inferior status hinges on the oversight authority of the district court.281 Likewise, a magistrate judge’s ability to rule on non-public claims hinges on the district court’s independent review of the claim or upon litigant consent.282

Looking ahead to the study, then, we should expect to see a meaningful reversal rate of magistrate judge decisions, consistent with the district court’s supervisory responsibilities. Of course, that is not to say that magistrate judges should be reversed because of the nature of the position that they hold; it just means that magistrate judges, like all people, make mistakes, and those mistakes should be caught by the district court judges. Further, it is reasonable to assume that district court judges would view the law and facts differently at least some of the time.

In order to determine whether that is happening, it is helpful to look at the rates at which district courts are reversed by appellate courts. In 2020, 8.8% of appeals terminated on the merits across all

278. See id. at 71.

Even when a magistrate judge’s demographics are different from the litigants’, just like a district judge, when deciding areas of novel or complicated legal issues, a magistrate judge is likely to be influenced by orders issued by others on the district’s bench. Thus, orders from a judge of a diverse background may impact outcomes of cases with which the judge has no direct contact.

Id.

279. See discussion supra Part II (discussing the creation and roles of magistrate judges).


282. See id.
circuits were full reversals. Notably, however, the standard of review on these appeals is generally much more deferential than the standard purportedly employed by district court judges when reviewing R&Rs submitted by magistrate judges. Recall that the standard of review for R&Rs on dispositive matters is de novo, which means that the district court judge should be reviewing the matter as if it were being heard in front of them for the first time. The standard of review on appeal, however, depends on what type of question is being reviewed. Generally, there are three categories of decisions: “denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ‘abuse of discretion’).” As such, all cases that do not present questions of law on appeal are reviewed with some level of deference towards the district judge’s decision.

Since cases on appeal are generally reviewed under standard that involves at least some level of deference to the district court judges instead of de novo review, if district judges’ constitutionally mandated supervisory responsibilities are being followed, we should expect to see higher reversal rates for R&Rs than we do for cases on appeal. That, however, is not the hypothesis we set forth. Instead, we hypothesized that reversal rates for R&Rs will be lower than or equal to reversal rates on appeal. After all, why would district court judges choose to conduct a truly de novo review when they can merely conduct a de novo determination—whatever that means—

283. See U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits by Nature of Proceeding: Judicial Business tbl.B-5, U.S. CTS. (Sept. 30, 2020), https://www.uscourts.gov/sites/default/files/data_tables/jb_b5_0930.2020.pdf [https://perma.cc/7ZXX-7T2M]. The data reported by the U.S. Courts system is not directly comparable because of how the data is summarized and computed. For example, “Affirmed” cases include those that are affirmed in part and reversed in part. See id. at n.1. In our study, we will report the percentage of R&Rs that were either modified (more akin to “affirmed in part and reversed in part”) or wholly reversed. Because of this reporting difference, we should expect to see some natural variation.


286. See SOLOMON ET AL., supra note 284, at 2 (discussing the different standards of review used by courts of appeals).


after *Raddatz*?\(^{290}\) Moreover, with heightened caseloads, it is unclear whether district court judges could possibly conduct de novo reviews of every dispositive motion assigned to a magistrate judge even if they wanted to.\(^{291}\) And even if they could, conducting a true de novo review of every R&R would greatly reduce the efficiencies to be gained from the use of magistrate judges.\(^{292}\)

If our hypothesis proves correct, there are important constitutional questions for our judicial system, and our nation, to grapple with. Without true supervision, critiques that magistrate judges are appointed unconstitutionally carry greater weight. Likewise, critiques that magistrate judges are unconstitutionally exercising Article III powers stand on more solid ground, especially considering the astonishingly weak de novo determination requirement with respect to R&Rs and the risk that litigants are being coerced to consent to magistrate judges hearing their cases. These are important questions that strike at the heart of our justice system; practicality cannot justify constitutional infirmity.

IV. STUDY

A. Origins of Study

This study was designed to identify and analyze possible trends in the magistrate judicial system in relation to the frequency with which magistrate judges’ R&Rs are adopted, modified, or rejected by the U.S. district court judges.\(^{293}\) The authors hypothesized that magistrate judges are effectively doing the job of Article III judges in many situations, thereby circumventing the power of Article III judges in violation of the Constitution.\(^{294}\) Said differently, the authors hypothesized that because district court judges do not adequately review a great majority of the decisions rendered by magistrate judges, the district court judges effectively transfer the Article III powers bestowed only to them to magistrate judges instead.\(^{295}\) Therefore, the basis of this study was to empirically track the extent


\(^{291}\) See *Koller*, supra note 140, at 1560 (explaining that the federal magistrate system was established to assist overworked district court judges).

\(^{292}\) See id. at 1560–61.

\(^{293}\) See infra Tables 1, 2, 3, 4, 5, 6.

\(^{294}\) See *supra* Part III.

\(^{295}\) See *supra* Part III.
to which district court judges involve themselves in additional legal analysis of magistrate judge R&Rs.

B. Methodology

This study compiled and analyzed data from the United States District Court for the District of Minnesota. Specifically, the authors analyzed approximately 1,515 R&Rs and their corresponding judicial orders from January 2017 to December 2019. The total number of cases tracked for this study consisted of both criminal and civil cases and included a notable portion of Social Security Income Disability cases. There was no specific type of case or subject material discussed in an opinion that was not considered for this study. Every R&R published by a magistrate judge and subsequently addressed by the district court between January 2017 and December 2019 was included in the total data set analyzed. Within each R&R, the following key data points were collected: (1) the case name, (2) the magistrate judge who authored the R&R, (3) the magistrate judge’s ruling, (4) the district court judge who was assigned the case, (5) the district court judge’s subsequent decision, (6) the subject matter of the case, (7) the motion addressed in the case, (8) the caseload per year for the magistrate judge, (9) the caseload per year for the district court judge, and (10) the decision dates for both the R&R and the subsequent district court decision.

Within this complete set of R&Rs is a subset of data that includes only the R&Rs modified or rejected by district court judges. This subset tracked additional data points: (1) the rationale for modification or rejection, (2) the length of the district court judge’s subsequent opinion, (3) a general classification for the alteration made by the district court judge, and (4) whether the original R&R was objected to prior to the district court’s consideration of the R&R. This study also includes a collection and analysis of the judicial backgrounds of both the magistrate judges and district court judges, as well as an overview of the backgrounds of all currently serving Article III judges at the time this study was conducted in 2021.

296. See infra Tables 1, 2, 3, 4, 5, 6.
297. These R&Rs are also referred to by the authors as ‘altered’ cases.
C. Results

After analyzing 1,515 R&Rs and their corresponding district court decisions, the authors quantified several variables that effectively illustrate the relationship between magistrate and district court judges for the District of Minnesota. We believe that the most important variable is the percentage of R&Rs altered in some way by district court judges. This variable compares the number of altered R&Rs that were either adopted in part, modified completely, or rejected outright to the total number of R&Rs considered by district court judges during the period of January 2017 to December 2019. Of the 1,515 R&Rs, 118 R&Rs fit this “altered” criteria, meaning that only approximately 7.8% of R&Rs were changed in some way by district court judges upon their review. Alternatively, this means that approximately 92.2% of magistrate judges’ R&Rs are adopted wholly by district court judges after a supposedly de novo review (in most cases). Upon further analysis, the data shows that of the 118 R&Rs that district court judges altered, 88 R&Rs were adopted partially, while only 30 of those R&Rs were rejected altogether. This results in a modified rate of approximately 5.8% and an outright rejection rate of 1.98% for R&Rs throughout the specified period.298 Looking further into the subset of the 118 R&Rs that were altered, the authors found that 97 of these cases were civil matters, while only 21 were criminal cases. Said differently, 82.2% of altered R&Rs were civil cases, and 17.8% were criminal cases.299

Considering the data by year, the authors observed that the number of altered R&Rs fluctuated somewhat.300 The number of R&Rs altered for 2017, 2018, and 2019 were 43, 25, and 50, respectively. Within these per-year totals, the number of R&Rs that were completely rejected by district court judges remained fairly constant. Therefore, the source of fluctuation came from the number of modified R&Rs per year (which ranged from 34 in 2017, to 17 in 2018, to 37 in 2019). Of course, one explanation for the lower number of altered R&Rs in 2018 could be a reduced number of cases considered. However, the caseload per year increased with 459 total cases reviewed in 2017, 501 total cases in 2018, and 555 total cases in 2019.

298. See infra Table 1.
299. See infra Table 2.
300. See infra Table 1.
Analyzing the data further, we divided each year into thirds to further identify any possible trends or outliers related to the rate of alteration by district court judges. The average number of R&Rs modified in part within each year’s tercile was approximately 9.8.\textsuperscript{301} In contrast, the average number of R&Rs rejected outright within each year’s tercile was approximately 3.3 (or approximately 13.1 R&Rs altered per each year’s tercile). Using these averages as a baseline, the authors observed three periods of time that featured notably higher alteration rates by district court judges. From January 1, 2017, through April 30, 2017, there were seventeen R&Rs altered by district court judges (fourteen modifications, three rejections), from September 1, 2017, through December 31, 2017, sixteen R&Rs were altered (thirteen modifications, three rejections), and from January 1, 2019, through April 30, 2019, twenty-four R&Rs were altered (twenty-two modifications, two rejections). Removing the data of these three time periods from the universe of data that the study considered would result in the average number of altered R&Rs for each year’s tercile dropping from 13.1 to 10.167, which is a 22% reduction. This indicates that the rate of alteration may be skewed upwards by these outlier terciles (perhaps related to seasonal patterns where district court judges in Minnesota work harder in the off-summer months) and may instead be even lower than this study demonstrates.

Next, the study focused on individual magistrate and district court judges to ascertain whether certain magistrate judges had higher rates of alteration for their R&Rs than their peers and whether specific district court judges had higher rates of alteration of the R&Rs they reviewed in comparison to their fellow district court judges.\textsuperscript{302} Based on each magistrate judge’s respective caseload for 2017–2019, the authors found that the average rate of alteration of an R&R for a magistrate judge was approximately 6.49%.\textsuperscript{303} However, when considering each magistrate judge specifically, only two magistrate judges’ rates of alteration are somewhat close to that average.\textsuperscript{304} Magistrate Judge Leo Brisbois’s rate of alteration was 6.62% over a total caseload of 272 cases, and Magistrate Judge

\textsuperscript{301} See infra Table 1.
\textsuperscript{302} See infra Tables 3, 4.
\textsuperscript{303} See infra Table 3.
\textsuperscript{304} The standard deviation (\(\sigma\)) for the rate of alteration of R&Rs for magistrate judges was 3.71, indicating that the set of data points considered fall far from the mean. See infra Table 3 (calculating standard deviation from the mean rate of alternation).
David Schultz’s alteration rate was 5.16% on 213 total cases. Every other magistrate judge’s alteration rate either fell below 3.37% or above 10.53%, with a total range of 2.45% to 11.97%. Such a drastic discrepancy in alteration rates was not similarly observed with district court judges. Instead, the average rate of a district court judge altering an R&R ended up being 3.45%, with only three district court judges’ rates falling outside of one standard deviation. It is important to note that during the time period examined for this study, the collection of both magistrate and district court judges examined for these calculations changed due to magistrate terms expiring or judges retiring and being replaced by new appointees.

The most striking result observed through this study was the overall lack of alteration of R&Rs by district court judges. Even with the fluctuation of alteration rates from year to year, only 7.78% of R&Rs being either modified or rejected by district court judges’ points to an obvious reality: the overwhelming majority of R&Rs are adopted completely. Looking closer at the 118 R&Rs that district court judges altered, the authors found that nearly half of those R&Rs were altered based on procedural issues or for a factual correction, meaning that a great deal of altered R&Rs were not altered due to a question of law. This further suggests that a majority of the legal analysis is being conducted by the magistrate judge with district court judges only rarely actually deciding relevant questions of law.

The significant differences in altered cases from year to year was another notable result from the study. Based on the scope of the data collected, it is difficult to tell if the lesser number of altered R&Rs for 2018 is an outlier compared to the number of altered

305. Magistrate Judge Janie Mayeron’s rate of alteration was 33.33%, but only published 3 R&Rs during the study’s considered time period due to her retirement in 2017, therefore her rate was excluded from the average calculation. See infra Table 3.
306. See infra Table 4.
307. \[\sigma = 1.931; \text{Judge Donovan Frank’s rate was 1.19\% (total caseload of 420), Judge Eric Tostrud’s rate was 6.56\% (total caseload of 122), and Judge Wilheminia Wright’s rate was 8.09\% (total caseload of 346). See infra Table 4 (calculating standard deviation from the rate of alteration mean).}\]
309. See infra Table 1 (showing the percent of R&Rs modified).
R&Rs for 2017 and 2019, or if, when considering years beyond 2017–2019, that 2018 instead represents more of the norm. If the 2018 alteration rate is more in line with the overall average rate of alteration for R&Rs, there would be an even stronger case that district court judges are simply rubber-stamping decisions made by magistrate judges.

One obvious result that is notable is the discrepancy in magistrate judges’ rates of alteration for their published R&Rs. Three magistrate judges with the highest rates of alteration accounted for nearly 45% of all altered R&Rs, while the remaining seven magistrate judges accounted for the rest. This disproportionate result would warrant future research to determine why these three magistrate judges’ R&Rs face such drastically different outcomes upon their review by district court judges. Upon initial consideration of Magistrate Judge Wright’s, Noel’s, and Rau’s backgrounds, there is no obvious indicator shared between the three, such as a lack of experience, that would explain this heightened rate of alteration.

D. Explaining the Results: Context and Potential Causes

The finding that only 7.8% of the R&Rs in the study data set were reversed or altered begs several questions, two of which will be examined here. First, is that a normal rate when compared to relevant benchmarks? Second, what are the potential causes of this substantial affirmance rate?

1. Reversal and Affirmance Rate Comparisons

As noted above, the U.S. Courts reported that 8.8% of appeals terminated on the merits in FY 2020 ended in reversals. This number is full reversal, since U.S. Courts statistics count terminations that were affirmed in part and reversed in part as affirmances. In our study, we found that only 30 R&Rs were rejected completely, leading to a 2% reversal rate (when calculated in a comparable manner as U.S. Courts statistics). This means that

310. See infra Table 3.
311. Elizabeth Cowan Wright (10.53%), Franklin Noel (11.97%), and Steven Rau (11.84%) combined for 53 altered R&Rs. See infra Table 3.
312. See infra Table 5.
313. See infra Table 1.
314. See U.S. COURTS, supra note 283.
315. See id.
the comparable reversal rate for district courts decisions was 4.4 times that of the reversal rate for magistrate judge R&Rs.\textsuperscript{316} This is especially notable since the courts of appeals applies much more deferential standards of review in many of its cases, leading to greater chance of affirmance.\textsuperscript{317}

Our study also found that 92.2% of all R&Rs were accepted completely without alteration. While U.S. Courts reports this affirmance number differently, only 66.5% of appeals were terminated with affirmances.\textsuperscript{318} This affirmance number includes cases that were affirmed in part and reversed in part, so the complete affirmance number (which would be directly comparable with ours) must be lower (though by how much we cannot say).\textsuperscript{319} In sum, when compared to U.S. Courts statistics on the disposition of cases at the courts of appeals, magistrate judge R&Rs were 4.15 times less likely to be reversed, and were wholly affirmed at least 38% more of the time.\textsuperscript{320}

The official statistics are not the only benchmark we can use. In a 2012 article, Robert Anderson IV conducted a long-range analysis of affirmance and reversal rates and how the standard of review impacted the likelihood of affirmance.\textsuperscript{321} Because the data from Anderson’s study encompasses a long time horizon and broad geographic scope, it can provide a reasonable benchmark to the results of our study. Further, the Anderson data are sub-categorized by both disposition (affirmed, affirmed in part and reversed in part, and reversed/vacated) and standard of review, allowing for more ready comparisons to our study results.\textsuperscript{322} Unlike the U.S. Courts data, the Anderson study enables us to compare true, complete affirmance rates to the results of our analysis.\textsuperscript{323}

Using data from the Anderson study, the complete affirmance rate for analyzed cases was 59.5%, with little variation across

\textsuperscript{316} See infra Table 1; see also U.S. Cts., supra note 283 (comparing reversal rates).

\textsuperscript{317} See supra text accompanying note 289.

\textsuperscript{318} See U.S. Cts., supra note 283.

\textsuperscript{319} See id. (noting the other categories included with the total affirmances).

\textsuperscript{320} See infra Table 1; see also U.S. Cts., supra note 283 (comparing this study with U.S. Court data).


\textsuperscript{322} See id. at 24.

\textsuperscript{323} See id.; see also U.S. Cts., supra note 283 (showing the affirmed decision category data).
standards of review. Cases with de novo review were affirmed completely 58.4% of the time. This stands in stark contrast to our findings, which showed that 92.2% of all R&Rs were affirmed in whole. This discrepancy echoes our comparison to the U.S. Courts official statistics. The Anderson study further found that 10.4% of de novo cases were affirmed in part and reversed in part, while 14.1% of all cases met the same fate. In our study, 5.8% of R&Rs were altered in some way prior to acceptance (which is similar to affirmed in part and reversed in part dispositions). Finally, the Anderson study found that 26.5% of all cases were reversed or vacated, with 31.3% of de novo cases falling into that category (as expected, the lowest reversal rate was for the highly deferential “abuse of discretion” review, at 19.5%). Our study found that R&Rs were fully rejected (akin to a reversal or vacation) in only 2% of cases. There is a clear, massive divide in reversal rates between our study of magistrate judge R&Rs and the Anderson’s study of court of appeals reversal rates of district court decisions. Having validated through two distinct data sources that district courts in our study affirmed magistrate judge R&Rs at much higher rates than courts of appeals generally do for district courts, and reverse at much lower rates, we next turn to potential explanations underlying this phenomenon.

2. Possible Explanations of Study Results

a. Present Study Limitations

One of the easiest explanations for the difference from our study results and our chosen benchmarks is that the data we analyzed is simply too little to generate a generalized result and cannot be accurately compared to the benchmarks. The data set considered for this study is both vast and discrete. While 1,515 cases is a significant sample size to base our initial conclusions on in support of our thesis, the data set is limited in several ways. First, this data set only provides a snapshot of the relationship between magistrate and

324. See Anderson IV, supra note 321, at 24.
325. See id.
326. See id.; see also infra Table 1 (comparing affirmed cases).
327. See Anderson IV, supra note 321, at 24.
328. See supra Table 1.
329. See Anderson IV, supra note 321, at 24.
330. See infra Table 1; see also Anderson IV, supra note 321, at 24.
district court judges, as it only includes cases considered within the District of Minnesota. While the mechanics of the magistrate judicial system are federally mandated, this does not necessarily mean that the same results from this study will be seen in every other district. There may be different processes by which magistrate judges are assigned cases across districts, or there could be particular types of cases that magistrate judges in certain districts are less likely to handle than they would be in other districts. The composition of cases that magistrate judges are assigned could vary somewhat across districts, but more importantly, the use of the magistrate judge system from the perspective of district court judges could also vary greatly. It is certainly possible that the relationship between magistrate judges and district court judges in other states share the same or similar characteristics as the relationship observed in the District of Minnesota. Still, such an assumption should not necessarily be made given the potential differing roles of magistrate judges from district to district.

Another notable limitation of the current study was the discrete time period from January 2017 to December 2019. Despite collecting 1,515 cases, this number still only represents a fraction of the total cases that are considered by magistrate and district court judges. This does not mean that a more comprehensive study of the magistrate judge system necessarily should consider every single R&R and subsequent decision that has been rendered over the past fifty years, but including more data points by expanding the time period of considered cases would likely be useful. We believe that the three-year period utilized for this study provided enough cases to identify clear trends in the magistrate judge system that can be extrapolated across the entire system. Still, the inclusion of additional years of data could further substantiate or contradict our conclusions.

b. District Court Abdication

The next easiest explanation for our results (and the least satisfying) is simply that district courts, which are overworked and overwhelmed, have simply abdicated their responsibility to conduct a true de novo review of R&Rs. This could explain why our study found such a high affirmance rate: district court judges assume that

331. See U.S. Cts., supra note 283.
332. See infra Table 1.
the magistrate judges did “good enough” work, perhaps by conducting a cursory review before approving the R&R. That said, we would expect even a review akin to “clearly erroneous” review to generate more reversals than we found in our study. And importantly, such “rubber-stamping” of R&Rs would be constitutionally insufficient for both Appointment Clause and separation of powers reasons.

c. Legal Model of Judicial Decision-Making

Some scholars studying judicial decision-making have developed the legal model of judicial decision-making. This model contends that a sense of duty to certain legal principles and norms drives judges’ decisions, and that these judges are motivated primarily to apply settled law where possible. This would assume, then, that lower courts are more constrained by precedent. When the law is not settled and is ambiguous, this model assumes that judges seek to discover the true purpose and intent of the law in good faith. In fact, this is the version of adjudication that courts want the public to perceive.

In order for this model to explain the high affirmance rates we observed in our study, we would have to assume that judges at both levels of adjudication (the magistrate judges and the district court judges) each came to the same conclusions about the law and facts. While this is not too unlikely in very settled areas of the law, it is difficult to assume that these judges would so consistently agree on what the meaning of ambiguous laws and facts were. Good faith assessments of unclear law regularly lead to splits in authority and

333. For example, the Anderson study found that cases using a “clearly erroneous” standard were reversed 22% of the time, cases using an abuse of discretion standard were reversed 19.5% of the time, and cases employing both standards were reversed 14.2% of the time. See Anderson, supra note 321, at 23–24. Even taking the most generous view from the Anderson study, our study still found an R&R reversal rate that was 7.1 times lower than we would expect if district court judges were reviewing R&Rs using the most deferential review standards.


337. See Parameswaran, supra note 335, at 2–3.

338. See id.
disagreement among courts.\textsuperscript{339} We should expect that same level of bifurcation to develop here, but our findings show that the district courts are much more likely to agree fully with the magistrate judges’ R&Rs. To accept this model would require assuming a high level of objective discoverability of law’s meaning.

d. Attitudinal Model of Judicial Decision-Making

Another model to understand judicial decision-making is the attitudinal model, which assumes that judges decide cases in the manner that maximizes their own individual policy preferences.\textsuperscript{340} In short, judges behave like legislators.\textsuperscript{341} For this model to hold, one must assume that the independence of individual judges (and the judiciary as a whole) is strong enough to resist the influence of outside forces (like public opinion or other government actors).\textsuperscript{342} This model does have at least one key constraint, namely that the presence of government actors could constrain a judge’s true-preference vote if that vote would result in backlash from the executive or legislature that replaced the court’s decision.\textsuperscript{343} Such a possibility could lead a judge to vote to preserve the status quo—despite it not being their preferred policy outcome—in order to avoid other branches of government from moving even further away from the judge’s preferred outcome.\textsuperscript{344} This model might be most applicable to the Supreme Court because of the nature and institutional perch of the Court.\textsuperscript{345}

For the attitudinal model to explain the abnormally high level of affirmance in our study results, we would need to assume two things: first, that both the magistrate judges and district court judges were making decisions based on their policy preferences; and second, that the policy preferences of the magistrate judge and the reviewing district court judge aligned nearly perfectly a vast majority of the time.\textsuperscript{346} These assumptions, especially the second, are not supported by any data in our study, and would be an interesting area.


\textsuperscript{340} See Parameswaran, supra note 335, at 2.

\textsuperscript{341} See id.

\textsuperscript{342} See Nash & Pardo, supra note 336, at 335.

\textsuperscript{343} See id. at 336.

\textsuperscript{344} See id.

\textsuperscript{345} See id. at 335.

\textsuperscript{346} See id.
of future research. It seems difficult to fathom—given the ideological diversity and varying backgrounds of the cohort of magistrate judges and district court judges—that such alignment of policy preferences could occur so frequently and consistently.\footnote{But see id. at 335 (stating that under the attitudinal model, judges will vote for their “sincere preferences” regardless of policy preferences).} This could, however, explain the variations observed in affirmance rate between judges.\footnote{See id. at 335–36.} If, for example, one magistrate judge is out-of-step ideologically with the rest of the magistrate judges, one would expect her affirmance rate to look different. As a general matter, though, we assume that the ideological differences, especially at the district court level, negate the validity of the assumptions required for the attitudinal model to explain why magistrate R&R affirmance rates were so abnormally high in our study.\footnote{See generally id. (explaining why lower court judges may decide cases based on the policy preferences of higher court judges).}

e. Reputational Model of Judicial Decision-Making

Yet another model attempting to explain judicial decision-making is the reputational model.\footnote{See Alma Cohen et al., Judicial Decision Making: A Dynamic Reputation Approach, 44 J. LEGAL STUD. 133, 133 (2015).} This model assumes that judges make decisions with an eye on establishing a reputation that will ultimately maximize their payoffs over the long-term, even if that means suppressing some of their personal preferences.\footnote{See id. at 133, 134.} This model seems especially ripe for judges who stand for reelection or reappointment, since reputation will play a more immediate role in a judge’s job security.\footnote{See id. at 135.} The possibility of reappointment (or, conversely, not being reappointed) can impact decisions directly by changing who holds the decision power, and indirectly by creating incentives to secure reappointment.\footnote{See Nash & Pardo, supra note 336, at 336.} For judges, reversals could be seen as reputation-damaging public rebukes that should be minimized.\footnote{See id. at 136.}

In this model, one would assume that a judge’s decisions would largely conform to the expectations of those who held appointment power, and the degree of conformity would depend on how much
power that appointing body had over the appointment process.\textsuperscript{355} One would also expect that as the time for reappointment approached, the decisions of the judge seeking reappointment would be maximally conforming to the appointer’s preferences (so that conformity was clearest right as reappointment approached).\textsuperscript{356} This model has some ready applicability to magistrate judges.\textsuperscript{357} As discussed above, magistrate judges are appointed to fixed terms by the active district court judges in the district, and magistrates may also be reappointed.\textsuperscript{358} In short, magistrate judgeships possess the baseline characteristics needed to enable the reputational model.\textsuperscript{359} It also serves as a potential explanation for the abnormally high level of affirmance.\textsuperscript{360} When magistrate judges work on cases, they do so knowing who the district court judge is.\textsuperscript{361} They may alter their work in order to increase their reputation with the judge, tailoring each R&R to the overseeing judge’s preferences to enhance their reputation and thus their chances for reappointment.\textsuperscript{362} By playing to the expectations of each district court judge, the magistrate judges may be able to increase their affirmance rate.\textsuperscript{363}

This is a different incentive structure than district court judges have when they make decisions.\textsuperscript{364} First, district court judges are not appointed by and do not serve at the pleasure of the reviewing court of appeals, so district court judges may have less incentive to act to enhance their reputation with that court by tailoring their decisions.\textsuperscript{365} Further, most appeals are (at least initially) heard by a randomly assigned three-judge panel.\textsuperscript{366} Since the district court judge would not know the judges assigned to the appeal (or even whether the decision

\begin{thebibliography}{99}
\bibitem{355} See Cohen et al., supra note 350, at 137.
\bibitem{356} See id.
\bibitem{357} See Hon. Philip M. Pro, United States Magistrate Judges: Present but Unaccounted for, 16 Nev. L.J. 783, 784–86 (2016).
\bibitem{358} See id. at 792.
\bibitem{359} See id. at 785–86 (explaining the interdependent relationship between federal district judges and magistrate judges in regards to judicial decision-making).
\bibitem{360} See id. at 797 (explaining why district judges affirm magistrate judge decisions).
\bibitem{361} See id.
\bibitem{362} See id. at 801.
\bibitem{363} See id. (explaining that magistrate judges have reported to value their judicial reputation).
\bibitem{364} See id at 784–85.
\bibitem{365} See id.
\end{thebibliography}
would be appealed at all!), their ability and incentive to make
decisions based on their reputation with a reviewing court would be
substantially depressed.\footnote{See Pro, supra note 357, at 813–14.}
Of course, district court judges seeking
elevation may be crafting their decisions to enhance their reputation
with those who actually could elevate them, whether that be a
political party, a President, senators, or a nominating committee.\footnote{See id. at 785–86 (evaluating how judges base their decisions on what
individuals can enhance their reputations would prefer).}
If this were the case, the district court judge would make decisions
irrespective of the reviewing court and focus on reputation-building
within the relevant group with elevation powers.\footnote{See id.}

All of this taken together suggests that, at least more than the
legal or attitudinal model, the reputation model possesses some
potential validity to explain why affirmance is so high in our study.\footnote{See Nash & Pardo, supra note 336, at 336.}
By highlighting the different incentive structures a reputational
motivation might have on magistrate judges versus district court
judges, this model could help explain the wide discrepancy between
the affirmance rates.\footnote{See Pro, supra note 357, at 784–85 (explaining how the differences in
appointment affect judicial decision-making).}
Further research should be conducted to
determine the extent to which magistrate judges act to enhance their
reputations with those who have the ability to reappoint them. This
could include analysis of whether magistrate judge R&Rs vary
according to the ideology of the district court judge overseeing the
case.

\textbf{f. Principal-Agent Model of Judicial Decision-Making}

Another widely discussed model of judicial decision-making is
the principal-agent model.\footnote{See, e.g., Pauline T. Kim, Beyond Principal-Agent Theories: Law and
the Judicial Hierarchy, 105 N.W. L. REV. 535, 535 (2011) (reviewing theories of
judicial decision-making but not mentioning magistrate judges).}
Before diving in, it should be noted that
while this model has been the subject of much scholarship,
magistrate judges are often omitted from the discussion.\footnote{See id.} Under the
traditional conception of this model, lower courts are agents of
higher courts, and the higher courts set policies to be implemented
by lower courts.\textsuperscript{374} The lower courts still have their own preferences, views, and goals, which leads to a classic principal-agent dilemma when those goals conflict.\textsuperscript{375} Generally, the “law” is viewed as the manner in which upper courts communicate their preferences to or exercise control over their lower court agents.\textsuperscript{376} Other versions of this model include conceptions where federal judges are instead agents of Congress, their appointing president, or the public; where state supreme courts are agents of the United States Supreme Court; and where the three-judge panel on the courts of appeals are agents for the en banc court.\textsuperscript{377}

The principal-agent model has been studied through both the common-law perspective (establishing the elements of legal agency) and the economic perspective (understanding the incentives available to induce the agent to act in the principal’s interests).\textsuperscript{378} Summarizing the key tenets of these two perspectives, the principal-agent model requires that a binding, consensual relationship be created between the principal and agent, that the agent has power to bind the principal, that the principal can control the agent’s actions, that the principal is able to set incentives to induce the agent to act loyally, and that the principal has the ability to monitor the agent for fidelity.\textsuperscript{379} In order to ensure the agent is acting in the principal’s interests, the principal must at least occasionally monitor the agent’s behavior, which she can do by relying on information provided by a third party, trusting an agent’s self-reporting, or directly monitoring the agent herself.\textsuperscript{380} Each of these varies in its reliability of information and cost to procure.\textsuperscript{381} The principal in judicial decision-making models also has one unique monitoring capability: the ability to render the agent’s decision null and void through reversal.\textsuperscript{382} This

\textsuperscript{374.} See id. at 535–36. Generally, agency is a fiduciary relationship in which a principal and agent agree that the agent will act on the principal’s behalf, in the principal’s interest, and subject to the principal’s control. Agents owe the duty of loyalty to the principal and must avoid acting in their own self-interest when acting on behalf of the principal. See Restatement (Third) of Agency § 1.01 (2006).

\textsuperscript{375.} See Kim, supra note 372, at 536.

\textsuperscript{376.} See id.

\textsuperscript{377.} Id. at 537–41.

\textsuperscript{378.} See id. at 541, 545.

\textsuperscript{379.} See id. at 544–45.


\textsuperscript{381.} See id.

\textsuperscript{382.} See Parameswaran, supra note 335, at 3.
ability to negate the legal effect of an agent’s decisions is fairly unique in principal-agent relationships.\textsuperscript{383}

Some, however, disagree with the idea that lower court judges (even those who are selected and reappointed) act as agents for a higher-court principal.\textsuperscript{384} They point to the fact that higher courts do not contract with lower courts for their services and that the higher courts have no ability to control judicial appointments nor structure the judicial hierarchy to achieve the higher court’s interests.\textsuperscript{385} Further, while judicial principals have the unique ability to reverse the actions of lower courts, scholars argue that reversal alone will not ensure compliance with the preferences of the higher courts when they differ from the goals of the lower courts.\textsuperscript{386} Indeed, when lower courts get reversed they lose their preferred outcome, which is the same final disposition as if they had acted according to the principal’s preference and avoided reversal.\textsuperscript{387} In short, higher courts have very few tools (especially the usual tools non-judiciary principals would have) to shape agent behavior, calling into question the validity of the model.\textsuperscript{388}

To test the applicability of this model, Nash and Pardo studied bankruptcy judges.\textsuperscript{389} These judges are unique because they are non-Article III judges who are appointed for fixed, renewable terms by the courts of appeal.\textsuperscript{390} From the pool of bankruptcy judges, the circuit’s judicial council appoints judges to also serve on the Bankruptcy Appellate Panel, which can hear initial appeals of bankruptcy cases (meaning that some bankruptcy judges sit on two courts—the bankruptcy court and the Bankruptcy Appellate Panel).\textsuperscript{391} Because bankruptcy judges are subject to reappointment and elevation by a court of appeals principal (who can actually exercise some normal oversight tools over the bankruptcy judge agents), Nash and Pardo believed that these courts would be a fertile

\textsuperscript{383.} Id.
\textsuperscript{384.} See, e.g., Nash & Pardo, supra note 336, at 3.
\textsuperscript{385.} See Kim, supra note 372, at 554–55. (discussing how it is Congress that creates the lower federal courts and funds them, and the President and Senate that are responsible for judicial appointments).
\textsuperscript{386.} See id. at 556.
\textsuperscript{387.} See id. at 557.
\textsuperscript{388.} See id. at 558.
\textsuperscript{389.} See generally Nash & Pardo, supra note 336, at 334.
\textsuperscript{390.} See id. at 338.
\textsuperscript{391.} See id. at 339
area to observe principal-agent judicial decision-making, if it existed.\textsuperscript{392}

In their analysis of bankruptcy decisions and appeals, Nash and Pardo found evidence that ideology influenced bankruptcy judge decisions but found no evidence of agent voting behavior.\textsuperscript{393} They concluded that if the threat of reappointment was not sufficient to encourage principal-agent behavior within bankruptcy judges, it was highly unlikely that the principal-agent model would be valid in other judicial contexts where no reappointment sanction is possible.\textsuperscript{394}

In order for the principal-agent model to explain the results of our study, we would first have to establish who the principal was.\textsuperscript{395} Magistrate judges are subject to reappointment, and thus presumably have incentives to work on behalf of their appointing judges.\textsuperscript{396} The principal may be the district courts of the district as a whole, since the judges of that body select magistrate judges for appointment and reappointment.\textsuperscript{397} If that were the case, the diversity of the judges of the district court would make it difficult to ascertain a coherent body of “principal preferences.”

If instead the principal is the individual judge assigned to each case that the magistrate works on, it is easier to understand how affirmance rates are so low. Similar to our discussion in the reputational model, magistrates may act in the interests of each individual judge.\textsuperscript{398} Magistrate judges know the judge for whom they are writing an R&R, so they could act loyally to the judge’s preferences and beliefs as an agent.\textsuperscript{399} Whether this is to avoid reversal or to secure that individual judge’s vote for reappointment, the effect would be R&Rs that were tailored to the judicial preferences of each judge.\textsuperscript{400} By tailoring R&Rs, the reversal rates could conceivably be much lower than the reversal rates of district

\begin{footnotesize}
\begin{enumerate}
\item[392.] See id. at 341.
\item[393.] See id. at 350–54.
\item[394.] See id. at 357.
\item[395.] See PARAMESWARAN, supra note 335, at 3.
\item[397.] See id. (stating that the body of district court judges appoint and reappoint judges).
\item[398.] See Nash & Pardo, supra note 336, at 353 (discussing ideological influences).
\item[399.] See id.
\item[400.] See id. at 357 n.93 (discussing reappointment of magistrate judges).
\end{enumerate}
\end{footnotesize}
court decisions, in which the ability (and incentive) to tailor decisions to a higher court principal is much lower.401

Magistrate judges share many of the same characteristics as the bankruptcy judges studied by Nash and Pardo (like reappointment for fixed terms, non-Article III status, and multiple layers of appellate review), so the findings of Nash and Pardo should give pause to the applicability of the principal-agent model to magistrate judges.402 There is one differentiating factor we would like to highlight: the certainty with which magistrate judge agents know the identity and preferences of their principal. In the bankruptcy system, Nash and Pardo identified the courts of appeals as the ultimate principals of the bankruptcy judge agents.403 As we discussed above, judges whose decisions are appealed do not know which circuit court judges would review the appeal. The same issue exists with bankruptcy judges, who would not be able to tailor their decisions to the preferences of the principals who would be reviewing their actions (or if their decisions would be appealed at all).404 Because of this uncertainty, bankruptcy judges may find it fruitless or impossible to tailor their actions to the amorphous preferences of an ambiguous principal, and thus fall back on ideology or something else as their default decision mechanism.405

That is not the case in the magistrate judge system if we view the principal as the individual district court judge on each case. In that scenario, magistrates know for whom they are writing the R&R, know the district court judge will have a say in their reappointment, know that the judge should be reviewing their work (unlike a discretionary appeal), and can readily ascertain the judge’s preferences. Because of the certainty in the identity and preferences of the individual principal, magistrate judges would be able to act as agents of the principals (or risk the sanction of not being reappointed).406 This possibility calls into question the applicability of Nash and Pardo’s findings to the particularities of the magistrate judge system.407

401. See Kim, supra note 372, at 556–57.
402. See Nash & Pardo, supra note 336, at 357.
403. See id. (discussing bankruptcy appeal panel judges acting as principal).
404. See id. at 354.
405. See id.
406. See id. at 357 n.93.
407. See id. at 356–57.
g. Additional Considerations in Judicial Decision-Making

In addition to the models discussed above, judges may have other influences (or a combination of influences discussed above).\textsuperscript{408} For example, one study examining various models of judicial decision-making found that judges act to optimize their happiness across set of personal factors.\textsuperscript{409} These factors include job satisfaction, external satisfaction (like reputation and influence), leisure (especially on lower courts with fuller workloads), income, and promotion.\textsuperscript{410} These factors are interrelated and span across multiple models discussed above.\textsuperscript{411} We introduce them here just to emphasize that human motivations, especially across a broad range of people, are complex and often not attributable to a single factor.\textsuperscript{412} Due to this complexity, it will take additional targeted research to fully understand the causes behind our observed high affirmance rate for magistrate judge R&Rs.\textsuperscript{413}

h. Summary

This Part has suggested several potential explanations for unusually high affirmance rate we found for magistrate judge R&Rs.\textsuperscript{414} From a constitutional perspective, some are more problematic than others. Any explanation that does not entail thorough district court review of the R&R, as interesting as it might be, still establishes a constitutional violation.\textsuperscript{415}

For example, if the reason for the high affirmance is that district courts have abdicated their review responsibilities and are simply rubber-stamping R&Rs, there is a clear violation of the Constitution in the appointment of magistrate judges (who then

\begin{itemize}
  \item \textsuperscript{409} See id.
  \item \textsuperscript{410} See id.
  \item \textsuperscript{411} See id.
  \item \textsuperscript{412} See id.
  \item \textsuperscript{413} See id.
  \item \textsuperscript{414} See Anderson IV, supra note 321, at 24 (suggesting that one explanation for the high affirmance rate is that district courts are overworked and overwhelmed).
  \item \textsuperscript{415} See Koller, supra note 140, at 1591 (“The magistrate system runs afoot of Article III if the essential attributes of the judiciary are removed from an Article III court and delegated to Article I magistrate judges.”).
\end{itemize}
should really be considered principal officers) and in the exercise of Article III judicial power by non-Article III judges. If, instead, the reason is some combination of the principal-agent and reputational models that lead to R&Rs being closely tailored to the beliefs of the district court judge and that district court judge conducts a full review prior to affirmance, there are less constitutional issues. Ultimately, the key factual question underpinning whether or not there is a constitutional violation is whether district court judges conduct the necessary review of R&Rs. The results of our study suggest—based on the normal reversal rates seen when courts of appeal review district court decisions—that R&Rs are not receiving the appropriate review. If that is the case, there is a constitutional crisis in our courts that we must address.

V. POTENTIAL SOLUTIONS

As discussed above, the results of our study and a review of the potential causes indicate that district court judges may not be undertaking the constitutionally required review and oversight of magistrate judge R&Rs. If that is the case, the magistrate judge system as currently constituted is unconstitutional. This implication is serious and should be addressed in order to ensure faith in our judicial system. We offer two potential solutions to cure this constitutional deficiency.

A. Retain Magistrate Judge System and Implement True De Novo Review or Make Magistrates Article III Judges

Despite its questionable constitutional underpinnings, many support the preservation of the magistrate judge system. In the words of the late Justice Stevens, “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

417. See generally Kim, supra note 372, at 542 (explaining the principal-agent model).
418. See generally U.S. CONST. art. III, § 1 (outlining the constitutional authority granted to district courts).
419. See id. (enumerating protections for federal judges).
indispensable.”421 Similarly, those that support the magistrate judge system cite concerns for efficiency, flexibility, and the right to a speedy trial.422 However, as we will explain below, these arguments in favor of retaining the magistrate judge system ignore a simple reality: replacing magistrate judges with more district judges would result in a similar or greater efficiency level in the district courts.

If the policy preference is to preserve the magistrate judge system, such preservation must include reforms that ensure district courts exercise true de novo review over magistrate judge R&Rs.423 This could be achieved using federal legislation to require such review.424 If this is the path forward, Congress should act swiftly and with sufficient explicit statutory detail to ensure that the appropriate level of review is conducted.

Alternatively, if the current system is desirable, Congress could transition magistrate judgeships to Article III judges subject to presidential nomination with advice and consent of the Senate, along with life tenure. Congress may prefer for various reasons to retain magistrate judges as Article III positions instead of simply creating new federal district court judgeships. For example, Congress might prefer to preserve magistrates as experts in pre-trial case management.425 While such a system could create new issues (like foreseeable clashes between an Article III magistrate and an Article III district court judge), it is foreseeable that there may be policy reasons for retaining both judges as Article III entities.426

1. Efficiency and Speedy Trial Concerns

For decades, ever-rising caseloads have outstripped the capacity of federal district courts to the frustration of both judges and

421. Id. (quoting Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989)).
422. See Chesley, supra note 116, at 758, 766, 797.
423. See Koller, supra note 140, at 1600 (“[W]hen dealing with dispositive motions, magistrate judges may only issue reports and recommendations that must be approved by district court judges before they become final and binding.”).
424. See 28 U.S.C. § 471 (demonstrating that Congress has previously enacted legislation requiring courts to implement cost and delay reduction plans).
425. Cf. Chesley, supra note 116, at 773 (discussing the large role magistrate judges currently serve in pre-trial case management).
426. See id. at 758, 766, 797 (highlighting the benefits of the magistrate judge system).
litigants. In addition, courts are under increasing pressure to resolve cases quickly. The Civil Justice Reform Act of 1990 (CJRA) required courts to implement cost and delay reduction plans. In particular, judges have less time to devote to civil cases due to the Sixth Amendment criminal right to a speedy trial.

Judges and advocates have long pleaded for more district judges in the federal courts, but congressional inaction in this area has spurred astonishing growth in the magistrate judge system. Instead of tackling the politically-fraught task of creating more Article III judgeships, Congress has authorized the Administrative Office of United States Courts to create magistrate judgeships in understaffed courts. Assigning time-consuming preliminary matters to magistrate judges, such as discovery management, arguably leaves district judges more time to devote to adjudication.

The magistrate judge system is also frequently justified as leading to more settlements of cases. In a 1990 report, the Senate Judiciary Committee advocated for early case management by magistrate judges. It cited empirical research confirming that the early involvement of judicial officials leads to the faster disposition of civil cases. It also cited concerns that fewer cases would settle if

428. See id.
435. See Marcum, supra note 427, at 1018 (noting that “some courts have . . . increased their focus on mediations and informal settlement conferences to resolve more cases before trial”).
437. See id.
initially managed by a district judge, as the litigants and the trial judge could not be as “frank” with one another. 438

In practice, it seems that this concern has little merit.439 Magistrate judges also frequently preside over trials with the parties’ consent and conduct dispositive pre-trial matters by consent referral from the district judge.440 Moreover, even when not given dispositive authority, this study shows that magistrate judges nonetheless effectively dispose of cases through R & Rs.441 Consequently, early case management by district judges would be at least equally efficient.442

2. Flexibility

Advocates of the magistrate judicial system often claim that the appointment of magistrate judges serves to overcome the delays and frustrations of the political process relating to Article III judges.443 Delays are inherent to Congress enacting legislation to create new district judgeships.444 The legislation would allow the incumbent President to appoint more judges.445 Thus, the party opposing the President would be likely to resist any such proposed bills.446 Once created, Article III judgeships must be filled by the President with the advice and consent of the Senate.447 This stage is also rife with political standstills, resulting in excessive vacancies in the district courts.448

It would seem that the apolitical process of appointing magistrate judges might be less challenging. However, the regulations require extensive public advertisement of magistrate judges.

438. See id.
439. See Marcum, supra note 427, at 1023–24 (noting how magistrate judges and district court judges work collaboratively).
440. See id. at 1025–33.
441. See id. at 1025.
442. See id.
443. See id. at 1010.
444. See generally U.S. CONST. art. III, § 1 (“The judicial power of the United States, shall be vested in one [S]upreme Court, and in such inferior [c]ourts as the Congress may from time to time ordain and establish.”).
445. See Marcum, supra note 427, at 1018.
446. See id. at 1017–18.
447. See U.S. CONST. art. II, § 2 (“[The President] …, by and with the [a]dvise and [c]onsent of the Senate, shall appoint …[j]udges of the [S]upreme Court, and all other [o]fficers of the United States.”).
448. See Marcum, supra note 427, at 1016–17.
judge openings. District judges in the relevant district then evaluate candidates and appoint new magistrate judges by a majority vote. Unlike Congress, district judges considering magistrate candidates are concerned not merely with appointing ideologically satisfying judges but also with selecting their own colleagues. Their greatest concern, then, is finding a meritorious candidate to ease the burden on the court’s docket, not political victory.

The current statutory and regulatory framework also allows for easy removal and alteration of the duties of magistrate judges in accordance with the individual needs of each district. Because of the eight-year terms of magistrate judges, courts can easily remove underperforming judges. Magistrate judges can also be removed during a term for “incompetency, misconduct, neglect of duty, or physical or mental disability.” Having witnessed the difficulty of removing Article III judges who were suffering from age-related impairments or other issues, one magistrate judge lauded the relatively simple removal process for magistrate judges. Magistrate positions can also be terminated entirely if the Judicial Conference determines they are no longer needed.

One can find significant variation in the implementation of magistrate judges across the district courts. For example, some districts opt to assign all pre-trial criminal matters directly to magistrate judges, while in other districts, Article III judges retain control of criminal matters. Because of regional variations in case type patterns, such as the greater number of drug prosecutions in coastal and border states, courts find the ability to customize the division of judicial responsibilities to be advantageous.

450. See id. at 37.
451. See Marcum, supra note 427, at 1030.
452. See id.
453. See id. at 1011 (explaining that Titles III and IV of the Judicial Improvements Act control judge removal).
454. See generally 28 U.S.C. § 631(e); see also Pro, supra note 357, at 817–19.
456. See Pro, supra note 357, at 817–18.
458. See Pro, supra note 357, at 807.
459. See id. at 808.
While the manipulability of the magistrate judge system is certainly appealing to those who seek a quick fix to docket pressure in the federal courts, the very political process that supporters seek to sidestep in the name of “flexibility” is an important constitutional safeguard that the Founders firmly established. As Chief Justice Roberts noted in a recent case, “it ‘goes without saying’ that practical considerations of efficiency and convenience cannot trump the structural protections of the Constitution.” And there are already several proposals for ways to structure the roll-out of new district judge positions to minimize political friction. Even those who advocate for the use of magistrate judges as gap-fillers often agree that increasing the number of district judges should be the ultimate goal.

3. Concerns for Merit and Diversity in Judicial Candidates

Another assumed benefit of the magistrate judge system is the emphasis on merit in the appointment process. Each magistrate judge opening usually brings about eighty applications. District judges select candidates by creating a merit panel made up of community members and lawyers to review the applications for the most qualified candidates. As a result, magistrate judges are generally highly qualified, having been members of the bar for an average of 22 years before appointment. Some scholars even argue that the selection of magistrate judges is more based on merit than the appointment of district judges, given that party alignment does not carry the same weight.

(describing a greater need for federal judgeships in border and coastal states due to drug cases).

461. See Pro, supra note 357, at 808 (describing differing practices of magistrate case assignment in different areas of the United States).
463. See Sharif, 575 U.S. at 703 (arguing that allowing non-Article III courts to conduct final adjudication of bankruptcy cases undermines the constitutional system of checks and balances).
464. See, e.g., Marcum, supra note 427, at 1036.
465. See generally id. (advocating for greater use of magistrate judges while the district courts await reinforcements from Congress).
466. See id. at 1021.
467. See Denlow, supra note 430, at 5.
468. See ADMIN. OFF. OF U.S. CTS., supra note 128, at 17–19.
469. See Marcum, supra note 427, at 1021.
470. See id. at 1030.
Other scholars believe that the magistrate selection process has the benefit of bringing greater diversity to the bench.\textsuperscript{471} It is true that the Judicial Conference regulations require the merit panel to give particular consideration to qualified applicants from underrepresented groups.\textsuperscript{472} Organizations, such as the Federal Magistrate Judge Association, also have programs to encourage diversity in the magistrate judge system.\textsuperscript{473} However, empirical research demonstrates that few candidates from underrepresented backgrounds are appointed.\textsuperscript{474}

B. Eliminating Magistrates in Favor of More District Court Judges Would Resolve Efficiency Concerns

\textit{1. The Need for More Article III District Court Judges}

If the current federal statutory magistrate judge system is disbanded—as this Article recommends—the caseload currently managed by the magistrate judges across the country needs to be handled by some other entity within the federal judiciary.\textsuperscript{475} Article III district court judges are best situated to take on the responsibility. Unlike magistrate judges, who receive their authority from federal statutes rather than the Constitution, Article III district court judges get their authority directly from the Constitution.\textsuperscript{476} Moreover, federal district court judges are appointed to the bench through a quasi-bicameral process that involves buy-in from two branches of the government.\textsuperscript{477} The Executive nominates candidates to be appointed to a federal district court, and the Senate votes to confirm or deny the nomination.\textsuperscript{478} In the case of magistrate judges, they are selected by the respective federal districts they will work in.\textsuperscript{479}

\textsuperscript{471.} See id. at 1022.
\textsuperscript{472.} See ADMIN. OFF. OF U.S. CTS., supra note 128, at 31.
\textsuperscript{473.} See generally Marian Payson, Diversity in the Magistrate Judge System, 61 FED. LAW. 55 (2014) (describing the FMJA Diversity Committee’s education and recruitment programs targeted towards minority groups).
\textsuperscript{474.} See Thurston, supra note 272, at 77 (reviewing demographics that show the magistrate judge system is overwhelming white, even in areas of the country with majority non-white populations).
\textsuperscript{475.} See infra Table 3.
\textsuperscript{476.} Compare 28 U.S.C. § 636 (authorizing the assignment of magistrate judges by district court judges), with U.S. CONST. art. III, § 1 (vesting the judicial power of the United States in the Supreme Court and inferior Courts).
\textsuperscript{477.} Marcum, supra note 427, at 1016–17.
\textsuperscript{478.} Id.
\textsuperscript{479.} See ADMIN. OFF. OF U.S. CTS., supra note 128, at 1–2, 17.
FMA neither mandates particular duties to magistrate judges nor limits magistrate authority. These are generally left to the respective federal district courts.

The United States Supreme Court has called magistrate judges “indispensable,” acknowledging that “federal magistrates account for a staggering volume of judicial work.” The number of cases in the federal district courts has increased by thirty-eight percent in the past thirty years, but the federal judiciary has not expanded since 1990. There is already a clarion call across the political spectrum to increase the number of federal judges to address the current capacity crisis. And some argue that appointing more judges “to address the current capacity crisis in federal courts is not controversial.”

2. Solving the Concerns for Efficiency and Speedy Trial

Supporters of the magistrate judge system cite legitimate concerns for speedy case resolution and relief of the overburdened federal courts. However, we maintain that these problems would be more effectively addressed by increasing the number of district judges. Because many magistrate judges already eventually become Article III appointees, if the magistrate system was eliminated in favor of more district judges, many magistrates would likely remain in the courts under a more constitutional and efficiently organized court system.

Additionally, if district judges decide pre-trial matters rather than magistrate judges, parties would avoid the cost and delays

481. See id.
482. Peretz v. United States, 501 U.S. 923, 928, 928 n.5 (1991) (citing Gov’t of the V.I. v. Williams, 892 F.2d 305, 308 n.5 (3rd Cir. 1989)).
484. See id.
487. See Denlow, supra note 430, at 66.
488. See id. at 6.
incurred while awaiting a district judge’s decision on an R&R.\textsuperscript{489} In the intervening period, “[t]he briefing of objections can be quite expensive, and it . . . take[s] the district judge a great deal of time to make a careful de novo review of the facts and the law.”\textsuperscript{490} Courts could conserve time and resources if there were not two judges reviewing and writing opinions on the same cases.\textsuperscript{491} This assumes that district courts are actually conducting a de novo review and not merely conducting a de novo determination which, according to the Supreme Court, does not require conducting a hearing with the witnesses.\textsuperscript{492} This is especially important because—as this study concludes—after the parties have waited months for a final decision, the district judge may be merely “rubber-stamping” the R&R.\textsuperscript{493} Why inflict unnecessary costs and delay determinations in the name of efficiency?\textsuperscript{494}

In many instances, litigants may consent to disposition of a case by a magistrate judge to avoid the delay and redundancy of the R&R process.\textsuperscript{495} However, parties are often unwilling to consent to magistrate disposition.\textsuperscript{496} In busier courts, parties who opt for a magistrate judge may receive an earlier trial date, an eventuality many civil defendants wish to avoid.\textsuperscript{497} In other courts, parties see no benefit in choosing a magistrate judge over a district judge.\textsuperscript{498} Even if litigants did wish to consent to a magistrate judge, “‘parties cannot

\textsuperscript{489}. See id. at 3.

\textsuperscript{490}. See id.

\textsuperscript{491}. See Marcum, supra note 427, at 1027 (detailing reasons that parties consent to magistrate disposition of civil cases, including avoiding “the duplicity of a district judge referring a motion to a magistrate judge for an R&R and then the delay of potential objections to that R&R being sent back to the district judge”).

\textsuperscript{492}. See United States v. Raddatz, 447 U.S. 667, 674 (1980). (“[T]he statute calls for a de novo determination, not a de novo hearing. We find nothing in the legislative history of the statute to support the contention that the judge is required to reheat the contested testimony . . . .”).

\textsuperscript{493}. See supra Subsection IV.D (explaining the potential conclusions of the case study).

\textsuperscript{494}. See Marcum, supra note 427, at 1027–28 (outlining cost as a consideration that parties already use in selecting magistrate judges).

\textsuperscript{495}. See Denlow, supra note 430, at 6.


\textsuperscript{497}. See id.

\textsuperscript{498}. See id.
by consent cure’ an Article III violation.”499 The issue of “consent” is especially troubling because many districts assume consent if the parties do not timely object.500

Even with consent, magistrate judges are limited in their adjudicatory powers.501 In felony cases, they may not conduct trials or sentencing.502 Consequently, magistrate judges typically have fewer cases on their dockets than their Article III colleagues.503 By replacing the magistrate judges with district judges, responsibilities could be more evenly spread among the bench members.504 Those accused of felonies would have an equal number of judges available to them as other criminal and civil defendants, likely resulting in speedier felony trials in line with the Sixth Amendment.505

VI. POSSIBILITIES FOR FUTURE STUDIES

The study presented represents a meaningful first step in properly analyzing and evaluating the magistrate judge system; however, further study is warranted. In addition to the future studies already suggested above, an obvious yet valuable possibility would be to expand any future studies to include an analysis of R&Rs and their subsequent district court opinions from every district court in the United States. With this expanded data set, a more comprehensive picture of the magistrate judge system as it is applied nationwide could be undertaken. Comparing the relationship of magistrate and district court judges across the country could lead to further studies focused on identifying factors that produce any apparent differences from state to state. One could also expand the time period of cases considered in these districts.

Another possible next step would be an examination into specific magistrate judges and why some may have what appear to be higher rates of alteration of R&Rs than their peers. An interesting elaboration on this could also include an analysis of judges’ possible

500. See Pro, supra note 357, at 809.
502. See id.
503. See Denlow, supra note 430, at 6.
504. See supra Subsection V.B.1.
505. See supra Subsection V.A.1.
changing views or efforts over the length of their careers. For example, a future study might examine whether district court judges become more or less likely to accept a magistrate judge’s R&Rs the longer that district court judge remains on the bench. Similarly, one could also study whether magistrate judges are more or less likely to have their R&Rs accepted without alteration the longer their tenure. A further variation on these two analyses could include how assuming senior status affects affirmation rates.

Looking beyond the content of the cases themselves, a future study could focus on identifying potential biases held by magistrate judges and district court judges in a variety of areas—for example, race within the context of criminal matters. The social, educational, and cultural backgrounds of magistrate judges and district court judges could be examined as well. Appendix B provides a summary of useful data of district court judges in our study. A more in-depth analysis of the structure and length of subsequent district court opinions addressing R&Rs could produce data related to the seeming effort devoted to matters by district court judges. And lastly, reviewing the effect of de novo versus a clear error standard of review on R&Rs by district court judges might prove valuable for purposes of further quantifying the level of diligence and arguable reflection district court judges put into cases initially assigned to magistrate judges.

CONCLUSION

The magistrate judge system has developed into a significant component of the United States’s federal court system. The authority granted to Article III judges is sacred, however, and should not be circumvented simply for nominally enhancing the efficiency and flexibility of district court judges. This Article demonstrates that the constitutionally-required de novo review is likely not happening. This creates a constitutional crisis in our federal courts, as the current magistrate judge system violates the Appointments Clause and separation of powers for its failure of district court judges to adequately review magistrate judge R&Rs. The most direct means of resolving this constitutional shortcoming would be the complete elimination of the magistrate judge system coupled with a

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506. See supra Part II.
507. See supra Subsection IV.D.2.h.
508. See supra Section II.B.
congressionally authorized increase in the number of federal district court judges.\textsuperscript{509}

\textsuperscript{509} See supra Section V.B.
### TABLE 1: R&R BREAKDOWN

<table>
<thead>
<tr>
<th>Year</th>
<th>Period</th>
<th>R&amp;Rs Adopted in Part</th>
<th>R&amp;Rs Rejected</th>
<th>Total R&amp;Rs</th>
<th>% Modified</th>
<th>% Rejected</th>
<th>Combined %</th>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2017</td>
<td>1/1-4/30</td>
<td>14</td>
<td>3</td>
<td>131</td>
<td>10.8%</td>
<td>2.3%</td>
<td>13.1%</td>
</tr>
<tr>
<td></td>
<td>5/1-8/31</td>
<td>7</td>
<td>3</td>
<td>171</td>
<td>3.5%</td>
<td>2.4%</td>
<td>5.9%</td>
</tr>
<tr>
<td></td>
<td>9/1-12/31</td>
<td>13</td>
<td>3</td>
<td>157</td>
<td>8.3%</td>
<td>1.9%</td>
<td>10.2%</td>
</tr>
<tr>
<td>2018</td>
<td>1/1-4/30</td>
<td>6</td>
<td>4</td>
<td>144</td>
<td>2.8%</td>
<td>4.2%</td>
<td>7.0%</td>
</tr>
<tr>
<td></td>
<td>5/1-8/31</td>
<td>5</td>
<td>3</td>
<td>179</td>
<td>2.8%</td>
<td>1.7%</td>
<td>4.5%</td>
</tr>
<tr>
<td></td>
<td>9/1-12/31</td>
<td>6</td>
<td>1</td>
<td>178</td>
<td>3.4%</td>
<td>0.6%</td>
<td>3.9%</td>
</tr>
<tr>
<td>2019</td>
<td>1/1-4/30</td>
<td>22</td>
<td>2</td>
<td>195</td>
<td>11.3%</td>
<td>1.0%</td>
<td>12.3%</td>
</tr>
<tr>
<td></td>
<td>5/1-8/31</td>
<td>5</td>
<td>6</td>
<td>194</td>
<td>2.6%</td>
<td>3.6%</td>
<td>6.2%</td>
</tr>
<tr>
<td></td>
<td>9/1-12/31</td>
<td>10</td>
<td>5</td>
<td>166</td>
<td>6.0%</td>
<td>3.1%</td>
<td>9.1%</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>88</td>
<td>30</td>
<td>1,515</td>
<td>5.8%</td>
<td>1.98%</td>
<td>7.78%</td>
</tr>
<tr>
<td>AVERAGE</td>
<td></td>
<td>9.8</td>
<td>3.3</td>
<td>168</td>
<td>5.72%</td>
<td>2.31%</td>
<td>8.03%</td>
</tr>
</tbody>
</table>

### TABLE 2: CIVIL CASES vs. CRIMINAL CASES

<table>
<thead>
<tr>
<th>Year</th>
<th>Period</th>
<th>Civil Cases Altered</th>
<th>Criminal Cases Altered</th>
</tr>
</thead>
<tbody>
<tr>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2017</td>
<td>1/1-4/30</td>
<td>14</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>5/1-8/31</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>9/1-12/31</td>
<td>13</td>
<td>3</td>
</tr>
<tr>
<td>2018</td>
<td>1/1-4/30</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>5/1-8/31</td>
<td>8</td>
<td>0</td>
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<tr>
<td></td>
<td>9/1-12/31</td>
<td>5</td>
<td>2</td>
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<tr>
<td>2019</td>
<td>1/1-4/30</td>
<td>21</td>
<td>3</td>
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<tr>
<td></td>
<td>5/1-8/31</td>
<td>11</td>
<td>0</td>
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<tr>
<td></td>
<td>9/1-12/31</td>
<td>11</td>
<td>4</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>97</td>
<td>21</td>
</tr>
<tr>
<td>AVERAGE</td>
<td></td>
<td>10.8</td>
<td>2.3</td>
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</table>
## TABLE 3: BREAKDOWN OF MAGISTRATE JUDICIAL RATES

<table>
<thead>
<tr>
<th>Magistrate Judge</th>
<th>Number of R&amp;Rs altered by district court judge</th>
<th>Total Caseload from 2017-2019</th>
<th>Rate of Alteration (Magistrate Judge)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bowbeer</td>
<td>8</td>
<td>242</td>
<td>3.31%</td>
</tr>
<tr>
<td>Brisbois</td>
<td>18</td>
<td>272</td>
<td>6.62%</td>
</tr>
<tr>
<td>E. Wright</td>
<td>10</td>
<td>95</td>
<td>10.53%</td>
</tr>
<tr>
<td>Leung</td>
<td>8</td>
<td>326</td>
<td>2.45%</td>
</tr>
<tr>
<td>Mayeron</td>
<td>1</td>
<td>3</td>
<td>33.33%</td>
</tr>
<tr>
<td>Menendez</td>
<td>11</td>
<td>326</td>
<td>3.37%</td>
</tr>
<tr>
<td>Noel</td>
<td>14</td>
<td>117</td>
<td>11.97%</td>
</tr>
<tr>
<td>Rau</td>
<td>29</td>
<td>245</td>
<td>11.84%</td>
</tr>
<tr>
<td>Schultz</td>
<td>11</td>
<td>213</td>
<td>5.16%</td>
</tr>
<tr>
<td>Thorson</td>
<td>8</td>
<td>251</td>
<td>3.19%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>118</td>
<td>AVERAGE</td>
<td>6.49%</td>
</tr>
</tbody>
</table>
TABLE 4: BREAKDOWN OF DISTRICT COURT JUDICIAL RATES

<table>
<thead>
<tr>
<th>District Court Judge</th>
<th>Number of opinions altering R&amp;R</th>
<th>Total caseload from 2017-2019</th>
<th>Rate of alteration (DC Judge)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brasel</td>
<td>4</td>
<td>114</td>
<td>3.51%</td>
</tr>
<tr>
<td>Davis</td>
<td>6</td>
<td>271</td>
<td>2.21%</td>
</tr>
<tr>
<td>Doty</td>
<td>6</td>
<td>290</td>
<td>2.07%</td>
</tr>
<tr>
<td>Erikson</td>
<td>11</td>
<td>262</td>
<td>4.20%</td>
</tr>
<tr>
<td>Frank</td>
<td>5</td>
<td>420</td>
<td>1.19%</td>
</tr>
<tr>
<td>Magnuson</td>
<td>5</td>
<td>311</td>
<td>1.61%</td>
</tr>
<tr>
<td>Montgomery</td>
<td>6</td>
<td>184</td>
<td>3.26%</td>
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<tr>
<td>Nelson</td>
<td>12</td>
<td>450</td>
<td>2.67%</td>
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<tr>
<td>Schiltz</td>
<td>9</td>
<td>313</td>
<td>2.88%</td>
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<tr>
<td>Tostrud</td>
<td>8</td>
<td>122</td>
<td>6.56%</td>
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<tr>
<td>Tunheim</td>
<td>18</td>
<td>575</td>
<td>3.13%</td>
</tr>
<tr>
<td>Wright</td>
<td>28</td>
<td>346</td>
<td>8.09%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>118</td>
<td>AVERAGE</td>
<td>3.45%</td>
</tr>
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</table>

TABLE 5: MAGISTRATE DEMOGRAPHICS

<table>
<thead>
<tr>
<th>Name</th>
<th>Gen</th>
<th>Race</th>
<th>Age</th>
<th>Years on Bench</th>
<th>Years of Legal Exp.</th>
<th>Previous Exp.</th>
<th>Additional Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hildy Bowbeer</td>
<td>F</td>
<td>White</td>
<td>66</td>
<td>6</td>
<td>41</td>
<td></td>
<td>Assistant chief/intellectual property counsel, 3M Company; private practice; clerk for the MN supreme court</td>
</tr>
<tr>
<td>Leo Brisbois</td>
<td>M</td>
<td>Native American</td>
<td>58</td>
<td>10</td>
<td>33</td>
<td></td>
<td>Private practice; JAG Corps</td>
</tr>
<tr>
<td>Name</td>
<td>Gen</td>
<td>Race</td>
<td>Age</td>
<td>Years on Bench</td>
<td>Years of Legal Exp.</td>
<td>Previous Exp.</td>
<td>Addi-</td>
</tr>
<tr>
<td>-----------------------</td>
<td>-----</td>
<td>-----------------</td>
<td>-----</td>
<td>----------------</td>
<td>---------------------</td>
<td>-----------------------------------------------------------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>Elizabeth Cowen Wright</td>
<td>F</td>
<td>White</td>
<td>46</td>
<td>2</td>
<td>14</td>
<td>Private practice; clerk for US district court (MN); previously worked as an engineer for 3M as well</td>
<td></td>
</tr>
<tr>
<td>Tony Leung</td>
<td>M</td>
<td>Asian American</td>
<td>61</td>
<td>26 (9 as a Magistrate; 17 on MN district court)</td>
<td>35</td>
<td>MN district court judge for Hennepin County; private practice</td>
<td></td>
</tr>
<tr>
<td>Janie Mayeron</td>
<td>F</td>
<td>White</td>
<td>69</td>
<td>15</td>
<td>41</td>
<td>Private practice</td>
<td>Retired in 2017</td>
</tr>
<tr>
<td>Kate Menendez</td>
<td>F</td>
<td>Hispanic</td>
<td>48</td>
<td>4</td>
<td>23</td>
<td>Attorney for the MN federal defender’s office; clerk for the 4th circuit court of appeals</td>
<td></td>
</tr>
<tr>
<td>Franklin Noel</td>
<td>M</td>
<td>White</td>
<td>72</td>
<td>29</td>
<td>41</td>
<td>Assistant US attorney; private practice</td>
<td>Retired in 2018</td>
</tr>
<tr>
<td>Steven Rau</td>
<td>M</td>
<td>White</td>
<td>63</td>
<td>8</td>
<td>36</td>
<td>Private practice; clerk for MN supreme court</td>
<td>Died in 2019</td>
</tr>
<tr>
<td>David Schultz</td>
<td>M</td>
<td>White</td>
<td>60</td>
<td>3</td>
<td>35</td>
<td>Private practice; MN attorney general’s office</td>
<td></td>
</tr>
<tr>
<td>Becky Thorson</td>
<td>F</td>
<td>White</td>
<td>50</td>
<td>6</td>
<td>25</td>
<td>Private practice</td>
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### TABLE 6: DISTRICT COURT JUDGE DEMOGRAPHICS

<table>
<thead>
<tr>
<th>Name</th>
<th>Gen</th>
<th>Race</th>
<th>Age</th>
<th>Years on Bench</th>
<th>Years of Legal Exp.</th>
<th>Previous Exp.</th>
<th>Appointed By</th>
<th>Additional Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nancy Brasel</td>
<td>F</td>
<td>White</td>
<td>51</td>
<td>9 (2 on US district court, 7 on MN district court)</td>
<td>24</td>
<td>MN district court judge; assistant US district attorney; private practice; clerk for the 8th circuit court of appeals</td>
<td>Trump</td>
<td></td>
</tr>
<tr>
<td>Michael J. Davis</td>
<td>M</td>
<td>African American</td>
<td>73</td>
<td>37 (26 on US district court, 11 on MN district court)</td>
<td>48</td>
<td>Legal professor; attorney for Hennepin County public defender’s office; attorney for Minneapolis civil rights commission; attorney and clerk for the legal rights center; attorney for US social security administration</td>
<td>Clinton</td>
<td>Senior status since 2015</td>
</tr>
<tr>
<td>David S. Doty</td>
<td>M</td>
<td>White</td>
<td>91</td>
<td>33</td>
<td>59</td>
<td>Special assistant attorney general for MN; private practice</td>
<td>Reagan</td>
<td>Senior status since 1998</td>
</tr>
<tr>
<td>Name</td>
<td>Gen</td>
<td>Race</td>
<td>Age</td>
<td>Years on Bench</td>
<td>Years of Legal Exp.</td>
<td>Previous Exp.</td>
<td>Appointed By</td>
<td>Additional Notes</td>
</tr>
<tr>
<td>--------------------</td>
<td>-----</td>
<td>------</td>
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<td>----------------</td>
<td>---------------------</td>
<td>---------------</td>
<td>--------------</td>
<td>-----------------------------------</td>
</tr>
<tr>
<td>Joan Erikson</td>
<td>F</td>
<td>White</td>
<td>65</td>
<td>25 (18 on US district court, 4 on MN Supreme Court, 3 on MN district court)</td>
<td>39</td>
<td>Private practice; assistant US attorney (MN)</td>
<td>George W. Bush</td>
<td>Senior status since 2019</td>
</tr>
<tr>
<td>Donovan W. Frank</td>
<td>M</td>
<td>White</td>
<td>69</td>
<td>35 (22 on US district court, 13 on MN district court)</td>
<td>43</td>
<td>Assistant county attorney (St. Louis, MO)</td>
<td>Clinton</td>
<td>Senior status since 2016</td>
</tr>
<tr>
<td>Paul Magnuson</td>
<td>M</td>
<td>White</td>
<td>83</td>
<td>39</td>
<td>57</td>
<td>Legal professor; private practice</td>
<td>Reagan</td>
<td>Senior status since 2002</td>
</tr>
<tr>
<td>Ann D. Montgomery</td>
<td>F</td>
<td>White</td>
<td>71</td>
<td>35 (26 on US district court; 9 on MN district court)</td>
<td>46</td>
<td>Assistant US attorney (MN); clerk for DC court of appeals</td>
<td>Clinton</td>
<td>Senior status since 2016</td>
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<td>Susan Richard Nelson</td>
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<td>White</td>
<td>68</td>
<td>20 (10 as a magistrate)</td>
<td>43</td>
<td>Private practice</td>
<td>Obama</td>
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<td>Patrick Schiltz</td>
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<td>White</td>
<td>60</td>
<td>14</td>
<td>35</td>
<td>Legal professor; private practice; clerk for US supreme court; clerk for US court of appeals DC circuit</td>
<td>George W. Bush</td>
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<td>Name</td>
<td>Gen</td>
<td>Race</td>
<td>Age</td>
<td>Years on Bench</td>
<td>Years of Legal Exp.</td>
<td>Previous Exp.</td>
<td>Appointed By</td>
<td>Additional Notes</td>
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<td>Eric Tostrud</td>
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<td>2</td>
<td>30</td>
<td>Private practice; clerk for US district court (MN)</td>
<td>Trump</td>
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<tr>
<td>John Tunheim</td>
<td>M</td>
<td>White</td>
<td>66</td>
<td>25</td>
<td>40</td>
<td>Legal professor; chief deputy attorney general (MN); solicitor general (MN); assistant attorney general (MN); private practice; clerk for US district court (MN)</td>
<td>Clinton</td>
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</tr>
<tr>
<td>Wilhelmina Wright</td>
<td>F</td>
<td>African American</td>
<td>56</td>
<td>20 (4 on US district court, 4 on MN Supreme Court, 10 on MN court of appeals and 2 on MN district court)</td>
<td>31</td>
<td>Assistant US attorney (MN); private practice; clerk for US court of appeals 6th circuit</td>
<td>Obama</td>
<td></td>
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