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Can They Do That--The Due Process and Article III Problems of Proposed Findings of Criminal Contempt in Bankruptcy Court

Richard Murphy

Note

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> The most careful note must often fail to convey the evidence fully in some of its most important elements. . . . It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; . . . the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it.[1]
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> That contempt power. . . is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir.[2]

Bankruptcy court contempt[3] authority lies at the intersection of two difficult bodies of law.[4] Bankruptcy judges are non-

1. Queen v. Bertrand, 16 Eng. Rep. 391, 399 (1867) *cited in* United States v. Raddatz, 447 U.S. 667, 679-80 (1980).

2. Sacher v. United States, 343 U.S. 1, 12 (1952).

3. *See infra* notes 100-114 and accompanying text (discussing contempt law).

4. Unsurprisingly, appellate courts divide on the validity of bankruptcy court authority over various forms of contempt. For a discussion of criminal contempt authority, see, e.g., Brown v. Ramsay (*In re* Ragar), 3 F.3d 1174, 1178-79 (8th Cir. 1993) (holding that bankruptcy courts may find a party guilty of criminal contempt if their findings are subject to adequate district court review); *In re* Brown, 94 B.R. 526, 534 (Bankr. N.D. Ill. 1988) (holding that bankruptcy courts may exercise non-core criminal contempt authority). *But see* Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503, 1509 (5th Cir. 1990) (holding that bankruptcy courts lack statutory authorization to punish criminal contempts committed outside their presence and that such a grant of jurisdiction would be constitutionally dubious); *In re* Lawrence, 1993 WL 590779, at *2 (W.D. Mich. 1993) (holding that bankruptcy courts lack criminal contempt authority); Kellog v. Chester, 71 B.R. 36, 37-39 (N.D. Tex. 1987) (holding that grant of criminal contempt power to bankruptcy courts would be unconstitutional); *In re* Industrial Tool Distrib., 55 B.R. 746, 750 (N.D. Ga. 1985) (holding that bankruptcy courts lack criminal contempt authority); Better Homes of Va., Inc. v. Budget Serv. Co. (*In re* Better Homes of Va., Inc.), 52 B.R. 426, 430 (E.D. Va. 1985) (holding that bankruptcy courts lack criminal contempt authority).

Article III officers.[5] Therefore, any analysis of their contempt authority must consider both contempt law and the limitations that Article III places on non-Article III tribunal authority. This is not an easy task. Contempt law is a confusing mess.[6] Chief Justice Rehnquist has characterized Article III jurisprudence as rife with "frequently arcane distinctions and confusing precedents."[7]

Undeterred by the complex web of Article III and contempt law, some bankruptcy judges have sought to punish persons for criminal[8] contempt pursuant to their courts' non-core[9] author-

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For discussions of the validity of civil contempt power in bankruptcy court, see, e.g., Mountain Am. Credit Union v. Skinner (*In re* Skinner), 917 F.2d 444, 448-49 (10th Cir. 1990) (holding that 11 U.S.C. § 105(a) grants bankruptcy courts civil contempt power and that this jurisdictional grant is constitutional); Burd v. Walters (*In re* Walters), 868 F.2d 665, 669-70 (4th Cir. 1989) (holding that Congress has authorized bankruptcy courts' civil contempt power and that this authorization is not a violation of separation-of-powers); *In re* Dennig, 98 B.R. 935, 938-39 (Bankr. N.D. Ind. 1989) (holding that bankruptcy courts possess civil contempt powers); Kellog v. Chester, 71 B.R. 36, 37-39 (N.D. Tex. 1987) (holding that bankruptcy courts possess statutory authority to issue final orders of civil contempt pursuant to their core powers); *In re* L.H. & A. Realty, Inc., 62 B.R. 910, 912 (Bankr. D. Vt. 1986) (holding that bankruptcy courts may issue final orders of civil contempt under their core authority); *In re* Kalpana, Inc., 58 B.R. 326, 335 (Bankr. E.D.N.Y. 1986) (holding that bankruptcy courts may exercise non-core authority over civil contempts). *But see* Plastiras v. Idell (*In re* Sequoia Auto Brokers Ltd.), 827 F.2d 1281, 1289 (9th Cir. 1987) (holding that Congress did not authorize bankruptcy court jurisdiction over civil contempts).

5. *See infra* notes 23-42 and accompanying text (explaining bankruptcy judges' non-Article III status).

6. Describing the labyrinths of contempt law, one commentator wrote:

> In legal literature, it [contempt] has been categorized, subclassified, and scholastically dignified by division into varying shades—each covering some particular aspect of the general power, respectively governed by a particular set of procedures. So, the texts separate retributive or criminal contempts from merely coercive or civil contempts; those directly offensive from those only constructively contemptuous; those affecting the judiciary and others the legislature.

RONALD GOLDFARB, THE CONTEMPT POWER 1 (1963).

7. Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring).

8. *See infra* notes 106-110 and accompanying text (distinguishing criminal from civil contempt). This Note examines only criminal contempt, not civil contempt. For a discussion of the constitutional issues bankruptcy court civil contempt powers raise, see generally William S. Parkinson, *The Contempt Power of the Bankruptcy Court Fact or Fiction: The Debate Continues*, 65 AMER. BANKR. L.J. 591, 597-623 (1991) (suggesting in the context of a discussion largely devoted to civil contempt that bankruptcy courts certify facts of contempt rather than independently hear or determine contempts); Richard C. Howard, Comment, *Contempt Power and the Bankruptcy Courts: The New Trend*, 14 U. DAYTON L. REV. 335 (1989) (discussing both civil and criminal con-

ity.[10] Generally, when a bankruptcy court acts in its non-core capacity, it issues "proposed findings of fact and conclusions of law."[11] These proposed findings of criminal contempt, however, pose difficult jurisdictional and procedural problems. The jurisdictional problems stem from the bankruptcy judges' non-Article III status.[12] Bankruptcy court proceedings that purport to decide criminal liability may impermissibly encroach on the Article III courts' control of "judicial power."[13] The procedural problems, which stem from the structure of district court review of bankruptcy court proposed findings, implicate principles of due process.[14] The district courts may confine review to de novo determination on the written records.[15] This practice arguably allows a court to violate the defendant's due process right that

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tempt); Jon C. Sogn, Comment, *In re Krisle: Civil Contempt Power of the Bankruptcy Court*, 31 S.D. L. REV. 273 (1986) (suggesting that bankruptcy courts exercise civil contempt powers despite constitutional concerns); *see also infra* note 57 (discussing how some of the constitutional issues relating to criminal contempt do not necessarily apply to civil contempt).

9. *See infra* notes 23-42 and accompanying text (discussing bankruptcy court non-core authority).

10. *See, e.g.*, Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503, 1504 (5th Cir. 1990) (criticizing an unpublished bankruptcy court proposed finding of criminal contempt); Brown v. Ramsay (*In re* Ragar), 140 B.R. 889, 891 (Bankr. E.D. Ark. 1992) (holding an attorney in criminal contempt of bankruptcy court); *see also* Moratzka v. Visa U.S.A. (*In re* Calstar, Inc.), 159 B.R. 247, 260-61 (Bankr. D. Minn. 1993) (asserting the power of the bankruptcy court to punish violation of bankruptcy court orders and automatic stays).

11. *See infra* notes 37-42 and accompanying text (discussing bankruptcy court proposed findings of fact and conclusions of law and the standard of review that district courts apply to these findings). For ease of expression, this Note will refer to bankruptcy court "proposed findings and conclusions of law" simply as "proposed findings."

12. *See infra* notes 23-29 and accompanying text (discussing bankruptcy judges' non-Article III status and limits on non-Article III tribunal authority).

13. *See infra* notes 155-165 and accompanying text.

14. *See infra* text accompanying notes 142-145.

15. *See infra* note 40 (discussing the district court standard of review for bankruptcy court proposed findings). The standard of review for magistrate judge findings on dispositive pretrial matters permits the district court to confine review to written records. *See infra* note 51 (discussing the district court standard of review on magistrate dispositive findings). The magistrate statutes refer to this standard of review as "de novo determination." 28 U.S.C. § 636(b)(1) (1988). The bankruptcy statutes and rules do not use the phrase "de novo determination" but adopt a functionally equivalent standard of review. *See infra* note 40; 11 U.S.C. § 157(c)(1) (1988); BANKR. R. 9033. Therefore, for ease of expression, this Note will at times refer to the standard of review for bankruptcy proposed findings as "de novo determination."

the judge who decides criminal liability *hear* the credibility-based evidence.[16]

This Note focuses on the constitutionality of bankruptcy court proposed findings of criminal contempt. Part I discusses the authority of bankruptcy courts, paying particular attention to their power to issue proposed findings and comparing this power to that of magistrate judges. It then discusses the constitutional limits on non-Article III resolution of criminal liability. In addition, Part I provides a brief overview of the law of contempt. Part II examines two recent appellate opinions that reached contrary conclusions on the validity of bankruptcy court criminal contempt proceedings: *In re Ragar*[17] and *In re Hipp*.[18] Part III analyzes existing law and concludes that bankruptcy court proposed findings of criminal contempt violate due process and Article III.[19] In the alternative, these findings are, at the very least, sufficiently problematic that courts should practice "constitutional avoidance"[20] and interpret the bankruptcy statutes to deny bankruptcy courts this authority. Part III concludes with a straightforward solution to the problem: require bankruptcy judges, like their magistrate judge colleagues, to certify[21] the facts of criminal contempt for a full district court de novo hearing rather than for a less stringent de novo determination.[22]

I. BANKRUPTCY AND MAGISTRATE AUTHORITY TO ISSUE "PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW"

The determination of whether bankruptcy courts have authority to issue proposed findings of contempt requires analysis

16. *See infra* note 71 and accompanying text (discussing the right to a hearing before the judge who determines guilt).

17. Brown v. Ramsay (*In re* Ragar), 3 F.3d 1174 (8th Cir. 1993).

18. Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503 (5th Cir. 1990).

19. For futher discussion of the validity of bankruptcy court contempt authority see generally Parkinson, *supra* note 8 (criticizing bankruptcy court contempt authority). *Contra* Howard, *supra* note 8 (concluding that bankruptcy courts enjoy both civil & criminal contempt authority). *See also* Sogn, *supra* note 8 (concluding that bankruptcy courts possess contempt authority).

20. *See infra* note 78 and accompanying text (discussing the "canon of constitutional avoidance").

21. *See infra* note 53 and accompanying text (discussing statutory authority of magistrate judges to certify the facts of contempt for district court hearing); *see also* Parkinson, *supra* note 8, at 618, 622 (suggesting that bankruptcy courts should certify the facts of contempt).

22. *See supra* note 15 (discussing use of the phrase "de novo determination" in this Note).

of several bodies of law. Examination of the Bankruptcy Code and its outline of non-core authority is necessary. In addition, comparison of bankruptcy and magistrate authority is helpful to illuminate the limits on non-Article III tribunal authority generally. Also, one must examine the Article III and due process concerns that proposed findings of criminal contempt raise. Finally, examination of the idiosyncratic nature of contempt law is necessary.

A. Bankruptcy Court Authority over Non-Core Issues

Bankruptcy courts are a hybrid of two forms of non-Article III tribunal,[23] the legislative court and the adjunct.[24] Congress may create legislative courts to adjudicate "public rights."[25] These courts are constitutional because Congress creates public rights by statute and possesses plenary authority over them.[26] Because Congress is free to create, destroy, or alter public rights, it may also entrust their adjudication to legislative courts without undermining the Article III courts' judicial power.[27] By contrast, adjuncts cannot undermine the Article III courts' judi-

23. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. Bankruptcy judges serve 14 year terms. 28 U.S.C. § 151 (1988). Congress may diminish the salaries of the bankruptcy judges during their terms of office. 28 U.S.C. § 153 (1988).

24. Plastiras v. Idell (*In re* Sequoia Auto Brokers Ltd.), 827 F.2d 1281, 1288 n.10 (9th Cir. 1987) (discussing "hybrid" nature of the bankruptcy courts).

25. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 68-70 (1982) (plurality) (describing congressional authority to create legislative courts in light of the "public rights" doctrine). The Supreme Court arguably called the continuing vitality of the public rights doctrine into question when it ruled that a non-Article III tribunal could adjudicate permissive common law counterclaims pendent to claims that commodities customers brought against their brokers. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986) (characterizing the Commission's jurisdiction as a de minimis invasion of the Article III courts' power). Three years later, however, the Court relied heavily on the public rights doctrine in Granfinancieras, S.A. v. Nordberg, 492 U.S. 33, 54 (1989) (holding that Congress may only commit to non-Article III tribunals the adjudication of statutory rights "closely intertwined with a federal regulatory program Congress has the power to enact" or rights that belong to or exist against the federal government).

26. *See, e.g., Granfinancieras*, 492 U.S. at 54 (discussing Congress's ability to create statutory public rights and then assign their adjudication to administrative agencies).

27. *Id.*

cial power because the Article III courts control them.[28] Adjuncts serve as assistants to the Article III judges.[29]

A bankruptcy court's power to resolve a given issue depends on whether it falls under the court's "core" or "non-core" authority.[30] Bankruptcy courts act as legislative courts and conclusively determine core issues, which involve the restructuring of creditor/debtor relations.[31] Because Congress has plenary authority over bankruptcy,[32] creditor/debtor relations arguably involve "public rights."[33] Thus, when exercising core jurisdiction,

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28. *See, e.g.,* United States v. Raddatz, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring) (holding that Article III judges' thorough-going control of magistrate judges renders Congress's grant of power to the magistrate judges constitutional), *cited with approval in* Peretz v. United States, 111 S. Ct. 2661, 2670 (1991) (adopting Justice Blackmun's concurring opinion in *Raddatz* for purposes of determining whether a grant of power to an adjunct violates Article III).

29. *See, e.g., Raddatz*, 447 U.S. at 686 (Blackmun, J., concurring) ("Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants [the magistrate judges], while ensuring that the judges retain complete supervisory control over the assistants' activities.").

30. 28 U.S.C. § 157 (1988) (stating bankruptcy court jurisdiction and dividing that jurisdiction into core and non-core areas of authority).

31. 28 U.S.C. § 157(b)(2) (1988). This statute defines core jurisdiction and states in part:

> Core proceedings include, but are not limited to—
> (A) matters concerning the administration of the estate;
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
> (C) counterclaims by the estate against persons filing claims against the estate; . . .
> (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

28 U.S.C. § 157(b)(2) (1988).

32. U.S. CONST. art. I, § 8, cl. 4.

33. At least Congress hoped this was the case. Current bankruptcy statutes represent Congress's reaction to the Supreme Court's decision in Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982). In this landmark case, a plurality of the Supreme Court overturned Congress's 1978 reorganization of the bankruptcy courts on the grounds that Congress's actions encroached on the Article III courts' judicial power. *Id.* at 87. Congress had granted the bankruptcy courts all of the "powers of a court of equity, law and admiralty," The Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2671 (codified at 28 U.S.C. § 1481 (1978)) (repealed 1984) [hereinafter 1978 Act], except that they could not "enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment

bankruptcy courts may constitutionally act as legislative courts.[34]

The Bankruptcy Code also authorizes bankruptcy courts to hear proceedings that are not core but are "otherwise related" to a case under Title 11.[35] They may determine non-core issues only with the consent of the parties.[36] Barring consent, bankruptcy courts may only make proposed findings of fact and conclusions of law on non-core matters.[37] When they issue these recommendations, bankruptcy judges act, like magistrate judges, as "adjuncts" or assistants of the district courts.[38]

After the bankruptcy court issues a proposed finding under its non-core authority, the parties may file written objections within ten days pursuant to Bankruptcy Rule 9033.[39] If one or

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of imprisonment." *Id.* (codified at 28 U.S.C. § 1481) (repealed 1984). The Court ruled that this grant of power enabled bankruptcy courts to decide issues of "private right." *Northern Pipeline*, 458 U.S. at 84. Thus, it encroached on the judiciary's Article III power. *Id.*

Congress responded in 1984 with amendments to the 1978 Act. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333 (codified at 11 and 28 U.S.C.) [hereinafter 1984 Act]. The amendments divided bankruptcy court jurisdiction into "core" and "non-core" areas. 28 U.S.C. § 157(a) (1988). Congress authorized the bankruptcy courts to continue to conclusively determine core cases which involve the restructuring of creditor/debtor relations. *Id.* § 157(b). Congress must have believed, therefore, that core issues (those involving the restructuring of creditor/debtor relations) were a matter of public right. Otherwise, in light of the *Northern Pipeline* holding, bankruptcy court determination of core matters would continue to usurp the Article III courts' judicial power. *See* Plastiras v. Idell (*In re* Sequoia Auto Brokers Ltd.), 827 F.2d 1281, 1287-88 (9th Cir. 1987) (discussing the 1984 amendments as a response to *Northern Pipeline*).

Despite Congress's best efforts, however, evidence exists that the restructuring of creditor/debtor relations is *not* a matter of public right. Justice Brennan wrote in *Granfinancieras*, "[w]e do not suggest that the restructuring of debtor-creditor relations is in fact a public right. This thesis has met with substantial scholarly criticism." 492 U.S. at 56 n.11. If restructuring is not a public right, then bankruptcy courts may still act unconstitutionally when they determine core matters.

34. *Sequoia*, 827 F.2d at 1288 n.10 (describing bankruptcy court core functions as like those of a legislative court).

35. 28 U.S.C. § 157(c)(1) (1988) ("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11.").

36. 28 U.S.C. § 157(c)(2) (1988).

37. *Id.* § 157(c)(1).

38. *See, e.g., Sequoia*, 827 F.2d at 1288 n.10 (discussing the hybrid legislative court/adjunct nature of bankruptcy courts).

39. BANKRUPTCY RULE 9033(b) provides:

> Objections: time for filing. Within 10 days after being served with a copy of the proposed findings of fact and conclusions of law a party may serve and file with the clerk written objections which identify the spe-

more of the parties file objections, the district court reviews de novo the objections and the portions of the record to which the parties have objected.[40] The district court retains complete discretion to take further evidence, conduct hearings, or confine review to written records.[41] Significantly, district courts use identical procedures to review magistrate judge findings on dispositive pretrial motions.[42]

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cific proposed findings or conclusions objected to and state the grounds for such objection. A party may respond to another party's objections within 10 days after being served with a copy thereof. A party objecting to the bankruptcy judge's proposed findings or conclusions shall arrange promptly for the transcription of the record, or such portions of it as all parties may agree upon or the bankruptcy judge deems sufficient, unless the district judge otherwise directs.

BANKR. R. 9033(b).

40. The bankruptcy statute describes district court review of non-core matters generally as "de novo":

> In such [a non-core] proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order of judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected.

28 U.S.C. § 157(c)(1) (1988) (emphasis added). Bankruptcy Rule 9033(d) introduces the notion that district courts may confine de novo review to the written records:

> Standard of review. The district judge shall make a de novo review *upon the record* or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions.

BANKR. R. 9033(d) (emphasis added). The Advisory Committee Notes immediately following the rule observe that this rule is an adoption of the Federal Rules of Civil Procedure 72(b).

The district judge need only review a bankruptcy finding of contempt if a party requests review. After a party makes such a request, the district court may confine its review to the written records. The district judge enjoys complete discretion whether or not to *hear* any evidence at all. This standard is identical to the "de novo determination" standard that district courts apply when they review magistrate proposed findings of fact and conclusions of law on dispositive pretrial motions pursuant to 28 U.S.C. § 636(b)(1). *See infra* note 51 (discussing "de novo determination" standard of review).

41. BANKR. R. 9033(d) (describing the standard of review that district courts use to examine bankruptcy court proposed findings of fact and conclusions of law).

42. *See infra* notes 50-52 and accompanying text (discussing district court review of magistrate judge findings).

B. A Comparison of Bankruptcy Court Authority over Non-Core Issues with Magistrate Court Authority over Dispositive Pre-Trial Matters and Contempts

As the primary example of district court adjuncts,[43] the limits on the authority of magistrate judges illuminate the limits on the authority of bankruptcy judges acting in their adjunct, or non-core, capacity. Although they are non-Article III officers,[44] magistrate judges may perform a variety of ministerial and adjudicative tasks for Article III courts.[45] For example, with both district court referral and consent of the parties, magistrate judges may conduct bench and jury trials for all civil disputes and misdemeanors.[46] They may also determine most pretrial matters subject to district court review under the "clearly erroneous and contrary to law" standard.[47]

For "dispositive" pretrial matters,[48] however, magistrates may only recommend "proposed findings of fact" to the district court.[49] If a party makes a timely objection to a proposed dispositive pretrial finding, the district court must review the proposed finding under the "de novo determination" standard.[50] "De novo determination" permits the district judge to confine review to written records.[51] District courts therefore apply the

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43. Magistrates are "competent and impartial assistants" under the "complete supervisory control" of the district courts. United States v. Raddatz, 447 U.S. 667, 686 (1980) (Blackmun, J., concurring).

44. Full-time magistrate judges serve eight year terms. Part-time magistrate judges serve four year terms. 28 U.S.C. § 631(e) (1988). *See supra* note 23 (stating the requirements for Article III judge status).

45. *See generally* 28 U.S.C. § 636 (1988 & Supp. IV 1992).

46. *Id.* § 636(c)(1).

47. *Id.* § 636(b)(1)(A).

48. Dispositive pretrial motions include motions:

> [F]or injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

Id.

49. *Id.* § 636(b)(1)(B).

50. *Id.* § 636(b)(1).

51. § 636(b)(1) states the standard of review for magistrate court proposed findings and recommendations:

> 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. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by

same standard of review to both magistrate dispositive pretrial findings and to bankruptcy court proposed findings.[52]

Magistrate judges may not, however, make proposed findings of contempt pursuant to their authority over dispositive pretrial motions pursuant to 28 U.S.C. § 636(b). Instead, magistrate judges must certify the facts of contempt pursuant to 28 U.S.C. § 636(e).[53] The district court then reviews the certified facts in a de novo *hearing*[54] rather than under the less strict de novo determination standard that district courts apply to proposed findings on dispositive pretrial motions.[55]

In contrast, the statute stating bankruptcy court jurisdictional authority appears to be silent on the issue of contempt.[56] Some bankruptcy judges have interpreted this silence as an implicit grant of the power to issue proposed findings of criminal contempt under their non-core authority[57] to hear proceedings

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the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

§ 636(b)(1) (1988). In *United States v. Raddatz*, the Supreme Court clarified the de novo determination standard, distinguishing de novo determinations from de novo hearings. 447 U.S. 667, 673-76 (1980). A court may confine de novo determinations to written records. *Id.* at 675. De novo hearings require that the district court actually *hear* the evidence. *Id.* at 673-74.

52. *See supra* note 40 (discussing the statutes and rules governing district court review of bankruptcy court non-core findings). Although the Bankruptcy Code does not use the phrase, this Note will refer to district court review of both bankruptcy and magistrate findings as "de novo determination."

53. In pertinent part, 28 U.S.C. § 636(e) states:

> Upon the commission of any such [contemptuous] act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, *hear* the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court. . . .

28 U.S.C. § 636(e) (emphasis added).

54. *Id.*

55. *See supra* note 51 (discussing "de novo determination" and the Supreme Court ruling in *Raddatz* that district courts may confine de novo determination review to written records).

56. 28 U.S.C. § 157(c) (1988) (stating bankruptcy court non-core authority).

57. Bankruptcy courts only issue proposed findings of fact and conclusions of law pursuant to their non-core authority. 28 U.S.C. § 157(c)(1). Any bankruptcy judge who submits a proposed finding of criminal contempt, therefore, must claim, implicitly or explicitly, that the power to hear criminal contempt proceedings comprises part of their non-core authority. *See, e.g.*, Brown v. Ram-

related to a case under Title 11.[58] Indeed, Bankruptcy Rule 9020, although it does not purport to grant contempt powers, buttresses this conclusion by providing non-core procedures for

say (*In re* Ragar), 3 F.3d 1174, 1177 (8th Cir. 1993); *see infra* note 119 (discussing proposed findings of criminal contempt as assertions of non-core authority).

Bankruptcy courts probably lack core criminal contempt authority. Core proceedings include cases under Title 11 and those that arise in Title 11 cases. 28 U.S.C. § 157(b). Courts punish criminal contempt to vindicate their authority. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 445 (1911). Criminal contempt proceedings may therefore continue even after dismissal of the underlying suit which gave rise to the alleged contempt. Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503, 1517-18 (5th Cir. 1990). As such, the Fifth Circuit concluded that criminal contempt proceedings are essentially unrelated to the underlying Title 11 proceedings in which they occur. *Id.* at 1518. Rather than arising under Title 11, criminal contempt of bankruptcy court arises under 18 U.S.C. § 401. *Id.*; *see infra* note 101 (stating text of 18 U.S.C. § 401). Bankruptcy courts therefore lack core authority over criminal contempts. *But see Ragar*, 3 F.3d at 1179 (holding that criminal contempt serves an enforcement function as well as a punitive function and therefore integrally relates to the underlying Title 11 proceeding and provides a "necessary and appropriate" means to enforce bankruptcy court orders).

In any event, bankruptcy court assertion of core criminal contempt authority would violate the Constitution. When acting in core capacity, bankruptcy courts function as legislative courts. *See supra* notes 31 & 33 (discussing the authority of bankruptcy courts over core matters). Legislative courts may only conclusively determine matters of public right. *See supra* notes 25-27 and accompanying text (discussing legislative court authority over public rights). The Supreme Court observed in *Northern Pipeline* that the public rights doctrine does not extend to criminal matters. 458 U.S. 50, 70 n.24 (1982) (plurality); *see also Hipp*, 895 F.2d at 1510-11. Therefore, the bankruptcy courts cannot consider criminal contempt in their legislative court capacity.

Importantly, none of these considerations applies to bankruptcy court *civil* contempt authority. *See infra* notes 106-110 and accompanying text (distinguishing criminal from civil contempt). Courts cite for civil contempt as a remedial measure to enforce their orders. *See, e.g.*, Plastiras v. Idell (*In re* Sequoia Auto Brokers Ltd.), 827 F.2d 1281, 1283 n.1 (9th Cir. 1987). The parties in interest in civil contempt are the contemnor and the party whom the contemnor has harmed by her refusal to obey a court order in the underlying suit. *Hipp*, 895 F.2d at 1510. Courts therefore dismiss charges of civil contempt if they dismiss the underlying suit. *See id.* at 1517-18 (comparing civil and criminal contempt). Thus, civil contempt is integral to the underlying suit which gave rise to the contempt in a way that criminal contempt is not. Finally, civil contempt, as the name implies, is not criminal.

These considerations have led some courts to hold bankruptcy courts have core authority over civil contempt. Better Homes of Va., Inc. v. Budget Serv. Co. (*In re* Better Homes of Va., Inc.), 52 B.R. 426, 430 (E.D. Va. 1985), *aff'd*, 804 F.2d 289 (4th Cir. 1986); *In re* Depew, 51 B.R. 1010, 1013 (E.D. Tenn. 1985) (same). *Contra Sequoia*, 827 F.2d at 1289 (rejecting bankruptcy court core authority over civil contempt). For further discussion of the core status of contempt see Mountain Am. Credit Union v. Skinner (*In re* Skinner), 917 F.2d 444, 448 (10th Cir. 1990).

58. *See infra* notes 117-119 and accompanying text (discussing bankruptcy court assertions of non-core authority to issue findings of criminal contempt).

bankruptcy courts to use when conducting contempt proceedings *just in case* they possess the necessary authority.[59] The rule provides that district courts subject proposed findings, at a party's timely request, to de novo determination pursuant to Bankruptcy Rule 9033 rather than to a full de novo hearing.[60] Still, the absence of express authority in the Bankruptcy Code to issue proposed findings in contempt proceedings clouds certainty in interpretation.[61] Thus, the analogy between magistrate and bankruptcy judge authority to make proposed findings is less compelling in the area of contempt law.

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59. Bankruptcy Rule 9020 purports to govern the procedures whereby bankruptcy courts may conduct contempt proceedings. Rule 9020(a) provides that bankruptcy judges may summarily "determine" contempts committed in their presence. Rule 9020(b) governs procedures for hearings on contempt committed outside the bankruptcy judge's presence. Rule 9020(c) controls the mechanisms whereby a party may obtain district court review:

> Service and effective date of order; review. The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

BANKR. R. 9020(c). Bankruptcy Rule 9033(d) provides for de novo review of appropriate portions of the record of bankruptcy court proposed findings of fact and conclusions of law. *See supra* notes 39-40 (discussing Bankruptcy Rule 9033). Bankruptcy Rule 9020, therefore, essentially provides mechanisms for bankruptcy courts to make proposed findings on contempt.

The Advisory Committee notes to the 1987 amendments of the Bankruptcy Rules follow the text of Bankruptcy Rule 9020. They note that the Bankruptcy Act of 1978, *see supra* note 33 (discussing the 1978 Act), provided that bankruptcy courts were courts of law, equity, and admiralty. It also contains explicit restrictions on bankruptcy court contempt power.

In contrast, the 1984 Amendments, *see supra* note 33 (discussing the 1984 amendments), provide that bankruptcy judges are judicial officers of the district court. 28 U.S.C. §§ 151, 152(a)1. The Amendments contain no explicit restrictions on bankruptcy court contempt power. The Advisory Committee recognized that these changes may well have robbed bankruptcy courts of statutory contempt authority. The Committee wrote, "This rule [9020], as amended, recognizes that bankruptcy judges may not have the power to punish for contempt." BANKR. R. 9020 (advisory committee's note to 1987 amends.); *see also Hipp*, 895 F.2d at 1518 (dismissing Bankruptcy Rule 9020 as a substantive grant of contempt power); *Sequoia*, 827 F.2d at 1288 (same).

60. *See supra* note 59 (stating text of Bankruptcy Rule 9020(c)).

61. *See infra* notes 115-134 and accompanying text (discussing the contrary conclusions on bankruptcy court criminal contempt authority reached by the Fifth and Eighth Circuits).

C. Constitutional Limits on Delegation of Criminal Matters to Non-Article III Adjuncts

Non-Article III tribunal power over criminal matters, such as criminal contempt, raises difficult constitutional questions. First, any such delegation of power raises the possibility that the adjunct will encroach on the authority of Article III courts to exercise the judicial power of the United States.[62] In addition, with specific regard to de novo determinations, any procedure that allows a judge to adjudicate guilt without actually hearing the credibility-based evidence risks violating the defendant's due process right to a hearing before the judge who determines criminal liability.[63]

1. Due Process Concerns

In *United States v. Raddatz*, the Supreme Court strongly implied that resolution of criminal liability requires that the judge who determines guilt hear the credibility-based evidence.[64] In *Raddatz*, a magistrate judge conducted a suppression hearing and issued appropriate proposed findings.[65] The district judge reviewed the magistrate judge's findings under the de novo determination standard,[66] confining his review to Raddatz's written objections and the relevant portions of the record.[67] Raddatz argued on appeal that this review violated his due process right that "[t]he one who decides must hear [the credibility-based evidence]."[68]

The Court rejected this claim, noting that due process requirements are partially a function of the importance of the private interests at risk.[69] The Court then reasoned that the interests at stake in Raddatz's suppression hearing were less

62. "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." U.S. Const. art. III, § 1.

63. *See* United States v. Raddatz, 447 U.S. 667, 677-79 (1980) (discussing the parameters of the due process right that the judge who decides an issue must hear the credibility-based evidence on that issue).

64. *Id.* at 680 (holding that "de novo determination" as defined in 28 U.S.C. § 636(b)(1) adequately protected the due process rights of the defendant who sought review of a suppression hearing held in magistrate court).

65. *Id.* at 669-72.

66. *Id.* at 672.

67. *Id.*

68. *Id.* at 677 (citing Morgan v. United States, 298 U.S. 468, 481 (1936) (holding that "[t]he one who decides must hear")).

69. *Id.* at 677 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976) for the proposition that one factor to consider in weighing due process claims is "the private interests implicated").

important than those involved when a court decides criminal liability in a full-blown trial.[70] Therefore, suppression hearings merit less protection than hearings on criminal liability, and the command that "the one who decides must hear" does not apply.[71]

2. Article III Concerns

Non-Article III resolution of criminal matters poses the danger of usurping the Article III courts' control of the judicial power.[72] Article III analysis proves difficult, however, because of the Supreme Court's refusal to develop clear standards to determine when the delegation of power violates Article III.[73] Rather than apply "formalistic" tests, the Court "weigh[s] a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."[74] Unsurprisingly, Article III jurisprudence has grown into a very difficult area of the law.[75]

Article III analysis hinges on both the personal rights of litigants and the structural integrity of the judicial branch.[76] Regarding personal rights, the Court has observed that whether defendants have a right to demand an Article III judge "at every critical stage of a felony trial"[77] constitutes a substantial constitutional question. The Court has avoided resolving this issue by obeying the canon of constitutional avoidance, adopting reason-

70. *Id.* at 677-79.

71. *Id.* at 679-80. By implication, the command that the "one who decides must hear" would apply in a hearing to decide guilt, when the defendant's interests are at their greatest. The Supreme Court bolstered this implication by citing with approval Lord Coleridge for the proposition that courts should not conduct retrial on the basis of notes of the witnesses' prior testimony. *See supra* note 1 and accompanying text (quoting the cited passage). The Court then noted that Lord Coleridge made this remark while admonishing an appellate court that had reviewed a trial on the merits based on mere written records. 447 U.S. at 679. The Supreme Court, therefore, presumably agrees that, for a trial on the merits, the judge must hear the evidence.

72. *See infra* text accompanying notes 155-165 (discussing the structural requirements of Article III).

73. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 852 (1986).

74. *Id.*

75. *Id.*

76. *See* Peretz v. United States, 111 S. Ct. 2661, 2669 (1991) (discussing the personal right and structural integrity issues of Article III).

77. *Id.* at 2665.

able statutory interpretations that enable it to avoid reaching this constitutional issue.[78]

Comparison of two recent Supreme Court cases highlights the role of constitutional avoidance in Court jurisprudence. In *Gomez v. United States*,[79] the Court invalidated delegation *without* the defendant's consent[80] of felony voir dire to a magistrate judge. Subsequently, in *Peretz v. United States*,[81] the Court affirmed the delegation *with* the defendant's consent of felony voir dire to a magistrate judge.[82] The two cases reached different statutory results due to the absence of Article III concerns in *Peretz*.[83] In *Gomez*, the defendant's lack of consent raised the difficult issue of whether the defendant had the right to demand an Article III judge.[84] To avoid this constitutional difficulty, the Court interpreted the relevant statutes as denying magistrates the authority to conduct non-consensual felony voir dire.[85]

In *Peretz*, the Court did not need to practice constitutional avoidance. Because a defendant may waive any right that may exist to demand an Article III judge,[86] Peretz's consent to magistrate voir dire obviated any need to resolve the existence of this

78. *See, e.g., id.*; Gomez v. United States, 490 U.S. 858, 864 (1989) (observing that "[i]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question").

Constitutional avoidance is particularly apt when an Article III issue is at stake. As Chief Justice Rehnquist remarked:

> Particularly in an area of constitutional law such as that of "Article III Courts," with its frequently arcane distinctions and confusing precedents, rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy.

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring).

Similar concerns led Justice Marshall to state, "[g]iven the inherent complexity of Article III questions, the canon of constitutional avoidance should apply with peculiar force when an Article III issue is at stake." *Peretz*, 111 S. Ct. at 2676 (Marshall, J., dissenting).

79. 490 U.S. 858 (1989).

80. *Id.* at 872.

81. 111 S. Ct. 2661 (1991).

82. *Id.* at 2667.

83. *See id.* at 2669.

84. *Id.* at 2665 (stating that *Gomez* implicated the policy of constitutional avoidance "because of the substantial question whether a defendant has a constitutional right to demand that an Article III judge preside at every critical stage of a felony trial").

85. *Id.* at 2667.

86. *See id.* at 2669 (holding that a defendant has "no constitutional right to have an Article III judge preside at jury selection if the defendant has raised no objection to the judge's absence").

right.[87] The Court therefore felt free to interpret the relevant statutes to permit magistrate judges to conduct felony voir dire with the defendant's consent.[88] Read together, these cases indicate that the right to demand an Article III judge is sufficiently robust that the Court will, when reasonably possible, interpret statutes in a manner that permits the Court to avoid resolving this constitutional problem.[89]

Article III analysis also involves structural concerns of separation-of-powers.[90] A grant of power to a non-Article III court must not rob the Article III courts of their control of the judicial power of the United States.[91] In *Commodity Futures Trading Commission v. Schor*[92] and *United States v. Raddatz*, the Court discussed factors it considers in assessing Article III challenges which include: the degree to which the Article III courts retain control over actions in the non-Article III courts,[93] the origin and importance of litigants' rights at risk in the non-Article III courts,[94] the extent to which the Article III courts retain exclusive control of the "essential attributes" of the judicial power,[95] and the importance of the concerns that led Congress to delegate power to a non-Article III court in the first place.[96]

Circuit courts have confronted structural Article III concerns when ruling on whether delegation of power to the magistrate judges violates Article III. Interestingly, a number of

87. *Id.* at 2667 (noting that "[t]he absence of any constitutional difficulty removes one concern that motivated us in *Gomez* to require unambiguous evidence of Congress' intent to include jury selection among a magistrate's additional duties").

88. *Id.*

89. The Fifth Circuit provided a reasonable reading of the bankruptcy statutes that denies the bankruptcy courts criminal contempt power in *In re* Hipp, 895 F.2d 1503 (5th Cir. 1990). *See infra* notes 127-128 and accompanying text (discussing the Fifth Circuit's analysis of the bankruptcy statutes and Congress's legislative intent).

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

91. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-52 (1986) (discussing the Article III requirement that grants of power to non-Article III tribunals not encroach on the Article III courts' control of the judicial power of the United States).

92. *Id.*

93. United States v. Raddatz, 447 U.S. 667, 685-86 (Blackmun, J., concurring), *cited with approval in Peretz*, 111 S. Ct. at 2669-70 (holding that Justice Blackmun's concurring analysis in *Raddatz* on Article III courts' control of magistrate judges' actions governed Article III inquiry in *Peretz* regarding validity of felony voir dire conducted by a magistrate judge with defendant consent).

94. *Schor*, 478 U.S. at 851.

95. *Id.*

96. *Id.*

circuit courts have stated that magistrate judges do not violate Article III, in part because they lack all contempt power.[97] For instance, the Seventh Circuit observed in *Geras v. LaFayette Display Fixtures, Inc.*[98] that exclusively vesting contempt power in the Article III courts helps ensure the constitutionality of the magistrate judges because it "provide[s] an adequate distinction between such [Article III] judges and non-Article III officers."[99]

D. A Little Contempt

Constitutional analysis of non-Article III tribunal authority over contempt requires a brief introduction to this idiosyncratic area of the law.[100] Contempt,[101] broadly speaking, is an act of

97. *See, e.g.*, Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1044 (7th Cir. 1984) (noting that vesting the contempt power in Article III judges distinguishes such judges from non-Article III officers such as magistrates); Pacemaker Diagnostic Clinic of Am. v. Instromedix, 725 F.2d 537, 545 (9th Cir.) (observing that the Federal Magistrate Act preserves Article III judicial power by, among other things, denying contempt authority to magistrates), *cert. denied*, 469 U.S. 824 (1984).

98. 742 F.2d 1037 (7th Cir. 1984).

99. *Id.* at 1044. In *Geras*, the Seventh Circuit ruled on the constitutionality of 28 U.S.C. § 636(c), which authorizes magistrate judges, with the consent of the parties, to enter final judgment on civil matters and misdemeanors. The court speculated that perhaps Article III analysis requires a clear line of demarcation between the authority of Article III judges and their adjuncts. It suggested that one could find this distinction in the magistrate judges' complete inability to punish for contempt.

100. *See supra* note 6 (noting the complexity of contempt law); *see generally* Goldfarb, *supra* note 6 (providing an excellent discussion of the historical development of contempt law).

101. The federal courts punish contempt pursuant to 18 U.S.C. § 401, which reads as follows:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401 (1988 & Supp. 1994).

Federal Rules of Criminal Procedure 42 establishes the procedures for punishment of criminal contempts. Rule 42(a) controls procedures for in-court contempts; Rule 42(b) controls procedures for out-of-court contempts:

> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) Disposition upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essen-

"disobedience or disrespect toward a judicial or legislative body of government, or interference with its orderly process."[102] The Supreme Court characterizes contempt authority as an "inherent power" of the courts.[103] The justification for this inherent power lies in separation-of-powers.[104] Without it, the courts would have to rely on the other branches of government to enforce their will. This subordinacy is incompatible with the idea of coequal branches in a tripartite government.[105]

Contempts may be either criminal or civil.[106] The distinction between the two rests on the ostensible purpose for which the court sanctions the contemnor.[107] A court cites for civil contempt for the benefit of a complainant whom the contemnor has hurt by refusal to obey a court order.[108] By contrast, courts cite

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tial facts constituting the criminal contempt charged and describe it as such. . . . The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. . . . Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

FED. R. CRIM. P. 42. Thus, a "court of the United States" may punish in-court contempts (that the judge witnesses) summarily. Courts must grant hearings for determinations of out-of-court contempt. Hence, out-of-court contempt is sometimes referred to as "nonsummary" contempt.

102. GOLDFARB, *supra* note 6 at 1. The courts' formal power to punish for contempt reaches back in time to medieval England. *Id.* at 9. The judges were agents of the king. To disobey them was to disobey the king. *Id.* at 11. It was not a good idea to disobey the king. In the United States, courts do not have the option of justifying their contempt power as a function of kingly sovereignty.

103. *See, e.g.*, Michaelson v. United States *ex rel* Chicago, St. P., M., & O.R. Co., 266 U.S. 42, 65-66 (1924) (holding that "the power to punish for contempts . . . has been many times decided and may be regarded as settled law. . . . The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power").

104. *See, e.g.*, Young v. United States *ex rel* Vuitton Et Fils S.A., 481 U.S. 787, 796 (1987) (holding that "[t]he ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches").

105. *See, e.g.*, Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911) (holding that without the contempt power "what the Constitution . . . fittingly calls the 'judicial power of the United States' would be a mere mockery").

106. *See, e.g., id.* at 441 (discussing distinctions between civil and criminal contempt); Plastiras v. Idell (*In re* Sequoia Auto Brokers Ltd.), 827 F.2d 1281, 1283 n.1 (9th Cir. 1987).

107. *See, e.g., Gompers*, 221 U.S. at 441.

> It is not the fact of punishment but rather its character and purpose that often serve to distinguish the two classes of [contempt] cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

Id.

108. *Sequoia*, 827 F.2d at 1283 n.1 (holding that "[c]ivil contempt is a refusal to do an act the court has ordered for the benefit of a party; the sentence is remedial").

for criminal contempt for punitive rather than remedial reasons.[109] The court's purpose in passing a judgment of criminal contempt is to vindicate its authority by punishing the contemnor.[110]

Criminal contempt is not a crime in the usual sense of transgression of a positive law. Rather, the criminal contemnor has in some way interfered with or shown disrespect for the court.[111] As a result, despite the obvious dangers that criminal contempt poses to liberty and property, courts were for many years reluctant to grant alleged criminal contemnors the same procedural protections as their "law"-breaking counterparts.[112] This is no longer the case. Courts now regard criminal contempt as a "crime in the ordinary sense"[113] for purposes of determining the defendant's procedural rights.[114]

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109. *Id.* (holding that "[c]riminal contempt is a completed act of disobedience; the sentence is punitive to vindicate the authority of the court"); *see also Gompers*, 221 U.S. at 445 (holding that criminal contempts that arise even in civil litigation are controversies between the state and the defendant, not between the parties of the underlying suit).

110. *Gompers*, 221 U.S. at 441.

111. *See supra* note 101 (stating the text of 18 U.S.C. § 401).

112. Historically, criminal contemnors did not merit much in the way of procedural protections from the danger of arbitrary courts. For instance, criminal contemnors were not entitled to a jury trial. *In re* Debs, 158 U.S. 564, 594-95 (1895); *cf.* GOLDFARB, *supra* note 6, at 168-84 (criticizing the historical lack of protections for a criminal contemnor).

113. Bloom v. Illinois, 391 U.S. 194, 201 (1968).

114. Nonetheless, courts face a practical difficulty in determining what procedures to accord criminal contemnors. Typically, one determines whether a crime is a misdemeanor or felony (and the procedural protections the defendant merits) on the basis of the maximum authorized penalty. 18 U.S.C. § 3559 (1988) (classifying crimes according to the maximum term of imprisonment that a court may impose; a crime is a felony if punishable by imprisonment for more than one year). The punishment for criminal contempts sometimes has no statutory maximum. *Bloom*, 391 U.S. at 206 n.8. The Supreme Court has ruled, therefore, that the seriousness of the contempt (for purposes of the felony/misdemeanor distinction) depends not on the (often nonexistent) statutory maximum penalty but rather on the penalty which the court actually imposes. *Id.* at 211 (holding that when "the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty . . . [courts are] to look to the penalty actually imposed" to determine the seriousness of the offense). Theoretically, punishment for the criminal contempt should depend on the evidence of the crime that the prosecution presents *during* the proceeding (i.e., let the punishment fit the crime). Courts dealing with a criminal contempt may therefore face the administrative difficulty of not knowing in advance whether they are dealing with a felony or a misdemeanor for purposes of deciding the procedural protections to afford the defendant.

II. *IN RE HIPP* AND *IN RE RAGAR*: TWO CONTRASTING APPROACHES TO THE PROBLEM OF BANKRUPTCY COURT PROPOSED FINDINGS OF CRIMINAL CONTEMPT

Two recent appellate decisions, *In re Hipp*[115] and *In re Ragar*[116] illustrate the difficulty of determining whether bankruptcy court issuance of proposed findings of criminal contempt violates the rights of alleged contemnors. The bankruptcy courts in both *In re Hipp*[117] and *In re Ragar*[118] regarded crimi-

115. Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503 (5th Cir. 1990).

116. Brown v. Ramsay (*In re* Ragar), 3 F.3d 1174 (8th Cir. 1993).

117. 895 F.2d at 1503 (criticizing an unpublished bankruptcy proposed finding of criminal contempt). On April 5, 1988, the bankruptcy court held an evidentiary hearing to determine whether to convict the defendant, David Oles, of criminal contempt for violating a November 9, 1987 order of the bankruptcy court commanding him not to interfere with the sale of property of the bankruptcy estate of Hipp, Inc. *Id.* at 1505-06. The bankruptcy court found Oles guilty of five counts of "willful contempt." *Id.* at 1506 & n.8. The court sentenced him to six months confinement and a $500 fine for each count—the terms of confinement to run concurrently and the fines to accumulate for a total of $2500. *Id.* The bankruptcy court entered a written order on April 8 formalizing its oral findings at the April 5 hearing. At no time in either the oral finding or the written order did the court refer to the need to find the defendant guilty "beyond a reasonable doubt." *Id.*

Oles filed timely objections to the bankruptcy court's order pursuant to Bankruptcy Rule 9020. *Hipp*, 895 F.2d at 1506. The district court reviewed the order pursuant to Rule 9033 under the "de novo determination" standard solely on the basis of the written record, the transcript of the contempt hearing, and Oles's written objections. The court declined to take any more evidence on the matter or to grant any further hearing. *Id.* On August 26, 1988, the district court filed an opinion and order affirming the bankruptcy court's "findings of fact and conclusions of law" that Oles had committed criminal contempt. *Id.* at 1504. It vacated the fines but upheld the term of confinement. *Id.* at 1504 n.4.

118. 140 B.R. 889, 891 (Bankr. E.D. Ark. 1992), *appeal decided by* 3 F.3d 1174 (8th Cir. 1993). The bankruptcy court disqualified an attorney, Brown, from representing Christine Ragar in bankruptcy reorganization. *Id.* at 889-90. Brown continued to represent Ragar and filed pleadings on her behalf. *Id.* at 890. The bankruptcy court ordered Brown to show cause why the court should not find him in civil or criminal contempt. *Id.* The court held a hearing, found Brown in criminal contempt, and fined him $950. *Id.* at 890-91. It ruled that its order would become final ten days after service on Brown unless he were to file written objections within that period. *Id.* at 891. Brown filed the necessary objections. The district court then reviewed the order and objections de novo as provided by Bankruptcy Rule 9033(b). *Ragar*, 3 F.3d at 1177. The district court affirmed the bankruptcy court's proposed finding that Brown had been in criminal contempt. *Id.*; *Ragar*, 3 F.3d at 1176-77.

Brown appealed the contempt to the circuit court. He argued, among other things, that bankruptcy courts have no statutory criminal contempt power. *Id.* at 1177. Furthermore, he argued that any such authorization would unconstitutionally usurp of Article III judicial power. *Id.*

nal contempt as falling under their non-core authority.[119] In both cases, the courts dealt with the contempts in a non-summary fashion, granting hearings.[120] After the hearings, both courts filed proposed findings that the defendants had committed criminal contempt.[121]

On appeal to their respective circuits, *Hipp* and *Ragar* reached diametrically opposed results. As a statutory matter, the Eighth Circuit held in *Ragar* that 11 U.S.C. § 105(a) authorizes the bankruptcy court to make recommendations of contempt to enforce Title 11.[122] In pertinent part, § 105(a) states that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[123] The court ruled that the "plain meaning of the statute" clearly authorizes the bankruptcy court's proposed finding, which is a "necessary or appropriate" means to enforce the provisions of Title 11.[124]

The Eighth Circuit shrugged off any constitutional arguments with the observation that, in making a proposed finding of criminal contempt, the bankruptcy court had acted precisely as a magistrate judge acts pursuant to 28 U.S.C. § 636.[125] Because analogous magistrate action has long survived constitutional attack, the court reasoned that the bankruptcy court's action was clearly constitutional.[126]

The Fifth Circuit in *Hipp* found the language of the bankruptcy statutes ambiguous and resorted to statutory history and legislative intent.[127] The court concluded that Congress did *not*

119. In both cases, the bankruptcy judges filed contempt orders that provided for district court review pursuant to Bankruptcy Rule 9033. *See supra* note 40 (stating BANKR. R. 9033(d)). District courts use Rule 9033 to review bankruptcy court proposed findings that they make pursuant to non-core authority. 28 U.S.C. § 157(b) (1988). Therefore, in both *Hipp* and *Ragar*, the bankruptcy judges treated contempt proceedings as falling under their non-core authority. *Ragar*, 3 F.3d at 1178 & n.3 (noting that the bankruptcy court below had treated criminal contempt as a non-core matter); *Hipp*, 895 F.2d at 1504 (noting that the bankruptcy court below had made "a proposed finding of fact and conclusion of law" on criminal contempt).

120. *Hipp*, 895 F.2d at 1505; *Ragar*, 3 F.3d at 1177.

121. *Hipp*, 895 F.2d at 1506; *Ragar*, 3 F.3d at 1177.

122. *Ragar*, 3 F.3d at 1178-79.

123. 11 U.S.C. § 105 (1988).

124. *Ragar*, 3 F.3d at 1178-79.

125. *Id.* at 1179.

126. *Id.*

127. *Hipp*, 895 F.2d at 1515-18 (noting that the current bankruptcy statutes make no explicit mention of contempt power and then proceeding to analyze legislative history and intent).

statutorily authorize bankruptcy courts to issue findings on nonsummary criminal contempt.[128] The court observed that courts

128. *Id.* at 1519. The circuit court posited that only two provisions of the 1984 Act could conceivably serve as statutory grants of bankruptcy court contempt power—11 U.S.C. § 105 and 28 U.S.C. § 157. *Hipp*, 895 F.2d at 1515-17. The court held that neither provision grants criminal contempt power.

11 U.S.C. § 105(a) grants the bankruptcy courts the authority to issue "any order, process, or judgment necessary or appropriate" to enforce Title 11. *See supra* text accompanying note 123 (stating pertinent part of 11 U.S.C. § 105(a)). The Fifth Circuit observed that courts use criminal contempt to punish contemnors, not to enforce orders. *Hipp*, 895 F.2d at 1515. Courts use civil contempt, by contrast, as a remedial measure to enforce court orders. *Id.* Criminal contempt, therefore, is not "necessary" to enforce bankruptcy court orders. *Id.* at 1516. As such, § 105(a) does not authorize bankruptcy courts to issue nonsummary criminal contempts. *Id.*

The court also rejected 28 U.S.C. § 157 as a statutory source of criminal contempt power. *Id.* at 1517-18. Section 157 sets forth the bankruptcy courts' core and non-core authority. *See supra* notes 31 & 35 (stating pertinent portions of the statute). A bankruptcy court may assert core authority over proceedings under Title 11, arising under Title 11, or arising in a case under Title 11. 28 U.S.C. § 157(b) (1988); *Hipp*, 895 F.2d at 1517. It may assert non-core authority over proceedings that are "related" to a case under Title 11. 28 U.S.C. § 157(c) (1988).

A court may continue a proceeding to punish criminal contempt even after the termination of the underlying proceeding in which the contempt occurred. *Hipp*, 895 F.2d at 1518; *see supra* notes 106-110 and accompanying text (discussing criminal and civil contempt). The Fifth Circuit therefore concluded that, because criminal contempt is a "separate and independent proceeding" from the proceeding in which it occurred, criminal contempt of bankruptcy court "is not itself a 'core' proceeding or a case under [t]itle 11." *Hipp*, 895 F.2d at 1518.

The Fifth Circuit also stated that, because criminal contempt proceedings may commence or continue even after resolution of an underlying case, criminal contempt proceedings may have no Title 11 case with which to "relate." *Id.* Thus, criminal contempt does not "relate" to an underlying bankruptcy court proceeding merely because the contempt consisted of violation of a bankruptcy court order. *Id.* As such, the court reasoned that bankruptcy courts lack non-core authority over nonsummary criminal contempt. *Id.*

The court buttressed its statutory analysis with a review of the legislative history of the 1984 Act. *Hipp*, 895 F.2d at 1517-18; *see supra* note 30. Congress designed the 1984 Act to deal with the constitutional infirmities of the 1978 Act. *Id.* at 1517; *see supra* note 33 (discussing the Supreme Court's holding in *Northern Pipeline*). The 1978 Act had, among other things, granted a restricted contempt power to the bankruptcy courts. *Hipp*, 895 F.2d at 1516 (citing 28 U.S.C. § 1481 (repealed) in the 1978 Act as a grant of limited contempt power to the bankruptcy courts). The 1984 Act does not explicitly grant contempt powers. *Id.* at 1518. If the bankruptcy court contempt power continues to exist under the 1984 Act, then Congress granted it implicitly and without limits. *Id.* Congress intended the 1984 Act to limit bankruptcy court jurisdiction to prevent them from usurping Article III judicial power. *Id.* at 1517. In light of this purpose, the Fifth Circuit held that Congress could not have intended in the 1984 Act to replace the 1978 Act's explicit but limited grant of contempt power with an implicit, unlimited grant of contempt power. *Id.* at 1518; *see supra* note

use criminal contempt to punish contemnors rather than to enforce orders.[129] Therefore, the court concluded, in direct opposition to the Eighth Circuit's holding in *Ragar*, that the enforcement provisions of § 105(a) do not authorize bankruptcy court findings of criminal contempt.[130]

Although the *Hipp* court resolved the case on statutory grounds, it noted that granting criminal contempt power to non-Article III officers raises serious constitutional problems.[131] The court observed that some circuit courts have stated that magistrate judges do not violate Article III in part because they lack contempt power.[132] To the extent that bankruptcy courts making proposed findings on non-core matters act like magistrate judges, the same analysis should apply.[133] Furthermore, the court stated its concern that the de novo determination standard permits district courts to violate the due process requirement that, in adjudication of criminal liability, the "one who decides must hear."[134] In sum, the *Ragar* court held that bankruptcy statutes constitutionally grant the bankruptcy courts the authority to issue proposed findings of criminal contempt; the *Hipp* court, motivated in part by constitutional avoidance, concluded that bankruptcy statutes do not authorize such findings.

III. BANKRUPTCY COURT PROPOSED FINDINGS OF CRIMINAL CONTEMPT VIOLATE THE CONSTITUTION

Bankruptcy court proposed findings of criminal contempt create very difficult constitutional problems. Fortunately, Congress can easily fix these problems by requiring bankruptcy judges who wish to initiate criminal contempt proceedings to follow the same procedures that magistrate judges must follow to

33 (discussing further the statutory history of the bankruptcy courts' 1978 and 1984 reorganizations in light of *Northern Pipeline*).

129. *Hipp*, 895 F.2d at 1515 (distinguishing the punitive nature of criminal contempt from the remedial nature of civil contempt).

130. *Id.*

131. *Id.* at 1509-11.

132. *Id.* at 1511 n.16 (citing cases).

133. *See supra* text accompanying notes 35-38, 48-52 (discussing bankruptcy court non-core authority and magistrate judge authority to issue findings on dispositive pretrial motions).

134. *Hipp*, 895 F.2d at 1519-20 (noting that de novo review pursuant to Bankruptcy Rule 9033(d) permits district courts to confine review to written documents in violation of the due process requirement that "the one who decides must hear"); *see supra* note 71 and accompanying text (discussing *Raddatz*).

initiate any contempt proceeding. Like magistrate judges, bankruptcy judges can avoid constitutional problems by *certifying* the facts of criminal contempt for district court hearing rather than making proposed findings of guilt for district court review.

A. Due Process and Article III Problems of Bankruptcy Court Proposed Findings of Criminal Contempt

District court "de novo determination" review based solely on written records of a bankruptcy court's proposed findings of criminal contempt violates the defendant's constitutional right to due process. Moreover, granting bankruptcy courts power to make preliminary findings of criminal liability in nonconsensual hearings may violate Article III. At the very least, exercise of this power implicates such serious Article III problems that the courts should follow the Fifth Circuit's example and favor a reasonable statutory reading that denies this authority to the bankruptcy courts.[135]

1. The False Analogy Between Current Bankruptcy and Magistrate Procedures for Criminal Contempt

As a preliminary matter, one can discard the notion that bankruptcy judges, in making proposed findings on criminal contempt, merely act as magistrate judges pursuant to 28 U.S.C. § 636 and that therefore these actions are clearly constitutional.[136] When bankruptcy courts make proposed findings concerning non-core issues, they behave like magistrate judges acting pursuant to § 636(b).[137] This section governs the magistrate judges' authority over dispositive pretrial matters. In contrast, when a magistrate judge initiates contempt proceedings, he or she must act pursuant to 28 U.S.C. § 636(e).[138] The magistrate judge *certifies* facts for an entirely fresh district court *hearing*.[139] This review differs from that of magistrate action pursuant to § 636(b) which requires only de novo *determination*

135. *See supra* note 128 and accompanying text (discussing the Fifth Circuit's statutory analysis of the bankruptcy statutes).

136. *See supra* notes 56-61 and accompanying text (comparing bankruptcy and magistrate statutory authority to issue findings of contempt).

137. *See supra* text accompanying notes 48-52 (comparing the bankruptcy court authority to issue proposed findings on non-core issues with magistrate court authority to issue proposed findings on dispositive pretrial motions).

138. *See supra* notes 53-55 and accompanying text (discussing magistrate authority to certify facts of contempt for district court de novo *hearing*).

139. *See supra* notes 53-55 and accompanying text.

without a hearing.[140] Therefore, bankruptcy court proposed findings of contempt are not constitutional merely because magistrate action pursuant to § 636 has survived constitutional scrutiny. Because the standards of review for contempt in the two contexts differ, one should not compare the bankruptcy finding apple to the magistrate certification orange.[141]

2. Due Process Concerns

De novo determination of criminal contempt confined to review of written documents violates the due process rights of defendants. The Supreme Court in *Raddatz* held that suppression hearings do not merit the full procedural protections that determinations of criminal liability require.[142] Therefore, unlike determinations of guilt, suppression hearings do not require that the "one who decides must hear."[143] By implication, due process requires that the one who decides guilt actually *hear* the credibility-based evidence of guilt.[144] To the degree that the district court reviews a finding of criminal contempt on the basis of the written records alone, it decides issues that it has not heard. Thus, the court violates due process.[145]

3. Article III: Personal and Structural Concerns

Bankruptcy court proposed findings of criminal contempt may run afoul of both the personal rights that Article III grants defendants and the structural requirements that Article III requires to preserve the integrity of the judicial branch. Regarding personal Article III concerns, whether a defendant possesses

140. *See supra* note 51 and accompanying text (noting that courts may confine de novo determination to review of written records).

141. Indeed, the fact that magistrate judges must obey procedures requiring that district courts *hear* all the evidence of contempt augurs against the constitutionality of allowing bankruptcy courts to make proposed findings of contempt subject to less severe scrutiny. A number of circuit courts have observed that the absence of magistrate contempt power is one reason why magistrates do not violate Article III as adjuncts of the district courts. *See supra* note 97 (listing cases). To the degree this observation is persuasive, one should apply it to bankruptcy courts acting in their adjunct capacity.

142. *See supra* notes 69-71 and accompanying text (discussing the implications of the *Raddatz* holding on due process).

143. *See* Morgan v. United States, 298 U.S. 468, 481 (1936) (holding that "[t]he one who decides must hear").

144. *Id.*

145. *See* Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503, 1520 (5th Cir. 1990) (stating the court's concern that de novo review confined to written records of a finding of criminal contempt may violate the due process requirement expressed in *Raddatz* that the decision maker hear the evidence).

the right to demand an Article III judge for every critical stage of a felony trial poses a "substantial constitutional question."[146] When a bankruptcy court conducts a nonconsenual hearing on a serious criminal contempt charge, it risks violating this possible right.[147]

The fact that the bankruptcy court makes a preliminary "proposed finding" rather than a conclusive determination of guilt does not render the hearing "non-critical" for Article III purposes. In *Gomez*, the defendant had the opportunity to demand de novo determination review of the felony voir dire conducted by the magistrate judge.[148] Despite the preliminary status of the voir dire the Court held that the voir dire implicated the issue of whether Gomez had the right to demand an Article III judge during any critical stage of a felony trial.[149] Proposed findings, therefore, may be critical despite their preliminary status.

When a bankruptcy court conducts a criminal contempt hearing, it controls a far more critical stage than preliminary felony voir dire—a decision on actual guilt.[150] If a preliminary voir dire implicates the right to demand an Article III judge, then surely a preliminary determination of guilt must also im-

146. *See supra* text accompanying note 77.

147. The idiosyncratic nature of contempt enhances this risk because a bankruptcy court may not know in advance whether it is making a proposed finding on a felony or misdemeanor criminal contempt. *See supra* note 114 (discussing the uncertainties a bankruptcy court faces when hearing a contempt charge).

148. Gomez v. United States, 490 U.S. 858, 861 (1989).

149. The *Gomez* court specified two reasons for regarding magistrate findings on felony voir dire as critical. First, felony voir dire is the jurors' "first introduction to the substantive factual and legal issues in a case." *Gomez*, 490 U.S. at 874. Felony voir dire is therefore obviously intrinsically important. Second, voir dire requires great attention to juror demeanor. Practically speaking, a judge cannot effectively review magistrate judge voir dire. *Id.* at 875.

Peretz also indicates that voir dire is a critical stage. The Court noted that if the right to demand an Article III judge exists, the defendant can waive it. 111 S. Ct. at 2669. *See supra* text accompanying note 86. Therefore, Peretz's consent to the magistrate judge conducting felony voir dire obviated the constitutional question. If felony voir dire were not a critical stage of a felony trial, the Court would not have needed to rely on defendant consent to avoid the constitutional question. It could have dismissed Peretz's appeal by holding that voir dire is not critical. The Court's choice to rely on Peretz's waiver indicates that felony voir dire did in fact raise the constitutional question. As such, felony voir dire is a critical stage of a felony trial.

150. *See, e.g.*, Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503, 1521 (5th Cir. 1990) ("[S]urely no stage [of a criminal trial] is more critical than that of the live presentation and receipt of the evidence. . . .").

plicate this potential right, at least whenever a bankruptcy court purports to decide felony-level[151] criminal contempts.[152]

Of course, the Supreme Court has not definitively held that defendants have a personal right to demand an Article III judge at every critical stage of a felony trial. It has merely held that the existence of this right is a "substantial constitutional question."[153] In *Gomez*, however, the Court demonstrated that it will adopt reasonable readings of statutes to avoid unnecessary final resolution of the parameters of this right. Therefore, bankruptcy court proposed findings of serious criminal contempt are either unconstitutional if the right to demand an Article III judge exists, or, at the very least, sufficiently controversial that the Supreme Court would adopt a reasonable reading of the relevant bankruptcy statutes that denies bankruptcy courts this authority.[154]

Bankruptcy court proposed findings of criminal contempt also implicate Article III's structural concerns.[155] Structural requirements exist not for the defendant's benefit but to maintain the integrity of the judicial branch.[156] In decisions upholding a grant of power to a non-Article III court, the Supreme Court has focused on the degree to which Article III courts maintain control over actions in the non-Article III tribunal.[157] In his *Raddatz* concurrence, Justice Blackmun specifically mentioned the power of district courts to decline to refer matters to magistrate

151. Adding to the procedural confusion, bankruptcy courts will not know before sentencing whether a relatively serious contempt is a misdemeanor or a felony. *See supra* note 114 (discussing the proposition that a contempt's status as a felony or misdemeanor depends on the sentence a court imposes for the offense).

152. *See Hipp*, 895 F.2d at 1520-21 (observing in the context of an appeal of a bankruptcy court's finding of criminal contempt that live presentation of the evidence of guilt is a critical stage of a trial and that the defendant has the right to a hearing before the "judicial officer having jurisdiction to render the judgment of acquittal or conviction and sentence").

153. *See supra* text accompanying note 77.

154. *See, e.g., Hipp*, 895 F.2d at 1518 (reading the bankruptcy statutes as denying contempt authority over nonsummary criminal contempts); Plastiras v. Idell (*In re* Sequoia Auto Brokers Ltd.), 827 F.2d 1281, 1290 (9th Cir. 1987) (holding that bankruptcy courts lack statutory civil contempt authority).

155. *See supra* text accompanying notes 90-96 (discussing Article III structural concerns).

156. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-51 (1986).

157. United States v. Raddatz, 447 U.S. 667, 685-86 (1980) (Blackmun, J., concurring), *cited with approval in* Peretz v. United States, 111 S. Ct. 2661, 2670 (1991) (noting the role of district court supervisory control in constitutionalizing the magistrate courts).

judges as one important aspect of the Article III control that renders magistrate judges constitutional.[158] This form of control is notably absent when bankruptcy judges make proposed findings of criminal contempt because criminal contempts would arise in cases that the district court has *already* referred to the bankruptcy court.

Moreover, in *Schor*, the Supreme Court mentioned the "importance of the right to be adjudicated" as another factor to weigh in determining the validity of delegation of power to non-Article III courts.[159] *Raddatz* taught that defendants merit maximum procedural rights during adjudication of guilt because the personal interests at stake are at their greatest.[160] Thus, the rights at stake in hearings on criminal liability are more important than those at stake in a suppression hearing, as in *Raddatz*, or felony voir dire, as in *Peretz* and *Gomez*.[161]

The *Schor* Court also held that to assess the constitutionality of a grant of power to a non-Article III tribunal, courts should focus on "the extent to which the 'essential attributes of the judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts."[162] If the power to conduct a nonconsensual hearing that decides criminal liability is not an "essential attribute" of the judicial power, it is difficult to imagine what is. Congress placed strict consent requirements on magistrate civil and misdemeanor trials precisely to ensure that the magistrate system would not usurp this critical power from the Article III courts.[163] Granting bankruptcy courts the power to conduct preliminary hearings for crimes that can merit felony-level punishment clearly constitutes a serious assertion of a significant, traditional judicial power.

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158. *Raddatz*, 447 U.S. at 685 (Blackmun, J., concurring), *cited with approval in Peretz*, 111 S. Ct. at 2661, 2670.

159. *Schor*, 478 U.S. at 851; *see supra* note 94 and accompanying text (stating a portion of the *Schor* holding).

160. *Schor*, 478 U.S. at 851; *see supra* notes 69-71 and accompanying text (discussing the *Raddatz* majority's approach to due process).

161. *See supra* note 70 and accompanying text (comparing the importance of rights implicated in a suppression hearing to those in a determination of guilt); Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503, 1520-21 (5th Cir. 1990) (observing that the interests at stake in an evidentiary hearing on guilt exceed those in a suppression hearing).

162. *Schor*, 478 U.S. at 851.

163. *See* 28 U.S.C. § 636(c) (1988) (placing strict consent requirements on the magistrate judges' authority to conduct civil and misdemeanor trials).

No overarching conceptual scheme controls Article III jurisprudence.[164] The Supreme Court renders its Article III decisions based on a complex weighing process in which no single factor is determinative.[165] Therefore, it is difficult to predict with confidence how the Court will rule on issues of delegation of power to non-Article III officers. When bankruptcy courts conduct nonconsensual hearings on criminal contempt, however, they seek to exercise greater powers with less Article III supervision over more important rights than those grants of power the Supreme Court upheld in cases such as *Raddatz* and *Peretz*. Thus, as bankruptcy court proposed findings on criminal contempt go beyond the pale of prior Supreme Court approval of non-Article III power, the exercise of this power likely violates Article III's structural requirements.

Circuit court observations on the constitutional importance of magistrate judges' lack of contempt power confirm this line of reasoning.[166] In *Geras*, the Seventh Circuit wrote that some line of demarcation might be necessary to distinguish Article III from adjunct authority.[167] It suggested that the magistrate judges' utter lack of contempt authority served this purpose.[168] This observation makes a great deal of sense in light of Article III's structural concerns. The court clearly viewed the contempt power to independently enforce judgements as an "essential attribute of the judicial power."[169] Thus, denying this power to the magistrate judges prevents adjunct encroachment on Article III judicial power. Application of this reasoning to the context of bankruptcy judges acting in their adjunct capacity indicates that they, too, should lack criminal contempt power.[170]

In sum, granting bankruptcy courts the power to conduct nonconsensual hearings to make preliminary determinations of criminal contempt risks violating the due process right to a

164. *Schor*, 478 U.S. at 851.

165. *Id.*

166. *See supra* note 97 (citing cases that note the importance of the magistrate judges' lack of contempt power).

167. 742 F.2d 1037 (7th Cir. 1984); *see supra* note 99 and accompanying text (discussing the *Geras* court's observations on contempt).

168. *Schor*, 478 U.S. at 851.

169. *See supra* note 95 and accompanying text (citing the *Schor* holding for the proposition that the degree to which delegation robs the Article III courts of their "essential attributes of judicial power" is one factor in weighing Article III challenges).

170. *See* Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503, 1511 n.16 (5th Cir. 1990) (noting the significance of circuit court observations on the magistrate judges' lack of contempt power in discussion of the constitutionality of bankruptcy court contempt authority).

hearing before the judge who determines guilt, the potential right to demand an Article III judge at every critical stage of a felony trial, and the Article III courts' control of the judicial power of the United States.

B. A Modest Proposal

Fortunately, Congress can easily mandate effective procedures that will eliminate constitutional concerns and will clarify the bankruptcy courts' authority to initiate criminal contempt proceedings. Congress[171] should require bankruptcy judges, like their magistrate judge colleagues acting pursuant to 28 U.S.C. § 636(e), to certify facts of criminal[172] contempt for de novo hearing at the district court level.[173] The bankruptcy courts would have the authority to notify the district judges that a person may have committed criminal contempt.[174] The district judge would conduct a de novo hearing on all the relevant evidence to determine guilt.

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171. Alternatively, the Supreme Court could adopt a new Bankruptcy Rule 9020 that similarly limits and clarifies bankruptcy court criminal contempt authority. *Cf. supra* note 59 and accompanying text (discussing the current Bankruptcy Rule 9020). Finally, appellate courts could achieve the same end simply by holding that bankruptcy courts lack the authority to conduct criminal contempt hearings. *See, e.g., Hipp*, 895 F.2d at 1509.

172. This Note does not analyze the bankruptcy courts' civil contempt authority. Civil contempt authority is also controversial. *See, e.g.*, Plastiras v. Idell (*In re* Sequoia Auto Brokers Ltd.), 827 F.2d 1281, 1290 (9th Cir. 1987) (holding that bankruptcy courts lack the power to issue final orders of civil contempt). Nonetheless, a number of courts have held that civil contempt falls under the bankruptcy courts' authority. *See supra* note 4 (noting decisions on bankruptcy court civil contempt power). For general discussions of bankruptcy court civil contempt power see, e.g., Parkinson, *supra* note 8; Howard, *supra* note 8 (discussing both civil and criminal contempt authority); Sogn, *supra* note 8.

Therefore, even if courts or Congress were to decide that bankruptcy courts may only certify facts of criminal contempt, bankruptcy courts may still enjoy authority to issue findings or orders of civil contempt. This would enable the bankruptcy courts to enforce their orders efficiently but deprive them of the power to punish crime. *See supra* notes 108-110 and accompanying text (comparing the remedial and punitive natures of civil and criminal contempt). Thus, depriving bankruptcy courts of criminal contempt power need not render them toothless.

173. *See* 28 U.S.C. § 636(e) (1988) (granting magistrate judges authority to certify facts for contempt); *see supra* note 53 (quoting pertinent part of 28 U.S.C. § 636(e)). For a discussion that concludes that bankruptcy courts should certify facts of contempt, see Parkinson, *supra* note 8, at 618, 622.

174. *See, e.g.*, Taberer v. Armstrong World Indus., 954 F.2d 888, 903 (3d Cir. 1992) (describing magistrate judge certification pursuant to 18 U.S.C. § 636(e) as serving a "notification" function).

This solution eliminates any Article III danger. No personal Article III rights of defendants are at risk because the bankruptcy judge would not conduct any sort of hearing purporting to decide guilt. Therefore, certification does not implicate any right to demand an Article III judge at a critical stage of a trial. In addition, no structural Article III interests are at risk because the bankruptcy court certification would only serve to notify the district court of a possible crime—not exactly a huge usurpation of traditional judicial functions.

This procedure also would lay due process concerns to rest. As under the current system, the district judge would formally determine guilt. The proposal simply guarantees that the district judge would *hear* all the credibility-based evidence necessary for this determination. This procedure therefore satisfies the due process requirement that the one who hears the evidence determines the guilt.

Two primary objections to this proposal come to mind. First, refusing bankruptcy judges the authority to conduct hearings on criminal contempt would waste judicial resources by requiring more hearings before district judges. Unfortunately, this may be true. Viewing the judicial system as a whole, however, the proposal might, in some respects, enhance judicial economy. Confusion in the current system has led some bankruptcy judges to conduct hearings on criminal contempt. Due process demands that a hearing also take place before the adjudicator who formally determines guilt, the district judge.[175] The current system therefore allows, or at least does not clearly prevent, two hearings on the criminal contempt charge—in bankruptcy court and district court. By clarifying bankruptcy judges' lack of criminal contempt authority, this proposal at least enjoys the merit of ensuring that only one hearing takes place.

A second objection is that the proposal would encourage contempt of the bankruptcy courts' authority by reducing the threat of sanctions for contemptuous behavior.[176] The magistrate

175. *See supra* note 71 and text accompanying notes 142-145 (discussing the due process requirement that the judge who decides guilt hear the evidence).

176. Of course, the mere fact that bankruptcy courts might find it useful to possess criminal contempt power does not, in itself, justify bankruptcy court contempt authority. As a matter of first principles, the justification for the contempt power lies in separation-of-powers. *See supra* text accompanying note 104 (discussing the justification for inherent contempt power). The Article III courts need an independent means to enforce their will to maintain the integrity of the judiciary in three-branch government. This rationale does not apply to the bankruptcy courts for the simple reason that they are not Article III courts. *See supra* note 23 and accompanying text. Courts have described con-

courts, however, perform quite well without either independent civil or criminal contempt authority.[177] Indeed, the Supreme Court has recently noted that magistrate courts play an "integral and important role in the federal judicial system."[178] Their importance to the federal judiciary contradicts the idea that lack of contempt authority has crippled the magistrate courts. If the magistrate judges can make do without civil or criminal contempt power, then presumably bankruptcy judges can dispense with pretensions to criminal[179] contempt power.

CONCLUSION

Criminal contempts are crimes in "the ordinary sense" that merit Article III and due process protections. Currently, district courts using the "de novo determination" standard may review bankruptcy court proposed findings of contempt entirely on the basis of written records. Review confined to written records violates the due process requirement that the one who decides guilt must hear the evidence. Furthermore, these findings may well violate Article III or, at the very least, raise troubling Article III questions. The Fifth Circuit's analysis of the statutory history of bankruptcy court contempt authority reasonably argues that Congress did not intend to grant the bankruptcy courts criminal contempt powers. Therefore, in the alternative, the "settled doctrine" of constitutional avoidance, a doctrine which applies with "peculiar force" on issues of Article III, dictates that courts should conclude that bankruptcy courts lack the statutory authority to issue proposed findings of criminal contempt. Instead of making these constitutionally dubious findings, bankruptcy courts should merely certify the facts of contempt for district court de novo *hearing*. This procedure avoids constitutional problems and has proven adequate in the magistrate system.

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tempt as an "awesome power." *See, e.g., Sequoia*, 827 F.2d at 1285. The Article III courts should carefully reserve to themselves this power to punish. Like their magistrate judge colleagues, bankruptcy courts may and should rely on the Article III courts to grant appropriate remedies for criminal contempt.

177. The Supreme Court recently observed that the magistrate system is flourishing and that magistrate judges account for a "staggering" amount of judicial work. Peretz v. United States, 111 S. Ct. 2661, 2665 n.5 (1991) (citing Virgin Islands v. Williams, 892 F.2d 305, 308 (1989)).

178. *Id.*

179. Again, this Note leaves open the possibility of whether bankruptcy courts possess civil, as opposed to criminal, contempt authority. *See supra* notes 4, 57, 172 (citing discussions of the civil contempt power).