1988

The Federal Magistrates Act: Are Defendants' Rights Violated When Magistrates Preside Over Jury Selection in Felony Cases

Marla Eisland

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/lr/vol56/iss4/7
THE FEDERAL MAGISTRATES ACT: ARE DEFENDANTS' RIGHTS VIOLATED WHEN MAGISTRATES PRESIDE OVER JURY SELECTION IN FELONY CASES?

INTRODUCTION

In 1968, Congress enacted the Federal Magistrates Act in response to the rapidly expanding caseload of the federal courts. The Act permits district judges to delegate to magistrates certain duties, including trying petty criminal offenses, conducting pretrial and discovery proceedings, and considering preliminary petitions for post-trial relief. In addition to enumerating the express powers and responsibilities of magistrates, the Act also contains an additional duties clause. The clause enables a district judge to assign magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States."

One of the issues that has arisen under the clause is whether federal magistrates may preside over jury selection in felony cases. This dispute occurs on two levels. First, because the Act does not specifically enumerate this function, courts disagree whether the additional duties clause allows federal magistrates to preside over jury selection in felony cases. This raises the question of whether defendants' rights are violated when magistrates preside over jury selection in felony cases.

---

3. Once Congress allows a delegation, the courts formulate their own rules governing procedure. See 28 U.S.C. § 636(b)(4) (1982). See, e.g., Fed. R. Civ. P. 72; D.N.J. R. 40; E.D.N.Y. Mag. R. 1-15; N.D.N.Y. R. 44; S.D.N.Y. Mag. R. 1-15; W.D.N.Y. R. 35-36. These rules have the "force of law" as long as they do not conflict with the Constitution, Supreme Court rules, or congressional enactments. See Weil v. Neary, 278 U.S. 160, 169 (1929); United States v. Yonkers Bd. of Educ., 747 F.2d 111, 112 (2d Cir. 1984). The rules concerning magistrates closely follow the Act which instructs the magistrate to submit his or her proposed findings or recommendations to the court and to all concerned parties. See 28 U.S.C. § 636(b)(1) (1982) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or reconsider the matter to the magistrate with instructions.").
4. See 28 U.S.C. § 636(a)(3) (magistrates have "the power to conduct trials under section 3401, title 18, United States Code" with defendant's consent).
5. See 28 U.S.C. § 636(b)(1)(A) ("[A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court.").
8. Id.
allows a district judge to delegate jury selection to magistrates. Second, controversy exists over whether such a delegation is constitutional.

In United States v. Raddatz, the Supreme Court set forth a general approach to follow when determining whether a district judge may delegate responsibility to a magistrate under the Act. Although the claim in Raddatz involved a delegation expressly provided for by the Act, courts have used the Raddatz approach to determine whether a district judge may delegate other powers under the additional duties clause.

This Note examines whether district judges may delegate jury selection to magistrates. Applying the Raddatz approach, this Note concludes that a district judge may delegate the duty of presiding over jury selection to a magistrate under the additional duties clause and that this delegation is consistent with the Constitution.

9. Compare United States v. Peacock, 761 F.2d 1313, 1317-19 (9th Cir.) (judges may delegate jury selection in felony cases to magistrates), cert. denied, 474 U.S. 847 (1985) and United States v. Rivera-Sola, 713 F.2d 866, 872-73 (1st Cir. 1983) (additional duties clause should be broadly construed to include jury selection in felony cases) with United States v. Ford, 824 F.2d 1430, 1435 (5th Cir. 1987) (en banc) (Congress did not intend to include jury selection in felony cases as an additional duty), cert. denied, 108 S.Ct. 741 (1988).

10. Some courts hold that because de novo review by an Article III judge always is available, the Constitution permits the delegation of jury selection in felony cases to magistrates. See United States v. Bezold, 760 F.2d 999, 1001-03 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986); accord United States v. Peacock, 761 F.2d 1313, 1317-19 (9th Cir.), cert. denied, 474 U.S. 847 (1985). One court holds that the de novo review available does not sufficiently protect defendant's due process rights and, therefore, the Constitution does not allow this delegation. See United States v. Ford, 824 F.2d 1430, 1435 (5th Cir. 1987) (en banc), cert. denied, 108 S.Ct. 741 (1988). Ford also holds that such a delegation violates Article III as well. Id. at 1435; See infra notes 40-104 and accompanying text.


12. See id. at 676, 680-81. In Raddatz, the Court held that a district judge may delegate his or her authority to conduct suppression hearings to magistrates under the Act without violating the Constitution because an Article III judge always retains the power to institute a de novo review of the magistrate's actions. Id. at 680-81. The Court's approach in Raddatz stemmed from its decision in Mathews v. Weber, 423 U.S. 261 (1976), see Raddatz, 447 U.S. at 682-83, in which it held that a delegation to a magistrate under the additional duties clause to review an administrative determination of defendant's entitlement to social security benefits does not violate the Constitution as long as the final decision is made by an Article III judge. 423 U.S. at 270-72.


14. Courts either have applied Raddatz, which is based on Mathews v. Weber, see supra note 12 and accompanying text, or they have applied Weber directly. See, e.g., United States v. Saunders, 641 F.2d 659, 662-64 (9th Cir. 1980) (applying Raddatz to whether magistrates may preside over jury deliberations), cert. denied, 452 U.S. 918 (1981); United States v. Southern Tanks, Inc., 619 F.2d 54, 55-56 (10th Cir. 1980) (applying Mathews to whether magistrates may enforce Internal Revenue Service summons). Courts that have addressed whether district judges may refer jury selection in felony cases to magistrates have relied on Raddatz. See United States v. Ford, 824 F.2d 1430, 1435 (5th Cir. 1987) (en banc), cert. denied, 108 S.Ct. 741 (1988); United States v. Peacock, 761 F.2d 1313, 1317-19 (9th Cir.), cert. denied, 474 U.S. 847 (1985).
DISCUSSION

In *United States v. Raddatz*, the Supreme Court analyzed whether a district judge may refer a motion for an evidentiary hearing to a magistrate under section 636(b)(1)(B) of the Federal Magistrates Act. The Supreme Court set forth a general approach for determining whether a district judge may delegate other duties to magistrates under the Act. Although section 636(b)(1)(B) specifically provides that magistrates may hear evidentiary motions, the Court's approach in *Raddatz* is applicable to other sections of the Act, including the additional duties clause.

A. Statutory Analysis

Under *Raddatz*, a court first must determine whether the Federal Magistrates Act authorizes the delegation of a particular duty to magistrates—here, jury selection in felony cases. Accordingly, it must examine the legislative history surrounding the Act to determine whether this referral comports with congressional intent.

Despite the concerns raised by some courts and litigants, a district judge may delegate the duty of presiding over jury selection in a felony case to a magistrate under the additional duties clause of the Act.

---

16. In *Raddatz*, the respondent moved to suppress incriminating statements he had made to federal agents. *Id.* at 669. Over defendant's objections, the district judge directed a magistrate to conduct an evidentiary hearing on the matter pursuant to 28 U.S.C. § 636(b)(1)(B). *Id.*
17. See *id.* at 676, 680-81; *infra* notes 20 and 35 and accompanying text.
18. The Act states that "a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition." 28 U.S.C. § 636(b)(1)(B) (1982).
19. District courts have applied *Raddatz* to determine whether district judges may delegate responsibilities to magistrates under the additional duties clause of the Act. See *supra* note 14 and accompanying text. For decisions applying *Raddatz* to the delegation of duties expressly stated in the Act, see for example, Wofford v. Wainwright, 748 F.2d 1505, 1507-08 (11th Cir. 1984) (per curiam) (delegation of a hearing for habeas corpus petition); Sullivan v. Cuyler, 723 F.2d 1077, 1085 (3d Cir. 1983) (same).
21. See *id.* at 674-75. In *Raddatz*, the respondent argued that the Act required the district judge to rehear all of the testimony that was presented to the magistrate during the evidentiary hearing on the motion to suppress. See *id.* at 673. The Court disposed of this contention with relative ease because § 636(b)(1)(B) of the Act provides that a district judge may "designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition ... of [the] motion." *Id.* at 673 (quoting 28 U.S.C. § 636(b)(1)(B)). Relying on 28 U.S.C. § 636(b)(1), the Court explained that the district judge need not rehear the disputed testimony because the Act requires "a de novo determination, not a de novo hearing." *Id.* at 674 (emphasis in original). The Court explained that it found "nothing in the legislative history of the statute to support the contention that the judge is required to rehear the contested testimony in order to carry out the statutory command to make the required 'determination.'" *Id.*
22. See *United States v. Peacock*, 761 F.2d 1313, 1317 (9th Cir.), cert. denied, 474 U.S. 847 (1985); *United States v. Bezold*, 760 F.2d 999, 1001-03 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986); *United States v. Rivera-Sola*, 713 F.2d 866, 872-74 (1st Cir.)
Although the Act does not list jury selection as an expressly delegable duty, the legislative history surrounding the Act indicates that delegation of this responsibility meets with congressional intent.

In 1968, when it first enacted the Federal Magistrates Act, Congress suggested three functions that district judges might refer to magistrates under the additional duties clause. Congress, however, did not intend to limit responsibilities that could be delegated under the clause to its suggestions, rather it hoped that district judges also would utilize magistrates in other areas the judges might deem necessary "to increase the efficiency of their courts." In 1976, in response to judicial misinterpretation, Congress amended the Federal Magistrates Act to include hearing and determining pretrial matters and conducting evidentiary hearings among the express duties that district judges may delegate to magistrates. At the time of amendment, Congress indicated its intent that the additional duties clause be construed broadly. Congress also placed this clause in an

---


24. See Pub. L. No. 90-578, 82 Stat. 1107, 1113 (1968) (amended 1976). These three suggestions were: "(1) service as a special master ...; (2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and (3) preliminary review of applications for posttrial [sic] relief ... ." Id.

25. See Hearings on the Federal Magistrates Act Before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 2d Sess. 81 (1968) (statement of Sen. Tydings, sponsor of the bill and Chairman of the Senate's Subcommittee on Improvements in Judicial Machinery) ("The Magistrate [sic] Act specifies these three areas because they came up in our hearings and we thought they were areas in which the district courts might be able to benefit from the magistrate's services. We did not limit the courts to the areas mentioned.").

26. See id.

27. The legislative history surrounding the amendment shows that Congress acted in response to the Supreme Court's decision in Wingo v. Wedding, 418 U.S. 461 (1974). See H.R. Rep. No. 1609, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6164-65. In Wingo, the Supreme Court held that the Federal Magistrates Act did not authorize the referral to magistrates of evidentiary hearings in habeas corpus proceedings because Congress did not intend to authorize this delegation. See Wingo, 418 U.S. at 470. In dissent, Chief Justice Burger suggested "now that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate its intentions if its declared objectives are to be carried out." Id. at 487.


31. See H.R. Rep. No. 1609, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6165. The House Report states: [T]he magistrate should be a judicial officer whose purpose [is] to assist the district judge to the end that the district judge could have more time to preside at the trial of cases having been relieved of part of his duties which required the judge to personally hear each and every pretrial motion or proceeding necessary to prepare a case for trial.

Id. at 6166. The additional duties clause "enables the district courts to continue innovative experimentations in the use of this judicial officer." Id. at 6172.
entirely separate subsection of the statute to emphasize that "it is not restricted in any way by any other specific grant of authority to magistrates." 32

Relying on the legislative history of the additional duties clause, courts have found that district judges may delegate to magistrates many duties not specifically enumerated in the Act. 33 A majority of the courts of appeals that have addressed whether district judges may delegate jury selection in felony cases to magistrates have found this delegation to be among these additional duties. 34 These courts have construed the Act broadly and have relied on a constitutional analysis to determine whether the district judge may delegate the responsibility.

32. Id. at 6172.


34. See United States v. Peacock, 761 F.2d 1313, 1317-18 (9th Cir.) (district judges may delegate jury selection to magistrates even if defendant objects to the delegation), cert. denied, 474 U.S. 847 (1985); United States v. Bezold, 760 F.2d 999, 1001-03 (9th Cir. 1985) (same), cert. denied, 474 U.S. 1063 (1986); United States v. Rivera-Sola, 713 F.2d 866, 872 (1st Cir. 1983) (upholding delegation of voir dire to a magistrate on theory that defendant waived his right to an Article III judge by failing to object at trial and implying it would uphold this delegation even if there had been no waiver); see also United States v. DeFiore, 720 F.2d 757, 764-65 (2d Cir. 1983) (defendant's failure to object to magistrate presiding over jury selection is not reversible error), cert. denied, 466 U.S. 906 (1984); cf. Haith v. United States, 342 F.2d 158, 159 (3d Cir. 1965) (per curiam) (judge's absence from the court room during jury selection does not constitute reversible error when defendant fails to object).

Moreover, the Administrative Office of the United States Courts has interpreted the Act to include jury selection as a delegable duty. See Legal Manual for United States Magistrates § 3.09(2) (1983). Thus, the local rules in a number of districts authorize the district judges to assign jury selection to magistrates in both civil and criminal cases. See, e.g., D. Ariz. R. 18(d)(6); M.D. Fla. R. 6.01(c)(20); N.D. Fla. R. 24 (J)(2)(c)(1); D.P.R. R. 506.6. Other courts allow the delegation of jury selection but do not specify whether they are referring to civil or criminal cases. See, e.g., N.D. Ala. Mag. R. 4(f); S.D. Ala. R. 26(1)(i)(6); N.D. Cal. R. 405(g); S.D. Cal. R. 501-8(f); D. Del. Mag. R. 1(i)(6); D.D.C. R. 501(b)(6); S.D. Fla. Mag. R. 1(i)(6); D. Haw. R. 401-8(f); C.D. Ill. R. 3(A)(14); S.D. Ill. R. 29(i)(6); N.D. Ind. Mag. R. 1(i)(9); N.D. Iowa R. 4.1.94; S.D. Iowa R. 4.1.94; D. Kan. R. 36(9)(f); E.D. La. R. 20.7(f); M.D. La. R. 26(1)(5); W.D. La. R. 28(a)(9)(e); W.D. Mich. Mag. R. 1(H)(5); D. Minn. R. 16 (E)(5); D. Neb. R. 44(f)(6); D.N.H. Mag. R. D(3); E.D.N.Y. R. 25.1 Mag. R. 5(e); N.D.N.Y. R. 43.5(A)(3); E.D.N.C. R. 62.09(f); M.D.N.C. R. 401(b)(4); D.N.D. R. 28(c)(4); N.D. Ohio R. 19.10(2); E.D. Pa. R. 7(1)(i)(6); M.D. Pa. R. 901.9(a)(7); W.D. Pa. Mag. R. 6(e); D.R.I. R. 32(e)(5); M.D. Tenn. R. 601(a)(2); W.D. Tenn. R. 17(1)(i)(6); W.D. Wash. Mag. R. 9(d); N.D. W.Va. R. 4.01(i)(6); S.D. W.Va. Mag. R. 1(i)(6); E.D. Wisc. 13.06(d).

Only the Court of Appeals for the Fifth Circuit holds that Congress did not intend to authorize the delegation of jury selection in felony cases to magistrates. See United States v. Ford, 824 F.2d 1430, 1438 (5th Cir. 1987) (en banc), cert. denied, 108 S.Ct. 741 (1988).
B. Constitutional Analysis

The next step in applying Raddatz requires the court to determine whether the Constitution permits the delegation to magistrates. This part of the analysis has two components. The first component addresses the preservation of the separation of powers among the three branches of the federal government: courts must determine whether delegation to magistrates of jury selection in felony cases violates Article III by allowing magistrates to exercise powers reserved to Article III judges. The second component addresses the defendant's fifth amendment due process rights. Courts must determine whether delegation of jury selection preserves the defendant's access to an independent federal judiciary that acts to protect his personal liberties. The delegation by a district judge to a magistrate must satisfy both components of the analysis to pass constitutional muster.

1. Separation of Powers

Delegating jury selection in felony cases to magistrates does not infringe upon the judicial power of the United States, which is governed by Article III of the Constitution. Therefore, it accords with the separation of powers between the three branches of the federal government.

The United States Constitution allocates the three basic political powers—legislative, executive, and judicial—to three separate branches of the federal government. Believing that the concentration of power in any one entity inevitably threatens liberty, the framers of the Constitution...
tion structured the government so that no single branch could exercise all powers.\textsuperscript{45} Therefore, the framers created an interdependent, tripartite system in which each institution both exercises its own powers\textsuperscript{46} and checks those of the other two branches.\textsuperscript{47}

This system was erected, not to protect the liberties of individual defendants, but rather to protect the populace as a whole from tyrannical government.\textsuperscript{48} Because separation of powers is not an individual right, waiver is impossible.\textsuperscript{49} Consent of an individual defendant, therefore, cannot cure a violation of this constitutional mandate.\textsuperscript{50}

In accordance with the separation of powers, the Constitution clearly establishes that the "judicial power of the United States"\textsuperscript{51} must be exercised by an independent judiciary and provides safeguards to protect this independence.\textsuperscript{52} Article III of the Constitution sets forth the powers that belong exclusively to the judicial branch of the federal government\textsuperscript{53} and vests these powers in judges who must receive life tenure and an un-

\begin{footnotes}
\item[45] See supra notes 41-43 and accompanying text.
\item[46] The legislative branch makes the laws, see U.S. Const. art. I, § 1, the executive branch administers the laws, see U.S. Const. art. II, § 1, and the judicial branch adjudicates the laws, see U.S. Const. art. III, § 2. No branch may exercise powers belonging to another. See INS v. Chadha, 462 U.S. 919, 945-46 (1983); Buckley v. Valeo, 424 U.S. 1, 123 (1976) (per curiam).
\item[47] The President has veto power over proposed legislation, see U.S. Const. art. I, § 7, a check on the lawmaking power of the legislative branch. The legislature has the power to impeach, see U.S. Const. art. II, § 4, a check on the executive branch. The judiciary has the power to interpret laws, a check on both the legislative and executive branches. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).
\item[48] See supra note 44 and accompanying text. "The doctrine of the separation of powers was adopted by the Convention of 1787 . . . to preclude the exercise of arbitrary power. . . . [and] to save the people from autocracy." Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).
\item[50] See Id.; Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1041-42 (7th Cir. 1984); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 544 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984); cf. United States v. Griffin, 303 U.S. 226, 229 (1938) (lack of subject matter jurisdiction cannot be cured by the parties' consent).
\item[51] U.S. Const. art. III, § 1.
\item[52] See id.
\item[53] Article III, § 2 of the Constitution provides in relevant part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
\end{footnotes}
diminishable salary. The framers believed that vesting the federal government's powers in judges who possess these attributes would ensure the impartiality and independence of the judiciary. Moreover, they felt these protections would promote public confidence in judicial determinations and attract well-qualified people to the federal bench. These provisions also insulate judges from influences of other branches and colleagues, and promote judicial individualism.

Although magistrates possess neither life tenure nor an undiminishable salary, the Federal Magistrates Act allows district judges to delegate many judicial functions to them. Relying on the additional duties clause of the Act, the majority of the courts of appeals that have ad-

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

The Supreme Court has interpreted the term "good Behaviour" to mean that judges will enjoy life tenure and can be removed only by impeachment. See United States ex rel. Toth v. Quarles, 350 U.S. 11, 16 (1955); Kaufman, supra note 39, at 691-92. Similarly, the Court has interpreted the term "fixed compensation" to mean that Article III judges must receive a fixed salary that cannot be reduced during their term in office. See United States v. Will, 449 U.S. 200, 220-21 (1980).

55. "[Tenure is] the best expedient . . . to secure steady, upright, and impartial administration of the laws." The Federalist No. 78, at 518 (A. Hamilton) (P. Ford ed. 1898). "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, at 527 (A. Hamilton) (P. Ford ed. 1898) (emphasis in original).

56. Because "the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments," The Federalist No. 78, at 523 (A. Hamilton) (P. Ford ed. 1898), the public needs to know that the judges will uphold their responsibilities. Id. Life tenure and an undiminishable salary, therefore, are "essential to the faithful performance of so arduous a duty," id., because they allow judges to question Congress without the fear of losing their livelihoods. Id.


58. See Kaufman, supra note 39, at 713.

59. Id. Judicial individualism allows the judicial branch to check the abuses of the other two branches because the judiciary is not politically accountable to them. Id. at 715.

60. Full-time magistrates serve eight-year terms and part-time magistrates serve four-year terms. See 28 U.S.C. § 631(e) (1982). Moreover, the district court may remove a magistrate during his or her term for incompetency, misconduct, neglect of duty, or physical or mental disability. See id. at § 631(i).

61. Although § 634(b) provides that "the salary of a full-time United States magistrate shall not be reduced, during the term in which he is serving, below the salary fixed for him at the beginning of that term," id., Congress remains free to reduce a magistrate's salary at any time by repealing or overruling this statutory provision. See Glidden Co. v. Zdanok, 370 U.S. 530, 593 (1962) (Douglas, J., dissenting).

62. See supra notes 3-6 and accompanying text.
dressed the issue have included jury selection in felony cases as a delegable duty.63

Perhaps the strongest argument raised against delegating jury selection in felony trials is that jury selection is not a pretrial matter, but rather an integral part of the trial itself64 and therefore must be presided over by an Article III judge as an exercise of the judicial power of the United States.65 This objection fails, however, because the Supreme Court has held that inherently judicial tasks, entrusted to the courts by Article III, may be delegated to magistrates as long as the district judge retains the power to make the final determination.66 This power is preserved through the district judge’s ability to conduct a de novo review.67

Although the additional duties clause does not provide explicitly for de novo review,68 this omission does not prevent a district judge from con-

63. See supra note 34 and accompanying text.
64. See United States v. Ford, 824 F.2d 1430, 1435 (5th Cir. 1987) (en banc) (jury selection is an essential element used to preserve a defendant's constitutional right to a jury trial), cert. denied, 108 S.Ct. 741 (1988).
65. See id.

Furthermore, the argument that jury selection is an integral part of the trial is subject to debate. Although voir dire unquestionably forms an important part of a felony trial, see infra notes 97-98 and accompanying text, its importance does not make it so integral to the trial that it cannot be delegated to a magistrate. See United States v. Peacock, 761 F.2d 1313, 1317-19 (9th Cir.), cert. denied, 474 U.S. 847 (1985); United States v. Rivera-Sola, 713 F.2d 866, 874 (1st Cir. 1983). The judge need not be present for many parts of a criminal trial. For example, the Federal Rules of Criminal Procedure allow depositions taken outside of the courtroom to be offered into evidence at trial. Fed. R. Crim. P. 15(a). Moreover, the Supreme Court has upheld the referral to magistrates of evidentiary hearings on motions to suppress. See United States v. Raddatz, 447 U.S. 667, 683-84 (1980). ”[T]he resolution of a suppression motion can and often does determine the outcome of the case,” id. at 677-78, however, “the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself.” Id. at 679. In practice, even before passage of the Federal Magistrates Act, the Constitution had not been deemed to require the court to conduct voir dire. See, e.g., Stirone v. United States, 341 F.2d 253, 255-56 (3d Cir.) (voir dire supervised by deputy clerk), cert. denied, 381 U.S. 902 (1965).

67. See United States v. Raddatz, 447 U.S. 667, 681-84 (1980); Mathews v. Weber, 423 U.S. 261, 270-71 (1976); United States v. Ford, 824 F.2d 1430, 1445 (5th Cir. 1987) (en banc) (Rubin, J., dissenting), cert. denied, 108 S.Ct. 741 (1988); United States v. Peacock, 761 F.2d 1313, 1318 (9th Cir.), cert. denied, 474 U.S. 847 (1985). In Weber, the Supreme Court, in upholding a delegation under the additional duties clause, explained “[t]he district judge is free to follow [the magistrate's recommendation] or wholly to ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew.” 423 U.S. at 271; see also United States v. Raddatz, 447 U.S. 667, 686 (1980) (Blackmun, J., concurring) (“Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants’ activities.”).

68. See generally 28 U.S.C. § 636(b)(3) (1982). The Act explicitly provides for de novo review in another section. See 28 U.S.C. § 636(b)(1) (if any party objects to the magistrates 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”); supra note 3; infra note 76.
ducting such a review. When he accepts a referral, the magistrate acts under the supervision of the district judge, and the authority for making final decisions remains with the district judge at all times. The district judge retains ultimate responsibility for decision-making in every instance in which a magistrate exercises additional duties jurisdiction. Therefore, the power to conduct de novo review resides inherently and implicitly with the district judge, and its availability satisfies the commands of Article III.

Because the district court still acts as a court of original jurisdiction, the district judge, conducting a de novo review, must review the proceedings and make an independent determination of the controversy. The type of review afforded must suffice to show that the district judge exercised his non-delegable authority to make the final determination. It need not be exercised, however, in the absence of a request. The dis-

---

71. See id.
74. The judge, not the magistrate, makes the final determination. See Mathews v. Weber, 423 U.S. 261, 271 (1976). Unlike an appellate review, when conducting a de novo review, the district judge may review the facts as well as the law. See United States v. Raddatz, 447 U.S. 667, 690 (1980) (Stewart, J., dissenting) (“‘de novo determination’... means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy”); United States v. Shami, 754 F.2d 670, 672 (6th Cir. 1985) (per curiam) (de novo review provides “for a redetermination by the Court”) (quoting United States v. Walters, 638 F.2d 947, 950 (6th Cir. 1981)).
75. See Raddatz, 447 U.S. at 673, 683; see, e.g., Gee v. Estes, 829 F.2d 1005, 1008-09 (10th Cir. 1987) (per curiam) (court must review actual transcript when defendant’s objections relate specifically to actual testimony); Cay v. Estelle, 789 F.2d 318, 327 (5th Cir. 1986) (if magistrate summarizes conflicts adequately, court may not need to review actual transcript); Goney v. Clark, 749 F.2d 5, 7 (3rd Cir. 1984) (reviewing summary of testimony is sufficient if objection made does not refer to a specific part of the proceeding); Wofford v. Wainwright, 748 F.2d 1505, 1509 (11th Cir. 1984) (court can adopt magistrate’s credibility finding without rehearing live testimony).
76. See United States v. Raddatz, 447 U.S. 667, 675 (1980); Delgado v. Bowen, 782 F.2d 79, 81-82 (7th Cir. 1986); United States v. Peacock, 761 F. 2d 1313, 1318 (9th Cir.), cert. denied, 474 U.S. 847 (1985). Although not explicitly applying to the additional duties clause, 28 U.S.C. § 636(b)(1) provides that “[w]ithin ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.” Id.
strict judge retains discretion to decide whether review of the magistrate's conduct is necessary. The judge may examine all or part of the record if he so chooses.

The Court of Appeals for the Fifth Circuit, however, holds that the lack of explicit statutory procedures requiring de novo review when magistrates select juries in felony cases renders such review illusory. The court reasons that access to the record of the proceedings does not give the judge sufficient evidence upon which to determine whether the selection or rejection of a juror was proper because the juror's demeanor is often more indicative of his real opinions than are his words.

The type of review available over a magistrate's supervision of voir dire satisfies Article III. The district judge may examine proposed questions before voir dire begins as well as the complete transcript once jury selection is finished. Moreover, the defendant can draw the district judge's attention to any possible problems with the selection procedure by raising an objection. The judge can question any or all of the jurors himself to confirm their qualifications and assess their credibility. If the judge determines that a juror is not qualified, he can dismiss the juror. The district judge's retention of the power to make the final determination with respect to the selection of the jury satisfies the requirements of Article III by preserving the independence of the federal judiciary.

2. The Defendant's Due Process Right

The availability of de novo review when a district judge delegates jury selection to a magistrate also protects a defendant's procedural right to

---

77. See supra cases cited note 76.
78. See supra cases cited note 76.
80. Id. at 1436-37. Furthermore, even if a district judge did question a juror, the spontaneity of the original response would be lost. Id. at 1437.
82. See United States v. Peacock, 761 F.2d 1313, 1318 (9th Cir.) (district judge may review questions prior to voir dire), cert. denied, 474 U.S. 847 (1985).
85. See supra cases cited in note 84.
access to an independent federal judiciary. The fifth amendment states that no person "shall . . . be deprived of life, liberty or property without due process of law." Due process, however, merely guarantees a defendant the right to a hearing "at a meaningful time and in a meaningful manner." Whether this guarantee has been afforded depends upon the circumstances.

Due process is a personal right belonging to the individual defendant. Thus, the defendant may waive any due process right if he acts voluntarily, knowingly, and intelligently. If the defendant consents to having a magistrate conduct voir dire, he waives his due process right. If, on the other hand, the defendant does not consent, Raddatz requires courts, in determining whether delegation of jury selection in felony trials preserves a defendant’s due process right, to weigh the three factors set forth by the Supreme Court in Mathews v. Eldridge: the private interests affected; the risk that the process used will cause an erroneous deter-


88. U.S. Const. amend. V.


91. Due process offers a means of protecting an individual’s inalienable rights. See Mathews v. Eldridge, 424 U.S. 319, 332 (1976); Pacemaker Diagnostic Clinic of Am. Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir. 1984) (en banc), cert. denied, 469 U.S. 824.

92. See Brady v. United States, 397 U.S. 742, 748 (1970). In fact, the Supreme Court has upheld a number of cases in which criminal defendants were found to have waived fundamental rights. See, e.g., Garner v. United States, 424 U.S. 648, 650 (1976) (privilege against self-incrimination); Schenckloth v. Bustamonte, 412 U.S. 218, 221 (1973) (right to be free from unreasonable searches and seizures); Barker v. Wingo, 407 U.S. 514, 536 (1972) (right to a speedy trial); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (by pleading guilty, the right to a trial itself); Carnley v. Cochran, 369 U.S. 506, 513-16 (1962) (the right to counsel); Patton v. United States, 281 U.S. 276, 312 (1930) (the right to trial by jury).

93. See United States v. Rivera-Sola, 713 F.2d 866, 873-74 (1st Cir. 1983); see also United States v. deFiore, 720 F.2d 757, 764-65 (2d Cir. 1983) (failure to object not reversible error), cert. denied, 466 U.S. 906 (1984); cf. Haith v. United States, 342 F.2d 158, 159 (3d Cir. 1965) (per curiam) (judge’s absence from courtroom during jury selection does not violate defendant’s due process right when defendant does not object); Stirone v. United State, 341 F.2d 253, 255-56 (3d Cir.), (same), cert. denied, 381 U.S. 902 (1965).

mination and the probable value that any added procedural safeguards would accord; and the public and governmental interests. Application of this analysis shows that delegation of jury selection in a felony case to a magistrate does not violate a defendant's due process right.

The private interest affected when a district judge delegates jury selection to a magistrate is extremely important. The jury that is chosen ultimately decides the defendant's guilt or innocence. Thus, the Supreme Court has held that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it." To uphold the defendant's interest, a magistrate must ensure that the jury selected is impartial and competent.

Having a magistrate, instead of an Article III judge, conduct voir dire results in only a negligible risk that an erroneous determination will occur because all of the magistrate's actions are subject to de novo review by an Article III judge. Furthermore, having a magistrate preside over jury selection provides greater procedural safeguards than having a district judge alone preside: when a magistrate conducts jury selection, a chance for reconsideration by the district judge always exists, whereas when a district judge presides, only one evaluation occurs.

95. See United States v. Raddatz, 447 U.S. 667, 677 (1980) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976); see also Wofford v. Wainwright, 748 F.2d 1505, 1507 (11th Cir. 1984) (per curiam) (applying Weber to magistrate's conduct of habeas corpus petition hearing). In Raddatz, the respondent contended that the guarantees of due process include a " 'hearing appropriate to the nature of the case.' " United States v. Raddatz, 447 U.S. 667, 677 (1980) (quoting Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306, 313 (1950)). Relying on this guarantee, the defendant argued that " '[t]he one who decides must hear.' " Raddatz 447 U.S. at 677 (quoting Morgan v. United States, 298 U.S. 468, 481 (1936)).


100. See United States v. Ford, 824 F.2d 1430, 1446 (5th Cir. 1987) (en banc) (Rubin, J., dissenting), cert. denied, 108 S.Ct. 741 (1988); United States v. Bezold, 760 F.2d 999, 1002 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986); United States v. Peacock, 761 F.2d 1313, 1318 (9th Cir.), cert. denied, 474 U.S. 847 (1985). Because the de novo review available to a district judge over a magistrate's conduct of jury selection satisfies the requirements of Article III, see supra notes 81-86 and accompanying text, it follows implicitly that the de novo review available also suffices to protect a defendant's procedural due process right to access to an independent federal judiciary.

Moreover, it is in the public interest to allow district judges to delegate voir dire to magistrates.\textsuperscript{102} The legislative history surrounding the Federal Magistrates Act indicates that Congress intended to increase the efficiency of the federal judicial system.\textsuperscript{103} Allowing district judges to delegate jury selection to magistrates gives them more time to preside over actual trials, thereby improving the efficiency of their courts\textsuperscript{104} at no cost to the defendant's rights.

**CONCLUSION**

Congress enacted the Federal Magistrates Act in an attempt to alleviate the growing caseload of the district courts. Although the Act does not specifically mention presiding over jury selection in felony cases as one of the duties that a district judge may assign to a magistrate, delegation of this responsibility under the additional duties clause comports with congressional intent. Furthermore, delegation of jury selection neither infringes upon the separation of powers implicit in Article III nor violates a defendant's procedural due process right to access to an independent federal judiciary because de novo review by an Article III judge is always available.

*Marla Eisland*

---

103. Id. at 6171.