



# PETTY OFFENSES AND ARTICLE III

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**E**VER SINCE CONGRESS enacted the Federal Magistrates Act of 1968, federal law has allowed magistrate judges – jurists who are neither appointed by the President nor confirmed by the Senate, and who lack Article III’s salary and tenure protections – to preside over and render judgments in criminal trials for petty offenses<sup>1</sup> without the defendant’s consent.<sup>2</sup> This petty offense jurisdiction is unique; the only *other* circumstances in which magistrate judges are entitled by statute to render judgments (as opposed to serving as “adjuncts” to district judges) are in civil and misdemeanor criminal cases in which the parties expressly consent to having their claims resolved by such a non-Article III federal judge.<sup>3</sup> Whether (and when) consent is sufficient to ameliorate the constitutional objections to adjudication by non-Article III federal judges is certainly a hot topic.<sup>4</sup> But why does Article III also permit non-Article III

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<sup>1</sup> Federal law defines a “petty offense” as an offense for which the maximum sentence is six months’ imprisonment, and the maximum fine is \$5000 for an individual or \$10,000 for a corporation. See 18 U.S.C. §§ 19, 3559, 3571; see also *Duncan v. Louisiana*, 391 U.S. 145, 160-61 (1968).

<sup>2</sup> Pub. L. No. 90-578, §§ 101, 201, 82 Stat. 1107, 1113, 1115-16 (codified as amended at 18 U.S.C. § 3401(b) and 28 *id.* § 636(a)(3)); see also Fed. R. Crim. P. 58(b)(E).

<sup>3</sup> See 18 U.S.C. § 3401(b); 28 *id.* § 636(c).

<sup>4</sup> See, e.g., *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015) (holding that, in at least some circumstances, consent *can* ameliorate Article III objections to non-Article III adjudication); see also *al Bahlul v. United States*, No. 11-1324 (D.C. Cir. argued Dec. 1,

magistrate judges to try petty offenses *without* the defendant's consent?

In its intriguing recent decision in *United States v. Hollingsworth*, a divided panel of the Fifth Circuit offered its own answer.<sup>5</sup> As Judge Edith Brown Clement reasoned, at least where the offense was committed on a "federal enclave," the magistrate's authority can – and should – be analogized to Congress's constitutional power to create non-Article III courts to try criminal offenses (along with civil suits) arising in the federal territories, like the D.C. Superior Court. Given that the Supreme Court expressly upheld such authority in *Palmore v. United States*,<sup>6</sup> Judge Clement concluded, it should follow that Congress may take the lesser step of delegating jurisdiction over petty offenses committed within the exclusive physical jurisdiction of the federal government to federal magistrate judges.<sup>7</sup>

The Fifth Circuit's analysis in *Hollingsworth* suffers from three different shortcomings: (1) it fails to engage the actual *text* of the Federal Magistrates Act, which turns on the status, and not the location, of the offense; (2) it ignores the obvious (and, in my view, constitutionally significant) distinctions between *Hollingsworth* and *Palmore*; and (3) it does not address the serious problems with *Palmore* itself.

This essay aims to provide a sounder constitutional justification for the petty offense jurisdiction of non-Article III magistrate judges, by tying it to the long- and well-established exception to the Sixth Amendment right to trial by jury for petty offenses. As the essay explains, viewing the petty offense jurisdiction of magistrate judges through the lens of the petty offense exception to the Sixth Amendment provides a more satisfying theoretical and practical justification for the result in *Hollingsworth*, and explains why petty offense jurisdiction should be constitutional even when the offense is *not* committed on exclusively federal land.

But it may do more than that: Insofar as the Supreme Court has, at various points, understood the permissible scope of non-Article III criminal

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2015) (en banc) (raising whether a defendant can forfeit his constitutional objection to trial before a non-Article III military court).

<sup>5</sup> See 783 F.3d 556 (5th Cir. 2015), *cert. denied*, No. 15-5317, 2015 WL 4485496 (U.S. Nov. 30, 2015).

<sup>6</sup> 411 U.S. 389 (1973).

<sup>7</sup> See *Hollingsworth*, 783 F.3d at 559-61.

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jurisdiction by reference to the defendant's jury-trial rights, properly accounting for the petty offense jurisdiction of magistrate judges might also highlight how the jury-trial rights of Article III and the Sixth Amendment should more generally inform the permissible scope of non-Article III criminal adjudication – including in all federal territories and military tribunals.

### I

David Hollingsworth was tried without a jury and convicted before a federal magistrate judge in the Eastern District of Louisiana for simple assault<sup>8</sup> – a “petty offense” under federal law. Hollingsworth’s offense was committed at the Naval Air Station Joint Reverse Base New Orleans in Belle Chasse – a “federal enclave” that is within the “special maritime and territorial jurisdiction of the United States.”<sup>9</sup> After an unsuccessful appeal to the district court, Hollingsworth appealed his conviction to the Fifth Circuit on the grounds that such a trial (without his consent) violated both Article III and his Sixth Amendment right to a jury trial. In rejecting Hollingsworth’s Article III claim, the Fifth Circuit tied its analysis to the Supreme Court’s 1973 decision in *Palmore*, which had upheld against an Article III challenge Congress’s creation of the Article I D.C. Superior Court and D.C. Court of Appeals. As Judge Clement wrote, because Belle Chasse is a “federal enclave,” and because Hollingsworth was tried for the violation of a federal criminal statute that applies only “within the special maritime and territorial jurisdiction of the United States,” “under *Palmore*, Hollingsworth has no constitutional right to trial before an Art. III court.”<sup>10</sup>

Although Hollingsworth objected that there’s a meaningful difference between Congress creating a special territorial court and Congress assigning the matter to a magistrate judge, the Court of Appeals held that “as applied, Congress has not even entered the constitutional borderlands. Pursuant to [Article I, Section 8] Clause 17, Congress could have referred all trials for crimes committed at Belle Chasse to an Article I judge, in-

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<sup>8</sup> See 18 U.S.C. § 113(a)(5).

<sup>9</sup> See *id.* § 7(3).

<sup>10</sup> *Hollingsworth*, 783 F.3d at 559.

cluding felony trials.”<sup>11</sup> Thus, from the Fifth Circuit’s perspective, it didn’t matter – at least for Article III purposes – that Hollingsworth’s crime was a petty offense; all that mattered was that it was committed on territory subject to the exclusive control of the federal government.

Finally, the majority quickly dispatched with Hollingsworth’s other argument – that, even if he could be tried by a magistrate judge, he was entitled to a trial by jury. As Judge Clement explained, “it is well-established that those charged with petty offenses do not have a right to a jury trial.”<sup>12</sup>

Dissenting, Judge Stephen Higginson took a more formalistic tack, arguing that magistrate judges are only Article III adjuncts – not Article I judges – and thus their petty offense jurisdiction “infringes the ‘total control and jurisdiction’ constitutional courts must exercise over federal criminal trials.”<sup>13</sup> As he concluded, “Without consent, persons accused of federal offenses should not lose their liberty except after trial in a constitutional court, unless an Article III judge reserves ‘the ultimate decisionmaking authority.’”<sup>14</sup>

## II

By rejecting Hollingsworth’s Article III challenge based upon the location – and not the status – of his offense, the Fifth Circuit’s analysis raised at least three sets of problems that could easily have been avoided.

First, the statutory authority of magistrate judges to try petty offenses is not in any way pegged to where those offenses were committed, but turns instead solely on the offense’s status.<sup>15</sup> In fact, no statute today authorizes magistrate judges to try without the defendant’s consent all crimes, including non-petty misdemeanors and felonies, simply because they’re committed within the special maritime and territorial jurisdiction of the United States.<sup>16</sup> Thus, the Fifth Circuit in *Hollingsworth* not only ignored

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 564.

<sup>13</sup> *Id.* at 568 (Higginson, J., dissenting).

<sup>14</sup> *Id.* at 570 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79 (1982) (plurality opinion)).

<sup>15</sup> 18 U.S.C. § 3401(b); 28 *id.* § 636(a)(3).

<sup>16</sup> As Judge Clement pointed out, there was a time when the petty offense jurisdiction of federal “commissioners” (the predecessors to magistrate judges) was tied to federal en-

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the language of the statute it was upholding, but in the process issued a quite broad constitutional ruling – affirmatively holding that non-Article III magistrate judges can try without the defendant’s consent *any* offense committed on territory subject to the federal government’s exclusive control.<sup>17</sup>

Of course, how Congress has legislated proves nothing about what Article III does and does not permit. But it *does* suggest that the legislature, at least, has consistently viewed the relevant constitutional distinction as going to the nature, rather than the location, of the offense. More to the point, the Fifth Circuit’s departure from the statute gives rise to at least the possibility that the statute draws the *wrong* distinction – although nothing in *Hollingsworth* helps to explain why that might be the case.

*Second*, it’s not nearly as obvious as the Fifth Circuit suggested that *Palmore* settles the authority of magistrate judges to try all offenses committed on federal enclaves.<sup>18</sup> In *Palmore* itself, Justice White made quite a lot (more than the historical record actually supports, as it turns out<sup>19</sup>) of the analogy between territorial courts of general jurisdiction and state courts – and the idea that Congress was certainly free to create a quasi-state court in a federal territory. In his words, “we have courts the focus of whose work is primarily upon cases arising under the District of Columbia

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enclaves. See *Hollingsworth*, 783 F.3d at 560 & n.10 (“From 1894 until 1948, Congress referred trials for misdemeanors committed on certain federal lands to the federal magistracy.”). But as Congress would later explain, “Congress appears to have [initially] restricted the Commissioner’s power to the enclaves for practical reasons – not because of a special constitutional basis that applied only to the enclaves.” *Hearings on Proposals to Reform the United States Commissioner System Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee*, 90th Cong., 1st Sess. 250 (Memorandum of Subcommittee Staff) (1967) [hereinafter “1967 Subcommittee Memo”].

<sup>17</sup> *Hollingsworth*, 783 F.3d at 559.

<sup>18</sup> The Fifth Circuit also pointed to the Ninth Circuit’s decision in *United States v. Jenkins*, 734 F.2d 1322 (9th Cir. 1983), but in that case, the defendant had consented to trial by a magistrate judge for a crime committed on a federal enclave, see *id.* at 1325-26, and so the constitutional question went to the sufficiency of the consent, and not, as in *Hollingsworth*, the magistrate judge’s power to act *without* it.

<sup>19</sup> See Steve Vladeck, *Federal Crimes, State Courts, and Palmore*, JOTWELL, Oct. 26, 2012 (reviewing Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243 (2011)), <http://courtslaw.jotwell.com/federal-crimes-state-courts-and-palmore/>.

Code and to other matters of strictly local concern.”<sup>20</sup> Whatever one thinks of such reasoning (more on that shortly), it necessarily turns on two elements not present in *Hollingsworth*: (1) Congress’s creation of a quasi-local court of general jurisdiction in the federal territory; and (2) a court focused on “local,” rather than federal, offenses.<sup>21</sup>

Nor is it any response, as Judge Clement argued in *Hollingsworth*, that the Supreme Court has expressly rejected any distinction between the scope of Congress’s Article I powers over the District of Columbia as compared to its Article I authority over federal enclaves.<sup>22</sup> The Article I question goes only to Congress’s power to define the offense; where the offense may be *tried* is an Article III question, one the Supreme Court has only answered with respect to the D.C. Superior Court.<sup>23</sup>

Instead, the better analogy for the Fifth Circuit would have been the three non-Article III federal *district* courts (for Guam, the Northern Mariana Islands, and the U.S. Virgin Islands), each of which are federal courts of limited subject-matter jurisdiction with the power to try all federal crimes<sup>24</sup> – and thus far more closely resemble the magistrate judge jurisdiction sustained by the Fifth Circuit in *Hollingsworth*. Those courts certainly provide stronger precedential support for the power of non-Article III judges to try federal offenses committed on federal enclaves. But, and critically, the Supreme Court has never expressly upheld such jurisdiction. Thus, the result in *Hollingsworth* could not simply follow from binding Supreme Court precedent.

*Third*, even if one were inclined to read *Palmore* broadly as upholding all non-Article III adjudication of all offenses committed on federal enclaves, there are any number of problems with *Palmore* itself. For starters, in explaining why federal crimes could be prosecuted in non-Article III

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<sup>20</sup> *Palmore v. United States*, 411 U.S. 389, 407 (1973).

<sup>21</sup> Indeed, the D.C. Superior Court may only entertain prosecutions for federal offenses of general applicability when those charges are tied to charges arising under the D.C. Code. See Note, *Federal and Local Jurisdiction in the District of Columbia*, 92 YALE L.J. 292 (1982).

<sup>22</sup> See *Hollingsworth*, 783 F.3d at 559 n.8 (citing *Paul v. United States*, 371 U.S. 245, 263 (1963)).

<sup>23</sup> See *al Bahlul v. United States*, 792 F.3d 1, 14 (D.C. Cir. 2015), *reh’g en banc granted*, No. 11-1324 (D.C. Cir. argued Dec. 1, 2015).

<sup>24</sup> See 48 U.S.C. §§ 1424(b); 1612(a); 1822(a).

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courts, Justice White relied heavily on the claim that Founding-era state courts had routinely entertained federal criminal prosecutions; it's now clear that, in fact, they had not.<sup>25</sup> Justice White also analogized the jurisdiction of the D.C. Superior Court to courts-martial,<sup>26</sup> even though the Supreme Court in *that* context has relied upon other constitutional text to justify the departure from Article III.<sup>27</sup> Finally, before Congress split the then-unitary Article III D.C. court system into separate Article I and Article III pieces in the early 1970s, virtually all major adjudication in the District was handled by the Article III D.C. courts. As I've suggested previously, that historical practice "undermines at least to some degree any argument that some non-Article III tribunal in the nation's capital is either formally or functionally necessary."<sup>28</sup>

Thus, all *Palmore* really stands for is the proposition that the departure from Article III turns on Congress's exclusive and plenary regulatory power over the District of Columbia – an argument that would prove far too much. If that argument were accepted, it would then follow that Congress could invest non-Article III federal courts with jurisdiction over any and all substantive fields over which the federal government has exclusive regulatory authority,<sup>29</sup> and not just over cases arising in federal enclaves.<sup>30</sup> Perhaps some narrower principle provides a more analytically satisfying defense of *Palmore*, but no such principle was offered by the Fifth Circuit.

As such, and given that the government also argued that the magistrate judge's authority could be sustained simply as applied to petty offenses,<sup>31</sup>

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<sup>25</sup> *Palmore*, 411 U.S. at 402-03.

<sup>26</sup> *Id.* at 404.

<sup>27</sup> See *infra* notes 37-40 and accompanying text.

<sup>28</sup> Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 983 (2015).

<sup>29</sup> See, e.g., 1967 Subcommittee Memo, *supra* note 16, at 250 ("Congress has exclusive jurisdiction over the coinage of money and the punishment of counterfeiters, but these provisions do not give it power to provide for the trial of counterfeiters without regard to the limitations of Article III." (citation omitted)).

<sup>30</sup> Vladeck, *supra* note 28, at 983 n.305; see also 1967 Subcommittee Memo, *supra* note 16, at 250 ("The mere fact that a particular law finds its constitutional roots in an Article I power, such as the authority to regulate Federal enclaves, does not give it any special status when viewed against the requirements that Article III sets down for the trial of all 'cases and controversies.'").

<sup>31</sup> See Brief for Appellee at 13-19, *Hollingsworth v. United States*, 783 F.3d 556 (5th Cir.

it's not at all clear why the Fifth Circuit didn't at least explore a path of less resistance in *Hollingsworth*. Because it failed to do so, however, the law of the Fifth Circuit currently recognizes the constitutional authority of magistrate judges (or any other non-Article III federal adjudicator, for that matter) to try *all* offenses committed on federal enclaves without the defendant's consent – and leaves for another day the petty offense jurisdiction of magistrate judges elsewhere.<sup>32</sup>

### III

As Judge Higginbotham's concurrence in *Hollingsworth* underscores,<sup>33</sup> the court could easily have arrived at a more modest holding, *i.e.*, that Article III does not bar the trial of petty offenses by non-Article III judges without the defendant's consent. Historically, petty offenses were understood to not even constitute "crimes" at common law – and therefore fell outside the right to grand jury indictment, counsel, and trial by jury, as well as the right to an Article III judge.<sup>34</sup> And, as a Judicial Conference study explained in 1993, "There is a historical tradition of such matters being summarily disposed of by judicial officers other than Article III judges, such as justices of the peace."<sup>35</sup> Indeed, when Congress passed the Federal Magistrates Act in 1968, it was expressly legislating against the

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2015) (No. 13-31265).

<sup>32</sup> *Hollingsworth*, 783 F.3d at 560 n.9 ("We refer to petty offenses only to show that Congress acted well within its constitutional power under Clause 17. We do not decide the distinct question whether all trials for petty offenses fall outside the scope of Art. III.")

<sup>33</sup> *Id.* at 564 (Higginbotham, J., concurring) ("That we are addressing a petty offense is important. A person charged with a petty offense has no right to an indictment, no absolute right to counsel, and no right to a trial by jury. To my eyes, this reality enforces the power of the Congress over federal enclaves and simultaneously limits it."). Curiously, Judge Higginbotham nevertheless joined the majority opinion in full.

<sup>34</sup> See, *e.g.*, *Frank v. United States*, 395 U.S. 147, 148-49 (1969); *Bloom v. Illinois*, 391 U.S. 194 (1968); *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Callan v. Wilson*, 127 U.S. 540 (1888).

<sup>35</sup> A Constitutional Analysis of Magistrate Judge Authority, 150 F.R.D. 247, 304 (1993); see also George Cochran Doub & Lionel Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 U. PA. L. REV. 443 (1959); Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).



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backdrop of that tradition.<sup>36</sup>

Based upon that statutory and common law tradition, the Judicial Conference study found no constitutional concern with the petty offense jurisdiction of magistrate judges. The Court of Appeals accordingly could have rested its affirmance of Hollingsworth's conviction by a non-Article III magistrate judge without his consent on the far narrower – and less controversial – ground that it was for a petty offense, rather than that it was committed on a federal enclave.

To be sure, the Supreme Court has never expressly held that petty offenses may be tried by non-Article III judges without the defendant's consent. But it *has* held, as noted above, that there is no right to jury trial for such offenses. And in other contexts, the Court has also held that the validity of non-Article III criminal adjudication turns on the applicability of the Constitution's jury-trial protections. Thus, with respect to courts-martial, the Justices have repeatedly looked to the express exception from the Fifth Amendment's Grand Jury Indictment Clause for "cases arising in the land or naval forces"<sup>37</sup> (which has been read implicitly into the Jury Trial Clauses of both Article III and the Sixth Amendment)<sup>38</sup> to define the permissible departure from Article III.<sup>39</sup>

To similar effect, the Supreme Court's constitutional defense of military commissions has historically been predicated upon an (atextual) exception to the jury-trial rights for "offenses committed by enemy belligerents against the laws of war."<sup>40</sup> Indeed, the D.C. Circuit's June 2015 invalidation of the Guantánamo military commissions' power to try domestic offenses was based almost entirely on the extent to which such offenses did *not* fit within that jury-trial carve-out.<sup>41</sup>

In the context of military courts, at least, the Justices have thereby conditioned the permissible departure from Article III upon the *inapplica-*

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<sup>36</sup> See 1967 Subcommittee Memo, *supra* note 16, at 250.

<sup>37</sup> U.S. CONST. amend V.

<sup>38</sup> See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); see also *Middendorf v. Henry*, 425 U.S. 25, 33-34 (1976).

<sup>39</sup> See *Vladeck*, *supra* note 28, at 951-57.

<sup>40</sup> See *Ex parte Quirin*, 317 U.S. 1, 41 (1942); see also *Vladeck*, *supra* note 28, at 957-61.

<sup>41</sup> See *al Bahlul v. United States*, 792 F.3d 1, 7-19 (D.C. Cir. 2015), *reh'g en banc granted*, No. 11-1324 (D.C. Cir. argued Dec. 1, 2015).

bility of the Constitution’s jury-trial protections, at least largely based on the assumption that criminal offenses that fall outside the Constitution’s jury-trial protections were understood at the Founding (and have been understood since) as not requiring an Article III judge, as well.

But the categories of criminal offenses that fall outside the Constitution’s jury-trial protections are broader than merely offenses “arising in the land or naval forces” or “offenses by enemy belligerents against the laws of war.” In addition to petty offenses, no jury trial has ever been deemed constitutionally necessary for certain contempt offenses – which Congress has also empowered magistrate judges to try without the defendant’s consent.<sup>42</sup> Again, this historical pattern does nothing to *settle* the Article III question, but it does reinforce the apparent relationship between a defendant’s right to an Article III judge and his right to a criminal trial before a petit jury.

Although there may be reasons not to make too much out of the connection between the jury-trial clauses and Article III in civil cases,<sup>43</sup> in the context of criminal adjudication, the argument that Article III allows for adjudication before a non-Article III federal judge of offenses to which there is no constitutional right to a jury seems on stronger footing. To begin, there would certainly be far less concern about congressional dilution of Article III if the only criminal cases that are allowed to be assigned to non-Article III judges without the defendant’s consent involve the limited and unique classes of offenses currently falling outside of the jury-trial protections.

In addition, although it might seem unusual to condition the scope of Article III upon the applicability of a separate constitutional provision rati-

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<sup>42</sup> See 28 U.S.C. § 636(e).

<sup>43</sup> In the civil context, at least, even though the Supreme Court has suggested some linkage between the Seventh Amendment and the permissible scope of non-Article III adjudication, see *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989); see also *id.* at 51 (“Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders.”), tying them together in all cases would lead to the rather absurd result that no Article III judge would be required for any case in equity or admiralty. See U.S. CONST. amend. VII (“In Suits at *common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .” (emphasis added)); see also Vladeck, *supra* note 28, at 983 & n.309.

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fied four years later, Article III *itself* includes a jury-trial clause that the Supreme Court has always read *in pari materia* with the Sixth Amendment,<sup>44</sup> suggesting that Article III itself was ratified with a comparable understanding. Finally, if one looks to state courts and the “insular” territories, there is also deep support for such a relationship in historical practice: After all, the Constitution’s jury-trial protections did not apply in the most common forum for non-Article III adjudication (state courts) until the Supreme Court incorporated them in 1968.<sup>45</sup> And although they remain exceptionally controversial, the so-called *Insular Cases* are still good law insofar as they provide that the grand- and petit-jury trial rights do not apply on their own in the “unincorporated territories” – including Guam, the Northern Mariana Islands, and the U.S. Virgin Islands. Under current law, jury-trial protections in those territories are a matter of legislative grace; the Organic Acts for each of the territories have incorporated these constitutional rights by statute.<sup>46</sup>

In other words, with the exception of the D.C. Superior Court, *every* federal criminal prosecution before a non-Article III judge today involves an offense (or offender) to which the Constitution’s jury-trial protections do not apply.<sup>47</sup> Thus, both historically and analytically, there is much to commend the argument that the scope of the Constitution’s jury-trial protections helps to explain – if not justify – the scope of permissible non-Article III federal adjudication.

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<sup>44</sup> See *Ex parte Quirin*, 317 U.S. 1, 39 (1942) (“The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article.”); see also *Cheff v. Schnackenberg*, 384 U.S. 373, 384 (1966) (Douglas, J., dissenting) (“Although the Sixth Amendment uses somewhat different language than that of Art. III, § 2, there is no reason to believe that the Sixth Amendment was intended to work a change in the scope of the jury trial requirement of Article III.”).

<sup>45</sup> See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>46</sup> See *Vladeck*, *supra* note 28, at 981.

<sup>47</sup> See, e.g., *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012) (upholding the court-martial of a civilian contractor on the ground that the defendant, as a non-citizen lacking substantial voluntary connections to the United States, did not *have* jury-trial rights that such a military trial could violate). See also *al Bahlul v. United States*, 792 F.3d 1, 71-72 (D.C. Cir. 2015) (Henderson, J., dissenting) (invoking the defendant’s lack of jury-trial rights as an alternative basis for rejecting his Article III challenge to his military commission conviction), *reh’g en banc granted*, No. 11-1324 (D.C. Cir. argued Dec. 1, 2015).

I don't mean to make too much of this argument. After all, the Sixth Amendment right to jury trial clearly applies within the District of Columbia, and yet, thanks to *Palmore*, the D.C. Superior Court constitutionally exercises criminal jurisdiction in cases with constitutionally required juries.<sup>48</sup> My point is more modest: There is a long tradition of understanding the permissible scope of non-Article III federal criminal adjudication by reference to the scope of the constitutional provisions conferring a right to criminal trial by jury. Thus, it would not only have been far easier for the Fifth Circuit to have sustained the petty offense jurisdiction of magistrate judges by reference to that tradition, but it would have reaffirmed the scope of the jury-trial clauses as both the source *and* the limit on the permissible departure from Article III for federal criminal adjudication.



For generations, courts and commentators alike have assumed that there are three “categories” of permissible non-Article III adjudication: (1) territorial courts; (2) military tribunals; and (3) adjudication of “public rights” disputes by legislative courts or administrative agencies.<sup>49</sup> But as then-Justice Rehnquist cogently observed in 1982, these experts have been unable to agree on whether the Supreme Court’s non-Article III decisions “in fact support a general proposition and three tidy exceptions . . . or whether instead they are but landmarks on a judicial ‘darkling plain’ where ignorant armies have clashed by night.”<sup>50</sup>

In one sense, adding the petty offense jurisdiction of magistrate judges to the non-Article III canon may suggest that the answer is more the latter – and that there really isn’t a coherent explanation for why some departures from Article III are permissible, while others are not. But insofar as the validity of magistrate judges’ petty offense jurisdiction derives from the inapplicability of the jury-trial clauses to such crimes, recognizing the

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<sup>48</sup> In a future paper, I tackle in far more detail the complicated relationship between the District of Columbia and Article III. See Stephen I. Vladeck, *The District of Columbia and Article III* (draft manuscript December 1, 2015).

<sup>49</sup> See, e.g., RICHARD H. FALLON JR., ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 339-40 (6th ed. 2009).

<sup>50</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring in the judgment).

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existence of a *fourth* category of permissible non-Article III adjudication may actually help *unite* the existing departures – and provide a more coherent and enforceable limit on non-Article III federal adjudication, at least in criminal cases.

*GB*