Rethinking Rule 59's Appellate 'Waiver' for Magistrate Judge Adjudication Post-Olano

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A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice.

· Horrelman v. Helvering, 312 U.S. 552, 557 (1941)

INTRODUCTION

In 1985, the U.S. Supreme Court held in Thomas v. Arn that a federal court of appeals may establish a rule that failure to file objections to a magistrate judge’s report and recommendations (R&R) “waives” both the right to further review by the district court and the right to appeal the judgment to the court of appeals.¹ The Arn majority determined that such a rule did not remove the essential attributes of the judicial power from the Article III court or elevate non-life-tenured magistrate judges to the functional equivalents of Article III judges.² Rather, loss of the right to any Article III review through failure to object to a magistrate judge’s R&R merely constituted a nonjurisdictional “procedural default,” similar to failure to pay an appellate filing fee or failure to file an appeal before an internal court deadline.³ The Court emphasized that discretionary appellate review “in the interest of justice” remained available.⁴

² Id. at 154.
³ Id.
⁴ Id. at 155.
Despite describing such a rule as a “procedural default,” the Arn Court consistently used the term “waiver” throughout the opinion to describe the operation of the rule. Many circuits—although not all—adopted analogous rules under their own supervisory powers, and in 2005 an Arn-type rule became codified as Federal Rule of Criminal Procedure 59 (Rule 59).\(^5\) Similarly to Arn, Rule 59 established for criminal matters that failure to timely object to a magistrate judge’s decision “waives a party’s right to review.”

However, in the twenty-year span between the Arn decision and the promulgation of Rule 59, the 1993 U.S. Supreme Court case of United States v. Olano\(^6\) had carved out special meaning for the word “waiver.” The Olano Court established that there is a procedural and substantive distinction between waiver—“the intentional relinquishment or abandonment of a known right”\(^7\)—and forfeiture—“the failure to make the timely assertion of a right.”\(^8\) Substantively, waiver fully extinguishes any error, precluding any form of review, whereas “mere” forfeiture means that an error which is clear and affects substantial rights remains potentially reversible under plain error review.\(^9\)

Failing to timely object is the paradigm example of forfeiture,\(^10\) and Thomas v. Arn’s “interest of justice” discretion has been held equivalent to review for plain error. Accordingly, “waiver” is an inapt description of the default rules authorized by Arn, despite the initial use of “waiver” in the Arn Court’s opinion, before Olano had specifically construed the term. By using the language of “waiver” post-Olano, Rule 59 semantically insinuates that every avenue of review, even plain error review, is foreclosed by the failure to timely file objections to a magistrate judge’s R&R. As such, the language of Rule 59 obfuscates the actual availability of plain error review. The parameters of appellate “waiver” rules demand greater clarity, particularly to the extent that this misleading choice of words subtly disrupts the constitutional rationale for magistrate judge adjudication, which rests on the presumption, at minimum, of some level of review by a lifetime-tenured Article III judge.

\(^{5}\) FED. R. CRIM. PROC. 59.  
\(^{7}\) Id.  
\(^{8}\) Id.  
\(^{9}\) Id. at 733–34.  
\(^{10}\) Olano itself dealt with the failure to timely object (to the presence of alternate jurors during federal criminal trial jury deliberations). See also, e.g., Yakus v. United States, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.").
Part I of this Article provides a brief overview of the history and evolving role of magistrate judges as non-Article III adjudicators in the federal courts. Part II examines the case, majority holding, and dissenting opinions of *Thomas v. Arn*, describes the concept of the “supervisory powers” of the courts, and explains the operation of the appellate “waiver” rules authorized by *Arn*. Part III provides a snapshot of *Arn*’s progeny, how various Courts of Appeals implemented appellate “waiver” rules prior to and pursuant to *Arn*, common exceptions to such rules, and the eventual adoption of Rule 59 in 2005. Part IV explains *United States v. Olano*’s delineation between “waiver” and “forfeiture,” and clarifies how *Arn*-type “waiver” rules actually affect a “forfeiture.” Part V discusses how this seemingly innocuous language choice advances a constitutionally disruptive norm of unreviewability of magistrate judge reports and recommendations, given that the structural constitutionality of magistrate judge adjudication is premised on the presumption of meaningful judicial supervision and review by an Article III judge. In conclusion, this Article recommends a change in the language of Rule 59 to more accurately reflect the current limits of appellate “waiver” for failure to timely object to a magistrate judge’s R&R, and to aid the future constitutional analysis of magistrate judge adjudication.

I. Magistrate Judges in the Federal Court System

A. Magistrate Judges’ Position and Authority in the Federal Courts

The modern position of magistrate judge evolved out of the United States commissioner system. Since 1793, federal law had provided that “persons learned in the law” could assist district courts by taking bail in criminal cases. These officers re-

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12 See Act of Mar. 2, 1789, ch. 22, § 4, 1 Stat. 334. The Judiciary Act of 1789 also authorized “any justice of the peace, or other magistrate of any of the United States” to take
ceived the title of “commissioners” in 1817, and were appointed by the circuit courts until 1896 and after then by the district courts. In the mid-1900’s, pressure on federal court dockets and dissatisfaction with the commissioner system spurred various studies and reform efforts, which ultimately resulted in the replacement of the United States commissioners with a system of “magistrates” charged with expanded responsibilities.

The new magistrates system was implemented via the Federal Magistrates Act (FMA) of 1968. In passing the FMA, Congress sought to relieve district judges from the pressures of their dockets and “cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers.” The FMA gave magistrates jurisdiction over the duties previously exercised by commissioners, including bail setting, warrant issuance, and the ability to conduct preliminary hearings and removal hearings, as well as a range of new judicial functions. Magistrates were given the power to conduct misdemeanor trials, “administer oaths and affirmations,” “impose condition of release,” and “take acknowledgements, affidavits, and depositions.” District courts were also given the authority to assign to magistrates “additional duties as are not inconsistent with the Constitution and laws of the United States,” including but not limited to assisting in civil and criminal pretrial and discovery proceedings, reviewing preliminary applications for post-trial relief in criminal cases, and serving as special master in civil cases.

In 1976, Congress increased magistrates’ authority to include a broader range of motions and evidentiary hearings, and subsequent amendments to the Act variously expanded the scope of magistrate duties. Notably, the Federal Magistrates Act of 1979 expanded the United States Magistrates’ jurisdiction to in-

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13 See Act of Mar. 1, 1817, ch. 30, 3 Stat. 350; Act of May 28, 1896, ch. 252, §§19, 21, 29 Stat. 184; see also Spaniol, supra note 11, at 566.
14 See Silberman Part II, supra note 11, at 1297-98; Spaniol, supra note 11, at 566-68.
17 28 U.S.C. § 636 (a)(1) (1970); see also Spaniol, supra note 11, at 569.
21 See Anderson, supra note 11, at 11-14, for a concise overview of modern magistrate judge adjudication and authority; see also infra notes 49-51 and accompanying text.
clude the ability to conduct jury or bench trials by consent of the parties in civil cases or criminal misdemeanor cases.'

23 The Judicial Improvements Act of 1990 changed the title of "magistrate" to "magistrate judge," 24 and the Federal Courts Improvement Act of 2000 clarified magistrate judges' contempt authority, expanded their role in juvenile cases, and eliminated the consent requirement for petty offense cases. 25

Currently, as under the original FMA, the Judicial Conference of the United States determines how many magistrate judges are needed in each district, and individual magistrate judges are appointed by majority vote of the active district court judges in each district. 26 Full-time magistrate judges serve eight-year fixed and renewable terms; part-time magistrate judges serve four-year terms. 27 Reappointment and temporary extension of terms are also by majority vote of the active district judges, 28 and there is a presumption in favor of reappointment. 29 Magistrate judges must meet certain statutory criteria and general qualification standards, 30 and are not permitted to serve after the age of seventy years, except by yearly majority vote of all active district judges. 31 Otherwise, removal of a sitting magistrate judge "shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability." 32


29 See SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES, supra note 26, at 28 ("Normally, an incumbent magistrate judge who has performed well in office should be reappointed to another term of office.").


32 28 U.S.C. §§ 631(i) (2006). Removal is also by majority vote of all active judges of the district. Id.
A massive amount of work within federal district courts is done by the growing ranks of magistrate judges. In 2009 there were 521 full-time and 48 part-time authorized magistrate judgeships. Magistrate judges may hear a wide variety of criminal and civil pretrial matters, filing orders in nondispositive matters and “reports and recommendations” in dispositive matters that become the final decision of the court when adopted by the district court judge. Magistrate judges also may fully conduct civil trials with the consent of the parties.

B. Article III Values and Magistrate Judge Adjudication

As officers created by statute, magistrate judges derive their authority from an exercise of Congressional power under Article I of the Constitution (the Legislative Article) rather than from Article III (the Judiciary Article), which establishes and broadly defines the federal judicial function. Magistrate judges may even appear to exist in conflict with the provisions of Article III, Section 1, which vests the federal judicial power in the Supreme

33 See Judith Resnik, Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure, 26 CARDOZO L. REV. 579, 611 (2005) [hereinafter Judicial Selection] (“Article III judges continue to have more authority, in terms of finality of decision. Yet, in practice, magistrate and bankruptcy judges make many decisions that are functionally final. . . . When the quality of the power is coupled with the volume of decisions (. . . magistrate judges deal with thousands of matters, both civil and criminal, annually), the authority of statutory judges becomes clear.”).

34 See Federal Magistrate Judges Association, www.fedjudge.org (last visited Nov. 2, 2010). There were also three combination Clerk of Court/Magistrate Judges. Id.

35 Under the FMA, a district judge may generally refer “any pretrial matter” to a magistrate judge for direct determination, so long as the referral is “not inconsistent with the Constitution and laws of the United States.” 28 U.S.C. §636(b)(1) (2010). There are eight dispositive pretrial areas which are exceptions to this authority, in which magistrate judges may only exercise authority if referred by a district judge to make an R&R (rather than a final order). These are motions for injunction, motions for judgment on the pleadings, motions for summary judgment, motions to dismiss or quash an indictment or information, motions to suppress, motions to dismiss or permit a class action, motions to dismiss for failure to state a claim, and motions for involuntary dismissal. 28 U.S.C. § 636 (b) (2010). According to the Federal Magistrate Judge’s Association, for the twelve-month period ending September 30, 2008, magistrate judges performed 968,921 total judicial duties. See Federal Magistrate Judges Association, supra note 34 (last visited November 2, 2010) (also providing detailed breakdown of number by types of matters and duties performed).

36 28 U.S.C. § 636(c)(1) (2010) (“Upon the consent of the parties, a full-time United States magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designed to exercise such jurisdiction by the district court or courts he serves.”). “Consent of the parties, however, is not necessary for a magistrate to have authority to issue an R&R to a district judge because ‘a magistrate judge’s R&R is not a final and independent determination of fact or law, as the district judge review[s] it[ ] de novo.”

37 U.S. CONST., art. II.

38 U.S. CONST., art. III.
Court and inferior federal courts, and provides protections for federal judges in the form of lifetime appointments “during good Behaviour,” and by “a Compensation, which shall not be diminished during their Continuance in Office.”

These provisions of life tenure and undiminished salary were seen by the Framers as insurance of judicial independence, by insulating federal judges from executive and legislative interference. Federalist 78, for instance, proclaimed that “That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from Judges who hold their offices by a temporary commission.” Federalist 81, in contrasting federal and state judges, similarly took the position that state “Judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws,” and added that “if there was a necessity for confiding the original cognizance of causes arising under those laws to them there would be a correspondent necessity for leaving the door of appeal as wide as possible.” And, Federalist 79 asserted that “[n]ext 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.”

Article III adjudication is, at the very least, our federal courts’ textual and rhetorical norm. Life tenure, and to a lesser extent salary protection, is at the heart of the federal judicial function, and of the conception of federal judges as independent decision-makers. This perception of independence is likewise integral to public understanding and trust of the federal judiciary.

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39 U.S. CONST., art. III, § 1 (“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.”).
40 Id. (“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.”).
42 THE FEDERALIST 78 (Alexander Hamilton).
43 THE FEDERALIST 81 (Alexander Hamilton).
44 Id.
45 THE FEDERALIST 79 (Alexander Hamilton) (emphasis in original removed).
46 As discussed further in Part V, infra, Article III’s guarantees serve both a structural, separation of powers role, in ensuring that federal judges have sufficient independence to check and balance the coordinate branches, and an individual protection role, in ensuring that litigants in the federal courts have access to impartial adjudication by an independent decision-maker.
and to the judiciary’s sustained legitimacy. Yet, despite Article III’s seemingly straightforward provisions for the judiciary, Article III literalism has never been practiced or practicable. American adjudication is so widespread and so multilayered that there is no realistic way to have all—or even most—matters within the purview of Article III decided only by life-tenured judges. The first Congress recognized as much in authorizing other kinds of adjudicators and non-Article III tribunals and officers have long been relied upon by the federal courts and coordinate branches to carry out various adjudicative duties. Accordingly,

47 See The Federalist 78 (Alexander Hamilton).
48 See generally Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 HARV. L. REV. 915, 918–26, 944 (1988) (discussing the “allure and impossibility” of Article III literalism, in light of the historical foundations, policy concerns, and entrenched practices of non-Article III adjudication that defeat strict adherence to the language of Article III, and concluding that “article III literalism is normatively unattractive and historically unworkable”). Professor Fallon traces the direction of constitutional doctrine away from Article III literalism back to Chief Justice Marshall’s opinion in American Ins. Co. v. Canter, 26 U.S. 511 (1828), which upheld congressionally-established courts, without life-tenured judges, in the federal territories. Id. at 916 & n. 2. See also Richard B. Saphire & Michael E. Solimine, Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era, 68 BOS. L. REV. 85, 151 (1988) (explaining that federal judicial power has been reposed in non-article III adjudicators “almost as long as article III courts have existed”); Judicial Selection, supra note 33 at 641 (“The existence of the statutory federal judiciary (with magistrate and bankruptcy judges sitting inside Article III but lacking life tenure) is evidence that this part of the Constitution is not one in which forms of originalism or textualism have had much sway.”); Paul Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 IND. L. J. 233, 235 (1990) (“[T]his Simple Model . . . has utterly failed to withstand the test of time.”).
49 See, e.g., Judith Resnik, The Mythic Meaning of Article III Courts, 56 COLO. L. REV. 581, 582 (1985) (noting that “the federal courts are not populated only by the remarkable Article III actors described in the constitutional text,” and that “the decisions of these officials constitute a large proportion of the federal adjudicative process.”).
50 See Fallon, supra note 48, at 919 (explaining how the first Congress vested various forms of adjudicative power in executive officers, such as disputes regarding veterans’ benefits and customs duties, rather than in constitutional courts).
51 For example, “legislative courts,” created by Congress under Article I, include (1) territorial courts, (2) military tribunals, and (3) miscellaneous “public rights” federal tribunals like the Court of Federal Claims, Court of Veterans Appeals, and Tax Court. These are longstanding exceptions in our judicial system to Article III’s requirements of life tenure and guaranteed compensation, described by Justice Brennan as “three narrow situations not subject to that command [of the Constitution that the judicial power of the United States be vested in Article III courts].” Northern Pipeline, 458 U.S. at 64. Each is considered an extraordinary circumstance “where congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers.” Id. Certain administrative agency adjudication, on the other hand, is permissible under Article III so long as the “essential elements” of Article III judicial power remain in an Article III court. See Northern Pipeline, 458 U.S. at 77 & n. 29; Crowell v. Benson, 285 U.S. 22, 51 (1922).
Constitutional analysis of non-Article III adjudication has at times emphasized a distinction between adjudication of “public rights” versus “private rights” matters in civil cases, a doctrine grounded in a historically recognized, if ill-defined, differentiation “between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are ‘inherently . . . judicial.’” Northern Pipeline, 458 U.S. at 68 n. 19 (citing Ex parte Bakelite Corp., 279 U.S. 438 (1929), and Murray’s Lessee v. Hobo-
despite the textual friction inherent in non-Article III adjudication, it is historically indefensible to assert that any vesting of federal judicial authority in non-Article III adjudicators is beyond the pale.

The presence of magistrate judges, though, as statutory judicial officers of the district courts who are appointed by the judges of each district and serve fixed terms, raises the question of how much judicial power may be delegated away from Article III judges within constitutional courts—"a separate and somewhat different problem from removal of matters from Article III courts."52 The increasing array of judicial functions assignable to magistrate judges has by and large passed constitutional scrutiny, with magistrate judges generally treated as a minimally problematic class of non-Article III adjudicators. This is in large part due to the rationale that magistrate judges are under the direct supervision and review of the life-tenured district judges with whom they serve, as explained further in Part V, infra.

Essentially, in upholding the various expansions to the FMA, "the courts of appeals have relied on the general notion that the district courts exercise enough control over the magistrate to make him or her a genuine adjunct" to the federal courts,53 and "[t]he Supreme Court has specifically upheld a broad grant of authority to magistrate judges under this adjunct model."54

In 1980, in United States v. Raddatz, the U.S. Supreme Court addressed the constitutionality of referring suppression motions—dispositive motions based on alleged violations of constitutional rights—to a magistrate judge for initial determination in accord with the 1976 amendments to the FMA.55 In a decision by Justice Burger, the Court held that such adjudication by magistrate judges did not violate Article III, given that magistrates'
R&Rs were subject to de novo review by the district court and that the district court had “plenary discretion” to refer the evidentiary hearing to a magistrate in the first instance. The Court declared that “Congress was alert to Article III values concerning the vesting of decisionmaking power in magistrates,” and stressed that “the magistrate acts subsidiary to and only in aid of the district court,” “the entire process takes place under the district court’s total control and jurisdiction,” and the “authority—and the responsibility—to make an informed, final determination...remains with the [district] judge.” In short, the Court concluded that delegation of judicial power to a magistrate judge “does not violate Art. III, so long as the ultimate decision is made by the district court.”

In 1990, the Supreme Court also found it constitutional for magistrates to conduct felony voir dire, in Peretz v. United States. Citing Raddatz, the Court found that “no [Article III] structural protections are implicated” by having magistrate judges oversee felony jury selection, because “[m]agistrates are appointed and subject to removal by Article III judges,” who retain ultimate control and decision making authority. The Article III judge “—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors” if requested by the parties.

Under the FMA, if a party timely objects to all or any part of a magistrate judge’s R&R, a district judge shall make a de novo

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56 Id. at 681–82. Justice Blackmun, in concurrence, additionally noted that magistrates are appointed and subject to removal by the district court. Id., at 685 (Blackmun, J., concurring).
57 Id. at 681–82 (quoting Mathews v. Weber, 423 U.S. 261, 271 (1976)); see also id. at 686 (Blackmun, J., concurring) (“describing magistrate adjudication as “a procedure under which 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”).
58 Raddatz, 447 U.S. at 683. In dissent, Justice Marshall disagreed with the Court’s “suggest[ion] that the retained power of the district court is sufficient to satisfy the requirements of Art. III” and warned that “the replacement of Art. III judges with magistrates...erodes principles that strike near the heart of the constitutional order.” Id. at 707, 714 (Marshall, J., dissenting).
60 Id. at 937. Defense counsel had given pretrial verbal consent to the magistrate judge proceeding with voir dire and made no objection to the district court about the situation. Id. at 924.
61 Id. at 938-39 (quoting Raddatz, 447 U.S. at 685–86 (Blackmun, J., concurring)). Justice Marshall objected on the basis, among other things, that the right to jury selection in felony trials to be conducted by an Article III judge does have structural implications, regardless of consent, and the “critical question for Article III purposes [of] whether meaningful judicial review of magistrate felony jury selection” remained unanswered by the majority. Id. at 949–52 (Marshall, J., dissenting).
determination of the portions to which objection is made.\textsuperscript{62} The U.S. Supreme Court in \textit{Thomas v. Arn} addressed the question of whether \textit{all} appellate review, not just de novo review by the district court, may be defaulted in the event that no objection is made to a magistrate judge’s R\&R.

\section*{II. The Supreme Court’s Authorization of Appellate “Waiver” Rules in \textit{Thomas v. Arn}}

\subsection*{A. Procedural Background}

Kathy Thomas was convicted by an Ohio court in 1978 of fatally shooting her abusive common-law husband during a domestic dispute.\textsuperscript{63} Although the sensational facts of the case would eventually take second stage to the procedural questions addressed in the Supreme Court, her husband’s history of violence provoked the procedural history that led there. Thomas raised the issue of self-defense and sought to call expert witnesses at trial to present testimony concerning Battered Wife Syndrome, but the trial court refused to admit the testimony.\textsuperscript{64} After the state court of appeals reversed, but was itself reversed by the Ohio Supreme Court,\textsuperscript{65} Thomas ultimately sought federal habeas corpus relief in the U.S. District Court for the Northern District of Ohio.\textsuperscript{66} Her petition, which raised the issue of whether she was denied a fair trial by the exclusion of expert testimony on Battered Wife Syndrome, was referred to a magistrate judge who recommended that the writ be denied.\textsuperscript{67}

The Court of Appeals for the Sixth Circuit had previously established a rule, citing its supervisory power, that failure to file timely objections to a magistrate judge’s report waived any further review.\textsuperscript{68} Accordingly, the magistrate judge’s report in Thomas’s case contained a notice that failure to file any objections to the report and recommendation within ten days would waive the right to appeal the district court’s order.\textsuperscript{69} Thomas never filed any objections, despite requesting and receiving an extension to do so.\textsuperscript{70} The district court nonetheless sua sponte

\begin{footnotes}
\item[63] See \textit{Arn}, 474 U.S. at 142–43.
\item[64] \textit{Id.} at 143.
\item[66] \textit{Id.} at 143.
\item[67] \textit{Id.} at 143–44.
\item[69] See \textit{Arn}, 474 U.S. at 144.
\item[70] \textit{Id.}
\end{footnotes}
reviewed the record de novo and dismissed the petition on the merits. Thomas was granted leave to appeal and appealed solely on the issue of the Battered Wife Syndrome testimony.

The Court of Appeals for the Sixth Circuit held that Thomas had waived her right to appeal by failing to timely file objections to the magistrate judge’s report, and the court affirmed on this threshold basis without reaching the merits. The U.S. Supreme Court subsequently granted certiorari on the question of “whether a court of appeals may exercise its supervisory power to establish a rule that the failure to file objections to the magistrate’s report waives the right to appeal the district court’s judgment.”

B. The Supreme Court’s Holding in Thomas v. Arn

The Supreme Court affirmed the Court of Appeals 6-3, in an opinion by Justice Marshall. The Arn Court centered its discussion on the Sixth Circuit case of United States v. Walters, which had established the appellate “waiver” rule relied on by the Court of Appeals in Thomas’s case. At the time of the Arn decision, a number of other Courts of Appeals had adopted similar appellate “waiver” rules; others had established appellate “waiver” rules for issues of fact but not issues of law; and the Eighth Circuit had explicitly rejected any appellate “waiver” rule. The Arn Court’s opinion addressed the supervisory power of the federal courts to establish nonjurisdictional rules of procedure, foregrounded considerations of judicial economy, and rejected the claim that there were any statutory and constitutional conflicts inherent in appellate “waiver” rules like that promulgated by the Sixth Circuit.

1. The Arn Court’s Discussion of Supervisory Power and Judicial Economy

In Walters, the Sixth Circuit had declared that although the “permissive language” of the Federal Magistrates Act suggests that failure to file objections is not a waiver of appellate review, policy considerations of access to federal courts and the “efficient
administration of justice” supported the court’s exercise of its supervisory power to adopt an appellate “waiver” rule. The Arn Court quoted the Walters opinion’s access and efficiency rationale with approval, and determined that the nature of the appellate “waiver” rule and the fact that the Sixth Circuit gave it only prospective effect indicated that it was a nonjurisdictional procedural rule within the court’s proper exercise of its supervisory powers.

The “supervisory power” or “supervisory authority” of the court refers to a court’s limited ability to promulgate its own procedural rules, considered inherent to the judicial power conferred, in the federal system, by Article III. The Supreme Court has stated that a federal court, “[g]uided by considerations of justice,... may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.” The Arn Court further noted that this supervisory power “rests on the firmest ground when used to establish rules of judicial procedure.” The Court rejected Thomas’s contention that the Court of Appeals was refusing to exercise its congressionally-granted jurisdiction, and stated that “neither the intent nor the practical effect” of the Sixth Circuit’s appellate “waiver” rule was jurisdictional restriction. Rather, the Court said that the appellate “waiver” rule merely authorized a procedural default, which in turn could be excused if the court in fact decided to exercise its jurisdiction to hear the matter. The Court analogized appellate “waiver” rules to the dismissal of appeals for failure to comply with a scheduling order or to pay a court of appeals filing fee, indicating that all were comparable “procedures deemed desirable from the viewpoint of sound judicial practice, though in nowise commanded by statute or the Constitution.” Thus, the Court

77 Walters, 638 F.2d at 949.
78 Arn, 474 U.S. at 145–46.
79 See, e.g., McNabb v. United States, 318 U.S. 332, 340–41 (1943); see also Amy Conney Barrett, The Supervisory Power of the Supreme Court, 106 COLU. L. REV. 324, 325 (2006) (discussing “the inherent authority that every federal court possesses over procedure,” “which is incident to ‘the judicial Power’ that Article III grants every federal court[ and] has conventionally been understood as authorizing a federal court to regulate its own proceedings”).
80 United States v. Hasting, 461 U.S. 499, 505 (1983) (quoting McNabb, 318 U.S. at 341); see also Cupp v. Naughten, 414 U.S. 141, 146 (1973) (courts of appeals have the power to adopt “procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution”); Arn, 474 U.S. at 146 (“It cannot be doubted that the courts of appeal have supervisory powers that permit, at the least the promulgation of procedural rules governing the management of litigation”).
81 Arn, 474 U.S. at 147 n. 5.
82 Id. at 146.
83 Id.
84 Id. at 146-47 (quoting Cupp, 414 U.S. at 146).
concluded that forfeit of the statutory right to an appeal did not alone invalidate the exercise of the court’s supervisory power.  

The Court asserted that “sound considerations of judicial economy” supported the Sixth Circuit’s appellate “waiver” rule. Notably, the preclusion of appellate review for issues not objected to in a magistrate judge’s report prevents litigants from “sand-bagging” the district court by failing to object and then appealing directly to the court of appeals. The Arn Court explained that the filing of objections serves to narrow the dispute for the reviewing court, absent which any issue before a magistrate judge would be open to appellate review—an inefficient use of judicial resources whether it resulted in the court of appeals considering claims not reviewed by the district court or in the district court reviewing every issue in every case initially adjudicated by a magistrate judge. In this sense, the Arn Court likened the filing of objections to a magistrate judge’s report to the raising of issues before the district court, stating that “[t]he same rationale that prevents a party from raising an issue before a circuit court of appeals that was not raised before the district court applies here.”

2. The Arn Court’s Statutory Interpretation of the Federal Magistrates Act with Regard to Appellate “Waiver” Rules

Having addressed Thomas’s jurisdictional and supervisory powers concerns, the Court granted that “[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions,” but proceeded to find no such conflict in the Sixth Circuit’s appellate “waiver” rule. The Court rejected the argument that the Federal Magistrates Act precludes appellate “waiver” rules. In relevant part, 28 U.S.C. § 636(b)(1)(C) provides:

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85 Id. at 147.
86 Arn, 474 U.S at 147.
87 Id. at 147-48.
88 Id.
89 Id. at 148 (quoting Schronce, 727 F.2d at 94). The Court further stated that “[a] contrary result ‘would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.’” (quoting United States v. Payner, 447 U.S. 727, 737 (1980)).
90 Arn, 474 U.S at 148. Nor may the supervisory power be used to avoid compliance with the various Federal Rules of Procedure. See, e.g., Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988) (holding that supervisory power may not be used to circumvent Federal Rule of Criminal Procedure 52 harmless error inquiry, because “federal courts have no more discretion to disregard the Rule’s mandate than they do to disregard constitutional or statutory provisions. The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked ‘because a court has elected to analyze the question under the supervisory power.’”) (quoting Payner, 447 U.S. at 736).
Within ten days after being served with a copy [of the magistrate judge’s R&R], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. 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.91

Disagreeing with the Eighth Circuit’s assessment that Congress would have explicitly stated so if it wanted the “drastic consequence” of total appellate waiver to follow from failure to object within ten days,92 the Court instead pointed out that the permissive statutory language, while perhaps not mandating the waiver of appellate review absent objections, nowhere prohibited such a rule.93 In fact, the Court determined, nowhere on its face did the Federal Magistrates Act affirmatively require any review at all by either the district court or a court of appeals on issues—factual or legal—to which no objection is made.94 And, nothing in the legislative history indicated “an intent to require the district court to give any more consideration to the magistrate’s report than the court considers appropriate.”95

The Court stated that “Congress apparently assumed . . . that any party who was dissatisfied for any reason with the magistrate’s report would file objections, and those objections would trigger district court review.”96 The Court found nothing in the legislative history or statutory language that precluded treating the failure to object as a procedural default of all further consideration or that persuaded the Court that Congress intended to forbid appellate “waiver” rules.97 Furthermore, the Arn Court found waiver of appellate review consistent with the Act’s purpose of providing caseload relief to district judges.98 Judicial economy would not be served by requiring district judges to review all magistrate judge reports regardless of objections being filed.99 “[n]or does the legislative history indicate that Congress intended this task merely to be transferred to the court of appeals.”100

In short, the Arn Court concluded that “[i]t seems clear that Congress would not have wanted district judges to devote time to

92 See Lorin Corp., 700 F.2d at 1206.
93 Arn, 474 U.S. at 148–49.
94 Id. at 149.
95 Id. at 150.
96 Id. at 152.
97 Id.
98 Arn, 474 U.S. at 152–53.
99 Id. at 149, 152–53.
100 Id. at 153.
reviewing magistrate’s reports except to the extent that such review is requested by the parties or otherwise necessitated by Article III of the Constitution.”

3. The Arn Court’s Discussion of the Constitutionality of Appellate “Waiver” Rules under Article III and the Due Process Clause

The Court further found that the default of appellate review did not implicate Article III or violate due process. Thomas had contended that because the Sixth Circuit’s appellate “waiver” rule foreclosed meaningful review at either the district or appellate level if no objections were filed to a magistrate judge’s report, it unconstitutionally permitted magistrate judges to exercise Article III judicial power. Citing Raddatz, the Court reiterated that although Article III vests the federal judicial power in judges with life tenure and undiminished salary, delegation of federal court duties to a magistrate judge is proper “so long as ‘the entire process takes place under the district court’s total control and jurisdiction’” and the district judge “‘retains the ultimate authority to issue an appropriate order.”

The Court found it constitutionally dispositive that the district judge could, if he or she wanted to, exercise full authority over any aspect of the case. The appellate “waiver” rule did not preclude discretionary sua sponte review by the district judge, and “[a]ny party that desires plenary consideration by the Article III judge of any issue need only [timely] ask.” Accordingly, the Supreme Court concluded that the Sixth Circuit had not removed the essential attributes of the judicial power from the Article III court.

The Arn Court also rejected Thomas’s contention that she was denied the statutory right to appeal in violation of the Due

101 Id.
102 Id.
103 Arn, 474 U.S. at 153 (quoting Raddatz, 447 U.S. at 681).
104 Id. at 153–54.
105 Id. at 154.
106 Id.
Process Clause of the Fifth Amendment. It stated that her right to appeal was not denied, but rather “conditioned” on the filing of objections, and noted that Thomas received clear notice of the consequences of not filing.\textsuperscript{107} Citing its “longstanding maxim” that “the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule,”\textsuperscript{108} the Court stated that the same rationale applied to forfeiture of an appeal and that the Sixth Circuit’s appellate “waiver” rule afforded adequate opportunity for litigants to obtain review by the Court of Appeals.\textsuperscript{109}

Finally, the Court emphasized that “because the rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interest of justice.”\textsuperscript{110}

C. Justice Brennan’s Dissent in \textit{Arn}

Justice Brennan dissented to the \textit{Arn} majority opinion on statutory grounds, finding the Sixth Circuit’s appellate “waiver” rule in conflict with the plain language of the Federal Magistrates Act.\textsuperscript{111} The Act, Justice Brennan argued, specified clearly that the only penalty for not filing objections to a magistrate judge’s report was the loss of the right to de novo review by the district court.\textsuperscript{112} By Justice Brennan’s reading, the Act neither required litigants to file objections nor provided that the failure to do so would deprive a party of the right to any review by the district court or court of appeals, but rather left unaffected both the district court’s obligation to “accept, reject, or modify” the magistrate judge’s R&Rs and a party’s right to appeal the district court’s judgment to the court of appeals.\textsuperscript{113} Justice Brennan concluded that the Sixth Circuit’s appellate “waiver” rule imposed a penalty beyond that contemplated by Congress and that such a supervisory rule unlawfully deprived Thomas of her statutory right to appeal the judgment of the district court.\textsuperscript{114}

\textsuperscript{107} Id. at 155.
\textsuperscript{108} \textit{Arn}, 474 U.S. at 155 (quoting \textit{Logan v. Zimmerman Brush Co.}, 455 U.S. 422, 437 (1982)) (emphasis in original).
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 156. Justice Brennan’s dissent avoided taking any position on the Article III constitutional question.
\textsuperscript{112} Id.
\textsuperscript{113} \textit{Arn}, 474 U.S. at 156 (quoting 28 U.S.C. § 636(b)(1)(C) (2010)). Brennan quoted with approval the Eighth Circuit’s statement, in rejecting an appellate “waiver” rule, that the lack of an objection “cannot relie[e] the district court of its obligation to act judicially, to decide for itself whether the Magistrate’s report is correct.” \textit{Id.} (quoting \textit{Lorin Corp.}, 700 F.2d at 1206).
\textsuperscript{114} Id. at 157. Justice Blackmun joined Justice Brennan’s dissent. Justice Stevens dissented separately, on the limited ground that because the district court did sua sponte
III. ARN’S AFTERMATH AND THE ADOPTION OF RULE 59

*Thomas v. Arn* has become one of the most cited Supreme Court cases of all time, as the growth of magistrate judge adjudication has ballooned.\(^{115}\) Most federal courts of appeals now have *Arn*-type appellate “waiver” rules: At the time of the *Arn* decision, the Courts of Appeals for the First, Second, Fourth, and Fifth Circuits had already adopted similar appellate “waiver” rules to the Sixth Circuit, for failure to file timely objections to a magistrate judge’s R&R.\(^ {116}\) The Ninth and Eleventh Circuits had established appellate “waiver” rules for issues of fact but not issues of law.\(^ {117}\) The Eighth Circuit had explicitly rejected any appellate “waiver” rule,\(^ {118}\) stating that the lack of an objection to a magistrate judge’s R&R “cannot reliev[e] the district court of its obligation to act judicially, to decide for itself whether the Magistrate’s report is correct,”\(^ {119}\) and it did not change this position after the *Arn* decision.

Post-*Arn*, the Third Circuit specifically declined to adopt any such rule as well.\(^ {120}\) In so doing, the Third Circuit indicated that despite the authorization of *Thomas v. Arn*, it did not want to get into the equitable and statutory problems of such rules, even presuming they were constitutionally defensible.\(^ {121}\) The Third Circuit “perceive[d] a number of problems with a rule that conditions appellate review on the existence *vel non* of objections to a magistrate’s report.”\(^ {122}\) The Third Circuit noted that other circuits had established exceptions to their rules for situations like

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\(^ {115}\) See Adam N. Steinman, *The Pleading Problem*, 62 Stan. L. Rev. 1293, 1357 (2010) (listing *Thomas v. Arn* as the tenth “most-frequently cited Supreme Court decision” of all time, in terms of citations by federal courts and tribunals, according to the Shepard’s citation service (as of March 17, 2010)). This high citation rate is doubtless due to the practice of federal magistrate judges, when issuing a report and recommendation, to state the time period for objections and warn of the consequences for failure to object, citing to *Arn*.


\(^ {117}\) See Britt v. Simi Valley Unified Sch. Dist., 708 F.2d 452, 454-55 (9th Cir. 1983); Nettles v. Wainwright, 677 F.2d 404 (Former 5th Cir. 1982) (en banc).

\(^ {118}\) See Lorin Corp. v. Goto & Co., 700 F.2d 1202, 1205-07 (8th Cir. 1983).

\(^ {119}\) *Id.* at 1206.

\(^ {120}\) Henderson v. Carlson, 812 F.2d 874, 878-79 (3d Cir. 1987), cert. denied, 484 U.S. 837 (1987) (proclaiming that in the Third Circuit, “the failure to object to a magistrate’s legal conclusions may result in the loss of the right to de novo review in the district court—but not in the loss of the statutory right to appellate review”). The *Henderson* court limited its holding to whether failure to object waived the right to appellate review of questions of law.

\(^ {121}\) *Id.* at 877–78.

\(^ {122}\) *Id.* at 878.
late filing of objections for pro se litigants\textsuperscript{123} or where litigants were not given adequate notice of the rule\textsuperscript{124} and had stated that the rule does not apply where the result would be “plain error.”\textsuperscript{125} The Third Circuit also explained that because it believed that a district court’s adoption of a magistrate’s report is a judicial act (with or without the district court’s de novo review of the report), and “no appealable decision exists until that act is performed,” there is no compelling justification for circumscribing either a party’s statutory right to appellate review or the court of appeals’ duty to review all final decisions of the district courts merely based on failure to object.\textsuperscript{126}

Despite these principled objections, the Third and Eighth Circuits’ views remained the minority. After \textit{Arn}, the Seventh and Tenth Circuits also adopted \textit{Arn}-type rules,\textsuperscript{127} leaving the vast majority of circuits with some type of appellate “waiver” rule.\textsuperscript{128}

\textbf{A. Federal Rule of Criminal Procedure 59 Codifies Appellate “Waiver”}

Appellate “waiver” rules became further institutionalized in 2005, when Rule 59 was adopted. Rule 59 established for criminal matters that failure to timely object to a magistrate judge’s decision “waives a party’s right to review” for both dispositive and nondispositive issues.\textsuperscript{129} Rule 59 was modeled on \textit{Thomas v. Arn} and Federal Rule of Civil Procedure 72, and its adoption was specifically provoked by the Ninth Circuit case of \textit{United States v. Abonce-Barrera}, which noted that the Criminal Rules did not explicitly require appeals (via objection) from nondispositive decisions by magistrate judges to district judges as a requirement for review by a court of appeals.\textsuperscript{130} Rule 59 is derived in part from Civil Rule 72, which sets forth a similar procedure and timeframe for filing of objections to a magistrate judge’s order or

\textsuperscript{123} See, e.g., Cay v. Estelle, 789 F.2d 318 (5th Cir. 1986); Patterson v. Mintzes, 717 F.2d 284 (6th Cir. 1983).

\textsuperscript{124} See, e.g., United States v. Valencia-Copete, 792 F.2d 284 (1st Cir. 1986); Walters, 638 F.2d at 949.

\textsuperscript{125} \textit{Park Motor Mart}, 616 F.2d at 605; \textit{see also Nettles}, 677 F.2d at 410 (“manifest injustice”); Video Views, Inc. v. Studio 21, 797 F.2d 538, 540 (7th Cir. 1986) (“would defeat the ends of justice”).

\textsuperscript{126} \textit{Henderson}, 812 F.2d at 878–79.

\textsuperscript{127} \textit{See Video Views}, 797 F.2d 538; Neihaus v. Kansas Bar Ass’n, 793 F.2d 1202 (10th Cir. 1986).

\textsuperscript{128} As described in Part V, \textit{infra}, the Fifth Circuit now calls its rule an “appellate forfeiture” rule. \textit{See Douglass}, 79 F.3d 1415.

\textsuperscript{129} \textit{Fed. R. Crim. Proc.} 59(a) & (b)(2).

\textsuperscript{130} \textit{United States v. Abonce-Barrera}, 257 F.3d 959 (9th Cir. 2001); \textit{see also Fed. R. Crim. Proc.} 59 advisory committee’s note.
R&R, However, Civil Rule 72 does not contain any “waiver” provision, and to date no explicit civil appellate “waiver” rule has been federally codified. Under Rule 59, nondispositive matters encompass “any matter that does not dispose of a charge or defense.” A district judge may refer nondispositive matters to a magistrate judge for determination, upon which “the magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination.” Objections by a party may be made within fourteen days thereafter, and “[t]he district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous.” Rule 59 originally set the time limit for objecting at ten days, but this was revised to fourteen days effective December 1, 2009. Failure to timely object “waives a party’s right to review.”

Dispositive matters that may be referred to a magistrate judge for recommendation include “a defendant’s motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense.” The magistrate judge to which the dispositive matter is referred “must promptly conduct the required proceedings,” conduct any necessary evidentiary hearings, and “enter on the record a recommendation for disposing of the matter, including any proposed findings of fact.” As with nondispositive matters,

131 See Fed. R. Civ. Proc. 72(a) (nondispositive matters) & 72(b) (dispositive motions and prisoner petitions).
132 The pre-Arn Advisory Committee Notes on Federal Rule of Civil Procedure 72(b), implementing 28 U.S.C. § 636(b)(1)(C) (2010), do state that “[f]ailure to make timely objection to the magistrate’s report prior to its adoption by the district judge may constitute a waiver of appellate review of the district judge’s order. Fed. R. Crim. Proc. 72 advisory committee’s note (citing Walters, 638 F.2d 947). “When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” Id. The Notes to the 1993 amendments to Civil Rule 72, which eliminated a discrepancy between subdivisions (a) and (b) in measuring the number of days for filing objections, add that “[t]he amendment is also intended to assure that objections to magistrate’s orders that are not timely made shall not be considered.” Fed. R. Crim. Proc. 72 advisory committee’s note.
133 Fed. R. Crim. Proc. 59(a). However, the Rule Committee noted that “although the rule distinguishes between “dispositive” and “nondispositive” matters, it does not attempt to define or otherwise catalog motions that may fall within either category. Instead, that task is left to the case law.” Fed. R. Crim. Proc. 59 advisory committee’s note.
135 Id.; see also 28 U.S.C. § 636(b)(1)(A). De novo review is not specified for nondispositive matters.
139 Id.
failure to object within fourteen days of a magistrate judge’s recommendations on a dispositive matter “waives a party’s right to review.”

Upon timely objection to a magistrate judge’s R&R on a dispositive matter, the district judge must make a de novo consideration of any objection.

The Advisory Committee Notes to Rule 59 explain the rationale behind the inclusion of Arn-type “waiver” provisions that “explicitly state[] that failure to file an objection in accordance with the rule amounts to a waiver of the issue.” The Advisory Committee believed that the provisions “enhance the ability of a district court to review a magistrate judge’s decision or recommendation by requiring a party to promptly file an objection to that part of the decision or recommendation at issue.” The Advisory Committee additionally indicated that such rules raised no Article III issues, noting that under Peretz v. United States, “de novo review of a magistrate judge’s decision or recommendation is required to satisfy Article III concerns only where there is an objection.”

While the Advisory Committee did not expressly include Arn’s admonition that the rule is a nonjurisdictional default provision which the court of appeals may excuse in the interest of justice, it did conclude the Notes to Rule 59 by reiterating that “[d]espite the waiver provisions, the district judge retains the authority to review any magistrate judge’s decision or recommendation whether or not objections are timely filed. This discretionary review is in accord with the Supreme Court’s decision in Thomas v. Arn.”

IV. SEMANTIC CONFUSION IN THE USE OF “WAIVER” AFTER UNITED STATES V. OLANO

Like the Supreme Court in Arn, Rule 59 reflexively uses the word “waiver.” However, in 1993 the U.S. Supreme Court in United States v. Olano had clarified the meaning of “waiver” in a way that renders misleading the use of this term in Rule 59. The Supreme Court’s interpretation in Olano reserved the term “waiver” to indicate those instances in which further judicial re-

143 Id.
144 Peretz, 501 U.S. 923.
146 Id.
147 Olano, 507 U.S. at 733–34.
view is completely precluded. Such a situation is above and beyond the sort of procedural default for failure to object, excusable by judicial discretion “in the interest of justice,” contemplated by Arnold or Rule 59.

A. Plain Error Analysis and Olano’s Distinction Between “Waiver” and “Forfeiture”

In Olano, the Supreme Court held that the erroneous presence of alternate jurors during federal criminal trial jury deliberations, to which no party had objected, was not a “plain error” that the court of appeals was authorized to correct under Federal Rule of Criminal Procedure 52(b). In so holding, the Court set forth the definitive standard for plain error analysis by the courts of appeals, and emphasized that there is a procedural and substantive distinction between “waiver” and “forfeiture” of the right to appellate review.

Rule 52(b) governs plain error review in criminal appeals, and provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the [trial] court.” The Olano Court explained that Rule 52(b) “provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court.” This “single category of forfeited—but-reversible error” is limited to: (1) errors, (2) that are plain, and (3) which affect substantial rights. When a party has failed to timely object, a court of appeals may correct an error if it meets these criteria. The Court further explained that “the decision to correct the forfeited error [is] within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’”

On the threshold first prong of plain error analysis, the Olano Court explained that “deviation from a legal rule is ‘error’
unless the rule has been waived.”158 The Court unambiguously stated: “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’”159 For example, a defendant may waive his constitutional right to trial by knowingly and voluntarily pleading guilty; under those circumstances, conviction without trial is not “error.”160 Waiver fully extinguishes any “error,” leaving no avenue for plain error (or any) review.161 In this, “waiver” is categorically distinct from forfeiture.

B. Rule 59’s Misuse of the Term “Waiver” Contravenes Olano’s Guidance

The Olano Court emphasized that “[m]ere forfeiture, as opposed to waiver, does not extinguish an ‘error’ under Rule 52(b).”162 If error is waived, then functionally no error exists, and therefore no plain error review is possible. Forfeiture, on the other hand, is simply the failure to timely raise a right, and the error still exists: “If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an ‘error’ within the meaning of Rule 52(b) despite the absence of a timely objection.”163

A claim of error that was merely forfeited for failure to raise it below, unlike a waiver, can in limited instances be analyzed by a court of appeals.164 An error that was forfeited may, in the discretion of the court, be corrected if it meets the remaining criteria for plain error review—that the error be plain, that it affect sub-

158 Olano, 507 U.S. at 732–33 (emphasis added). “Whether a particular right is wai-
vable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant’s choice must be particu-
larly informed or voluntary, all depend on the right at stake.” Id. at 733 (citing 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 11.6 (1984) (allocation of authority between defendant and counsel); George E. Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, 55 TEXAS L. REV. 193 (1977) (waivability and standards for waiver)).


160 Olano, 507 U.S. at 733.

161 See id. (“[m]ere forfeiture, as opposed to waiver, does not extinguish an ‘error’ un-
der Rule 52(b).”).

162 Id.

163 Id. at 733–34.

164 Id. at 735 (“Rule 52(b) is permissive, not mandatory. If the forfeited error is ‘plain’ and ‘affect[s] substantial rights,’ the court of appeals has authority to order correction, but is not required to do so.”).
stantial rights, and that it “seriously affects the fairness, integrity or public reputation of judicial proceedings.”

In light of Olano, the appellate “waiver” rules authorized by Thomas v. Arn and codified in Rule 59 more accurately effect a forfeiture of any error, rather than a true waiver extinguishing all further review. Indeed, Arn’s provisions for discretionary review and excusal of appellate “waiver” “in the interest of justice,” even absent objections to a magistrate judge’s R&R, have commonly been held synonymous with review for plain error: As summarized by the Second Circuit in 2000, in explaining its decision to review a case despite the lack of timely objections to a magistrate judge’s R&R:

A party may serve and file objections to a magistrate judge’s report within ten days after being served with it. Failure to timely object to a report generally waives any further judicial review of the findings contained in the report. However, because the waiver rule is nonjurisdictional, we “may excuse the default in the interests of justice.” Thomas v. Arn, 474 U.S. 140, 155 (1985). Such discretion is exercised based on, among other factors, whether the defaulted argument has substantial merit or, put otherwise, whether the magistrate judge committed plain error in ruling against the defaulting party. . . . We exercise our interests of justice discretion here, where a grave injustice may be avoided, by excusing the default and deciding the case on its merits.

As such, the misleading use of the term “waiver” in Rule 59 semantically obscures the availability of plain error review by a court of appeals (or other review at the district court’s discretion) even absent objections to a magistrate judge’s report.

V. CONSEQUENCES AND CONSTITUTIONAL CONSIDERATIONS OF RETAINING THE LANGUAGE OF “WAIVER”

Such confusion in language is neither procedurally nor substantively innocuous. In 2005, given the benefit of Olano’s guidance, this imprecision with Rule 59’s terminology was a curious oversight with both procedural and substantive—even constitutional—implications.

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165 Olano, 507 U.S. at 734, 736.
166 Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162, 174 (2d Cir. 2000) (emphasis added) (some internal citations omitted); see also Park Motor Mart, 616 F.2d 605 (rule not applicable where result would be plain error); Douglass v. United Serv. Auto. Ass’n, 79 F.3d 1415, 1428 (5th Cir. 1996) (same); Nara v. Frank, 488 F.3d 187 (3d Cir. 2007) (Arn’s “‘in the interests of justice’ exception . . . is closely analogous to the plain error exception to the contemporaneous objection rule.”).
A. Procedural and Jurisdictional Uncertainty Arising from the Terminology of Appellate “Waiver”

At the very least, the disconnect between the use of the term “waiver” in Rule 59 and the term’s construal in Olano sows the seeds for procedural confusion.

Notwithstanding the statement at the end of the Advisory Committee Notes to Rule 59, which reiterates that “[d]espite the waiver provisions, the district judge retains the authority to review any magistrate judge’s decision or recommendation whether or not objections are timely filed,” on its face the language of Rule 59 invites the presumption that Olano’s definition of “waiver” applies and that no further appellate review, even plain error review, is available. In addition, the Advisory Committee Notes, while making clear that Rule 59’s “waiver” provisions are modeled on Arn, fail to reaffirm Arn’s clear statement that appellate “waiver” rules are in fact nonjurisdictional procedural defaults excusable by a court of appeals in the interest of justice. Practitioners in the post-Olano era thus may miss the opportunity on appeal to seek review of plain errors that affect substantial rights, if they were not timely raised in response to a magistrate judge’s R&R.

Courts of appeals are likewise ending up split about the actual extent of their jurisdiction to review claims of error in a magistrate judge’s decision absent timely objection. Most starkly, the Eleventh Circuit Court of Appeals has indicated its belief that because review is “waived” under Rule 59 absent timely objections, plain error review of unobjected magistrate judge decisions is in fact foreclosed by Rule 59. The Eleventh Circuit has also explicitly connected Olano and Rule 59, in a recent handful of conclusory unpublished per curiam opinions that appear to derive their results—that failure to object means no plain error review—entirely on the “waiver” wording of Rule 52, along the following lines:

A waiver is “the intentional relinquishment or abandonment of a known right.” [citing Olano]. When a party waives a claim, we do not review the claim for plain error. . . . Federal Rule of Criminal Proce-

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168 See Arn, 474 U.S. at 155.
169 See, e.g., United States v. Martinez-Barrera, No. 09–10873, 2009 WL 3208741, at *1 (11th Cir. Oct. 8, 2009) (per curiam) (“We lack jurisdiction to review the validity of [defendant’s] guilty plea because he did not file a written objection to the magistrate judge’s R&R. See Fed. R. Crim. P. 59(b)(2) (providing that the failure to file a written objection to the magistrate judge’s proposed findings and recommendations with regard to a dispositive matter ‘waives a party’s right to review’). . . . [I]f this issue were not waived, our review would be for plain error[.]”).
dure 59(b)(2) says that a party must file a written objection to a magistrate judge’s report and recommendation within 10 days; a failure to do so waives a party’s right to review. Fed. R. Crim. P. 59. . . . Defendant did not object in that time, and so she waived her right to challenge the guilty plea.170

The Eleventh Circuit’s interpretation that plain error review is expressly prohibited by Rule 59 vividly highlights the ambiguity inherent in the Rule’s use of the term “waiver.”

The Eleventh Circuit in recent years has likewise consistently dismissed cases for lack of jurisdiction where no objection was made to a magistrate judge’s R&R, concluding that “[b]ecause of the waiver provision in Rule 59(a) [and (b)] . . . we ‘lack jurisdiction to review the magistrate judge’s order because [the defendant] never appealed the ruling to the district court.’”171 The Eleventh Circuit’s conviction that “failure to comply with the

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170 United States v. Granados-Gutierrez, No. 08-15719, 2009 WL 4730418, at *2 (11th Cir. Dec. 11, 2009) (per curiam) (internal citations omitted); see also United States v. Wilcox, No. 08-10917, 2009 WL 1101399, at *3 (11th Cir. Apr. 24, 2009) (per curiam) (“The failure to file written objections to a magistrate judge’s report and recommendation within ten days after being served with the report, or by some other date set by the court, ‘waives a party’s right to review.’” Fed. R. Crim. P. 59(b)(2). Because waiver constitutes an “‘intentional relinquishment or abandonment of a known right’”, waived claims are not subject to plain error review. [quoting Olano, 507 U.S. at 733]. Accordingly, we have declined to review challenges to a guilty plea where the defendant did not timely object to the magistrate judge’s report and recommendation.”); United States v. Candelio, No. 08-10918, 2008 WL4133939, at *1-2 (11th Cir. Sept. 8, 2008) (per curiam); United States v. Flores, No. 07-11365, 2007 WL 4208638, at *1 (11th Cir. Nov. 30, 2007) (per curiam). But see United States v. Louis, No. 08-10536, 2009 WL 368317, at *1 (11th Cir. Feb. 17, 2009) (per curiam), and United States v. Barefoot, No.08-14084, 2009 WL 2488178, at *3 (11th Cir. Aug. 17, 2009) (per curiam) (both asserting that defendant waived his right to appellate review by not objecting to the magistrate judge’s report and recommendation, but reviewing for plain error nonetheless).

171 United States v. Artilés-Martín, No. 08–17205, 2009 WL 2986964, at *1 (11th Cir. Sept. 21, 2009) (per curiam); see also, e.g., United States v. Schultz, 565 F.3d 1353, 1362 (11th Cir. 2009) (per curiam) (”[B]ecause [defendant] did not appeal the magistrate judge’s order to the district court, we lack jurisdiction to review the merits of the magistrate judge’s order. Accordingly, we dismiss this portion of his appeal for lack of jurisdiction.”); United States v. Brown, 441 F.3d 1330, 1352 & n. 9 (11th Cir. 2006) (“We lack jurisdiction to review the magistrate judge’s order because [defendant] never appealed the ruling to the district court. Accordingly, we may not consider [it]” (making determination under pre-2005 circuit law but finding Rule 59 in accord); Martinez-Barrera, 2009 WL 3208741, at * 1 (11th Cir. Oct. 8, 2009) (“We lack jurisdiction to review the validity of [defendant’s] guilty plea because he did not file a written objection to the magistrate judge’s R&R. See Fed. R. Crim. P. 59(b)(2)[.]”); United States v. Griffin, No. 09–10542, 2010 WL 2073407, at *2 (11th Cir. May 25, 2010) (per curiam) (“Failure to comply with the objection and review provisions of Rule 59(e) is jurisdictional”); United States v. Mallory, No. 09-15286, 2010 WL 2232268, at *1 (11th Cir. Ala. June 3, 2010) (per curiam) (“Because [defendant] did not appeal the magistrate judge’s order to the district court, we lack jurisdiction to review it.”). The Eleventh Circuit’s position is that it is bound by the former Fifth Circuit opinion in United States v. Renfro, 620 F.2d 497, 500 (Former 5th Cir. 1980), which held that the appellate court only has jurisdiction over appeals from a magistrate judge’s decision if the appeal was first made to the district court. See, e.g., United States v. Brown, 342 F. 3d 1245, 1246 (11th Cir. 2003).
objection and review provisions of Rule 59[] is jurisdictional," 172 seems in clear disregard of Arn’s guidance that “because [such a] rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interest of justice.” 173

Indeed, the Eleventh Circuit’s position that failure to object is jurisdictional has been challenged by the U.S. Solicitor General on petition for certiorari in the Supreme Court, and the Supreme Court appeared to agree with the Solicitor General. 174 In a brief in opposition to certiorari in a pre-Rule 59 case in which the Eleventh Circuit ruled that in the absence of objections it lacked jurisdiction to review a magistrate judge’s denial of pre-trial motion for defense counsel to withdraw, the Solicitor General “argued that appellate courts should have jurisdiction to review magistrate judges after conviction” 175 and expressed the position that the Court of Appeals “can review the magistrate judge’s order but only for plain error.” 176 The Supreme Court granted certiorari, and vacated and remanded the case for reconsideration in light of the Solicitor General’s brief. 177 However, on remand the Eleventh Circuit held it was still bound by its own precedent to the contrary, and merely reinstated its original ruling. 178

In encouraging contrast to the Eleventh Circuit, however, both the Fifth and Third Circuits have interpreted Olano’s teachings as ensuring the continuing availability of plain error review despite failure to object to a magistrate’s R&R.

In the 1996 case of Douglass v. United Services Automobile Association, the Fifth Circuit proclaimed that it was now referring to its appellate “waiver” rule as an “appellate forfeiture rule for accepted unobjected-to proposed findings and conclusions,” 179 in light of the difference between waiver and forfeiture. 180 The Fifth Circuit explained that both its “former and new rules are premised on ‘forfeiture’, not ‘waiver,’” and hence permitted plain error review:

172 Griffin, 2010 WL 2073407, at *2.
173 Arn, 474 U.S. at 155.
174 See Brown, 342 F.3d at 1246.
175 Id.
176 Id. at 1247 (Carnes, J., concurring).
177 Id. at 1246.
178 Id.
179 Douglass, 79 F.3d at 1417–18 (emphasis added).
180 Id. at 1418-19 (explaining that “if the failure to object to the magistrate judge’s report and recommendation is considered a waiver, then there are few, if any, exceptions, not even for plain error, to not reviewing issues raised for the first time on appeal concerning the unobjected-to proposed findings and conclusions accepted by the district court. But, if such failure to object is considered a forfeiture, as it is by our court, then there is a limited exception to not reviewing such issues raised on appeal for the first time.”).
Therefore, consistent with our precedent, . . . we refer to our circuit’s rule as an appellate “forfeiture”, rather than a “waiver”, rule. As the Supreme Court emphasized in United States v. Olano, in clarifying plain error review, FED. R. CRIM. P. 52(b) (“Plain Error”) is premised on there being a forfeiture, rather than a waiver; otherwise, in general, there could be no correction of the error on appeal. Under our former rule, our court treated the failure to object to a magistrate judge’s report and recommendation as a forfeiture, rather than as a waiver; thereby permitting, inter alia, plain error review. 181

The Douglass Court also deleted the redundant “manifest injustice” standard of Nettles v. Wainwright, after reviewing the current state of appellate “waiver” rules in all the Circuits, and concluded:

Mindful of Thomas v. Arn’s reminder that a failure to object to a magistrate judge’s report and recommendation may be excused in the “interests of justice”, having examined exceptions used by other circuits, and consistent with our treating the failure to object as a forfeiture, rather than as a waiver, we hold that such forfeitures will be reviewed only for plain error. 182

Relying on the Fifth Circuit’s opinion in Douglass, the Third Circuit in 2007 also construed Arn in light of Olano, in the context of review of habeas corpus rulings. In the case, Nara v. Frank, the Third Circuit concluded that “plain error review is appropriate where a party fails to timely object to a magistrate judge’s R&R in habeas corpus cases. First, plain error review recognizes the difference between failing to timely assert a right, and voluntarily waiving a right. Failing to timely assert a right results in forfeiture, which permits plain error review. [citing Olano]. Waiver, on the other hand, extinguishes any error. Id.” 183 In addition, the Third Circuit emphasized that “plain error review recognizes failure to timely object to an [R&R] is not a jurisdictional defect.” 184 These conclusions stand in vivid contrast to those of the Eleventh Circuit.

In addition, many federal district courts construing Rule 59 have accurately noted that discretionary review of magistrate judge decisions remains available to district courts regardless of whether objections were properly made, 185 and in earlier cases,

181 Id. at 1420 (internal citations omitted).
182 Id. at 1423–24 (internal citations omitted).
183 See Frank, 488 F.3d at 196. Both the Third Circuit in Nara and the Fifth Circuit in Douglass were revising their previous higher standard of review for unobjected-to R&Rs.
184 Id. at 196–97 (adding that “[d]istrict courts may therefore consider request by parties for extra time or requests to excuse late filings on adequate justification”).
185 See, e.g., United States v. Tooze, 236 F.R.D. 442, 445–46 (D. Ariz. 2006) (“release decisions by magistrate judges notwithstanding the waiver provision of Rule 59(a). No language in the rule precludes discretionary review by district courts, and the Advisory
multiple courts of appeals have relied on the interest of justice discretion of Thomas v. Arn to support their plain error review of cases in which no timely objection was made to a magistrate judge’s R&R.\footnote{See, e.g., Spence, 219 F.3d at 174; Theede v. United States Dep’t of Labor, 172 F.3d 1262, 1268 (10th Cir. 1999); Douglass, 79 F.3d at 1428.}

Nevertheless, the Eleventh Circuit’s interpretations underscore the most obvious problems with Rule 59’s retention of the term “waiver” post-Olano, as well as the confusion that can arise regarding the exact scope of jurisdiction over unobjected magistrate judge decisions at—and as between—the district court and court of appeals levels.

B. “Waiver” and Disruption of Justifications for the Structural Constitutionality of Magistrate Judges

Less obviously, Rule 59’s choice of the language of “waiver” also effects a subtle constitutional disruption, given that the rationale for magistrate judge adjudication rests on the presumption of some degree of review by an Article III judge.\footnote{See, e.g., Note, Federal Magistrates and the Principles of Article III, 97 HARV. L. REV. 1947, 1960 (1984) (“The ability of article III judges to control the magistrates dockets ensures the independence of the federal judiciary” because of the ability of article III judges to review cases at the trial and appellate level, and to refer and withdraw matters from the magistrate).} The word “waiver,” with its post-Olano connotations of extinguishment of error and total foreclosure of any appellate review, undermines Arn’s determination that the institutionalization of appellate default rules is constitutionally innocuous. The Federal Rules’ misuse of the term “waiver” to describe the operation of these rules, which are more properly considered a “forfeiture” under United States v. Olano, implies total unreviewability of magistrate judge R&Rs. However, the constitutional justification for magistrate judge adjudication is that at least a modicum of review by an Article III judge is always retained.\footnote{See, e.g., id. at 1951 (Article III’s principle of judicial independence “implies that, in any article III case heard by a federal tribunal, a judge with article III tenure and salary protections must maintain at least some minimum degree of control.”).}

Article III’s guarantees serve both a structural, separation of powers role, in ensuring that federal judges have sufficient independence to check and balance the coordinate branches, and an individual protection role, in ensuring that litigants in the federal courts have access to impartial adjudication by an independent

Committee Notes make clear that such discretion remains[:\”]"); In re Antunez de Mayolo, No. 06-MC-69-LRR, 2007 WL 1121303, at *4 (N.D. Iowa Apr. 16, 2007) (“A district court judge retains the authority to review de novo any aspect of a magistrate judge’s ruling on a nondispositive matter in a criminal case, even if neither party files a timely objection.”).
decision maker. As Justice O’Connor elaborated in the majority opinion in Commodity Futures Trading Commission v. Schor:

“Article III, § 1, serves both to protect ‘the role of the independent judiciary within the constitutional scheme of tripartite government,’ and to safeguard litigants’ right to have claims decided before judges who are free from potential domination by other branches of government.”

Federal litigants may waive their individual right to a hearing before a life-tenured Article III judge in the first instance, but some degree of appellate review by an Article III court is generally considered necessary to insuring a proper separation of powers in the vesting of federal judicial power in any non-Article III officer. And, unlike the

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189 See, e.g., Judicial Selection, supra note 33, at 588 (“Numerous articles and opinions describe the centrality—both to the framers and to present day commentators—of two forms of judicial independence: the structuring of an independent branch of government empowered to check excesses of coordinate branches and the creation of a cadre of independent individual judges, free from threats of coercion and therefore assumed able to judge impartially.”).

190 Schor, 478 U.S. at 848 (1986).

191 Id.; see also, e.g., Peretz, 501 U.S. at 936 (“litigants may waive their personal right to have an Article III judge preside over a civil trial”).

192 The phrase “appellate review,” in the case of magistrate judges, may refer both to the review power of the district court over a magistrate judge’s R&R, and the review power of the court of appeals over the district court’s judgment. “The expression ‘appellate’ taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both.” Federalist 81 (Alexander Hamilton).

193 See, e.g., Fallon, supra note 48, at 918 (“adequately searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements or [A]rticle III”). Fallon’s “appellate review theory” relies on “the line of cases, traceable to Crowell v. Benson, that have legitimated congressional reliance on non-[A]rticle III adjudicators because of the availability of adequate judicial review to protect [A]rticle III values.” Id. at 946. See also Brown, supra note 52, at 76 (concluding that under the Article III analysis synthesized by Justice O’Connor in Commodity Futures Trading Comm’n v. Schor and Thomas v. Union Carbide Agricultural Products Co., “[a]ppellate review pretty much provides the essentials of the judicial power”). Professor Brown explains that that the Court in Schor basically adopted the position taken by Justice White in his Northern Pipeline dissent—that “appellate review essentially satisfies whatever degree of [A]rticle III involvement is required,” although the “pragmatic majority” in the split Northern Pipeline decision also came “close to saying that appellate review is enough to satisfy [A]rticle III.” Id. at 83. “By implication then, lack of appellate review would not satisfy [A]rticle III‖” Id. at 83, 87. See also Saphire & Solimine, supra note 48, at 139 (1988) (concluding that, because only “mandatory and meaningful article III court review [is] likely to preserve these [A]rticle III values,” “the mandate of [A]rticle III is only satisfied when Congress, in creating a non-[A]rticle III tribunal, makes available [A]rticle III review of that tribunal’s factual and legal determinations’); Daniel J. Meltzer, Legislative Courts, Legislative Power, and the Constitution, 65 Ind. L. J. 291 (1990) (proposing that “[A]rticle III review of the decisions of non-[A]rticle III federal tribunals is a constitutionally adequate vesting of the judicial power,” and that “even when a federal tribunal provides due process, [A]rticle III may require the availability of at least some judicial review in an [A]rticle III tribunal”). But see Resnik, supra note 49, at 616-17 (“Appellate review of records made and facts found by non-Article III judges is a weak substitute for Article III judging.”). Although courts and commentators may disagree on what constitutes a constitutionally sufficient amount of review, an adequate level of review is generally presumed in the case of magistrate judges, whether based on an “ad-
individual right to an independent judge, Article III’s structural separation of powers protections may not be waived by a litigant. When [structural] Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.\(^\text{195}\)

As Justice Marshall cautioned in his dissent in *Raddatz*, “there can be no doubt that one holding the office of magistrate is unprotected by the safeguards that the Framers regarded as indispensable to assuring the independence of the federal judiciary.”\(^\text{196}\) The early Federal Papers, for instance, proclaimed that:

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from Judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence.\(^\text{197}\)

Nevertheless, over the past 40 years, magistrate judges have been authorized to perform an ever-expanding array of judicial functions.\(^\text{198}\) Magistrate judges exercise a significant degree of
Article III judicial power: “the jurisdiction of the district court itself, delegated to the magistrate judge by the district judges of the court.”

Nevertheless, for the most part, magistrate judges have been seen as a uniquely subordinate class of adjudicators, and the delegation of federal judicial power to magistrate judges is well-established as constitutional. This stems from the analysis, as summarized by Professor Brown, that “[t]o be valid, non-[A]rticle III adjudicative bodies must either fit within a narrow group of exceptions to th[e] principle [of Article III adjudication], or operate in such close relationship to an [A]rticle III court as to become a subordinate component (‘adjunct’) of that court.”

Magistrate judges are considered classic “adjuncts” to the federal courts. “With adjuncts, the problem [of non-article II adjudication] can be finessed to some extent by viewing them as within the article III structure.” As such, the constitutionality of magistrate judges is justified by the notion that the “essential attributes of judicial power” are preserved in the Article III judges who—ostensibly—exercise direct review and close judicial supervision of magistrate judges. Professor Resnik has referred to this as a “dependency model.”

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199 SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES, supra note 26 at 4.
200 Brown, supra note 52, at 90.
201 See, e.g., Raddatz, 447 U.S. 667; Peretz, 501 U.S. 923; see also Note, supra note 187, at 1963 (“Adjudication by federal magistrates . . . is consistent with the historic purpose of Article III.”).
202 Brown, supra note 52, at 58 (summarizing Justice Brennan’s analytical framework, in the Northern Pipeline plurality opinion, for evaluating the constitutionality of bankruptcy courts); see also Northern Pipeline, 458 U.S. at 63-87.
203 See, e.g., Raddatz, 447 U.S. at 681–83 (“the magistrate acts subsidiary to and only in aid of the district court,” “the entire process takes place under the district court’s total control and jurisdiction,” the “authority—and the responsibility—to make an informed, final determination . . . remains with the [district] judge,” and delegation of judicial power to a magistrate “does not violate Art. III, so long as the ultimate decision is made by the district court”); id. at 686 (Blackmun, J., concurring) (“describing magistrate adjudication as “a procedure under which 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’’); see also Brown, supra note 52, at 88 (“Devices such as magistrates are placed within the judicial system and are ostensibly a part thereof.”).
204 Brown, supra note 52, at 60.
205 See, e.g., Raddatz, 447 U.S. at 681–84; id. at 686 (Blackmun, J., concurring); see also Note, supra note 187, at 289 (rejecting strict Article III analysis for federal magistrates because “magistrates are under the direct and constant supervision of Article III judges”).
206 See Resnik, supra note 49, at 596.
tators who dislike the “adjunct” concept generally believe that, at minimum, some form of appellate review is necessary to protect Article III values.207

Under the circumstances, appellate default rules already indicate a great deal of confidence in magistrate judges. In allowing any level of forfeiture of the right to review by an Article III judge, we are treating magistrate judges less like adjuncts and more like autonomous federal judicial officers. True, “[t]he assumption that [A]rticle III judges would always conscientiously review magistrates’ decisions . . . may be a heroic one”).208 But, the delegation of federal court duties to magistrate judges—and of appellate “waiver” rules themselves—is considered structurally constitutional in large part because of this presumption of oversight (and at the very least, of some level of appellate review) by Article III judges.209

Constitutionally, the Arn majority, led by Justice Marshall himself, found it dispositive that the district judge could, if he or she wanted to, sua sponte take over any aspect of the case and retained the ultimate authority to issue an appropriate order.210 The Court of Appeals could also choose to excuse the waiver in the interest of justice.211 The Arn Court concluded that with such protections in place, an appellate default rule for failure to object to a magistrate judge’s R&R did not remove essential attributes of the judicial power from the Article III court.212

To the extent that these discretionary oversight powers are obscured by the Olano understanding of “waiver,” however, the constitutional rationale for appellate default rules evaporates. As such, retaining the language of “waiver” disrupts Arn’s conclusion that appellate default rules shift none of the essential attributes of judicial power from the Article III tribunal, and subtly complicates longstanding rationales for the constitutionality of magistrate judges.

As an individual constitutional protection, Article III’s guarantee of an impartial and independent federal adjudication in the first instance is considered waivable, and parties in the federal courts may consent to having a magistrate judge hear a wide variety of cases.213 From a purely individual rights perspective, ap-

207 See, e.g., supra note 199 and accompanying text; see also, e.g., Northern Pipeline, 458 U.S. at 115-16 (J. White, dissenting opinion).
208 Meltzer, supra note 193, at 294.
209 See supra note 199 and accompanying text.
210 Arn, 474 U.S. at 146.
211 Id. at 153–54.
212 Id. at 154.
213 See Part I-A, supra.
PELLATE DEFAULT RULES MAY PASS CONSTITUTIONAL MUSTER SO LONG AS CLEAR NOTICE OF THE RULE IS GIVEN TO CONSENTING LITIGANTS AND COURTS RETAIN THE DISCRETION TO EXCUSE SUCH PROCEDURAL DEFAULT OF APPELLATE REVIEW IN THE INTEREST OF JUSTICE OR, IN OTHER WORDS, FOR PLAIN ERROR. BUT, A STRUCTURAL CONSTITUTIONAL DILUTION IS ENCOURAGED WHEN COURTS SUCH AS THE ELEVENTH CIRCUIT AUTHORIZE JURISDICTIONAL, OLANO-TYPE WAIVER OF ALL ARTICLE III REVIEW OF A MAGISTRATE’S R&R. UNDER SUCH AN INTERPRETATION, ARTICLE III CONCERNS CAN NO LONGER BE FINESSED BY VIEWING MAGISTRATE JUDGES AS SAFELY WITHIN THE ARTICLE III STRUCTURE.

CONCLUSION

TO THE EXTENT THAT SOME DEGREE OF APPELLATE REVIEW OF MAGISTRATE JUDGE ADJUDICATION IS REQUIRED TO SATISFY ARTICLE III’S REQUIREMENTS, IT IS IMPORTANT THAT THE PROMULGATION OF APPELLATE “WAIVER” RULES NOT OBSCURE THE DISCRETIONARY POWER OF THE DISTRICT COURT TO REVIEW MAGISTRATE JUDGE DETERMINATIONS EVEN ABSENT TIMELY OBJECTIONS, AND OF COURTS OF APPEALS TO CONDUCT PLAIN ERROR REVIEW OF THE SAME. UNFORTUNATELY, TO THE EXTENT THESE LIMITED AVENUES OF APPELLATE REVIEW DO REMAIN UNDER THE RULES AUTHORIZED BY THOMAS V. ARN AND CODIFIED IN FEDERAL RULE OF CRIMINAL PROCEDURE 59, THEY ARE OBFUSCATED BY THE CONTINUED USE OF THE TERM “WAIVER,” WHICH, AFTER THE TERM’S INTERPRETATION IN UNITED STATES V. OLANO, INACCURATELY IMPLIES THAT EVEN PLAIN ERRORS AFFECTING SUBSTANTIAL RIGHTS ARE FULLY EXTINGUISHED BY THE FAILURE TO OBJECT TO A MAGISTRATE JUDGE’S R&Rs. MORE ACCURATELY, THE APPELLATE “WAIVER” RULE UNDER ARN AND RULE 59 CONSTITUTES A FORFEITURE OF THE RIGHT TO REVIEW THROUGH FAILURE TO TIMELY OBJECT TO A MAGISTRATE JUDGE’S R&Rs, A NONJURISDICTIONAL PROCEDURAL DEFAULT THAT REMAINS EXCUSABLE IN THE INTEREST OF JUSTICE. IN ADDITION TO ENCOURAGING PROCEDURAL AND JURISDICTIONAL CONFUSION, RULE 59’S MISUSE OF THE LANGUAGE OF “WAIVER” SUBTLY UNDERMINES THE CONSTITUTIONAL COHERENCE OF MAGISTRATE JUDGE ADJUDICATION UNDER THE DEPENDENCY/ADJUNCT MODEL, CONTRIBUTING TO A WATERED-DOWN ARTICLE III DOCTRINE. A CHANGE AS SIMPLE AS ADJUSTING THE LANGUAGE OF RULE 59 TO READ THAT FAILURE TO TIMELY OBJECT “FORFEITS” OR “DEFAULTS” A PARTY’S RIGHT TO ANY FURTHER REVIEW WOULD GO A LONG WAY TOWARD ACCURATELY CHARACTERIZING THE PROPER NATURE AND OPERATION OF THESE RULES. SUCH A SHIFT, IDEALLY PAIRED WITH INCREASED CLARITY IN THE ADVISORY COMMITTEE NOTES TO RULE 59, WOULD PROVIDE BETTER DIRECTION TO COURTS AND TO LITIGANTS, AND WOULD PROMOTE EVOLUTION IN THE CASE LAW TOWARD A MORE PRECISE “APPELLATE FORFEITURE” DOCTRINE.