District Court Review of Findings of Fact Proposed by Magistrates: Reality Versus Fiction

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Abstract

In this Essay, Professor Pierce criticizes the decisions in six circuits that forbid a district judge from rejecting a finding of fact proposed by a magistrate without first conducting a new evidentiary hearing. Those decisions are inconsistent with the Magistrates Act of 1968, the Supreme Court's 1951 decision authorizing agencies to reject findings of fact made by administrative law judges without conducting a new evidentiary hearing, the consistent findings of empirical studies that a fact-finder's ability to observe the demeanor of witnesses does not improve the fact-finder's ability to evaluate the credibility of witnesses, and Articles I and III of the Constitution.

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* Lyle T. Alverson Professor of Law, The George Washington University Law School. I owe special thanks to Barbara Bruce, The George Washington University Law School Class of 2014, for providing me the best edit I have received in forty years of publishing books and articles. Because of Ms. Bruce's editing, the published version of this article is significantly better than the manuscript I submitted for publication.

INTRODUCTION

Magistrates have become an indispensable and ubiquitous part of the federal judicial system.[1] District judges can assign to magistrates the tasks of conducting hearings and making proposed findings with respect to a wide variety of civil and criminal matters.[2] The Federal Magistrates Act of 1968 ("Magistrates Act")[3] confers this power subject to the district judge's duty to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."[4] Given their increasingly large caseloads, district judges make extensive use of this mechanism, often in circumstances in which the findings are determinative of the outcome of a case.[5]

The use of magistrates to make proposed findings of fact that have the potential to be outcome-determinative raises two constitutional concerns. First, because magistrates are not judges within the meaning of Article III, using magistrates to make outcome-determinative proposed findings of fact arguably violates Article III.[6] Second, when a district court decides to uphold or reject a magistrate's proposed finding without conducting an evidentiary hearing, the court arguably violates due process.[7] The Supreme Court addressed both issues in its 1980 decision in *United States v. Raddatz*.[8] The Court held that the use of magistrates to make outcome-determinative proposed findings is consistent with Article III because "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 statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings."[9]

The Court concluded that "in providing for a 'de novo determination' rather than *de novo* hearing, Congress intended to permit

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1 For descriptions of the increasingly important roles of magistrates, see generally Kevin Koller, Note, *Deciphering De Novo Determinations: Must District Courts Review Objections Not Raised Before a Magistrate Judge?*, 111 COLUM. L. REV. 1557 (2011); Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge System*, 1999 FED. CTS. L. REV., no. 4, at 1, http://www.fclr.org/fclr/articles/html/1999/fedctslrev4.shtml.

2 Koller, *supra* note 1, at 1565.

3 Federal Magistrates Act of 1968, 28 U.S.C. §§ 631–639 (2006).

4 *Id.* § 636(b)(1).

5 *See* Koller, *supra* note 1, at 1557–58, 1565.

6 *See id.* at 1561.

7 *See id.* at 1567–68.

8 United States v. Raddatz, 447 U.S. 667 (1980).

9 *Id.* at 680–81.

whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations."[10] The Court then held that due process does not require a district judge to conduct a hearing if he decides to adopt a magistrate's proposed finding, even when that finding has the effect of virtually ensuring that a criminal defendant will be convicted.[11] The Court added a footnote, however, that has been the source of a great deal of litigation:

> [W]e assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach.[12]

The Court's assumption has proven to be unfounded—district judges often reject credibility-based findings proposed by magistrates without conducting a new oral evidentiary hearing, thereby requiring circuit courts to address the questions the Court did not reach.[13]

Six circuits have held that a district judge cannot reject a magistrate's proposed outcome-determinative credibility-based finding without conducting a new evidentiary hearing when the result is likely to be conviction of a criminal defendant.[14] The courts have announced that holding in the context of findings that a guilty plea was involuntary,[15] that a prosecutor used race as a factor in objecting to

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10 *Id.* at 676.

11 *See id.* at 669, 680–81 (holding that a district court judge was not required to hold a hearing before accepting a magistrate judge's determination in a suppression hearing that the defendant's inculpatory statements to interviewing officers had been made freely, and were therefore admissible).

12 *Id.* at 681 n.7.

13 Subsequent references in this Essay to the "findings" or "proposed findings" of magistrate judges include only credibility-based findings. This Essay does not address magistrate judge findings that are unrelated to the credibility of a witness, which have been treated separately by the courts. *See, e.g.*, United States v. Ridgway, 300 F.3d 1153, 1157 n.3 (9th Cir. 2002) (reserving the question of whether the rule for reversal of credibility findings also applies to "a reversal based on findings *other than* credibility findings"); Hill v. Beyer, 62 F.3d 474, 484 (3d Cir. 1995) (explaining that an evidentiary hearing may not be required if erroneous factual determinations concerned issues that "do not call a witnesses' credibility into question").

14 United States v. Hernández-Rodríguez, 443 F.3d 138, 148 (1st Cir. 2006); *Ridgway*, 300 F.3d at 1154; United States v. Cofield, 272 F.3d 1303, 1306 (11th Cir. 2001); Cullen v. United States, 194 F.3d 401, 407 (2d Cir. 1999); *Hill*, 62 F.3d at 482; Louis v. Blackburn, 630 F.2d 1105, 1109 (5th Cir. 1980).

15 *Louis*, 630 F.2d at 1108.

jurors in a criminal case,[16] and that a criminal defendant's lawyer provided ineffective assistance.[17] All of those holdings were announced in the context of a criminal defendant's objection to a district judge's rejection of a magistrate's proposed finding that was favorable to the defendant.[18] All were based on the theory that the district court's rejection of such findings, without a new hearing, violated the Due Process Clause.[19] That reliance on due process would seem to be essential, given the Supreme Court's holding in *Raddatz* that Congress had an "unmistakable" intent to confer on district judges the discretion to reject findings proposed by magistrates without conducting a new evidentiary hearing.[20]

After *Raddatz*, all of the holdings that district judges could not reject magistrates' proposed findings without conducting a new hearing were based on due process and were limited to the context of district court rejection of a magistrate's proposed finding that was favorable to a criminal defendant.[21] In *United States v. Thoms*,[22] however, the Ninth Circuit broadened the scope of its prior holding by applying it to a district judge's rejection of a proposed finding that was favorable to the government.[23] Since due process does not apply in such a context, the court could not rely on constitutional reasoning to support its new holding that extended the right to a new hearing to all

16 Johnson v. Finn, 665 F.3d 1063, 1065–66 (9th Cir. 2011).

17 *Cullen*, 194 F.3d at 402.

18 *See.e.g.*, *Johnson*, 665 F.3d at 1065 (district judge rejected magistrate's finding that prosecutor used peremptory challenges to exclude black jurors).

19 *See Hernández-Rodríguez*, 443 F.3d at 148; *Ridgway*, 300 F.3d at 1155–56; *Cofield*, 272 F.3d at 1306; *Cullen*, 194 F.3d at 406–07; *Hill,* 62 F.3d at 482; *Louis*, 630 F.2d at 1110.

20 United States v. Raddatz, 447 U.S. 667, 676 (1980).

21 *See supra* note 14 and accompanying text.

22 United States v. Thoms, 684 F.3d 893 (9th Cir. 2012). It should be noted that two other courts have applied the de novo hearing requirement in cases involving a district judge's rejection of a magistrate's proposed findings that were favorable to the government. *See* Carrion v. Smith, 549 F.3d 583, 584–85 (2d Cir. 2008); *Cofield*, 272 F.3d at 1305–06. In *Cofield*, the Eleventh Circuit simply cited *Raddatz* without making a distinction between credibility findings favorable to the defendant and those favorable to the government. *Cofield*, 272 F.3d at 1305–06. In *Carrion*, the Second Circuit based its decision that a de novo hearing of the credibility evidence by the district court was necessary on the fact that the record produced at the magistrate's hearing could not support the district judge's independent credibility determination. *Carrion*, 549 F.3d at 589–90. As neither of these cases explicitly held that district judges must conduct a new hearing when rejecting a magistrate's proposed findings that were favorable to the government, this Essay considers *Thoms* as having announced a new rule.

23 *Id.* at 896 (holding that "a district court abuses its discretion when it reverses a magistrate judge's credibility determinations, made after receiving live testimony and favorable to the government, without viewing key demeanor evidence").

litigants.[24] It instead based its holding on its power "to mandate procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution."[25] The court concluded that "all litigants" have a right to a new hearing before a district judge can reject a magistrate's proposed credibility-based finding that is favorable to the litigant.[26]

If it is adopted by other circuits or upheld by the Supreme Court, the Ninth Circuit's broad prohibition on rejection of a magistrate's proposed findings by a district court judge without conducting a new hearing will have major effects on the relationship between district judges and magistrates in all contexts, including reversal of proposed findings favorable to the government and reversal of proposed findings made in civil cases. In this Essay, I argue that the broad restriction on the power of district judges announced by the Ninth Circuit in *Thoms* is indefensible. In Part I, I argue that even the pre-existing restriction on the power of district judges to reject proposed findings favorable to criminal defendants is based on an erroneous interpretation and application of the Due Process Clause. In Part II, I argue that the new broad restriction on the power of district judges violates both Article I and Article III of the Constitution. In Part III, I use Supreme Court decisions issued in the context of administrative law to demonstrate that the circuit court restrictions on the relationship between district judges and magistrates are inconsistent with the principles and reasoning the Supreme Court has long used as the basis for its decisions that govern both the relationship between agencies and courts and the relationship between administrative law judges ("ALJ") and agencies. In Part IV, I urge courts to adopt a legal regime governing the relationship between district judges and magistrates that is based on the approach the Fifth Circuit took in *United States v. Marshall*,[27] and the approach the Supreme Court has long required all courts to take in the analogous context of the relationship between ALJs and agencies. Under this approach, circuit courts should uphold district court rejections of magistrates' proposed credi-

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24 *See id.* at 903 (noting that the newly announced rule was not mandated by the Constitution but was designed "to further the integrity and accuracy of our judicial process and to facilitate the search for truth").

25 *Id.* (internal quotation marks omitted). The court recognized one exception to the rule it announced. The exception applies "where the district judge finds that the magistrate judge's credibility determinations had no legally sufficient evidentiary basis, so that, were they jury determinations, judgment as a matter of law would issue for the defendant." *Id.*

26 *Id.* at 900.

27 United States v. Marshall, 609 F.2d 152 (5th Cir. 1980).

bility-based findings without conducting a new hearing if the district judge offers adequate reasons for the rejection.

I. The Pre-*Thoms* De Novo Hearing Requirement Is Not Supported by Due Process

The pre-*Thoms* circuit court opinions that restricted the power of district judges to reject findings proposed by magistrates were based on the conclusion that such a rejection violates due process when the judge rejects a magistrate's proposed finding that is favorable to a criminal defendant without conducting a new evidentiary hearing. All of these circuit decisions relied on *Raddatz*, which recited the Court's prior holding in *Mullane v. Central Hanover Bank & Trust Co.*[28]: due process requires a "hearing appropriate to the . . . case."[29] The *Raddatz* Court then determined the kind of hearing that is "appropriate to the case" by reciting and applying the test the Supreme Court announced in *Mathews v. Eldridge*,[30] which considers three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[31]

In the cases involving a district court's rejection of a magistrate's credibility findings, the circuit courts adopted the conclusions, with respect to the three *Eldridge* factors, that (1) the private interest at stake is important; (2) the failure to conduct a new oral evidentiary hearing before rejecting a magistrate's finding creates an unacceptably high risk of error; and (3) the cost of conducting such a hearing is low.[32]

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28 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

29 United States v. Raddatz, 447 U.S. 676, 677 (1980) (internal quotation marks omitted).

30 Mathews v. Eldridge, 424 U.S. 319 (1976).

31 *Eldridge*, 424 U.S. at 335; *see also Raddatz*, 447 U.S. at 677 (citing *Eldridge*, 424 U.S. at 335).

32 *See, e.g.*, Johnson v. Finn, 665 F.3d 1063, 1075–76 (9th Cir. 2011) ("Because the petitioners' interest in the vindication of their rights is immense, because the administrative burden of an additional hearing is relatively minor, and because a credibility determination based on a cold record is substantially more likely to be in error than one based on an in-person evaluation of a witness, the district judge deprived [the defendants] of due process when he declined to afford them a new evidentiary hearing.").

The result of the application of the first part of the test is undeniably correct. Where a district court's reversal of a magistrate's proposed finding is likely to result in the conviction and incarceration of a criminal defendant, the private interest at stake is significant.[33] The result of the application of the third part of the test is questionable, however, and the result of the application of the second part of the test is unsupportable.

The third part of the *Eldridge* test considers the administrative burdens that a hearing would impose.[34] Courts should recognize that the costs of requiring a district judge to conduct a new evidentiary hearing before rejecting a magistrate's proposed finding are high. Those costs arise in at least two forms—the practical cost of requiring a busy district judge to conduct a new evidentiary hearing, and the constitutional cost of reducing the district judge's ability to control the fact finding process. The Supreme Court rejected the argument that delegation of the task of making proposed findings to an Article I magistrate violates Article III, based on its belief that "the entire [fact-finding] process takes place under the district court's total control."[35] To the extent that circuit courts render the process of district court rejection of a magistrate's proposed findings burdensome by conditioning it on the use of costly additional procedures, they render inaccurate the assumption on which the Supreme Court based its holding that delegation of the process of making proposed findings to magistrates is consistent with Article III.

The impetus for the enactment of the Magistrates Act was the well-supported belief of Congress that district judges have heavy caseloads and that conducting hearings to find facts is such a major part of the burden of deciding cases that district judges should be permitted to delegate the task of conducting hearings to make proposed findings to magistrates.[36] Thus, the conclusion that requiring a district judge to conduct a new hearing as a prerequisite for rejection of a magistrate's proposed finding does not pose significant costs[37] is in-

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33 *See id.* at 1075; Louis v. Blackburn, 630 F.2d 1105, 1110 (5th Cir. 1980) (stating that a criminal defendant's constitutional rights are "of the highest order").

34 *Eldridge*, 424 U.S. at 335.

35 *Raddatz*, 447 U.S. at 681 (explaining that "Congress made clear that the district court has plenary discretion whether to authorize a magistrate to hold an evidentiary hearing and that the magistrate acts subsidiary to and only in aid of the district court").

36 *See* Koller, *supra* note 1, at 1597 ("The legislative history unambiguously indicates that the underlying purpose of the Federal Magistrates Act is to increase the efficiency of the judicial system.").

37 *See*, *e.g.*, *Johnson*, 665 F.3d at 1075 (considering the administrative burden of an additional hearing to be "relatively minor").

consistent with the sole justification for delegating the proposed fact-finding process to magistrates in the first place.

The requirement to conduct a new hearing is particularly burdensome when the hearing must be conducted by a judge other than the judge who is presiding in the case in which the proposed finding will have substantive effects, as most circuits require.[38] Once a court mandates a new hearing, it is easy to understand why the court would then conclude that the hearing should be conducted by a new judge. Judge Chambers has provided a good explanation for that part of the requirement:

> I cannot agree with the concept that a district judge can accept without hearing . . . a magistrate's ruling (recommendation), but he must hold a hearing de novo before he can reverse. In practice, fair as the judge may be, if he exercises a discretion to hold a hearing, it will usually mean that he has almost made up his mind to reverse the magistrate. That is not good.[39]

It is hard to disagree with Judge Chambers's logic. If the legal regime that governs the relationship between judges and magistrates empowers a judge to reject a magistrate's proposed finding only if the judge conducts a de novo hearing, the judge's decision to conduct the hearing is powerful evidence that he has prejudged the issue of fact that is the sole reason for the hearing. Thus, if the de novo hearing requirement makes any sense, the hearing must be conducted by a judge other than the judge who orders the hearing. That, in turn, makes the de novo hearing requirement particularly costly. A decision by a district judge to convene a de novo hearing would require the judge to impose the high cost of conducting such a hearing on a colleague who already is grappling with his own heavy caseload. This adds friction and resentment between judges to the inherent cost of the de novo hearing.

In practice, even when a judge is confident that a magistrate's proposed finding is wrong, he will likely be unwilling to incur the high

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38 *See, e.g.*, Boyd v. Waymart, 579 F.3d 330, 333 (3d Cir. 2009) (en banc) (remanding to different district judge "to ensure the appearance of impartiality" despite having "no doubts about the district court judge's fairness"); United States v. Hernández-Rodríguez, 443 F.3d 138, 148 (1st Cir. 2006) (remanding to different district judge to avoid "possible appearance of injustice"); Cullen v. United States, 194 F.3d 401, 408 (2d Cir. 1999) (remanding to different district judge "not only in recognition of the difficulty that a judge might have putting aside his previously expressed views, but also to preserve the appearance of justice" (internal quotation marks omitted)).

39 United States v. Bergera, 512 F.2d 391, 394 (9th Cir. 1975) (Chambers, J., dissenting).

interpersonal-relations cost of requiring a colleague to conduct a de novo hearing. This understandable reluctance undermines the Supreme Court's assumption that the fact-finding process "takes place under the district court's total control" when a district court delegates the task of making proposed findings to a magistrate.[40] Yet that assumption was the basis for the Supreme Court's holding that Congress can empower a district judge to delegate the initial fact-finding process to a magistrate without violating Article III of the Constitution.[41]

The error in the circuit courts' application of the *Eldridge* test is even more apparent in the context of the second part of the test. Each circuit court that has held that due process requires a de novo hearing as a prerequisite to rejecting a proposed finding that is favorable to a criminal defendant has concluded—implicitly or explicitly—that failure to conduct a de novo hearing creates an intolerably high risk of error and that conducting a de novo hearing significantly reduces that risk.[42] That conclusion, in turn, is based solely on the assertion that findings made by someone who hears live testimony are systematically more accurate than findings that are based on a "cold record."[43]

If an assertion could become true as a result of the frequency with which it is made, all courts would have to accept the accuracy of this assertion. Every Anglo-American court, including the Supreme Court, has repeatedly distinguished between accurate findings that are based on observation of the demeanor of witnesses and findings that are unreliable because they are based on a "cold record."[44] In *Raddatz*, the Supreme Court reiterated this distinction, quoting an 1867 opinion of the Privy Council to support it:

> The most careful note must often fail to convey the evidence fully in some of its most important elements . . . . It cannot give the look or manner of the witness: his hesitation, his

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40 *Raddatz*, 447 U.S. at 681.

41 *Id.* at 681-83.

42 *See, e.g.*, United States v. Ridgway, 300 F.3d 1153, 1156–57 (9th Cir. 2002); United States v. Cofield, 272 F.3d 1303, 1305–06 (11th Cir. 2001); Louis v. Blackburn, 630 F.2d 1105, 1110 (5th Cir. 1980).

43 *See, e.g.*, *Louis*, 630 F.2d at 1109 ("Like the Supreme Court, . . . we have severe doubts about the constitutionality of the district judge's reassessment of credibility without seeing and hearing the witnesses himself.").

44 *See, e.g.*, *Raddatz*, 447 U.S. at 695 ("One of the most deeply engrained principles in Anglo-American jurisprudence requires that an official entrusted with finding facts must hear the testimony on which his findings will be based.") (Marshall, J., dissenting); FED. R. CIV. P. 43 advisory committee's note (stressing that "[t]he importance of presenting live testimony in court cannot be forgotten" and that "[t]he opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition").

> doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; . . . the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it.[45]

The only problem with this eloquent statement is its totally mythical nature. The assertion in hundreds of judicial opinions for over a century that live testimony is more reliable than a "cold record" is inconsistent with an enormous body of evidence presented in social science literature.[46]

Professor Olin Wellborn's meta-study of the literature on the role of demeanor in fact-finding led him to conclude:

> Psychologists and other students of human communication have investigated many aspects of deceptive behavior and its detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanor as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments.[47]

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45 *Raddatz*, 447 U.S. at 679 (quoting R v. Bertrand, (1867) 16 Eng. Rep. 391, 399 (P.C.) (appeal taken from New S. Wales)).

46 *See* Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1204 ("It is unforgiveable that the legal system deliberately ignores demonstrated, relevant findings about demeanor evidence and willfully adheres to an ineffectual traditional approach."); Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2563 (2008) (explaining that courts and legislatures have largely ignored scientific studies showing that demeanor evidence can be misleading and instead adhere to the traditional view of demeanor as helpful to the fact-finder).

47 Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991); *see also* 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2 (2d ed. 1997 & Supp. 2012) (noting that "[p]erhaps, indeed, the entire American reliance on demeanor is misplaced"); Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 757–62 (1989) (explaining that psychological research "indicates that most people do a poor job of using demeanor evidence to determine whether a declarant is lying or telling the truth").

The context in which magistrates originally make their proposed findings involves situations—such as a suppression hearing featuring testimony from a police officer or the defendant—in which demeanor is particularly likely to detract from the accuracy of the judge's credibility determination.[48] Police officers are professional witnesses who have more experience testifying than most criminal defendants and are more articulate than most criminal defendants.[49] A judge who concentrates on a witness's demeanor is likely to discount important contextual considerations when making sense of the witness's story.[50] A judge might place greater weight on the articulate and relaxed testimony of the professional witness even when a focus on context would lead the judge to the opposite conclusion with respect to a contested issue of fact.[51]

It is time for courts to resign their long-time memberships in the flat-earth society and to recognize, in this and many other contexts, that demeanor can be worse than worthless as a means of choosing which witnesses to believe. In fact, demeanor can be affirmatively misleading.[52] District court review of magistrates' proposed findings is a good place to begin.[53] It is indefensible for a court to hold a statute unconstitutional based on an assertion that has been called into serious doubt by decades of scientific evidence dispelling myths about the reliability of demeanor evidence.[54]

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48 *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 914–15 (1991) (describing conditions that create a "credibility gap" between police officers and defendants who testify at suppression hearings).

49 *See, e.g.*, *id.*

50 For an example of the importance of such contextual considerations, see United States v. Thoms, 788 F. Supp. 2d 1001, 1014 (D. Alaska 2011) (rejecting magistrate's credibility-based finding and explaining that "[i]t is difficult to conceive how [a marijuana] odor could have traveled over 400 feet in the middle of winter—above or through forest and above or around the Thoms' home—when [according to the officer's testimony] '[i]t wasn't breezy at all'").

51 *Cf. id.* at 1012 (rejecting magistrate's credibility-based finding given the factual context and because the officer's sworn affidavit was inconsistent with officer's live testimony); *see also* United States v. Thoms, 684 F.3d 893, 904 (9th Cir. 2012) ("[B]efore a district court calls a police officer a liar, there is a strong presumption that the judge should look him in the eye first."); Stuntz, *supra* note 48, at 915 (arguing that the risk of police perjury is "unavoidable" in an exclusionary rule system).

52 Wellborn III, *supra* note 47, at 1091 (explaining that live testimony involves "distracting, misleading, and unreliable nonverbal data").

53 *See id.* (arguing that "legal procedures could be improved by abandoning live trial testimony in favor of presentation of deposition transcripts").

54 The Ninth Circuit implicitly found the Magistrates Act unconstitutional in *Thoms* when it held that district judges must hold a de novo hearing before rejecting a magistrate's finding based on credibility evidence. *See Thoms*, 684 F.3d at 896.

II. The Broad De Novo Hearing Requirement in *Thoms* Is Unconstitutional

In *Thoms*, the Ninth Circuit confronted a situation in which a district judge had rejected a magistrate's proposed credibility-based finding that was *unfavorable* to a criminal defendant.[55] The court recognized that due process could not support a requirement that a district judge conduct a de novo hearing before rejecting a proposed finding that is unfavorable to the defendant.[56] Nevertheless, the court held "that a district court abuses its discretion when it reverses a magistrate judge's credibility determinations, made after receiving live testimony and favorable to the government, without viewing key demeanor evidence."[57] The court stated that the right to a de novo hearing is "shared by all litigants,"[58] presumably including civil litigants as well as the government. The court supported its broadening of the de novo hearing requirement to apply to all litigants by referring to the ancient myths that: "live testimony is the bedrock of the search for truth;"[59] "[w]here an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility;"[60] and resolution of factual disputes on a "cold record" detracts from accuracy in the fact-finding process.[61] The court provided no evidence to support its assertions. There is no such evidence.[62] Rather, the court could only support its unsubstantiated assertions by quoting similar past assertions.[63]

The broad holding in *Thoms* is inconsistent with the "unmistakable" congressional intent not to require de novo hearings that the Supreme Court recognized in *Raddatz*.[64] The *Thoms* court claimed the power to trump that decision of Congress based on its "supervisory authority 'to mandate procedures deemed desirable from the view-

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55 *Id.* at 898.

56 *Id.* at 902 (noting the government "concedes it has no due process rights").

57 *Id.* at 903; *see also id.* at 906 (holding that the district court must hear live testimony of at least the "key witnesses" while leaving the district court to determine "whose live testimony it should hear").

58 *Id.* at 900.

59 *Id.* at 903.

60 *Id.* (alteration in original) (internal quotation marks omitted).

61 *Id.* at 903–05.

62 *See supra* notes 43–53 and accompanying text.

63 *See Thoms*, 684 F.3d at 905 (dismissing scientific studies with contrary propositions and explaining that "more importantly, trial judges and juries in our circuit and all over the country rely on the demeanor evidence given by live testimony everyday [sic], and they find it quite valuable in making accurate decisions").

64 United States v. Raddatz, 447 U.S. 667, 676 (1980).

point of sound judicial practice although in nowise commanded by statute or by the Constitution.'"[65] That does not work. The supervisory power of the courts is independent of statutes, but it is inferior to the legislative power of Congress.[66] Thus, although a court does not need a statutory source of power to require a lower court to adopt a particular procedure, it cannot exercise its "supervisory power" in a manner that is inconsistent with a statute.[67]

A court can order a lower court to act in a manner that is inconsistent with a statute only if it concludes that the statute is unconstitutional.[68] The *Thoms* court did not even attempt to make the case that the congressional choice to allow a district judge to engage in de novo review, rather than a de novo hearing, to make a decision to accept, amend, or reverse a magistrate's proposed finding favorable to the government violates the Constitution. There is no conceivable theory on which a court could hold the Magistrates Act unconstitutional in the context of an action by a district judge that is unfavorable to the government in a criminal case.[69]

The *Thoms* court's attempt to use its supervisory power to trump a statute violates Article I by defying an explicit, constitutionally valid congressional mandate. It also violates Article III. If a district judge is prohibited in every context, whether criminal or civil, from rejecting a magistrate's proposed finding absent a de novo hearing (most likely conducted by another judge), it simply cannot be said that the fact-finding process remains in a district court's "complete supervisory control"[70] when a district judge delegates the task of making a proposed finding to a magistrate.[71] Yet that was one of the critical predicates for the Supreme Court's decision in *Raddatz* to reject the argument that the Magistrates Act violates Article III.[72] Once that

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65 *Thoms*, 684 F.3d at 903 (quoting Thomas v. Arn, 474 U.S. 140, 146–47 (1985)).

66 For a detailed discussion of legislative supremacy, see Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989).

67 The Supreme Court has recognized the legislative supremacy of Congress in many cases. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, . . . must give effect to the unambiguously expressed intent of Congress.").

68 *See* United States v. Booker, 543 U.S. 220, 283 (2005) ("[T]he Court simply has no authority to invalidate legislation absent a showing that it is unconstitutional.").

69 *See Thoms*, 684 F.3d at 903 (holding that the due process right to a de novo hearing does not apply to the government).

70 United States v. Raddatz, 447 U.S. 667, 686 (1980) (Blackmun, J., concurring).

71 *See id.* at 711 (Marshall, J., dissenting) (arguing that "in view of the likely finality of the magistrate's decision and the importance of fact-finding to the process of legal decision," district judges would not retain effective control of the fact-finding process).

72 *See id.* at 681 (majority opinion) (explaining that in holding evidentiary hearings under

predicate is eliminated, the delegation of the power to make proposed findings of fact in the Magistrates Act cannot survive an Article III challenge.

III. A Broad Restriction on the Power of District Judges to Reject Proposed Findings by Magistrates Is Inconsistent with Core Administrative Law Doctrines

There is a near-perfect analogy between the relationship between ALJs and agencies on the one hand, and between magistrates and district judges on the other. In both contexts, Congress conferred on a superior institution the power to reject findings proposed by a subordinate, to whom the superior delegated the task of initial fact-finding, without holding a new evidentiary hearing. In *Raddatz*, all of the Justices recognized this similarity and agreed that cases involving the permissible relationship between agency hearing officers and agencies, and between agencies and courts, are relevant to the process of determining the permissible relationship between magistrates and district judges.[73] In particular, the Justices relied heavily on the principle announced in the Court's 1936 opinion in *Morgan v. United States*[74] that "[t]he one who decides must hear."[75]

That principle has long been obsolete.[76] It is inconsistent with the basic characteristics of the administrative state that have existed for decades and that have been enshrined in numerous Supreme Court opinions.[77] In its 1951 opinion in *Universal Camera Corp. v. NLRB*,[78] the Court upheld Congress's decision in the Administrative Procedure Act to empower agencies to substitute their findings for those of an ALJ even though the ALJ heard the evidence and the agency decisionmaker did not.[79] In its 1955 opinion in *FCC v. Allentown Broad-*

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the Act, "the magistrate acts subsidiary to and only in aid of the district court," and "[t]hereafter, the entire process takes place under the district court's total control and jurisdiction").

73 *Id.* at 680; *id.* at 707–11 (Marshall, J. dissenting).

74 Morgan v. United States, 298 U.S. 468 (1936).

75 *Raddatz*, 447 U.S. at 677, 696 (quoting *Morgan*, 298 U.S. at 481). The *Raddatz* Court also relied heavily on another obsolete administrative law doctrine: the requirement that a court must engage in de novo review of agency findings of constitutional fact, announced in *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38 (1936). The demise of the constitutional fact doctrine is described in detail in Richard J. Pierce, Jr., Sidney A. Shapiro & Paul R. Verkuil, Administrative Law and Process § 5.2.2 (5th ed. 2009).

76 The demise of the rule announced in *Morgan* is described in detail in 1 Richard J. Pierce, Jr., Administrative Law Treatise § 8.6 (5th ed. 2010).

77 *See id.*

78 Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

79 *Id.* at 492–94.

casting Corp.,[80] the Court reversed a circuit court opinion which had held that an agency is bound to accept the findings of an ALJ when they are based on demeanor.[81] The Court held that, while an agency must consider the ALJ's findings in making its own, it can make findings that are inconsistent with the ALJ's findings without conducting a de novo hearing even when the ALJ's findings were based on credibility determinations.[82]

Courts routinely uphold agency findings that are inconsistent with ALJ findings where the ALJ relied on live testimony, but the agency decisionmaker did not.[83] In such situations, the court upholds the agency finding as long as the agency explains why it deviated from the ALJ's findings.[84] Courts should use administrative law cases as an aid in determining the permissible relationship between magistrates and district judges, as the Supreme Court did in *Raddatz*.[85] Courts should use modern cases, rather than obsolete older cases, in this endeavor.

IV. Courts Should Uphold District Court Decisions to Reject Proposed Findings by Magistrates Without Conducting a New Hearing if the Judge Gives Adequate Reasons for the Decision

Cases like *Universal Camera* and *Allentown Broadcasting* provide a good framework for determining the permissible relationship between magistrates and district judges. A district judge should have the discretion to reject a finding proposed by a magistrate without conducting a new hearing if, but only if, the judge provides an adequate explanation for his decision. Two circuit court decisions—*Thoms* in the Ninth Circuit, and *Marshall* in the Fifth Circuit—address the relationship between magistrates and district judges. Although the courts take starkly different approaches, these cases illustrate well the way this legal regime should work in the context of district court review of magistrates' proposed credibility-based findings.

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80 FCC v. Allentown Broad. Corp., 349 U.S. 358 (1955).

81 *Id.* at 364–65.

82 *Id*. For a detailed discussion of *Allentown*, see 2 Pierce, *supra* note 76, at § 11.2.

83 *See, e.g.*, Long v. Soc. Sec. Admin., 635 F.3d 526, 530–31 (Fed. Cir. 2011). For a discussion of scores of similar cases, see 2 Pierce, *supra* note 76, at § 11.2.

84 *See, e.g.*, Leatherbury v. Dep't of Army, 524 F.3d 1293, 1304–05 (Fed. Cir. 2008) (explaining agency must give "adequate explanation" to deviate from administrative judge's demeanor-based credibility findings); *see also* 2 Pierce, *supra* note 76, at § 11.2.

85 United States v. Raddatz, 447 U.S. 667, 680 (1980); *see also id.* at 707–11 (Marshall, J., dissenting).

Ironically, *Thoms*, in which the Ninth Circuit expanded the de novo hearing requirement to cover all litigants, presents a particularly good example of when a circuit court should uphold a district court's rejection of a magistrate's proposed finding without conducting a new hearing. In *Thoms*, a police officer testified that he had probable cause to search a house based on his detection of the smell of marijuana emanating from the house as he drove past at a distance of 400 to 600 feet.[86] Seven witnesses testified for the defendants.[87] One of the witnesses for the defendant was Professor Richard Doty, Director of the Smell and Taste Center of the University of Pennsylvania School of Medicine.[88] Professor Doty explained in detail why it is impossible for anyone to detect the smell of marijuana at a distance of 400 to 600 feet from a house, given the use of the insulation and filtration systems installed in the house.[89] The district court concluded in light of all the testimony that it was impossible for anyone to smell marijuana under those circumstances.[90]

The magistrate, on the other hand, had proposed a finding that the officer smelled the marijuana as he drove past the house and thus had probable cause to conduct the search.[91] The magistrate relied on the officer's demeanor as the basis for his finding.[92] The district judge explained in detail why he disagreed with the magistrate's proposed finding:

> To conclude that [Investigator] Young did smell marijuana from the road, while in his vehicle would require the court to assume that Thoms' [sic] filtration system was either saturated or not functional; that the odor of marijuana left the outbuilding unfiltered and remained warm long enough to stay above the vegetation behind the Thomses' house; that it either traveled around the Thomses' two-story residence or stayed warm long enough to traverse above it then suddenly dropped in the area Young claimed to smell marijuana; and that it followed the described 450 foot course without dispersing beyond perceptible levels. Those assumptions are

86 United States v. Thoms, 684 F.3d 893, 896 (9th Cir. 2012).

87 *Id.* at 897.

88 *Id.*

89 United States v. Thoms, 788 F. Supp. 2d 1001, 1007–10 (D. Alaska 2011) ("Doty ultimately opined that there was a 'zero' probability that [the officer] smelled marijuana as he claimed.").

90 *Id.* at 1015.

91 *Thoms*, 684 F.3d at 897.

92 *Id.* at 903.

> contrary to a preponderance of the evidence presented at the *Franks* hearing.[93]

The district judge further explained in a subsequent Order on Reconsideration that he did not need to conduct a new hearing:

> [T]his court has had access to a transcript of the original evidentiary hearing and has explained at length how the evidence presented renders it highly improbable (indeed, it seems to this court in light of all the evidence, virtually impossible) that Investigator Young could smell the marijuana grow under the circumstances that existed at the time. That conclusion would not change simply because this court heard the evidence all over again. The issue here does not turn on the demeanor of the witnesses, but rather on the implausibility of the officer's conclusion that he smelled the marijuana grow inside a sealed building at least 450 feet away, which was screened by forest vegetation and a hill with a house on it. These considerations, which are paramount in rendering Young's conclusion unbelievable, are either derived directly from or are entirely consistent with Investigator Young's own testimony. It would serve no purpose but delay to conduct a second hearing to hear the testimony all over again.[94]

Any court would uphold this reasoning as adequate if it were an agency's rejection of a finding made by an ALJ. There is no good reason for a court to find such justifications inadequate in the analogous context of a district judge's rejection of a magistrate's proposed finding. The only reason given by the Ninth Circuit—that a finding based on a "cold record" is inherently less accurate than a finding made by someone who observed the demeanor of the witnesses[95]—is unsubstantiated nonsense that is inconsistent with an overwhelming body of scientific evidence.[96]

The facts and reasoning of the Fifth Circuit in *Marshall* provide a stark contrast with the facts and reasoning of the Ninth Circuit in *Thoms*. In *Marshall*, a magistrate conducted a hearing to determine whether customs officers had reasonable suspicion to board and search a vessel, and whether the operator of the vessel had consented to the officers' boarding.[97] The magistrate proposed findings that the

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93 *Thoms*, 788 F. Supp. 2d at 1015.

94 United States v. Thoms, No. 3:10-cr-00069 JWS, 2011 WL 1597793, at * 2 (D. Alaska Apr. 28, 2011), *vacated and remanded by Thoms*, 684 F.3d at 903–04.

95 *Thoms*, 684 F.3d at 904.

96 *See supra* note 47.

97 United States v. Marshall, 609 F.2d 152, 153 (5th Cir. 1980).

officers lacked reasonable suspicion and that the operator had not consented to the initial boarding.[98] The magistrate filed a report with the district judge in which he explained his proposed findings with reference to the evidence presented at the hearing.[99] The district judge rejected the magistrate's proposed findings without conducting a new hearing, without reading the transcript of the hearing before the magistrate, and without giving reasons for rejecting the magistrate's proposed findings.[100]

The Fifth Circuit held that a district judge need not conduct a de novo hearing before accepting a finding proposed by a magistrate.[101] Where a district judge rejects a finding proposed by a magistrate, the court found that the district judge must base his decision "on a proper record."[102] The court then indicated that the district judge, on remand, should consult the transcript of the hearing before the magistrate and provide an opportunity for counsel for both sides "to point out, by memorandum or brief, whatever in the evidence each deems important to the judge's ruling."[103] Additionally, in making a determination based on the hearing transcript, "there should be . . . an articulable basis for rejecting the magistrate's original resolution of credibility," and the district judge should state that basis in his decision.[104]

The holding in *Marshall* is an eminently sensible rule: a judge must provide adequate reasons for rejecting a magistrate's proposed findings. This rule mirrors the approach courts have taken for decades in reviewing agency decisions to reject ALJ findings.[105] Unfortunately, the Fifth Circuit drifted from its approach in *Marshall* and joined the ranks of five other circuits in the flat-earth society.[106] These

98 *Id.*

99 *Id.*

100 *Id.* at 153–54.

101 *Id.* at 155.

102 *Id.*

103 *Id* at 156.

104 *Id.* at 155.

105 *See supra* notes 83–85 and accompanying text.

106 *See* Louis v. Blackburn, 630 F.2d 1105, 1109–10 (5th Cir. 1980) (holding that a district judge cannot reject a proposed finding that is favorable to a criminal defendant based on a "cold record"). The court in *Louis* limited *Marshall* to its holding—that it was error for the district judge to reject the magistrate's recommendation without at least consulting the transcript of the hearing before the magistrate—and noted that no opinion was expressed concerning whether a rejection on the transcript alone would be proper. The *Louis* court further noted the *Marshall* court's statement that "it would be a rare case in which a district judge could resolve credibility choices contrary to the recommendations of the magistrate without himself having had an opportunity to see and hear the witness testify." *Id.* at 1109.

six circuits prohibit district judges from rejecting a magistrate's proposed finding that is favorable to a criminal defendant without conducting a new hearing, based on the unsupported assertion that observation of the demeanor of witnesses enhances the accuracy of fact-finding.[107] In *Thoms*, the Ninth Circuit broadened that holding to cover any proposed finding by a magistrate that is favorable to any litigant in a criminal or civil case.

Conclusion

It is time for circuit judges and Supreme Court Justices to resign their memberships in the flat-earth society by refraining from basing decisions on assertions about the value of demeanor evidence that are contradicted by an overwhelming amount of scientific evidence. Courts should apply to the relationship between magistrates and district judges the legal regime they have long applied to the analogous relationship between ALJs and agency decision-makers.

107 *See supra* notes 43–53 and accompanying text (describing the extensive evidence that contradicts this assertion).