

THOMAS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 02–69

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES
REAGAN, PETITIONERS *v.* JON MICHAEL
WITHROW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[April 29, 2003]

JUSTICE THOMAS, with whom JUSTICE STEVENS,
JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

The provision that this Court must interpret reads: “Upon the consent of the parties, a . . . magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment.” 28 U. S. C. §636(c)(1). The majority holds that no express consent need be given prior to the commencement of proceedings before the magistrate judge. Rather, consent can be implied “where . . . the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge.” *Ante*, at 10. In my view, this interpretation of §636(c)(1) is contrary to its text, fails to respect the statutory scheme, and raises serious constitutional concerns. Furthermore, I believe that a lack of proper consent is a jurisdictional defect and, therefore, a court of appeals reviewing a judgment entered by a magistrate judge pursuant to §636(c) may inquire *sua sponte* into the consent’s validity.

I
A

There are two prongs to the majority’s holding: (1) par-

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ties can give their consent *during* the actual proceedings conducted by a magistrate judge, and (2) such consent need not be explicit, but rather may be inferred from the parties' conduct. Neither of these conclusions is correct.

As already noted, a magistrate judge may carry out certain functions of a district court only “[u]pon the consent of the parties.” Congress’ use of the word “upon” suggests that the necessary consent must precede the magistrate judge’s exercise of his authority. “Upon” is defined as “immediately or very soon after.” The Random House Dictionary of the English Language 1570 (1966). Thus, under the plain language of the statute, consent is a precondition to the magistrate judge’s exercise of case-dispositive power; without it, a magistrate judge cannot preside over a trial or enter judgment. *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F. 2d 537, 540 (CA9 1984) (en banc) (Kennedy, J.).

The word “upon” is used to mean “thereafter” in other parts of the statute as well. For example, §636(h) provides that a “magistrate judge who has retired may, *upon* the consent of the chief judge of the district involved, be recalled to serve as a magistrate judge . . .” (Emphasis added.) Clearly, a retired magistrate judge cannot return to his former post before the chief judge consents. Similarly, §636(e)(3) uses the word “upon” to mean “subsequent to.” That subsection grants magistrate judges the power to hold parties before them in contempt, but conditions the imposition of contempt sanctions “*upon* notice and hearing under the Federal Rules of Criminal Procedure.” (Emphasis added.) That is, a party cannot be held in contempt without *first* being given notice and a hearing. Because under the normal rules of statutory construction the Court “assumes that identical words used in different parts of the same act are intended to have the same meaning,” *Sorenson v. Secretary of the Treasury*, 475 U. S. 851, 860 (1986) (citations and internal quotation marks omitted),

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the word “upon” in §636(c)(1) must mean “thereafter,” just as it does in §§636(h) and (e)(3). By allowing consent to be “inferred from a party’s conduct *during* litigation,” *ante*, at 1 (emphasis added), the majority disregards the clear meaning of the word “upon.”

Similarly, the conclusion that implied, rather than express, consent suffices is not borne out by either §636(c)(1) itself or the statutory scheme as a whole. The majority is, of course, correct that the relevant clause of §636(c)(1) speaks only of “consent,” while the clause addressing part-time magistrate judges requires that consent be communicated by a “specific written request.” *Ante*, at 6 (internal quotation marks omitted). But this premise does not command the conclusion the majority draws. Both clauses require *express* consent, with the latter mandating a *specific form* of express consent—a written request.

This reading is most consistent with the statutory scheme. Despite the majority’s concession that §636(c)(2) and Federal Rule of Civil Procedure 73, “are by no means just advisory,” *ante*, at 7, the majority fails to give them any weight. Section 636(c)(2) requires the clerk of the district court to notify the parties of the availability of a magistrate “at the time the action is filed,” *after* which the “decision of the parties [whether to consent] shall be communicated to the clerk of court.” The fact that the parties’ decision must be communicated to the clerk soon after the filing of the action indicates that the consent envisioned by the statute must be given affirmatively and expressly. Indeed, a party would find it quite difficult to “communicat[e]” the necessary consent to the *clerk of the court* through actions undertaken “*during litigation*,” *ante*, at 1 (emphasis added). The majority’s view suggests that the clerk of the court must monitor the parties’ behavior in the magistrate judge’s courtroom and determine, at some point not specified by the majority, that the parties’ ac-

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tions have ripened into consent. That is not a reasonable interpretation. Accordingly, I would hold that appearance before a magistrate judge without objection cannot be deemed “consent” within the meaning of this statutory scheme.

Federal Rule of Civil Procedure 73 fortifies this reading. The Rule mirrors the provisions of §636(c)(2) for informing parties of their option to proceed before a magistrate judge and of their obligation to file a consent form if they chose to do so. Fed. Rule Civ. Proc. 73(b) (“When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent,” and if the parties agree, “they *shall execute and file a joint form of consent* or separate forms of consent . . .” (emphasis added)).

Read together, the foregoing provisions indicate that parties must *expressly* communicate their consent to the magistrate judge’s exercise of jurisdiction over their case and must do so *before* litigation—or at the very least *before* a magistrate judge enters a binding judgment.

B

While I agree with the majority’s view that §636(c)(1) was “meant to preserve a litigant’s right to insist on trial before an Article III district judge,” *ante*, at 8, and to prevent “coercive referrals,” *ibid.*, the majority’s construction of this provision does not follow the Court’s “settled policy to avoid an interpretation of a federal statute that engenders constitutional issues.” *Gomez v. United States*, 490 U. S. 858, 864 (1989).

“A critical limitation on [the] expanded jurisdiction [of magistrate judges] is consent.” *Id.*, at 870. Reading §636(c)(1) to require express consent not only is more consistent with the text of the statute, but also ensures that the parties knowingly and voluntarily waive their right to an Article III judge. A party’s express consent is a

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clear and unambiguous indication that the party had sufficient notice it was freely waiving its right. Accordingly, I would choose this interpretation over the majority's view that implied consent suffices to give a magistrate judge dispositive authority over a case. Cf. *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U. S. 389, 393 (1937) (holding that the parties, by their request for directed verdicts, did not waive their right to trial by jury, and observing that "courts indulge every reasonable presumption against waiver"); *Ohio Bell Telephone Co. v. Public Util. Comm'n. of Ohio*, 301 U. S. 292, 307 (1937) (holding that a telephone company did not waive its right to have the value of its property determined upon evidence presented in open proceedings by not opposing consolidation of two proceedings, and noting that "[w]e do not presume acquiescence in the loss of fundamental rights").

Moreover, the majority's test for determining whether a party has given adequate implied consent—"where . . . the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge," *ante*, at 10—is rife with ambiguities. How are the courts to determine whether the litigant or counsel "was made aware of the need to consent and the right to refuse it"? Are courts required to search beyond the record and inquire into whether a clerk of the court informed either a litigant or his counsel of the litigant's rights and provided them with requisite forms to sign? Can courts rely, if applicable, on the parties' participation in other unrelated proceedings before a magistrate judge? In addition, the majority's view of what constitutes "voluntariness" in this context is not at all clear as it seems to depend, at least in part, on establishing a litigant's or counsel's awareness of the litigant's rights.

Although the majority brushes aside the prudential implications of its reading, *ante*, at 10, n. 7 ("We doubt

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that this interpretation runs a serious risk of ‘spawn[ing] a second litigation of significant dimension.’ *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 609 (2001)”), it is hardly a novel proposition that a bright-line rule would be easier to administer. And, it would certainly be so in adjudicating the validity of consent under this statute. If express consent is required, courts will not have to study the record of a proceeding on a case-by-case basis, searching for patterns in the parties’ behavior that would provide sufficient indicia of voluntariness to satisfy this newly minted, but vague, test for consent. A bright-line rule brings clarity and predictability, and, in light of the constitutional implications of this case, these values should not be discounted.

Given the uncertainties surrounding the determination of the validity of implied consent, it is not surprising that the majority does not even claim that the requirements of Article III have been satisfied in this case. Rather, all the majority can muster is that “the Article III right is *substantially* honored.” *Ante*, at 10 (emphasis added). However, litigants’ rights under Article III are either protected or they are not. As the majority suggests, its reading does not safeguard these rights. Indeed, the only protection offered by the majority is its hope that the “procedural requirements of §636(c)(2) and Federal Rule of Civil Procedure 73(b)” will be complied with. *Ante*, at 10, n. 7. The majority offers no credible solution for circumstances, such as the ones here, where these rules were not followed.

Even apart from the plain text of the statute and the canon of constitutional avoidance, concerns about fairness—to which the majority alludes above, see *ante*, at 8–9—weigh in favor of express consent. According to the majority, the respondent is a “possibly opportunistic litigant,” who “deserves no boon from the other side’s failure to cross the bright line,” *ante*, at 9. The record, however,

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provides no evidence that respondent, proceeding *pro se* below, manipulated the system. Moreover, “the other side” is the State of Texas, a repeat player, represented by its own counsel, and no doubt familiar with the rules of the local federal courts. Finally, it was not respondent who raised the issue of consent, but the Court of Appeals, which considered the question *sua sponte*.

II

Because the parties here did not expressly consent to the proceeding before the Magistrate Judge, I next consider whether the lack of such consent destroys jurisdiction of a court of appeals reviewing a magistrate judge’s judgment. I believe it does, and thus, a court of appeals may—and indeed must—raise it *sua sponte*.

A court of appeals exercises jurisdiction over a magistrate judge’s final order pursuant §636(c)(3), which provides that:

“Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. *The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure.*” (Emphasis added.)

Under §636(c)(3), appellate jurisdiction over final judgments entered by a magistrate judge depends on whether the requirements of §636(c)(1), including consent, are satisfied. Absence of consent means absence of a “judgment,” which, in turn, means absence of appellate jurisdiction. Thus, under §636, the necessary precondition for a

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court of appeals' jurisdiction over a magistrate judge's order is the parties' consent to proceed before the magistrate judge. Because valid consent is a jurisdictional prerequisite for appellate jurisdiction, and, hence, an integral part of the inquiry into the existence of such jurisdiction, §636(c)(3) permits a court of appeals to examine the validity of the consent to the magistrate judge's authority *sua sponte*.

The *de facto* officer doctrine is not to the contrary. That doctrine "prevent[s] litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." *Glidden Co. v. Zdanok*, 370 U. S. 530, 535 (1962) (plurality opinion). Examples of such "technicalities" are defects in the judge's appointment or designation. See, e.g., *Ex parte Ward*, 173 U. S. 452, 456 (1899) (judge improperly appointed during a Senate recess); *Wright v. United States*, 158 U. S. 232, 238 (1895) (deputy marshal whose oath of office had not been properly administered); *McDowell v. United States*, 159 U. S. 596, 601–602 (1895) (judge whose designation to sit in a different district may have been improper under the statute); *Ball v. United States*, 140 U. S. 118, 128–129 (1891) (judge sitting in place of a deceased judge where designation permitted only the substitution for a disabled judge). The doctrine is, however, inapplicable "when the alleged defect of authority operates also as a limitation on this Court's appellate jurisdiction. *Ayrshire Collieries Corp. v. United States*, 331 U. S. 132 (three-judge court); *United States v. Emholt*, 105 U. S. 414 (certificate of divided opinion)." *Glidden*, 370 U. S., at 535 (plurality opinion). Additionally, "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional' and agreed to consider it on direct review even though not raised at the earliest practicable opportunity." *Id.*, at 535–536.

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This is the case here—§636(c) “embodies a strong policy” of ensuring that litigants waive their rights to an Article III judge knowingly and voluntarily. The requirement of consent is not a mere “technicality.” Sections 636(c)(1), 636(c)(2), and 636(c)(3) reference consent explicitly and require it as a precondition for the exercise of a magistrate judge’s authority and of a court of appeals’ review of the magistrate judge’s judgment. The foregoing indicates the importance of consent as a touchstone of this statutory scheme. Thus, absence of consent is a jurisdictional defect and a court of appeals must raise such defects *sua sponte*.

* * *

I would vacate the judgment below and remand the case with instructions to dismiss the appeal for lack of subject-matter jurisdiction. I respectfully dissent.