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Dubious Delegation: Article III Limits on Mental Health Treatment Decisions

Adam Teitelbaum
University of Michigan Law School

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NOTE

DUBIOUS DELEGATION: ARTICLE III LIMITS ON MENTAL HEALTH TREATMENT DECISIONS

Adam Teitelbaum*

A common condition of supervised release requires a defendant, post-incarceration, to participate in a mental health treatment program. Federal district courts often order probation officers to make certain decisions ancillary to these programs. However, Article III delegation doctrine places limits on such actions. This Note addresses the constitutionality of delegating the "treatment program" decision, in which a probation officer decides which type of treatment the defendant must undergo; the choice is often between inpatient treatment and other less restrictive alternatives. The resolution of this issue ultimately depends on whether this decision constitutes a "judicial act." Finding support in lower court case law, this Note argues that a "judicial act" encompasses decisions affecting the defendant's significant liberty interests. The Supreme Court case law and the mental health literature make clear that significant liberty interests are at stake in these "treatment program" decisions. Thus, delegating the "treatment program" decision to probation officers is unconstitutional under Article III. The Note concludes by suggesting a constitutionally permissible scheme whereby the judge orders a maximally intrusive treatment while giving the probation officer the discretion to choose a less restrictive program.

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INTRODUCTION

In the federal criminal justice system, individual liberty is placed in the hands of an array of decisionmakers. There is the police officer who decides whether to investigate a suspicious character; the magistrate judge who approves a warrant to search someone’s home; the jury which decides whether or not to convict; the district judge who orders a sentence; and the probation officer who oversees the conditions of supervised release. Sometimes, these roles bleed together. For example, a police officer may conduct a warrantless search in certain situations, and a judge may override a jury conviction not supported by the evidence. This Note addresses the overlapping roles of a probation officer and a judge in determining the type of mental health treatment a defendant must undergo pursuant to a condition of supervised release.

Imagine that you have been convicted of a federal drug crime and you have a history of addiction and mental health issues. You are now in court to be sentenced. Once you hear that you will be spending the next five years in prison, you do not even give a second thought to everything else the judge is saying. You do your time, you are released from prison, and you meet your probation officer. At that point, the officer, not the judge, decides you need to spend more time confined—this time, in a restrictive inpatient mental health facility. In fact, the judge, five years ago at sentencing, ordered the probation officer to make such a decision.

This situation has become surprisingly common: judges, in their orders regarding conditions of supervised release, regularly delegate to probation officers certain mental health treatment decisions. While potentially troubling from a policy perspective, this issue also has a constitutional dimension. Article III limits the exercise of the judicial power to federal courts, and thus may impose constitutional restraints on this practice. This...
Note examines the constitutionality of delegating the “treatment program” decision: when judges order mental health treatment upon a defendant’s release but allow the probation officer to determine—at a later time—the type of treatment program the defendant must undergo.

The pressure on district judges to delegate more duties to probation officers is not surprising. Undoubtedly, it is necessary that probation officers assume certain tasks in order to “support judicial functions,” as probation officers “play a vital role in effectuating the sentences imposed by district courts.” District court judges face an “ever-increasing workload.” For example, in California from 1983 to 1992, judges’ caseloads grew by 73 percent. This puts pressure on all facets of the judicial system, and it suggests that judges will be driven to delegate more duties to probation officers. As a practical matter, “courts cannot be expected to map out every detail of a defendant’s supervised release.”

It is also intuitive to leave certain decisions to a probation officer, who is “a liaison between the sentencing court, which has supervisory power over the defendant’s term of supervised release, and the defendant, who must comply with the conditions of his supervised release or run the risk of revocation.” With regard to mental health decisions, probation officers are closer to the situation and can monitor the defendant’s progress over time, making adjustments when necessary. If these decisions were left to judges, judges would be forced to choose between making a single determination at the time of sentencing or delaying a hearing for a later date.

Despite the administrability and efficiency justifications for delegating decisions to probation officers, there are benefits to having an Article III judge make this decision. The Constitution imparts to Article III judges certain important protections; it ensures that (1) they have life tenure, unless

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59 (1982) (plurality opinion) (“The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III.”).

4. This phrase was created for the purposes of this Note and does not appear in the case law.

5. United States v. Nash, 438 F.3d 1302, 1305 (11th Cir. 2006) (per curiam) (quoting United States v. Taylor, 338 F.3d 1280, 1284 (11th Cir. 2003) (per curiam)).

6. Taylor, 338 F.3d at 1284.


8. Id.

9. United States v. Pruden, 398 F.3d 241, 250 (3d Cir. 2005). Further, “district courts, to remain efficient, must be able to rely as extensively as possible on the support services of probation officers.” United States v. Johnson, 48 F.3d 806, 809 (4th Cir. 1995).


11. Heather Barklage et al., Probation Conditions Versus Probation Officer Directives: Where the Twain Shall Meet, 70 FED. PROBATION, no. 3, 2006, at 37, 37 (“Because every change in circumstance cannot be anticipated at the time of sentencing, it is helpful if the conditions of supervision can be adjusted and modified, sometimes on very short notice, in order to meet a particular offender’s needs or answer a particular concern in the community.”).

12. MacDonald & Baroody-Hart, supra note 7, at 42.
impeached, and that (2) their compensation can never be diminished.\textsuperscript{13} Both of these protections were meant to ensure the independence of the judiciary from other branches of government, and this independence must be “jealously guarded.”\textsuperscript{14} Probation officers, by contrast, are not insulated by these constitutional protections—it would be expensive and impractical to give these employees life tenure and salary protections. Further, a defendant may feel that he is being treated more fairly when a judge makes this type of decision after hearing and weighing the arguments through the typical judicial process—as opposed to the probation officer making the decision on his own whims, potentially biased by his closer relationship to the defendant.\textsuperscript{15}

While these practical concerns provide perspective, this issue must ultimately be resolved according to Article III delegation doctrine. This Note argues that it is unconstitutional for a judge to delegate to a probation officer the decision regarding the type of mental health treatment a defendant must undergo following his or her release from jail. Part I discusses the duties and training of probation officers, as well as the mechanics of conditions of supervised release.\textsuperscript{16} Part II argues that this delegation is impermissible under the Supreme Court’s delegation precedent if and only if a “judicial function” has been delegated—an issue on which the Court has provided no guidance. Part III argues that a “judicial function” has been delegated when the probation officer is allowed to make a decision depriving the defendant of a significant liberty interest. This framework finds support in the plentiful lower court case law\textsuperscript{17} dealing with delegations to probation officers and parole boards. Finally, Part IV analyzes the liberty interests at hand by focusing on Supreme Court civil commitment cases and inpatient treatment literature and ultimately determines that this delegation is impermissible. The Note concludes by outlining a proposed solution whereby a judge orders the most restrictive treatment at the time of sentencing while giving the probation officer discretion to choose a less restrictive alternative at a later time.

\textsuperscript{13} U.S. CONST. art. III, § 1; see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) (plurality opinion).

\textsuperscript{14} N. Pipeline, 458 U.S. at 59–60.

\textsuperscript{15} See infra Section II.B.1.

\textsuperscript{16} This Note uses the term “supervised release” instead of probation, as this is the terminology used for the federal system. E.g., 18 U.S.C. § 3583 (2006 & Supp. IV 2010).

\textsuperscript{17} Because Article III only applies to federal courts, state court delegation will not be analyzed in this Note. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (“[T]he constraints of Article III do not apply to state courts . . . .”). This applies even when state courts are adjudicating federal issues. Id.; see also Lucinda M. Finley, Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 572 (1980) (“[State courts do] not have to conform to article III requirements but could nonetheless exercise some of the subject matter jurisdiction described in article III . . . .”).
I. BACKGROUND ON CONDITIONS OF SUPERVISED RELEASE AND PROBATION OFFICERS

This Part provides background information on the statutory and practical considerations involved in the implementation of post-release mental health conditions. Section I.A focuses on conditions of supervised release, specifically those dealing with mental health treatment. Section I.B details the appointment, duties, and training of probation officers.

A. Conditions of Supervised Release

Several important statutory provisions enable judges to fashion conditions of supervised release and allow courts to supervise a defendant following his release from prison. These statutes limit the types of conditions that can be placed upon a defendant, and conditions of supervised release must comply with these statutes. However, compliance with a statute is not sufficient to dispose of the challenge to delegation. Article III is a constitutional provision, and it places limits even on these federal laws.18

18 U.S.C. § 3583(c) references factors to be used in determining conditions of supervised release. These factors are also used in determining the length of a sentence:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

   (B) to afford adequate deterrence to criminal conduct;

   (C) to protect the public from further crimes of the defendant; and

   (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(4) the kinds of sentence and the sentencing range established . . . ;

(5) any pertinent policy statement . . . ;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.21

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18. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) ("[A] law repugnant to the constitution is void . . .").
19. 18 U.S.C. § 3553(a)(2)(A) is omitted because 18 U.S.C. § 3853(c) excludes this as a factor.
20. 18 U.S.C. § 3553(a)(3) is omitted because 18 U.S.C. § 3853(c) excludes this as a factor.
The statute makes clear that a court may impose a condition of supervised release that is "reasonably related" to the enumerated factors and that "involves no greater deprivation of liberty than is reasonably necessary" to accomplish the above goals. While all of these factors are relevant, "it is not necessary for all of the factors . . . to be present before a special condition of supervised release may be imposed." The Sentencing Guidelines specifically envisioned mental health treatment conditions: "If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment—a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office [is permitted]." The U.S. Probation and Pretrial Services System defines this as a "special condition the court imposes to require an individual to undergo evaluation and treatment for a mental disorder," which "may include psychiatric, psychological, and sex offense-specific evaluations, inpatient or outpatient counseling, and medication.

A condition with no basis in the record violates this statute, and therefore a district court must state its reasons on the record for imposing a condition. Many delegation cases are disposed of on this basis because courts seek to avoid constitutional questions where possible. For example, in one case a condition requiring mental health treatment was struck down because it was based on the groundless assumption that the defendant would abuse his wife once released, even though he had not abused her or threatened abuse for over a decade. On the other hand, in a case where the defendant had a history of violent behavior and admitted to homicidal and suicidal thoughts, such a condition was deemed warranted. It is in this second class of cases—where the condition is statutorily permissible—that there are potential Article III concerns because even the impermissible delegation of a permissible condition violates the Constitution. In other words, the question of who decides has constitutional ramifications apart from the content of the decision itself.

A condition of supervised release, once ordered by the court, is not automatically reviewed at any time. It is considered a final order. It may be modified on rehearing, but this may occur only rarely for docket control.

22. Id. § 3583(d).
28. United States v. Kent, 209 F.3d 1073, 1077 (8th Cir. 2000); cf. United States v. Pruden, 398 F.3d 241, 249 (3d Cir. 2005) (holding that the statute was violated where there was no evidence of any mental health problems).
29. United States v. Wynn, 553 F.3d 1114, 1120 (8th Cir. 2009).
reasons. While defendants have a right to appeal, conditions of supervised release are ordinarily reviewed under the deferential "abuse of discretion" standard. However, when a timely objection is not made, courts employ the even more deferential "plain error" standard. These considerations will prove to be important factors in analyzing the constitutionality of probation officer delegations.

B. Probation Officers

Probation officers are considered both district court employees and federal law enforcement officers. They are appointed by district courts and can only be removed for cause. The probation officer's tasks primarily revolve around information. The officer investigates the defendant, monitors the defendant's actions, and relays observations to the court. Officer obligations are statutorily defined and include, among other express duties, that the officer shall "perform any other duty that the court may designate." It is this provision that allows Article III judges to delegate almost any duty they wish to probation officers, setting up the issue addressed in this Note.

Probation officers are considered the "eyes and ears of the federal courts." They conduct thorough investigations, which include interviews of the defendant and the defendant's family and friends, and they review criminal, medical, financial, and other relevant records. Probation officers present this information to the courts in the form of a Presentence Report ("PSR"). The PSR recommends a sentence, addresses any fines or restitution, and most importantly for this Note's purposes, recommends conditions of supervised release. When a mental health condition is recommended,

31. See supra notes 7–9 and accompanying text.
32. 18 U.S.C. § 3742 (2006) (providing the right to appeal one's sentence); see also United States v. Yellow Mule, 427 F. App'x 572, 573 (9th Cir. 2011) ("This [statute] unambiguously includes any right to appeal conditions of supervised release.").
33. United States v. Allen, 312 F.3d 512, 514 (1st Cir. 2002).
34. E.g., id.
35. See infra Section II.A.
38. For example, the officer must instruct the probationer of his conditions of supervised release, keep informed of the probationer's conduct and report that conduct to the court, and aid the probationer to improve his conduct. Id. § 3603(1)–(3).
39. Id. § 3603(10).
40. See United States v. Bernardine, 237 F.3d 1279, 1283 (11th Cir. 2001) ("However, 'the catch-all provision' is not all encompassing. A court may not delegate a judicial function to a probation officer.").
41. U.S. COURTS, supra note 36 (internal quotation marks omitted).
42. Id.
43. Id.
the PSR will often provide a detailed mental health history of the defendant. While nothing in the PSR is binding, its influence should not be underestimated. The probation officer is a primary source of facts for the judge and is given a great deal of discretion. Some have even described the position as a quasi-judicial role, like that of a federal magistrate. The Supreme Court in discussing PSRs has stated that "[t]o deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation." The Court has further emphasized the importance of this tool in holding that all PSRs are presumed reliable.

Probation officers also have an important supervisory role, as they are sometimes considered "social workers employed by the courts." These duties include implementing the court's conditions of supervised release. Probation officers ensure that defendants comply with the conditions and direct them to certain services pursuant to orders by the court. Supervision is meant to satisfy three core criminal justice goals: (1) enforcing the court's order, (2) protecting the community, and (3) providing treatment and assistance to the defendant. With regard to mental health treatment, a probation officer is required to interview the family, review mental health records, consult with medical health professionals, look for danger signs, and refer the defendant to mental health treatment as ordered by the court. There are clear challenges to this role. For example, defendants with mental health issues are often less responsive to supervision. They can also require more intensive supervision, and they may be violent or unpredictable.

It is important to note that these investigative and supervisory duties do not alone raise any Article III concerns. As long as the Article III judge makes the final decision, it makes no constitutional difference how he obtains the information informing that decision. This Note deals instead with a situation in which the final decision itself—not just the investigative duty—is delegated.

44. E.g., United States v. Vazquez, 381 F. App'x 168, 173 (3d Cir. 2010). Indeed, a court may only order mental health treatment where there is evidence of a mental disorder. United States v. Pruden, 398 F.3d 241, 249 (3d Cir. 2005).


48. Maveal, supra note 45, at 552.

49. U.S. COURTS, supra note 36.


51. Id.

52. Id.

53. Id.
II. SUPREME COURT DELEGATION FRAMEWORK

In determining the constitutionality of the "treatment program" decision, the first logical place to look is Supreme Court jurisprudence. As Justice Rehnquist wryly noted, the Court's Article III delegation cases "do not admit of easy synthesis." This was perhaps an understatement, as the contours of the doctrine change with each subsequent Supreme Court opinion on the subject. Section II.A summarizes the development of the doctrine. Section II.B discusses the applicability of the "adjunct" theory developed in those cases, ultimately concluding that the delegation of the "treatment program" decision to a probation officer is impermissible if the decision is considered a "judicial act."

A. Development of the Doctrine

The first major Supreme Court case to address Article III delegation came in 1932 with Crowell v. Benson, in which the Court considered the constitutionality of delegating judicial functions to the United States Employees' Compensation Commission, a non-Article III administrative agency. The case arose out of the Longshore and Harbor Workers' Compensation Act, which created rights to compensation arising out of injuries on navigable waters, while giving the Commission jurisdiction to hold evidentiary hearings over some of those claims. The Court's decision turned on whether "essential attributes" of the judiciary remained in the Article III court; if so, the delegation would be permissible. While the Court noted the utility and policy reasons for desiring a separate fact-finder to aid the Article III courts, it made clear that these reasons could not drive the decision to delegate. The Court also rejected the contention that this was a "public rights" case, which would constitute an exception to Article III delegation concerns, because the case involved the liability of one private party to another.

Nonetheless, the Court found the delegation permissible. While the agency was delegated the role of primary fact finder, the Court found determinative that all questions of law, constitutional fact, and jurisdictional fact were subject to de novo review by an Article III court, and other questions of fact

55. 285 U.S. 22.
56. Id. at 36-37.
57. Id. at 51.
58. Id. at 56-57. For a discussion of the policy benefits of this delegation, see supra notes 5–12 and accompanying text.
59. Crowell, 285 U.S. at 50–51. These cases typically involve suits between a private individual and the United States government. Id. at 50. This distinction sounds in separation-of-powers considerations. When Congress creates the right, it is logical that Congress have some leeway in defining the boundaries of those rights through adjudication. However, no such justification exists for the encroachment on the judiciary with regard to constitutional rights. N. Pipeline, 458 U.S. at 83–84 (plurality opinion).
were subject to substantial evidence review. Further, authority for the ultimate execution of the order was left to the district courts. Thus, the essential attributes of the judicial power remained with the Article III court.

The Court refined its delegation doctrine again in 1980 in *United States v. Raddatz.* The Court addressed the constitutionality of the Federal Magistrates Act, which allowed magistrates to conduct evidentiary hearings and propose findings of fact and recommendations for rulings on certain motions. In deeming the delegation permissible, the Court noted a key distinction from *Crowell*—in *Raddatz,* judicial tasks were delegated to an officer appointed by the court, rather than to an administrative agency as was the case in *Crowell.* Moreover, the Article III court retained plenary discretion regarding whether to allow the magistrate to rule on these motions, magistrates were appointed and subject to removal by the district courts, and less deference was given to magistrates than to the agencies in *Crowell.* Finally, the magistrate’s findings resulted only in recommendations reviewed de novo; it was the Article III court that ultimately issued the order. The Court thus concluded that it was not addressing a situation in which the ultimate decision had been delegated.

61. *Id.* at 44.
62. In the meantime, the Court in 1973 held that non-Article III courts in the District of Columbia that tried federal criminal cases were unconstitutional. *Palmore v. United States,* 411 U.S. 389 (1973). Some of the language in *Palmore* could be broadly read as requiring no Article III limits on delegations involving criminal cases. *Id.* at 402 (“Nor, more particularly, has the enforcement of federal criminal law been deemed the exclusive province of federal Art. III courts.”). However, *Palmore* has since been read very narrowly, as the Court has suggested that the reasoning only applies in situations where Congress has exercised its “‘plenary authority’ under the District of Columbia Clause.” *N. Pipeline,* 458 U.S. at 76. The Court has suggested that, in such a situation, there are lesser separation-of-powers concerns, as “Congress’ power over the District of Columbia encompasses the full authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative.” *Id.* Since *Northern Pipeline,* the Court has not once relied on *Palmore’s* reasoning in any of its delegation cases. The rejection of a broad reading of *Palmore* is further supported by the fact that federal criminal cases are not deemed “public rights” cases. See infra note 109.
63. 447 U.S. 667, 669.
67. *Id.* at 681.
68. *Id.* at 685 (Blackmun, J., concurring).
69. See *id.* at 683 (majority opinion).
70. *Id.* at 682.
71. *Id.* at 681.
In 1982, the Court attempted to synthesize its previous delegation opinions in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* The Court addressed the constitutionality of the Bankruptcy Act of 1978, which created non-Article III bankruptcy courts and judges. The scheme allowed the bankruptcy judges to hear all cases arising under or related to Title 11 of the U.S. Bankruptcy Code. The case has no majority opinion, but Justice Brennan’s plurality opinion has maintained the most influence. Justice Brennan began by delineating three categorical historical exceptions to Article III: (1) territorial courts, (2) military tribunals, and (3) public rights cases. Most importantly for the purposes of this Note, the Court then went on to discuss the “adjunct” theory. That theory provides that even if one of the categorical exceptions does not apply, Article III still allows for certain adjudicative functions to be performed by subordinates of the courts. Justice Brennan characterized the *Crowell* and *Raddatz* cases as prime illustrations of the permissible use of adjuncts. Justice Brennan distilled from these cases two key requirements for adjuncts. First, where the underlying substantive right is congressionally created (as in *Crowell*), more can be delegated than where those rights are not congressionally created (as in *Raddatz*). Second, adjuncts “must be limited in such a way that ‘the essential attributes’ of judicial power are retained in the Art. III court,” so that “the ultimate decision is made by the district court.”

Applying these principles to the case before it, the Court found the delegation to bankruptcy courts impermissible. Justice Brennan noted that state law, not Congress, created the rights at issue here. Accordingly, the Court compared the scheme to that at issue in *Crowell*, finding that (1) the subject matter heard by the bankruptcy courts was much broader than in *Crowell*, (2) the bankruptcy court had total jurisdiction, not just jurisdiction over fact finding functions, (3) the bankruptcy court had all

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73. *N. Pipeline*, 458 U.S. 50.
74. *Id.* at 54.
75. *Id.* at 65.
76. *Id.* at 66.
77. *Id.* at 67.
78. See *id.* at 76–77.
79. *Id.* at 78–79.
80. *Id.* at 80–81. Thus, Justice Brennan noted that the level of delegation to the magistrates in *Raddatz* was significantly more restricted than the delegation to the agency in *Crowell*. *Id.* at 82–83.
81. *Id.* at 81.
82. *Id.* (quoting United States v. *Raddatz*, 447 U.S. 667, 683 (1980)).
83. *Id.* at 84–85.
84. *Id.* at 84.
85. *Id.* at 85.
86. *Id.*
ordinary powers of the district courts, unlike the agency in *Crowell*,87 (4) the
orders in *Crowell* were set aside if "not supported by the evidence," while
the standard for the bankruptcy courts was the more deferential "clearly
erroneous" standard,88 and (5) the bankruptcy courts, unlike the agency in
*Crowell*, could issue binding final judgments.89 These distinctions led the
plurality to conclude that the act impermissibly delegated to the bankruptcy
courts essential attributes of the judicial power.90

Four years later in *Commodity Futures Trading Commission v. Schor*,91
the Court took a more pragmatic approach to Article III delegation issues.
The Court addressed the constitutionality of the Commodity Futures Trading
Commission ("CFTC"), a non-Article III body that adjudicated claims under
the Commodity Exchange Act.92 Seemingly eschewing Brennan's formalistic
*Northern Pipeline* categories,93 the Court adopted a multifactor balancing test
to determine whether Article III had been violated. The Court considered:
(1) "the extent to which the 'essential attributes of judicial power' are reserved
to Article III courts"; (2) "the extent to which the non-Article III forum exercises
the range of jurisdiction and powers normally vested only in Article III
courts"; (3) "the origins and importance of the right to be adjudicated"; and
(4) "the concerns that drove Congress to depart from the requirements of Arti-
cle III."94 Noting that the CFTC was closer to the scheme in *Crowell* than the
scheme in *Northern Pipeline*,95 the Court also emphasized Congress's practi-
cal justifications for the CFTC in determining its permissibility.96 Justice
O'Connor's majority opinion concluded that there was only a de minimis encroachment on the realm of the judicial branch.97 In his dissent, Justice
Brennan criticized this emphasis on practical considerations, warning that it
could lead to the "incremental erosion" of Article III powers.98

The Court seemed to return to a *Northern Pipeline* formalistic view of
Article III in its recent opinion in *Stern v. Marshall*.99 The Court considered
the constitutionality of the new bankruptcy court scheme, which replaced
the one invalidated in *Northern Pipeline*.100 The Court specifically consid-

87. *Id.* (noting the bankruptcy courts' authority to preside over jury trials, issue declara-
tory judgments, and issue writs of habeas corpus).
88. *Id.*
89. *Id.* at 85–86.
90. *Id.* at 87.
92. *Schor*, 478 U.S. at 835–36. Specifically at issue was the Commission's adjudication
of state common-law counterclaims. *Id.* at 852.
93. *Id.* at 851 ("T]he Court has declined to adopt formalistic and unbending rules.").
94. *Id.*
95. *Id.* at 852–53.
96. *Id.* at 855–57.
97. *Id.* at 856.
98. See *id.* at 861–62 (Brennan, J., dissenting).
100. *Stern*, 131 S. Ct. at 2610.
erred the bankruptcy courts’ powers to decide a narrow category of claims without de novo review by district judges. Writing for the majority, Chief Justice Roberts first determined that the scheme did not fall within the “public rights” exception to Article III. The Court next addressed the question of whether the bankruptcy courts should be considered permissible adjuncts to the district courts. In determining that the bankruptcy courts were not adjuncts and that the Act had delegated “essential attributes” of the judiciary, the Court relied on the following considerations: (1) the bankruptcy courts adjudicated issues along a broad range of subject matter; and (2) the bankruptcy courts could issue final orders, reviewable only on appeal. It made no difference to the Court that the bankruptcy judges were appointed by the district courts rather than the president.

In Stern, the Court notably disagreed with two elements of Justice O’Connor’s opinion in Schor. First, echoing Justice Brennan’s dissent in Schor, the Court rejected the concept of de minimis intrusions, stating that “[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.” Second, the Court in Stern seemed to dispel the role of practical considerations in impermissible-delegation analysis. According to Chief Justice Roberts, “[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”

B. Application of the Adjunct Theory

The delegation of tasks to a probation officer must be viewed under the adjunct theory. None of the categorical Article III exceptions applies; the probation officer is neither a territorial court, nor a military tribunal, nor is the officer adjudicating public rights. Therefore, as in the bankruptcy and magistrate cases, the only potential justification for this delegation is under the adjunct theory.

101. Id. at 2620.
102. Id. at 2611.
103. Id. at 2618–19.
104. Id. at 2619.
105. Id.
106. Id. at 2620.
107. Id. at 2619 (quoting INS v. Chadha, 462 U.S. 919, 944 (1983)).
109. Public rights cases have been defined as those “between the Government and persons subject to its authority.” Crowell v. Benson, 285 U.S. 22, 50 (1932). Although the United States is a party in federal criminal cases, those types of cases do not fall within this exception. N. Pipeline, 458 U.S. at 70 n.24 (“Of course, the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party.”); see also Griffith v. Oles (In re Hipp, Inc.), 895 F.2d 1503, 1511 (5th Cir. 1990) (“[The public rights] doctrine has never encompassed criminal matters.”).
The adjunct analysis can be broken down into two questions: (1) whether any judicial function is being delegated away from Article III courts; and (2) if so, whether Article III oversight is sufficient, such that the “essential attributes” of the judicial power remain with the Article III courts. This Note considers these questions in reverse order. It first establishes that Article III oversight of the “treatment program” decision is insufficient. The rest of the Note then discusses whether the “treatment program” decision is a “judicial function,” such that it cannot be delegated consistent with Article III.

1. Article III Oversight

Article III oversight of “treatment program” delegation is clearly insufficient for the judiciary to retain its “essential attributes.” The Court has found the following factors relevant to whether “essential attributes” have been delegated: (1) whether the delegee could issue final orders,110 (2) whether the rights at issue were congressionally created,111 (3) whether the delegee’s powers extend beyond fact finding,112 (4) whether the delegee can exercise all ordinary powers of the district courts,113 (5) the breadth of the subject matter delegated,114 (6) the standard of review for factual findings,115 and (7) the standard of review for legal findings.116 All but two of these factors cut in the direction of an unconstitutional delegation. First, the probation officer’s decision to require a certain type of mental health treatment is, in essence, a “final order.” The officer is not merely making a recommendation to the judge; rather, the judge has ordered that the probation officer has final authority to make the treatment decision.117 Second, as in Raddatz, the officer is not deciding any congressionally created rights.118 Third, this power is broader than fact finding because the officer is making a final determination based on the facts. Fourth, the standard of review of supervised release conditions is either “abuse of discretion” or “plain error.”119 With regard to factual findings, “abuse of discretion” is more deferential than the “clearly erroneous” stand-

110. See Stern, 131 S. Ct. at 2619; N. Pipeline, 458 U.S. at 85–86.
111. N. Pipeline, 458 U.S. at 81–82.
112. Id. at 81.
113. Id.
115. N. Pipeline, 458 U.S. at 85. In one sense, the probation officer does not have the power to enforce his own decision, as he cannot hold the defendant in contempt for disobeying him. However, the court could hold the defendant in contempt for disobeying the probation officer’s order—even without reviewing the decision itself. In contrast, in Crowell, the order was not enforced until the matter was appealed and the district court had reviewed the determination. Crowell v. Benson, 285 U.S. 22, 44–45, 48 (1932).
118. See supra note 80 and accompanying text.
119. United States v. Allen, 312 F.3d 512, 514 (1st Cir. 2002). The “plain error” standard applies if no timely objection is made at trial. Id.
found to weigh against constitutionality in *Northern Pipeline*.

More notably, this same standard of review applies to the officer’s legal determination of the appropriate level of treatment. However, the cases emphasize the necessity of de novo review for legal determinations. In fact, in every scheme the Court has deemed permissible, such review has been in place.

The only factors on the other side of the scale are related: the probation officer has not been delegated the ordinary powers of the district courts, and the subject matter conferred is not especially broad. However, if these two factors alone could tip the scale in favor of permissibility, a judge could regularly delegate narrow (but important) decisions to a variety of other decisionmakers without salary and tenure protections. Article III could not tolerate such an erosion of a judge’s judicial functions. Further, the vast majority of the factors weigh in favor of finding the delegation impermissible, especially given the importance of the level of review for legal findings. Finally, even though there are legitimate policy reasons for desiring that probation officers make this decision, the Court has rejected the importance of functional concerns as a factor.

Article III delegation, at its core, is concerned with the separation of powers. One may argue that no significant separation-of-powers concerns are at issue here, since probation officers are appointed and employed by the district courts. Yet the *Stern* Court did not find this factor persuasive when it considered delegation to bankruptcy court judges, who are also appointed by the district courts. Even delegations that “may seem innocuous at first blush” risk a “compromise [of] the integrity of the system of separated powers and the role of the Judiciary in that system.” In other words, Congress’s mere creation of a scheme that tempts the judiciary to delegate even minor tasks raises separation-of-powers issues. Each individual judge will always desire to reduce his workload—a concrete, immediate benefit—without properly considering the long-term, abstract costs of delegating tasks to an individual not insulated by Article III protections.

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123. *See supra* notes 5–12 and accompanying text.

124. *See supra* note 107 and accompanying text.

125. *N. Pipeline*, 458 U.S. at 83 (discussing “the delicate accommodations required by the principle of separation of powers reflected in Art. III”).


127. *See supra* note 105 and accompanying text.


129. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1052 (7th Cir. 1984) (Posner, J., dissenting) (“The independence of the federal judiciary is as threatened by smothering Article III judges in non–Article III auxiliaries as by vesting the judicial power of the
These delegations risk the "incremental erosion" of the judiciary. One need not be convinced by the concededly speculative assumption that a probation officer may be biased by his close relationship to the defendant. The assumption of bias is made in the Constitution itself: anything less than Article III's tenure and salary protections fails "to give [the decisionmaker] maximum freedom from possible coercion or influence by the executive or legislative branches of the Government." When those Article III protections are not in place, and the above oversight factors are left unfulfilled, a constitutional violation occurs.

2. Presence of a Judicial Act

The oversight factors appear unfulfilled when a probation officer makes any decision regarding a condition of supervised release—even, for example, choosing the day of the week for a program the judge ordered. But such a conclusion would render almost every unreviewed action by a probation officer unconstitutional.

Implicit in the Supreme Court case law, however, is a threshold requirement that some "judicial act" has been delegated. Only then does the extent of Article III oversight become relevant. The Supreme Court delegation cases each deal with clear judicial functions, such as fact finding or the issuance of orders. The Court has therefore never needed to define a judicial act. Choosing the day of a week for a program is clearly nonjudicial, but the "treatment program" decision is more difficult. The remainder of this Note attempts to answer this question: is the "treatment program" decision a judicial act? If it is, then the Article III oversight is insufficient, and the delegation is impermissible.

III. A LIBERTY-CENTERED FRAMEWORK

This Part argues that a liberty-centered framework is appropriate for determining whether the "treatment program" decision qualifies as a judicial act. Section III.A summarizes the confusion in the lower courts surrounding the "treatment program" issue, concluding that all of the circuit courts, which have directly addressed the issue, have focused on the liberty interests at stake in deeming the delegation impermissible. Section III.B proposes an analytical framework, whereby the delegated decision constitutes a judicial act if it allows for "a significant deprivation of liberty beyond that ordered by the judge." This formulation finds support from lower court case law ad-

131. U.S. ex rel. Toth v. Quarles, 350 U.S. 11, 16 (1955); see also Stern, 131 S. Ct. at 2609 ("Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges.").
132. See supra Section II.A.
dressing other types of delegations to probation officers and parole boards. Section III.B also addresses and rejects other potential tests for resolving this issue.

A. Confusion in the Circuits

Although some have claimed that there is a circuit split on the “treatment program” issue,\footnote{E.g., United States v. Turpin, 393 F. App’x 172, 173 (5th Cir. 2010) (per curiam).} all of the courts addressing the issue directly have deemed the delegation impermissible by focusing on the liberty interests at stake. Confusion persists, however, because so many courts fail to recognize that the decision is being delegated. Consequently, these courts uphold orders that can be read to allow probation officers to make the “treatment program” decision.\footnote{Few of these cases contain even a single citation to any of the Supreme Court delegation cases discussed above. For example, the First Circuit upheld a delegation of the “treatment program” decision without even recognizing that there was a constitutional issue. United States v. Chan, 208 F. App’x 13, 16 (1st Cir. 2006) (per curiam).}

For example, the Second Circuit defines the test for the permissibility of a mental health condition delegation as follows:

If [the defendant] is required to participate in a mental health intervention only if directed to do so by his probation officer, then this special condition constitutes an impermissible delegation of judicial authority to the probation officer. On the other hand, if the District Court was intending nothing more than to delegate to the probation officer details with respect to the selection and schedule of the program, such delegation was proper.\footnote{United States v. Peterson, 248 F.3d 79, 85 (2d Cir. 2001) (per curiam) (citations omitted).}

This test, followed by several circuits,\footnote{E.g., United States v. Vazquez, 348 F. App’x 168, 171 (3d Cir. 2010); United States v. Heckman, 392 F.3d 400, 410 (3d Cir. 2010); United States v. Pruden, 398 F.3d 241, 250–51 (3d Cir. 2005); United States v. Allen, 312 F.3d 512, 516 (1st Cir. 2002).} can plausibly be read to allow the delegation similar in type or nature to the mental health treatment decision because such a decision is inclusive of the “selection and schedule of the program.”\footnote{Peterson, 248 F.3d at 85.} Similarly, an order of mental health treatment “[a]s deemed necessary” by the probation officer is a common order held to be permissible.\footnote{United States v. De Los Santos, 332 F. App’x 993, 993–94 (5th Cir. 2009) (per curiam) (alteration in original) (quoting Judgment at 5, United States v. De Los Santos, No. 2:05-cr-00020 (S.D. Tex. filed Jan. 12, 2009), ECF No. 51); United States v. Grubert, 339 F. App’x 406, 406–07 (5th Cir. 2009) (per curiam).} Under this language, a probation officer could presumably decide which type of treatment is necessary.

Another circuit has permitted an order of treatment “under the supervision of” the probation officer.\footnote{United States v. Wynn, 553 F.3d 1114, 1117, 1120 (8th Cir. 2009).} There, because treatment was not
specified, a probation officer would likely be the one deciding which type of program the defendant undergoes. The most common language orders a defendant to treatment "as directed by" the probation office or officer. Again, this order could be read to imply that the probation officer can direct the defendant to that officer's choice of mental health program.

Because circuit courts have upheld these vague orders, probation officers can make "treatment program" decisions pursuant to their unclear terms. But appellate court approval should not be construed to support a conclusion that these circuit courts find "treatment program" delegation permissible. In fact, these courts have failed to recognize that the decision has been delegated in the first place. This is the result of several factors. First, this issue is often one of many issues brought on appeal and one to which courts rarely devote more than a paragraph or two. Another reason for the lack of attention to the "treatment program" decision is that the debate has focused primarily on whether the ultimate decision of "treatment versus no treatment" has been delegated. It is plausible that these courts, after analyzing whether the judge made the ultimate mental health treatment determination, have failed to consider the constitutional implications of the remaining decisions left to the probation officer through these broad orders. This lack of thorough analysis has also resulted in lower courts conflating the constitutional and statutory issues in these cases.

140. Id. at 1117.

141. See e.g., Heckman, 592 F.3d at 403, 409; United States v. Miller, 341 F. App'x 931, 934 (4th Cir. 2009) (per curiam); United States v. Smart, 472 F.3d 556, 558 (8th Cir. 2006); United States v. Stephens, 424 F.3d 876, 879, 882 (9th Cir. 2005); Allen, 312 F.3d at 515.

142. See, e.g., Wynn, 553 F.3d at 1120; De Los Santos, 332 F. App'x at 993; Allen, 312 F.3d at 516.

143. See, e.g., Wynn, 553 F.3d at 1120; Miller, 341 F. App'x at 932–33; United States v. Nash, 438 F.3d 1302, 1306 (11th Cir. 2006); United States v. Pruden, 398 F.3d 241, 251 (3d Cir. 2005); Stephens, 424 F.3d at 880; Allen, 312 F.3d at 516; United States v. Peterson, 248 F.3d 79, 85 (2d Cir. 2001).

144. See, e.g., Grubert, 339 F. App'x at 406 ("[Defendant shall] participate in a mental health program as deemed necessary and approved by the probation officer." (quoting Judgment at 4, United States v. Grubert, No. 6:08-cr-00007 (S.D. Tex. filed Sept. 26, 2008), ECF No. 38)); Wynn, 553 F.3d at 1117, 1120 ("[Defendant shall] participate in mental health counseling under the supervision of the U.S. Probation Office . . . ." (quoting Judgment at 3, United States v. Wynn, No. 4:07-cr-00011 (E.D. Ark. filed Aug. 27, 2007), ECF No. 24)); Allen, 312 F.3d at 515 ("[D]efendant shall participate in a program of mental health treatment, as directed by the probation officer . . . ." (quoting United States v. Allen, No. 2:01-cr-00035 (D. Me. filed Nov. 6, 2001)).

145. Several circuits, in determining whether a delegation was constitutionally permissible, have looked at whether there was factual support for conclusions on the defendant's mental health issues. E.g., United States v. Vazquez, 381 F. App'x 168, 173 (3d Cir. 2010); Heckman, 592 F.3d at 410; Allen, 312 F.3d at 516. The First Circuit argued that "[t]he extensive evidence of [the defendant's] mental illness indicates that the court was imposing mandatory counseling and delegating the administrative details to the probation officer, actions constituting a permissible delegation." Allen, 312 F.3d at 516. That court appears to be saying that the evidence of the defendant's mental illness helps show that the judge intended to make the treatment mandatory. This argument is a weak one, since it is difficult to imagine this evidence being conclusive of a judge's intent. The reasoning would be valid, however, if
The circuits that have expressly addressed the “treatment program” issue—the Third, Ninth, and Tenth—have determined that this delegation is impermissible. The Third Circuit, in United States v. Mangan, rejected as unconstitutional an order that the defendant undergo mental health treatment “as directed by the U.S. Probation Office.” This holding was made both on the determination that the ultimate decision was delegated and because the probation officer would have the authority to choose the treatment program. In United States v. Esparza, the Ninth Circuit held unconstitutional an order that the defendant participate in either an inpatient or outpatient program, as determined by the probation officer. Most recently, in United States v. Mike, a district court ordered that the defendant undergo mental health treatment but left it to the probation officer to decide whether the program would include residential placement. The Tenth Circuit found this delegation by the district court impermissible as well.

While none of these circuits conducted a rigorous constitutional analysis, they each placed a strong emphasis on liberty interests. The Ninth Circuit in Esparza noted the restrictiveness of inpatient psychiatric care in terms of the “liberty interest at stake,” finding support in Congress’s protections applying to civil commitment in such facilities. The Third Circuit in Mangan emphasized the “deprivation of liberty” resulting from the mental health treatment condition, which the court defined as a “substantive aspect[] of Mangan’s sentence.” Finally, the Tenth Circuit in Mike laid out a specific test, holding that “any condition that affects a significant liberty interest, such as one requiring the defendant to participate in residential

the issue was not the delegation’s constitutionality but its permissibility under the United States Sentencing Guidelines. Under the Guidelines, a condition of supervision requiring mental health treatment is permitted “[i]f the court has reason to believe that the defendant is in need of psychological or psychiatric treatment.” U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(d)(5) (2011). In United States v. Pruden, the Third Circuit properly determined that the delegation was not allowable under the Guidelines because of the defendant’s lack of a mental health history. See 398 F.3d 241, 250–51 (3d Cir. 2005). The court, for other reasons, also determined that the delegation was unconstitutional. Id. at 251. Later Third Circuit cases, in an attempt to distinguish Pruden, used the defendant’s mental history as support for the delegation’s constitutionality. Vazquez, 381 F. App’x at 173; Heckman, 592 F.3d at 410.

146. United States v. Mike, 632 F.3d 686 (10th Cir. 2011); United States v. Mangan, 306 F. App’x 758 (3d Cir. 2009); United States v. Esparza, 552 F.3d 1088 (9th Cir. 2009) (per curiam).


148. Mangan, 306 F. App’x at 761 (“In our view, it is the District Court that must determine the type and duration of mental health treatment. These are substantive aspects of Mangan’s sentence and not simply administrative details.”).

149. 552 F.3d at 1091.

150. 632 F.3d at 698–700.

151. Mike, 632 F.3d at 699.

152. Esparza, 552 F.3d at 1091; see also Mike, 632 F.3d 686.

153. Mangan, 306 F. App’x at 759.

154. Id. at 761.
treatment... must be imposed by the district court.”155 This emphasis suggests that any assessment of the constitutionality of “treatment program” delegation must consider the significant liberty interests at stake.

B. A Proposed Framework: Finding a Judicial Act Where There Has Been a Significant Deprivation of Liberty

This Note argues that a modified version of the *Mike* test, asking whether the delegated decision allows for “a significant deprivation of liberty beyond that ordered by the judge,” provides the proper framework for resolving the “treatment program” issue. Answering the question affirmatively is sufficient to conclude that a “judicial act” has been delegated.156 There is nothing more inherent to the judicial power than the ability to restrict a person’s liberty—a power most evident in the court’s authority to order physical confinement. Additionally, decisions affecting liberty interests have some of the most serious consequences, and therefore, benefit most from Article III protections.157

This intuition finds support in two other sources of case law: other types of delegation to probation officers, as discussed in Section III.B.1, and delegation to federal parole boards, as discussed in Section III.B.2. Finally, Section III.B.3 rejects other potential tests for defining a “judicial function.”

1. Case Law on Delegation to Probation Officers

This Section discusses delegation of decisions with regard to drug testing, personal contact provisions, polygraph testing, and the issuance of a summons and argues that the decisions in these cases are consistent with the proposed liberty test. Several circuits have encountered delegation issues regarding conditions of probation that require drug testing. The issue arises when the court does not specify the number of drug tests to be administered, leaving the decision to the probation officer. The First and Seventh Circuits have determined that

155. *Mike*, 632 F.3d at 696 (citations omitted).

156. However, this Note does not argue that passing this test is necessary for an act to be deemed judicial. For example, a majority of circuits have found the delegation of restitution payment schedules impermissible. *E.g.*, United States v. Overholt, 307 F.3d 1231, 1256 (10th Cir. 2002); United States v. Merric, 166 F.3d 406, 409 (1st Cir. 1999); United States v. Graham, 72 F.3d 352, 357 (3d Cir. 1995); United States v. Johnson, 48 F.3d 806, 809 (4th Cir. 1995); United States v. Porter, 41 F.3d 68, 71 (2d Cir. 1994); United States v. Albrow, 32 F.3d 173, 174 (5th Cir. 1994) (per curiam); United States v. Gio, 7 F.3d 1279, 1292 (7th Cir. 1993). Thus, there may be situations where a decision significantly affecting proprietary or monetary interests may also qualify as a judicial act, though this is beyond the scope of this Note.

This test, on its face, could imply that any significant liberty-depriving act of a private party could be deemed judicial. This is obviously not the case. It would probably be more accurate to say that the test only applies in a situation where the act is taken to decide a legal controversy. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 131 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690). However, it is not necessary to delve deeply into the issue, as decisions by probation officers surely satisfy this prerequisite.

the delegation of this decision is unconstitutional.\textsuperscript{158} The Ninth Circuit held that the probation officer could determine the number of tests, as long as the court set a maximum number.\textsuperscript{159} No circuit that has addressed the issue has found it entirely permissible to delegate this decision. Additionally, the Third Circuit has held that it is not permissible to delegate to a probation officer the decision as to whether the defendant can have contact with certain individuals.\textsuperscript{160} The Ninth Circuit, in its only case addressing the issue, allowed such delegation because the court was only soliciting the probation officer's recommendation.\textsuperscript{161}

Yet there have been several types of delegation to probation officers that courts have deemed acceptable. The First Circuit has determined that, once a court orders that a defendant submit to polygraph testing, it is permissible to allow the probation officer to determine the scope of the questions, the frequency, and the duration of such tests.\textsuperscript{162} Also, the Eleventh Circuit ruled that once a court decides to issue a summons, it can delegate to the probation officer the actual task of issuing the summons.\textsuperscript{163}

Although the reasoning of these cases does not expressly turn on whether significant liberty interests are at stake, the outcomes suggest such a distinction. Drug tests and no-contact provision decisions each implicate significant liberty interests—in one's own bodily fluids and in the freedom to interact with others respectively. This informs why courts are hesitant to allow their delegation. On the other hand, tasks that courts have found permissible, such as administering a polygraph test and issuing a summons, do not implicate such serious liberty interests. While there may be other explanations for these outcomes,\textsuperscript{164} it is significant that application of the Mike test would not require overturning this substantial body of case law.

\textsuperscript{158} See, e.g., United States v. Tejeda, 476 F.3d 471, 473–74 (7th Cir. 2007); United States v. Padilla, 415 F.3d 211, 224 (1st Cir. 2005) (en banc). However, both circuits, while holding that the delegation did constitute error, held that no reversible plain error existed, as it could not be shown that the defendants would be any worse off had the district court, rather than the probation officer, determined the number of drug tests to be administered. Tejeda, 476 F.3d at 475; Padilla, 415 F.3d at 223. Again, there have been questions as to what type of language constitutes delegation. See United States v. Figueroa-De-La-Cruz, 128 F. App’x 775, 777 (1st Cir. 2005) (per curiam).

\textsuperscript{159} United States v. Stephens, 424 F.3d 876, 883 (9th Cir. 2005). Interestingly, the court narrowed this holding to situations in which drug tests were ordered specifically. If there was a general treatment in which drug tests were a part of, the court is not required to set a maximum number. Id. This became a non-issue after district courts issued general orders capping the maximum allowed of drug tests allowed. See, e.g., United States v. Teson, No. 94-1136GT, 2007 WL 1114052, at *2 (S.D. Cal. Apr. 4, 2007) (noting that the district court's General Order No. 547 "cured any possible Stephens problems").

\textsuperscript{160} United States v. Voelker, 489 F.3d 139, 154 (3d Cir. 2007). The Fifth Circuit, citing Voelker, has allowed the delegation where the condition was in place for only a period of several years. United States v. Rodriguez, 558 F.3d 408, 416 (5th Cir. 2009).

\textsuperscript{161} United States v. Bowman, 175 F. App’x 834, 838 (9th Cir. 2006).

\textsuperscript{162} United States v. York, 357 F.3d 14, 21 (1st Cir. 2004).

\textsuperscript{163} United States v. Bernardine, 237 F.3d 1279, 1283 (11th Cir. 2001).

\textsuperscript{164} See infra Section III.B.3 (discussing and rejecting other potential tests).
2. Case Law on Delegation to Federal Parole Boards

The United State Parole Commission ("USPC") has also posed Article III delegation issues. Although its constitutionality has been consistently upheld, the reasoning in these decisions provides further support for the "significant deprivation of liberty" test.

The USPC maintains broad authority to grant the release of incarcerated individuals. The Parole Commission and Reorganization Act created the USPC and empowered it to make parole release decisions for eligible federal prisoners. According to the statutory framework, eligibility for release depends on the sentence imposed by the Article III judge. If the judge orders a definite sentence, the prisoner is usually ineligible for release until he has served one-third of the sentence. However, if the judge sets only a minimum term of incarceration, the prisoner is not eligible for parole until that term ends. Finally, if the judge sets a maximum sentence only, the USPC has authority to release the prisoner at any time. Once the prisoner is eligible for release, the USPC follows a detailed set of statutory guidelines for determining whether release should be granted.

The ability of non-Article III actors to make such drastic incarceration decisions is still consistent with the probation officer delegation precedent, as discussed in Section III.B.2. The reasoning behind the USPC cases turns on the fact that the judge retains control over the minimum and maximum deprivation of liberty:

The Commission may not require a prisoner to spend a single day in prison longer than his judicial sentence dictates, regardless of whether it thinks that the judge mischaracterized the nature of the offense or the offender's potential for committing further harm. In addition, the Commission may not release a prisoner even one day earlier than his judicially set parole eligibility date ...

165. In 1984, Congress repealed the statute creating the USPC. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 1837, 2027. Though the repeal was initially to take effect five years after November 1, 1987, see id. § 235(b), 98 Stat. at 2032–33, the effective date has been pushed back by a string of subsequent legislation, the most recent in 2011. See United States Parole Commission Extension Act of 2011, Pub. L. No. 112-44, 125 Stat. 532 (extending the life of the USPC to November 2013).


168. Id. § 4205(a), reprinted in 18 U.S.C. ch. 311 note at 776.

169. Id. § 4205(b)(1).

170. Id. § 4205(b)(2).

171. Id. § 4206(a), reprinted in 18 U.S.C. ch. 311 note at 777.


Article III Limits on Mental Health Treatment

Such a scheme is not much different than Congress’s ability to set terms of punishment for specific crimes. Even if a judge may have had an expectation of the length of incarceration, the Supreme Court has deemed this irrelevant.

The USPC cases have found the parole scheme constitutional because the USPC’s decision “does not enhance the sentence” or “extend [the defendant’s] sentence.” In other words, any extension of a prison sentence—any additional deprivation of liberty—beyond the sentence the judge orders would be impermissible. This parallels the test proposed in this Note, which would disallow “a significant deprivation of liberty beyond that ordered by the judge.”

Therefore, the USPC cases support this Note’s liberty-centered test, subject to two important distinctions. First, in the “treatment program” cases, the judge is not setting a maximum amount of deprivation (such as a prison sentence), but rather is ordering participation in a generic mental health treatment program. However, this is no less troublesome, since it is impossible to know what the judge has in mind when making that order. Unless the judge desired that the defendant undergo the most restrictive program, there is always the possibility that the probation officer can choose a program more restrictive—and therefore, more liberty depriving—than the judge contemplated. Second, the Federal Parole Board scheme does not allow probation officers to release a prisoner below a minimum term. However, this is only a statutory requirement, and the case law provides no reason to believe this plays a role in the constitutional analysis.

3. Other Potential Tests

Before proceeding, this Section will briefly address two other potential frameworks for determining whether an act is a judicial function: the distinction between “ministerial tasks” and “ultimate responsibility,” and the

174. Id.
175. United States v. Addonizio, 442 U.S. 178, 190 (1979) (“To require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack as a mechanism for ensuring that these expectations are carried out, would substantially undermine the congressional decision to entrust release determinations to the Commission and not the courts.”). Despite this language, the Supreme Court has never reached the Article III issue; Addonizio was decided on statutory grounds. See id. at 186.
177. Weppner v. U.S. Parole Comm’n, 95 F.3d 47, 47 (5th Cir. 1996) (per curiam).
178. A third distinction is that the USPC is an agency in the executive branch, see 18 U.S.C. §§ 4201–4218 (repealed 1984), reprinted at 18 U.S.C. ch. 311 note 774–81 (2006), while probation officers are employees of the judiciary: 18 U.S.C. § 3602 (2006). However, this is a distinction without a difference in the Article III delegation analysis. See supra notes 125-129 and accompanying text.
179. E.g., United States v. Stephens, 424 F.3d 876, 878–79, 882 (9th Cir. 2005).
distinction between punishment- and rehabilitation-motivated decisions. Neither distinction provides a workable test for permissible delegation.

A handful of courts have determined the constitutionality of delegations to probation officers by distinguishing between "ultimate responsibility" and "ministerial act[s]." But courts have not adequately fleshed out this test. They have not recognized any factors that courts should consider when drawing this line, and the analysis includes little more than conclusory assertions. Regardless of the merits of the test, the "treatment program" decision cannot be deemed ministerial under any formulation. Because of the open-ended nature of these orders, the probation officer has total discretion in the choice of program; there are no guidelines to follow or factors to consider. Thus, there is no support for the notion that probation officers can make the "treatment program" decision "without regard to or exercise of [the officers'] own judgment upon the propriety of the act being done." In addition, a decision with such significant implications for the lives of defendants is not one "involving merely execution of a specific act arising from fixed and designated facts."

At first glance, the punitive-versus-rehabilitative distinction has more appeal. The First Circuit hinted at this test in United States v. Merric, when it discussed the punitive aspects of restitution payments in determining that a probation officer could not set the schedule for these payments. However, while punishment is one judicial function, it is not necessarily the sole judicial function. In deciding the constitutionality of a court setting aside a sentence mandated by statute, the Supreme Court indeed stated that, "under our constitutional system the right to try offences against the criminal laws and upon conviction to impose the punishment provided by law is judicial." Based on this language, it may very well be true that all punitive

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181. E.g., United States v. Miller, 341 F. App’x 931, 932–33 (4th Cir. 2009) (per curiam) (quoting United States v. Bernardine, 237 F.3d 1279, 1283 (11th Cir. 2001)) (internal quotation marks omitted); see also United States v. Nash, 438 F.3d 1302, 1305 (11th Cir. 2006) (per curiam).

182. In fact, these courts supply little discussion at all as to why the delegation at issue should fall into one category over another. See, e.g., Miller, 341 F. App’x at 932–33; Nash, 438 F.3d at 1305.

183. E.g., Nash, 438 F.3d at 1306 ("[T]he district court has delegated to the probation officer the ‘ultimate responsibility’ of whether Nash must participate in mental health counseling instead of the ‘ministerial function’ of how, when, and where the defendant must participate.").


185. See infra Section IVA.

186. See BALLENTINE’S LAW DICTIONARY 803 (3d ed. 1969) (defining "ministerial duty").

187. 166 F.3d 406, 409 (1st Cir. 1999).

188. Perhaps the same could be said about liberty—that not all judicial functions implicate significant liberty interests. But this Note does not make that assertion; it only argues the inverse, that all acts affecting significant liberty interests constitute judicial functions.


190. Id. at 41.
actions must be left to the Article III judge. But this does not require that punitive decisions be the only actions over which a judge has sole authority. For example, the orders given by a judge in a typical bankruptcy action are not punitive, yet the Supreme Court determined that they may be non-delegable. Additionally, imposition of liability in civil cases is surely a "judicial function," though most civil remedies would not be considered punitive.

This distinction could also lead to an absurd result. The Supreme Court has noted that the probation and parole system generally has a rehabilitative rather than punitive focus, and the statutory scheme also reflects this. Therefore, under the punitive-versus-rehabilitative distinction, all decisions regarding conditions of supervised release could be delegated to probation officers. This would overturn whole bodies of case law. For example, such a distinction would allow officers to make even the ultimate decision of treatment versus no treatment—a decision that the circuits all agree is not delegable, and which has serious implications.

On the other hand, the liberty-focused test is grounded in case law, as shown by its consistency across a range of delegation cases. Further, courts commonly are adept at analyzing liberty interests, as shown by Due Process Clause jurisprudence. Thus, the test proposed in this Note does not face the obstacles burdening these alternatives.

IV. LIBERTY AND INPATIENT MENTAL HEALTH TREATMENT

Part IV considers whether a significant liberty interest is at stake in this "treatment program" decision. Section IV.A concludes, based on Supreme Court language and inpatient mental health treatment literature, that such an interest is implicated and the delegation is therefore unconstitutional. Section IV.B briefly considers ways in which the current scheme can be amended to comply with Article III.

A. Application of the Test

The Supreme Court, in dicta from a line of civil commitment cases, has strongly suggested that the "treatment program" decision implicates a

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192. Hence the distinction between compensatory and punitive damages.
194. Compare 18 U.S.C. § 3553 (2006 & Supp. IV 2010) (listing the need for providing just punishment as a factor to be considered in sentencing), with id. § 3583 (incorporating several of the sentencing factors to conditions of supervised release, but expressly omitting the punishment factor).
195. See supra note 143 and accompanying text.
196. See infra Section IV.A.
197. See supra Part III; infra Sections IV.A, IV.B.
198. See infra Section IV.A.
significant liberty interest, and nonlegal mental health treatment literature supports this conclusion. Because the delegation issue will be adjudicated on appeal before the probation officer ever makes a decision, the analysis must be facial rather than as applied. In other words, since it is impossible to know ex ante what decision the probation officer would ultimately make, it makes sense to look at the deprivation of liberty of the officer's most restrictive option. Thus, the focus will be on inpatient mental health treatment.

The Supreme Court has mandated significant procedural protections for involuntary civil commitment, primarily because inpatient treatment is extremely restrictive on liberty. The Court first addressed civil commitment in O'Connor v. Donaldson, when it considered whether a state could confine an individual solely because he or she is determined to have a mental illness. The Court acknowledged that civil confinement may in some cases protect the individual from self-inflicted harm but rejected the notion that the possible increased quality of life in an institution was sufficient to hold him against his will. Because the individual was not dangerous, the state's confinement was deemed a violation of due process.

Four years later, the Court addressed the proper burden of proof for civil commitment decisions in Addington v. Texas. The Court noted the need to balance the individual's liberty interests against the state's legitimate parens patriae interests in caring for its citizens, as well as its police power interests in protecting its citizens from the dangerous mentally ill. In conducting this balancing test, the Court determined that due process requires at least a "clear... and convincing evidence" standard. At the core of both of these decisions was the liberty interest being infringed by inpatient commitment, and the Court used strong language to assert this. In O'Connor, the Court spoke of the individual's "constitutional right to freedom." In Addington, the Court noted that "civil commitment... constitutes a significant deprivation of liberty that requires due process protection." Even where an individual has already been convicted of a crime (and arguably has lesser liberty interests), the Court has deemed post-incarceration civil commitment a "massive curtailment of liberty." The Court's holding that the Due Process Clause requires certain procedures

200. O'Connor, 422 U.S. at 575.
201. Id.
202. Id. at 576. The issue of due process is outside the scope of this Note.
204. Addington, 441 U.S. at 426.
205. Id. at 433 (internal quotations marks omitted).
207. Addington, 441 U.S. at 425.
before a defendant's transfer from a prison to a mental health facility also supports this proposition.209

Literature on inpatient treatment further confirms the Court’s conclusion that a significant liberty interest is at stake in inpatient mental health treatment decisions. The typical inpatient stay restricts liberty in a way mirroring that of a prison sentence. For example, patients often have limited access to cell phones or other forms of communicating with the outside world.210 The hospital or treatment facility may also confiscate the patient’s belongings.211 Some patients are barred from leaving the facility under any circumstances because the doors are locked twenty-four hours a day.212 At the very least, most patients are restricted to the hospital unit’s boundaries for the first twenty-four hours, with any subsequent increase in freedom left in the hands of doctors and nurses.213

Inpatient treatment also entails a risk of physical harm. Even with increasing quality of care,214 there are still significant dangers in inpatient treatment. For example, it is estimated that 150 deaths are caused each year in the United States from the use of seclusion and restraints in psychiatric hospitals.215 Further, a random sampling of 31 psychiatric hospital patients detected 2,194 medication errors during the patients’ collective 1,448 inpatient days.216 58 percent of those errors were judged to have the potential to cause severe harm.217 More serious methods are used for disruptive patients: “Seclusion is the placement and retention of an inpatient in a bare room for containing a clinical situation that may result in a state of emergency. Restraint involves measures designed to confine a patient’s bodily movements.”218 Patients may be subject to potentially more serious

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210. Lauri Kuosmanen et al., Deprivation of Liberty in Psychiatric Hospital Care: The Patient’s Perspective, 14 NURSING ETHICS 597, 601 (2007). These results were based on interviews of fifty-one patients in two acute psychiatric inpatient wards. Id. at 597.

211. Id. at 601 (citing clothes, money, and other personal belongings).

212. Id. at 600.


214. Nancy P. Hanrahan & Linda H. Aiken, Psychiatric Nurse Reports on the Quality of Psychiatric Care in General Hospitals, 17 QUALITY MGMT. HEALTH CARE 210, 210–11 (2008), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2582015/pdf/nihms-75082.pdf. This study sample consisted of 456 registered nurses permanently assigned to psychiatric units, as well as a larger sample of 11,071 registered nurses who work permanently on medical, surgical, or medical–surgical units. Id.

215. Id. at 211.

216. Id.

217. Id.

deprivations of liberty by being forced to take medications either orally or by injection. These dangers have led to legitimate fears. In 2008, of those with unmet mental health care needs, 9.6 percent did not seek treatment for fear of being committed or being forced to take medicine. While such serious liberty deprivations may not be the norm, these risks are probative of the liberty interests at stake.

The literature and cases make clear that inpatient mental health treatment can result in a significant curtailment of a defendant’s liberty interests. Because imposing deprivations of liberty is a function of the judiciary, it follows that the “treatment program” decision is an exercise of a judicial function. And because the court delegates a judicial function and Article III oversight is inadequate, delegating the “treatment program” decision to a probation officer does not pass scrutiny under the “adjunct theory.” Therefore, as interpreted by the Supreme Court, Article III requires that an Article III judge make the “treatment program” decision.

B. Possible Solutions

While the main purpose of this Note is to establish the impermissibility of delegation of the “treatment program” decision to a probation officer, the discussion prompts the obvious question: how can the current scheme be made constitutional? This Note outlines some potential solutions.

At one extreme, judges can simply decline to delegate this decision, always specifying in their orders the type of treatment program to be administered. This would, of course, skirt the constitutional issue. It would also result in the policy benefits of a having neutral, insulated decisionmaker weighing all of the relevant considerations. The main objection to this proposal is that probation officers can make more individually tailored decisions, while making adjustments to the treatment over time. Judges, on the other hand, have much less flexibility. While they technically could modify their decision upon rehearing, docket control concerns would likely preclude this. The practical result is that judges would be forced to make an untailored treatment decision at the time of sentencing.

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hospitals [studied] ranged from 0.4 to 9.4% of patients.”). These conclusions were drawn from a survey of multiple studies. Id.; see also Munich & Greene, supra note 213, at 31 (“The patient is physically held and escorted with force or possibly put on the floor, and then carried by staff to a seclusion area.”).

219. Kuosmanen et al., supra note 210, at 601.


221. See supra notes 13–15 and accompanying text.

222. See supra notes 11–12 and accompanying text.

223. See, e.g., United States v. Heath, 419 F.3d 1312, 1314 (11th Cir. 2005) (per curiam).

224. See supra notes 7–8 and accompanying text.
Another option is to create a framework with sufficient oversight by the Article III judge so that delegation even of the judicial act can be permissible.225 Like the schemes in Crowell and Raddatz, the probation officers could provide a proposal to be reviewed de novo by the district judge.226 Such a scheme would be permissible, as it would avoid the main problem of having all discretion delegated away in the judge’s final order. In fact, it would not appear very different from the magistrate scheme approved in Raddatz.227 However, it is unclear whether this would be significantly less burdensome than having a rehearing for the judge to modify the final decision. It still requires further action taken by a judge and therefore raises the same efficiency concerns.

One proposal would likely avoid the constitutional issue while striking a balance between the tailored decision by the probation officer and the neutral decision-making of the Article III judge. The judge, at the sentencing hearing, could set the maximum restrictiveness of the mental health program while allowing the probation officer to choose a less restrictive program at some point in the future. For example, the judge would order the defendant to undergo “a health treatment program chosen by the probation officer, but no more restrictive than an inpatient program [or program X].” This would be consistent with the test outlined in this Note, as it would not allow the probation officer to deprive the defendant of any additional liberty beyond that which the judge ordered.228 The proposal would also allow probation officers to tailor the decision over time, as long as they act within the confines of the order. And here, as opposed to the impermissible wide-open delegation, the judge must decide the maximum treatment after considering its suitability for the particular defendant.

One may object that a judge can easily overcome this obstacle by routinely ordering inpatient treatment as the maximum, resulting in a delegation of the entire decision to the probation officer. However, the same objection could be made to other delegations the Supreme Court has deemed permissible. A judge could decide to always rubber stamp a magistrate’s decision229 or the decision of an administrative agency.230 But we must assume that the judge will follow the law—here, the law requires that the judge give an independent judgment as to the propriety of the maximum treatment. Further, as demonstrated above, a significant problem with this

225. See supra Section II.B.
227. See Raddatz, 447 U.S. at 682. Both magistrates and probation officers are appointed by the courts. 18 U.S.C. § 3602 (2006); Raddatz, 447 U.S. at 685.
228. This is also consistent with the federal parole board case law, where judges were permitted to set a maximum jail sentence and allow the parole board to shorten it. See supra Section III.B. It is also consistent with the drug test cases, where the courts found it permissible for the judge to set a maximum number of drug tests in conditions of supervised release. See supra notes 158–161 and accompanying text.
229. See Raddatz, 447 U.S. 667.
decision is that judges do not realize what it is they are delegating.\textsuperscript{231} Forcing the judge to articulate the maximally intrusive treatment solves this problem by bringing the delegation front and center. Under the proposed solution, the judge would be required to contemplate the implications of the treatment and its appropriateness for the particular defendant.

\textbf{CONCLUSION}

While "courts cannot be expected to map out every detail of a defendant's supervised release,"\textsuperscript{232} Article III places limits on which details must in fact be mapped out by courts. The mental health "treatment program" decision is one such detail. Supreme Court precedent makes clear that the scheme under which this decision is made does not provide sufficient oversight over judicial acts delegated from the Article III judge to the probation officer. By applying the liberty-focused test proposed in this Note, the "treatment program" decision—one with significant liberty ramifications—qualifies as a judicial act, and its delegation is therefore impermissible. Instead of delegating this decision, judges should set a maximum-restrictive treatment, allowing a probation officer to choose any equally or less restrictive program.

\textsuperscript{231} See supra Section III.A.

\textsuperscript{232} United States v. Pruden, 398 F.3d 241, 250 (3d Cir. 2005).