

-MASTER, SPECIAL / APPOINTMENT OF -

BRIEF BANK

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MICHIGAN

U.S. v. Michigan



PC-MI-0007-0003

UNITED STATES OF AMERICA,)
)
Plaintiffs,)
)
v.)
)
STATE OF MICHIGAN, et al.,)
)
Defendants.)

No. G84-63-CA
Hon. Richard A. Enslen

BRIEF IN SUPPORT OF APPOINTMENT OF SPECIAL MASTER

I. MASTERS AND RELATED OFFICERS OF THE COURT HAVE HAD
A SALUTORY EFFECT IN ASSURING COMPLIANCE, AIDING
JUDICIAL EFFICIENCY AND PROMOTING APPROPRIATE
FEDERAL-STATE RELATIONS

A. The Use of Masters Has Been an Accepted Part of
Equitable Tradition

Because amici curiae expect that the parties to this
litigation may challenge the Court's exercise of its discretion
to appoint a special master, amici will demonstrate that the
Court's decision is wise and appropriate. Court-appointed
officers with limited quasi-judicial power have long been a
feature of common law equity tradition. See Silberman, Masters
and Magistrates, Part I: The English Model, 50 N.Y.U.L.REV. 1071
(1975).

In this country, the use of masters and related court-
appointed officers is a well-established practice. This practice
is rooted not only in the tradition of the English master, but
also in the use of receivers in complex corporate litigation.
While the use of masters is perhaps most widely known in complex

resources and expertise to carry out its judicial function.²

Subsequent to Brown,³ the Supreme Court underlined the authority of courts to take the remedial action necessary to cure a constitutional wrong: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 at 15 (1971). Cf. Hutto v. Finney, 437 U.S. 678 (1978), in which the Supreme Court approved a limit of thirty days on the duration of punitive confinement in the context of the Arkansas prisons:

In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation... But taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.

Id. at 687.

Just as the Supreme Court has approved substantive remedial orders that were flexible and creative in order to cure the constitutional violations found, so have the courts evolved procedural devices to aid in the implementation of relief that are tailored to the complexity of contemporary institutional litigation.

² For a comprehensive and illuminating discussion of the conceptual differences between traditional litigation and complex institutional reform litigation, see Chayes, The Role of the Judge in Public Law Litigation, 89 HARV.L.REV. 1281 (1976).

³ Brown v. Board of Education, 347 U.S. 483 (1954) [Brown I]; Brown v. Board of Education, 349 U.S. 294 (1955) [Brown II].

C. The Utilization of a Special Master Can Facilitate Implementation at the Same Time That It Limits Direct Judicial Intervention

1. The Use of a Special Master Facilitates Implementation of Relief

In a study commissioned by the Law Enforcement Assistance Administration, Harris and Spiller conclude in After Decision: Implementation of Judicial Decrees in Correctional Settings (American Bar Association Resource Center on Correctional Law and Legal Services, 1976)⁴ that the most important factors in non-compliance with judicial decrees are (1) an unwillingness or inability to comply on the part of one or more necessary actors; and (2) a lack of judicial determination to compel compliance. Id., 3. Compliance devices such as a special master can assist in overcoming both these problems. First, the appointment of a special master or similar officer acts as a direct signal of judicial resolve to the defendants. Second, the use of a special master gives a trial court greater flexibility to respond to the problem of defendant non-compliance. By utilization of a special master or similar court-appointed officer, the court preserves options beyond the unpalatable choices of closing an institution forthwith, throwing the defendants in jail, or ignoring wholesale non-compliance with the order. See, for example, the dilemma of the trial court in Ramos v. Lamm, 485 F.Supp. 122 (D.Colo. 1979) rev'd in part and

⁴ The Harris and Spiller report is probably the most extensive study of implementation problems in institutional litigation. It analyzed case studies of implementation of four separate prison or jail remedial decrees.

aff'd in part and remanded, 639 F.2d 559 (10th Cir. 1980), cert. denied, ___ U.S. ___, 101 S.Ct. 1759 (1981). Because Ramos is one of very few major prison cases in which a special master or other monitor was not appointed to assist in effectuating compliance, all the trial court then had to work with was a threat to close the maximum security institution, a threat the trial court obviously had no desire to carry out.

In contrast, the appointment of a master or similar monitoring device facilitates the division of the remedial task into smaller discrete units with interim deadlines. Such subdivision of the task gives the court early warning of problems in implementation, such as the problems here with the delayed submission of fire safety and mental health plans.⁵

2. Utilization of a Special Master Can Limit Direct, Coercive Judicial Intervention

One of the concerns frequently expressed regarding

⁵ "There is an ancient saying, Quis custodiet ipsos custodes? Who is guarding the guards? Which is peculiarly applicable to this kind of litigation. The answer to the question is, Nobody! The experience of this and other courts has demonstrated that it is not enough to make an order, no matter how detailed and explicit. Unless somebody checks the order against the defendants' performance, they do not perform. When somebody watches them, they squirm, but they comply, or get out of the way for someone else to do so. Thus, rather than using the classical, simple, and entirely appropriate remedy of sending the defendants to jail with the keys in their pockets, this court will undertake to monitor the defendants' future performance of its order."

Jones v. Wittenberg, 73 F.R.D. 82, 85 (N.D.Ohio 1976) (appointing special master), subsequent opinions 440 F.Supp. 60 (N.D.Ohio 1977), 509 F.Supp. 653 (N.D.Ohio 1980).

institutional litigation is that federal judicial intervention, even when necessary to remedy egregious conditions, trenches upon the appropriate relationships between the states and the federal government.

To the extent, however, that judicial intervention is necessary to protect provisions of the Bill of Rights incorporated into the protections of the fourteenth amendment, such intervention necessarily follows from our constitutional scheme of priorities. In such cases, the appropriate focus of concerns about federalism is not the prevention of necessary intervention but the reduction of the scope and level of intrusiveness of such intervention. Despite the superficial impression that appointment of a master increases the scope of intervention, in fact in numerous cases the use of a skilled and sensitive special master can serve to minimize the level of perceived intrusiveness of federal intervention.

The policing function of a special master discussed supra in section 1 is critical. But a special master has just as significant a potential role in moving the parties and the trial court away from confrontational relations. In reducing overly adversarial relations among the parties in the remedial phase of institutional litigation, a special master potentially can act directly on the willingness and ability of defendants and other necessary parties to comply.

The cases involving the appointment of a special master bear testimony that this ascribed role of the special master as a conciliator is a real one, even when the liability

stage of the litigation has resulted in some acrimony. See, e.g., the language of the District Court in Palmigiano v. Garrahy, 448 F.Supp. 659 (D.R.I. 1978), approximately five months after the original appointment of the Special Master:

We have found further that there have been long periods in which no efforts to comply were made whatsoever and other periods when efforts to comply were limited. The defendants were dilatory. We have found also that none of the reasons offered for delay by defendants related to an inability to comply.

Id. at 671.

With that language compare the language of the same court after the Special Master had held his office approximately fourteen months:

[The Special Master]... helped build at the inception of the implementation period a solid foundation for the court-directed reforms that are today moving slowly but inexorably towards completion.

* * *

[The Deputy Special Master] has helped to clarify and resolve problems that seemed to prevent compliance with the mandates of the August 10 Order [443 F.Supp. 556] while developing simultaneously a rare spirit of cooperation and mutual understanding among the parties that bodes well for the future. The Court has made frequent use of his mediating skills to resolve other prison controversies...

Palmigiano v. Garrahy, Order of January 30, 1979.

See also Taylor v. Perini, supra:

It is clear that all of the defendants in this action... are responsible for the state of non-compliance demonstrated by the report of

the Special Master. In addition, certain subordinates... are responsible for their failure to effectuate the terms of the Court's order of September 12, 1972...

413 F.Supp. at 193.

Within slightly more than two years the Special Master was able to find substantial compliance and to recommend termination of the Court's jurisdiction. Taylor v. Perini, 455 F.Supp. 1241. This recommendation was accepted by the court.

There is a critical point to be made here beyond the observation that ideally and often in practice special masters can promote efficient implementation by reducing adversarial relations that have developed during the liability segment of the litigation. This promotion of cooperative interaction with input by the defendants in the ongoing remedial process also is responsive to the requirements of federalism:

In Kendrick v. Bland, 740 F.2d 432 (6th Cir. 1984), the Court of Appeals reversed and remanded an order enjoining certain prison officials of the Kentucky State Prison from performing certain duties as an overly intrusive action. In the course of the opinion, however, the Sixth Circuit identified appointment of a compliance monitor as part of an appropriate minimally intrusive remedy:

Minimally intrusive relief may assume the form of an order enjoining a continuation of the practices, policies or conditions adjudged as constitutionally infirm whereby the responsibility of developing a program to safeguard against abridgement of constitutional rights in the future.... Such an injunction may be attended by the appointment of a monitor with authority to observe defendants' conduct and

thereby permit the federal court to oversee compliance with its continuing orders.

Id. at 438. (Citations omitted)⁶

Professor Chayes also notes the problem that can develop when a trial court judge becomes personally involved in negotiations regarding a remedial order, at a resulting cost in his time and impartiality. Chayes, supra, n.2 at 1300-1301. Conversely, total reliance on the plaintiffs to monitor compliance can be expected to promote intrusions into the defendant institution that may be fiercely resented. Note, Implementation Problems in Institutional Reform Litigation, 91 HARV.L.REV. 428, 445 (1977). Nor will a monitoring system that relies on defendants be likely to succeed:

Since defendants are unlikely to report non-compliance frankly, the plaintiffs' task remains both crucial and burdensome.⁷ Reports are more helpful if their format and content are specified with precision, but few courts have the expertise to formulate such requirements. Insofar as qualitative rather than quantitative improvements are mandated, standards of compliance may be unclear and advance specification of a perspicuous reporting format may not realistically be possible. Further, even a well-formulated reporting requirement may be frustrated by the defendant institution's lack of adequate information gathering or record keeping procedures. While the court may order

⁶ Kendrick's reference to a monitor as part of minimally intrusive relief seems to supersede United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981).

⁷ These problems here are exacerbated by the nominal plaintiff's misconceived solicitude for perceived state's rights issues that interferes with an appropriately vigorous advocacy on the part of the plaintiff.

the development of such procedures, this will further delay implementation.

Special Project: The Remedial Process in Institutional Reform Litigation, 78 COLUM.L.REV. 784 at 824. (Footnotes omitted) At the other extreme, of course, a failure by the court to supervise ongoing compliance so that the court is ultimately faced with the choice of ignoring violations of its orders, jailing the defendants, or closing institutions can scarcely be viewed as promoting legitimate goals of federalism. Rather, the object of the trial court must be to promote compliance with its orders at the same time that it remains sensitive to federalism. Despite the opposition of the defendants in this case, the proper use of a master can in fact reduce judicial intrusiveness.

D. This Court Should Appoint the Special Master Pursuant to Its Inherent Power as Well as Pursuant to Rule 53

Amici urge the Court to make its appointment of a special master pursuant to its inherent power as well as pursuant to Rule 53. The inherent power of the court to appoint a master has its source in the power of a court of equity to take the steps necessary to enforce its decree.

The Court of Appeals for this circuit has indicated, in the course of affirming appointment of a special master in a school desegregation case, that courts have inherent power to appoint special masters and similar court officers in institutional litigation of this type:

Further, it is a fact that public law litigation often places a trial judge in a position where his role is necessarily somewhat different from that performed in more traditional cases. This is especially true in

the remedial phase of a school desegregation or institutional reform case. School and institutional financing and administration are subjects with which few judges have more than a passing familiarity. Yet, when litigation exposes constitutional violations in public institutions a court of equity must take steps to eliminate them. In accomplishing this result trial courts frequently issue orders which require fundamental changes in the administrative and financial structures of the institutions involved. In order to accomplish these ends with fairness to all concerned a judge in equity has inherent power to appoint persons from outside the court system for assistance.

Reed v. Cleveland Bd. of Ed., 607 F.2d 737, 743 (6th Cir. 1979) (footnote omitted). In Reed, the court also approved the appointment of expert advisors or consultants to the special master and the court pursuant to either Rule 53 or the inherent power of the court. Id. at 746.

See also Ruiz v. Estelle, 679 F.2d 1115 at 1161 (5th Cir. 1982), mod. on other grounds, 688 F.2d 266, affirming the trial court's appointment of a special master pursuant to both Rule 53 and the inherent power of the court in a case involving the Texas prison system:

Furthermore, rule 53 does not terminate or modify the district court's inherent equitable power to appoint a person, whatever his title, to assist it in administering a remedy. The power of a federal court to appoint an agent to supervise the implementation of its decree has long been established.

(Footnote omitted)

In Miller v. Carson, 563 F.2d 741, 898 (5th Cir. 1977) the district court's appointment of an ombudsman was without reference to Rule 53. In Hart v. Community School Board of

Brooklyn, N.Y., School District 21, 383 F.Supp., supra, at 699, the court acted under Rule 53 and its inherent authority to appoint an expert; and in Jordan v. Wolke, 75 F.R.D. 696 (E.D.Wis. 1977), the trial court expressly disclaimed reliance upon Rule 53.

Because a court's inherent authority to appoint a master is not limited by Rule 53 of the Federal Rules, this Court should not be limited by the language in Rule 53 that mandates a showing that some exceptional condition requires the appointment. Rather, reference to a master is committed to the sound discretion of the trial court and is upheld absent an abuse of discretion. See Hoptowit v. Ray, 682 F.2d 1237, 1263 (9th Cir. 1982). Cf. Rogers v. Societe Internationale Pour Participations Industrielles et Commerciales, 278 F.2d 268 (D.C.Cir. 1960).

E. This Case Meets the "Exceptional Condition" Requirement of Rule 53

The instant case has in common with other major institutional litigation a degree of complexity that distinguishes such cases from typical two-party private litigation. Such cases, and certainly this one, by definition meet the "exceptional case" standard of Rule 53. There is nothing novel about the argument that "big" cases meet the definition of "exceptional" in Rule 53 whenever the court is demonstrably in need of additional resources. See Kaufman, Masters in the Federal Courts: Rule 53, 58 COLUM.L.REV. 452, 465 (1958).

Nor does the Supreme Court's decision in La Buy v. Howes Leather Co., 352 U.S. 249 (1957) affect the propriety of

reference to a master in this case. In La Buy, the Supreme Court disapproved a trial court's reference to a master in an antitrust case for the purpose of trying the case to determine liability. It was in this context of disapproving reference of the trial itself that the Supreme Court held that calendar congestion, the prospect of a lengthy trial, and complex issues did not by themselves constitute an exceptional condition under Rule 53. The Supreme Court in La Buy was making policy decisions, and not a judgment on constitutional limitations.⁸

Policy concerns regarding abdication of judicial authority and extra expense and delay are, however, quite different in the La Buy context in which the master determines initial questions of liability; when a master supervises implementation of a remedy, he or she executes rather than undermines judicial responsibility. Moreover, when supervision by a master becomes essential to vindicate a court's authority, the master speeds rather than delays conclusion of the litigation, and the cost is essential to the remedy involved. The courts have not considered the La Buy limitations on predecisional masterhips to apply outside of their policy context to post-decisional masterhips. Appointment of a special master is appropriate in the implementation of a major institutional reform case without other exceptional circumstances. See Gary W. v. State of Alabama, 601 F.2d 240 (5th Cir. 1978). See also Silberman, Part II at 1327; Nathan,

⁸ See Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975).

The Use of Masters in Institutional Reform Litigation, 10 U.TOL.L.REV. 419 (1979); and Special Project, supra, at 807.

It is certainly not the case that the trial court is required to wait until noncompliance with an initial remedial decree has become evident in order to turn to the services of a special master. See also Kendrick v. Bland, 740 F.2d at 439, supra, in which the Sixth Circuit noted that the court could appoint a monitor to observe defendants' conduct in a prison case in which the Court of Appeals noted that the defendants had a "history of cooperation and good faith demonstrated by the comprehensive Consent Decree" and the court assumed that this good faith would continue. In New York State Ass'n. for Retarded Children v. Carey, 706 F.2d 956, 960 (2nd Cir. 1983), the Court of Appeals upheld appointment of a special master in an institutional reform case in which the trial court had specifically found that the defendant's compliance actions were taken in good faith. In Amos v. Board of Directors, 408 F.Supp. 765 (E.D.Wis.) aff'd sub nom. Armstrong v. Brennan, 539 F.2d 625 (7th Cir. 1976), vacated on other grounds, 433 U.S. 672 (1977), a school desegregation case, the trial court expressed its confidence in the parties' good faith. Id. at 823. In Costello v. Wainwright, 387 F.Supp. 324 (M.D.Fla. 1973), aff'd, 489 F.2d 1311 (5th Cir. 1974), a prison medical care case, the Special Master was appointed prior to a decision in favor of plaintiffs after a prima facie showing that plaintiffs had a likelihood of success at trial. There was no suggestion of bad faith; rather, the court found that the appointment was "...in the best

interests of all parties and of justice..." Id. at 324-325. In Davis v. Watkins, 384 F.Supp. 1196 (N.D.Ohio 1974), a challenge to treatment in a mental hospital, the trial court appointed a special master at the time of entry of the initial remedial decree at the same time that it commended the parties and noted that "...these proceedings were marked with the spirit of cooperation and full disclosure contemplated by the Federal Rules of Civil Procedure." Id. at 1197. In Reed v. Cleveland Bd. of Ed., 607 F.2d 737, supra, the Court of Appeals did not suggest that there had been any bad faith in the case.

In New York State Ass'n. for Retarded Children v. Carey, 706 F.2d at 962-963, supra, the Second Circuit appropriately disposed of the argument that implementation of relief for an institution for the mentally retarded does not meet the exceptional condition requirement of Rule 53:

[Defendants'] argument that the present case fails to show the requisite "exceptional condition" under F.R.Civ.P.53(b) is wholly lacking in merit. The monitoring of a Consent Judgment that mandates individualized care for thousands of class members and that entails balancing of the interests of parties with third-party employers, school authorities, and community groups is just the sort of "polycentric problem that cannot easily be resolved through a traditional courtroom-bound adjudicative process" for which Judge Weinstein found a Special Master appropriate in Hart v. Community School Bd. of Brooklyn, 383 F.Supp. 699, 766 (E.D.N.Y. 1974), aff'd, 512 F.2d 37 (2nd Cir. 1975).

(Footnote omitted)

Moreover, the defendants' failures to produce several plans required by the consent decree in a timely fashion, their failure to notify the Court and the parties in a timely fashion

of those failures, and their repeated failure to accomplish timely service on the amici curiae are certainly other circumstances supporting appointment of a special master. Finally, the anomalous posture of the plaintiff in this case, in purporting to act as an advocate but limiting its advocacy according to preconceived narrow interpretations of prisoners' constitutional rights, is another exceptional circumstance justifying appointment of a special master.

F. The Court Should Not Certify for Appeal Its Decision to Appoint a Special Master

Amici believes that it is possible that one or both parties may request that the Court certify for appeal its decision to appoint a special master pursuant to 28 U.S.C. §1292(b).⁹

In order for this Court to certify the order of reference for appeal, the court must find that the order involves

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An order of reference to a master is interlocutory and not appealable as a final order. Decker v. Independent Shares Corp., 311 U.S. 282 (1940). In this Circuit, it appears that an order of reference, other than one involving the trial itself, is not reviewable on either mandamus or prohibition. See Vickers Motors, Inc. v. Wellford, 502 F.2d 967 (6th Cir. 1974), involving an attempt to review on a petition for writs or mandamus and prohibition the referral of discovery motions to a magistrate. The Court of Appeals denied the petition on the ground that review could only be had of a final order in the case: "Although the extraordinary remedy of mandamus is proper when a court has clearly exceeded or refused to exercise its jurisdiction, it should not issue as a substitute for appeal to review interlocutory orders that do not deprive the parties of a trial before the court on the basic issues involved in the litigation." Compare La Buy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957) where a reference to a master was made on the merits, with Will v. United States, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), where mandamus was held not to lie to test a pretrial discovery order in a criminal case." Id. at 968.

a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. §1292. For the reasons noted in the previous sections, reference to a special master or some other form of monitor is the norm in enforcement of complex institutional reform decree, and there is no substantial ground for difference of opinion that is within the discretion of the Court to make such an order of reference. See Hoptowit v. Ray, 682 F.2d 1237, 1263 (9th Cir. 1982).

II. THE POWERS, DUTIES, AND FUNDING SOURCE FOR SPECIAL MASTERS HAVE BEEN WELL-DEFINED IN PAST LITIGATION

A. Powers and Duties

Amici attach to this brief two orders of reference in prison cases: Hoptowit v. Ray, 79-359 (E.D.Wash.) (8/4/80)¹⁰ and Ruiz v. Estelle, civil action No. H-78-987 (S.D.Tex.) (6/24/81).¹¹ In addition, amici refer the Court to the order of reference

¹⁰ On appeal, the Ninth Circuit affirmed the trial court's exercise of discretion to appoint a special master but vacated the appointment pending remand on remedy issues. Hoptowit v. Ray, 682 F.2d 1213, supra.

¹¹ On appeal, the Fifth Circuit affirmed the appointment of the special master, along with the powers and duties given to the special master, with the limitations that the special master and monitors did not have the authority to hear matters that should appropriately be the subject of separate judicial proceedings; that the duties were restricted to those set forth in the order of reference; and that findings of the special master were not to be entitled to the clearly erroneous standard of review unless based on hearings conducted on the record pursuant with proper notice. Ruiz v. Estelle, 679 F.2d 1159-1163.

described in the remedial order in Palmigiano v. Garrahy, 443 F.Supp. 956, 989 (D.R.I. 1971).

A review of these orders suggests the following principles that should guide this Court in formulating an appropriate order of reference:

(1) The Court should appoint the special master and additional monitors as necessary pursuant to both Rule 53 and the inherent power of the Court. In view of the major scope of this litigation, amici believe that the Court should appoint at least one monitor as an assistant to aid the special master in his or her duties. The order of reference should incorporate a finding that exceptional conditions, including the size and complexity of this case; the defendants' inability to achieve timely compliance; and the plaintiff's limited advocacy, justify the appointment of a special master.

(2) The order should provide for the master and the monitors to have necessary access to the institution, records, staff, and prisoners. The attached orders of reference provide exemplary models for provisions here.

(3) The special master should have the power to order and conduct hearings with respect to the defendants' compliance and implementation of the consent decree and the related plans for compliance. The provisions in the Hoptowit amended order of reference, subdivision 2, are appropriate for adoption here. These provisions give appropriate guidance regarding procedure to the special master and the parties. These provisions also distinguish appropriately between findings made pursuant to

formal hearings, which are attended with a presumption of corrections, and other findings of the special master, which carry no such presumption. As such, the Hoptowit provisions meet the objections of the Ruiz Court of Appeals.

The requirement of periodic reports from the special master will also help to assure that compliance proceeds in a timely fashion. It is apparent that the Court's requirement of a hearing on compliance galvanized the parties into action directed at compliance; periodic reports by the special master will also prove invaluable in this regard.

(4) The order of reference should also set forth the authority of the special master to incur incidental expenses and hire clerical help, and should set forth the rate of compensation and the source of payment for the expenses of the special master. See Reed v. Cleveland Bd. of Ed., 607 F.2d 748, supra, in which the Sixth Circuit stated that it is better practice to set the hourly fee of the special master at the time of the appointment and to require the special master to file monthly vouchers regarding expenses. In addition, the special master should have the authority to request court approval for the appointment of necessary additional expert help.

B. Allocation of the Cost

Rule 53 gives the Court broad discretion regarding allocation of the costs. Ordinarily in institutional litigation cases in which a special master is appointed to expedite compliance, the defendant is required to absorb the entire cost. See, e.g., Gary W. v. State of Ga., 601 F.2d 240, supra,

and Morgan v. Kerrigan, 530 F.2d 901 (1st Cir. 1976).

In view of the fact that the United States, rather than a private party, is the plaintiff here, it would be within the discretion of the Court to allocate the costs to both parties, or to require payment of the entire costs by the United States. This step would assist the State by preserving funds for expenditures directly on compliance.

C. Suggestions for Special Master

Counsel for amici approached counsel for both parties and offered to join in any reasonable suggestions for names of a special master. Ultimately both parties declined. Mr. Nelson informed counsel for amici that defendants would not be proposing names. Ms. Russell indicated that, as of July 1, 1985, she could not say whether plaintiff would propose names. Amici therefore believe that both parties have waived any right to suggest names.

Amici accordingly suggest two names, listed alphabetically, of their own to the Court. Patrick D. McManus, former Secretary of the Kansas Department of Corrections, is currently special master in Grubbs v. Bradley, 552 F.Supp. 1052, 1132 (M.D.Tenn. 1982). Linder Singer, a partner in the law firm of Goldfarb & Singer, is among other activities special master in Todaro v. Ward, 565 F.2d 48 (2nd Cir. 1977).

Finally, amici believe that the Court referred to Frederick J. Postill when the Court indicated that a corrections expert who had previously appeared before the Court would be considered for the position. Although counsel for amici is not personally familiar with Mr. Postill, a brief investigation has

convinced amici that Mr. Postill also appears to be a fine choice for special master. Amici have spoken to all three of the individuals, and all have expressed interest in the appointment. Amici attach to this brief resumés for the three individuals.

Amici believe that the Court should interview several condidates for the position and then select an appropriate person for this difficult and challenging task. Amici further ask that the Court proceed with the order of reference now rather than allowing the parties further briefing opportunities when they have chosen not to comply with the Court's order.

Respectfully submitted,

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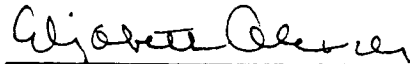
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Dated: July 5, 1985

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 1985, I mailed by first class mail a true copy of the Amicus Brief in Support of Appointment of a Special Master with appendix and attachments to Thomas Nelson, Corrections Division, 401 S. Washington Sq., Lansing, Michigan 48913; Joann Russell, U.S. Department of Justice, HOLC Building, 320 1st St., NW, Room 969, Washington, D.C. 20530; and Larry Bennett, 2900 Cadillac Tower, Detroit, Michigan 48226.


Elizabeth Alexander

DATED: July 5, 1985

APPENDIX

TABLE OF CASES

<u>CASE NAME</u>	<u>INSTITUTION</u>	<u>TITLE OF COURT APPOINTED OFFICER</u>
<u>Ahrens v. Thomas</u> , *434 F.Supp.873, 908 (W.D.Mo. 1977), <u>mod.</u> , 570 F.2d 286(8th Cir.1978)	Platte County Jail, Missouri	Panel
<u>Bel v. Hall</u> , *392 F.Supp. 274, 275 (D.Mass.1975)	BX Unit of the Massachusetts Corr- ectional Institution	U.S. Magistrate sitting as Special Master
<u>Bills v. Henderson</u> , *446 F.Supp. 967, 970 (E.D.Tenn.1978), <u>mod. on</u> <u>other grounds</u> , 631 F.2d 1287 (6th Cir.1980)	Brushy Mountain State Penitentiary, Tennessee	U.S. Magistrate sitting as Special Master
<u>Costello v. Wainwright</u> , *387 F.Supp. 324, 327 (M.D.Fla.1973), *397 F.Supp. 20, 23 (M.D.Fla.1975), <u>aff'd</u> , *525 F.2d 1239 (5th Cir.), <u>vac. on reh.</u> <u>on other grounds</u> , 539 F.2d 547(5th Cir.1976) (<u>en banc</u>), <u>rev'd</u> 430 U.S. 325, <u>aff'd</u> <u>on remand</u> 553 F.2d 506(5th Cir.1977) (<u>en banc</u>) (<u>per</u> <u>curiam</u>)	Florida Division of Corrections	Expert Special Master
<u>Cruz v. Hauck</u> , 345 F.Supp. 189 (W.D.Tex.1972) <u>rev'd</u> <u>and rem'd</u> , 475 F.2d 475 (5th Cir.1973), <u>vac and</u> <u>rem'd</u> , *515 F.2d 322 (5th Cir.1975), <u>cert den.</u> , 424 U.S. 917 (1976)	Bexar County Jail, Texas	U.S. Magistrate sitting as Special Master
<u>Gates v. Collier</u> , 349 F.Supp.881(N.D.Miss.1972), <u>aff'd</u> , *501 F.2d 1291,1321 (5th Cir. 1974)	Mississippi State Penitentiary	Federal Court Monitor
<u>Grubbs v. Bradley</u> , *552 F.Supp.1052 (M.D.Tenn. 1982)	Tennessee Department of Corrections	Special Master

* Indicates citation to reference to appointment, report or
mention of Special Master.

(table of cases continued)

<u>CASE NAME</u>	<u>INSTITUTION</u>	<u>TITLE OF COURT APPOINTED OFFICER</u>
<u>Hamilton v. Schiro,</u> 338 F.Supp. 1016 (E.D.La. 1970), <u>sub nom.*Hamilton v.</u> <u>Landrieu,</u> 351 F.Supp. 549 (E.D.La. 1972)	Orleans Parish Louisiana	Special Master
<u>Hoptowit v. Ray,</u> *682 F.2d 1237 (9th Cir.1982), 753 F.2d 779 (9th Cir.1985)	Washington State Penitentiary	Special Master
<u>Inmates of Allegheny</u> <u>County Jail v. Wecht,</u> *565 F.Supp. 1278 (W.D.Pa. 1983)	Allegheny County Jail	Monitor
<u>Jones v. Wittenberg,</u> 323 F.Supp. 93 (N.D.Ohio 1971), 330 F.Supp. 707 (N.D.Ohio 1971), <u>aff'd sub nom.Jones</u> <u>v. Metzger,</u> 756 F.2d 854 (6th Cir.1972), 73 F.R.D. 82, 83(1976), *440 F.Supp. 60(N.D.Ohio 1977), 509 F.Supp.653(N.D.Ohio 1980)	Lucas County Jail, Ohio	Special Master
<u>Jordan v. Wolke,</u> *75 F.R.D. 696(E.D.Wis.1977), 463 F.Supp.641(E.D.Wis.1978), *464 F.Supp.173(E.D.Wis. 1979), <u>rev'd on other</u> <u>grounds,</u> 615 F.2d 749 (7th Cir.1979)	Milwaukee County Jail, Wisconsin	Special Master
<u>Kendrick v. Bland,</u> *740 F.2d 432 (6th Cir.1984)	Kentucky State Penitentiary	Monitor
<u>Lightfoot v. Walker,</u> *486 F.Supp.504,528 (S.D.Ill. 1980)	Menard Correctional Center, Illinois	Special Master

* Indicates citation to reference to appointment, report or
mention of Special Master.

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<u>CASE NAME</u>	<u>INSTITUTION</u>	<u>TITLE OF COURT APPOINTED OFFICER</u>
<u>Miller v. Carlson</u> , 392 F.Supp.515(M.D.Fla.1975), *401 F.Supp.835,898 (M.D. Fla.1975), <u>mod and rem'd</u> <u>on other grounds</u> , *563 F.2d 741,753-54 (5th Cir. 1977), <u>den reh en banc</u> , 566 F.2d 106(5th Cir. 1977), <u>rem'd</u> , 599 F.2d 742 (5th Cir.1979)	Duval County Jail, Florida	Ombudsman
<u>McMurry v. Phelps</u> , *533 F.Supp. 742 (W.D.La.1982)	Ouachita Parish Jail	Special Master
<u>Mobile Jail Inmates v.</u> <u>Purvis</u> , *581 F.Supp. 222 (S.D.Ala.1984)	Mobile County Jail	Jail Monitor
<u>Monmouth County Correc-</u> <u>tional Institution Inmates</u> <u>v. Lanzaro</u> ,*595 F.Supp.1417 (D.N.J.1984)	Monmouth County Correctional Institution	Special Master
<u>Newman v. State of Alabama</u> , *559 F.2d 283(5th Cir.1977), <u>cert den</u> , 438 U.S.915(1978)	Alabama State Prison System	Human Rights Committee (later replaced by monitor)
<u>Owens-El v. Robinson</u> , 442 F.Supp. 1368 (W.D.Pa.1978), *457 F.Supp.984(W.D.Pa.1978), <u>rem'd on other grounds</u> , <u>sub.</u> <u>nom.</u> , <u>Inmates of Allegheny</u> <u>County Jail v. Pierce</u> , 612 F.2d 754 (3rd Cir.1979), 487 F.Supp.638(W.D.Pa.1980)	Allegheny County Jail	Court Advisor
<u>Palmigiano v. Garrahy</u> , *443 F.Supp.956,989(D.R.I.1977), <u>cert den</u> .101 S.Ct.115(1980) 707 F.2d 636 (1st Cir.1983)	Rhode Island Adult Correctional Institution	Special Master

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<u>CASE NAME</u>	<u>INSTITUTION</u>	<u>TITLE OF COURT APPOINTED OFFICER</u>
<u>Powell v. Ward</u> , 392 F.Supp. 628 (S.D.N.Y.1975) <u>aff'd</u> <u>as mod</u> , 542 F.2d 101 (2d Cir.1976), 487 F.Supp. 917, 935 (S.D.N.Y.1980), <u>aff'd and mod</u> at *643 F.2d 924 (2nd Cir.1981) 540 F.Supp.515 (S.D.N.Y.1982), 562 F.Supp.274 (S.D.N.Y. 1983)	Bedford Hills Correctional Facility, New York	Special Master
<u>Ruiz v. Estelle</u> , *503 F.Supp. 1265 (S.D.Tex.1980), 679 F.2d 1115, 1145 (5th Cir. 1982), <u>vac'd in part on</u> <u>other grounds</u> , 553 F.Supp. 567 (S.D.Tex.1982), 688 F.2d 266 (5th Cir.1982), <u>cert den.</u> , 460 U.S. 1042, (1983)	Texas Department of Corrections	Special Master
<u>Taylor v. Perini</u> , *413 F.Supp.198(N.D.Ohio 1976), *421 F.Supp.742(1976), *431 F.Supp.570(1977), *446 F.Supp. 1186(1977), *455 F.Supp.1255 (1978), *477 F.Supp.1289(1978)	Marion Correctional Institution	Special Master
<u>Toussaint v. McCarthy</u> , 553 F.Supp.1365(N.D.Cal.1983), 722 F.2d 1490(9th Cir.1984) *597 F.Supp.1388(N.D.Cal.1984)	San Quentin and Folsom Prisons	Special Master
<u>Union County Jail Inmates</u> <u>v. Scanlon</u> , *537 F.Supp.993 (D.N.J.1982) <u>rev'd on other</u> <u>grounds sub nom.</u> , <u>Union</u> <u>County Jail Inmates v.</u> <u>D'Buono</u> , 713 F.2d 984, <u>reh.</u> <u>den.</u> , 718 F.2d 1247(3d Cir. 1983) <u>cert den.</u> 104 S.Ct. 1600 (1984)	Union County Jail	Special Master
<u>Valentine v. Engelhardt</u> , *474 F.Supp.294, 303(D.N.J. 1979), 492 F.Supp.1039(D.N.J. 1980)	Passaic County Jail, New Jersey	Special Master

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<u>CASE NAME</u>	<u>INSTITUTION</u>	<u>TITLE OF COURT APPOINTED OFFICER</u>
William v. Edwards, *547 F.2d 1206,1208(5th Cir. 1977), <u>rem'd</u> , <u>sub nom.</u> *Williams v. McKeithen, 495 F.Supp.707,709 (M.D.La. 1980),671 F.2d 892(5th Cir. 1982)	Louisiana State Penitentiary	Special Master

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