

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
Paris Division

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

MAY 5 1986

LUCILLE YOUNG, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 SAMUEL PIERCE, JR., et al.,)
)
 Defendants.)
)
 _____)

MURRAY D. HARRIS, CLERK

BY DEPUTY JAMIE KIRKPATRICK

Civil Action No.
P-80-8-CA

DEFENDANTS' MEMORANDUM RAISING OBJECTIONS
TO THE PROPOSED THE ORDER OF REFERENCE

INTRODUCTION

On April 14, 1986, the Court issued a proposed order that would refer the remedial phase of this case to a special master. Defendants (also referred to as "HUD" herein) object to the appointment of special master on the ground that the circumstances of this case do not warrant such an appointment. If the Court decides to appoint a special master over defendants' objections, however, defendants approve of the Court's choice of Professor Francis E. McGovern as the special master. In either event, defendants also object to certain specific provisions of the proposed order for the reasons enumerated below. Defendants have attached to this memorandum, for the Court's consideration, a revised version of the proposed order which incorporates their specific objections.¹

¹ The bracketed and underlined language in defendants' revised version of the proposed order reflects additional

(CONTINUED)

The circumstances of this case do not warrant the use of a special master for two basic reasons. First, no exceptional circumstances exist, as required by Rule 53 of the Federal Rules of Civil Procedure, to justify the appointment of a special master. The complexity of the case, alone, is not enough to support the use of a special master. Also, there has been no showing that lengthy and detailed supervision of this case is necessary. In this regard, the reports that HUD proposes to file with the Court will be sufficient. Second, in the role that the Court proposes for the special master, the master would act as a substitute for an Article III judge.

If, despite HUD's overall objection to a special master, the Court determines to appoint Professor McGovern (whom defendants agree is qualified to serve in such capacity), defendants have specific objections to the proposed order of reference. First, because HUD did not agree in its Proposed Remedial Plan to implement that Plan voluntarily, a court order is required if the monitoring function proposed for the master is to have any effect. Second, defendants object to the grant of broad discovery and ex parte investigative authority to the master unless certain protections are provided to them, such as the right to assert applicable privileges and the right to be

¹ (FOOTNOTE CONTINUED)

language. The bracketed elipses reflect deletions of the Court's proposed language.

present during witness interviews. Third, the master's authority to hire assistants must be subject to certain limitations such as the number of assistants and their rate of compensation. Fourth, the proposed order should explicitly provide that the discovery to be conducted or supervised by the master will be instead of, not in addition to, any discovery between the parties.

Finally, defendants must inform the Court that because there has been no express waiver of sovereign immunity, HUD may not be compelled to pay the costs and expenses of a special master and his assistants. Nevertheless, the United States would agree to pay one-half of all such costs and expenses if plaintiffs will pay the other half.

ARGUMENT

I. THERE IS NO NEED TO APPOINT A SPECIAL MASTER IN THIS CASE

A. This Case Does Not Present Any Exceptional Conditions Justifying The Appointment Of A Special Master

As a general matter, Rule 53(b) of the Federal Rules of Civil Procedure circumscribes the use of a master by stating that "[a] reference to a master shall be the exception and not the rule." In particular, the rule states that "in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."

Id. (emphasis added).² Neither matters of account nor difficult computation of damages are present here. Accordingly, unless some exceptional condition exists in this case, a reference to a special master is simply not warranted.³

Courts may not equate the complexity of the litigation with the exceptional conditions required by Rule 53(b). La Buy v. Howes Leather Co., 352 U.S. 249, 259 (1957). See also Piper v. Hauck, 532 F.2d 1016, 1018-19 (5th Cir. 1976). "On the contrary, we believe that this is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work." La Buy v. Howes Leather Co., 352 U.S. at 259. Nor does "the great length of time" which will be necessary for resolution of the issues justify reference to a special master. Id. Even the existence of both these reasons does not create exceptional conditions justifying reference to a master. Id.

Moreover, the existence of multiple claims "with a number of subsidiary factual-legal issues" does not justify a reference to

² See generally La Buy v. Howes Leather Co., 352 U.S. 249, 258 (1957). Cf. Dairy Queen v. Wood, 369 U.S. 469, 478, n.18 (1962).

³ See La Buy v. Howes Leather Co., 352 U.S. at 256 (the exceptional condition exists to prevent "an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." See also Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L. Rev. 452, 453 (1958).

a master. In re Watkins, 271 F.2d 771, 774 (5th Cir. 1959). This fact, as a basis for the use of a special master would "make trial by reference the usual and make trial by court or jury the exceptional." Id.

Finally, the Court's proposed order notes that "this action will necessitate detailed and perhaps lengthy supervision. . . . [A] remedy will need to be tailored to each public housing authority or housing project based on its peculiar facts." Proposed Order at 3. As noted above, the length of time it may take to resolve issues in a case cannot be used to justify appointment of a special master. La Buy v. Howes Leather Co., 352 U.S. at 259. Moreover, there has been no showing of the necessity for this type of supervision. At this stage, before a remedy has been ordered and implemented, it would be premature for the Court to conclude that individualized remedies are necessary or that close monitoring of the remedy will be required. See Proposed Order at 4. It would be equally premature for the Court to anticipate the need for a special master without some basis in the record establishing the need to monitor HUD's proposed plan.

B. The Special Master May Not Be Used As A Substitute For An Article III Judge

Article III of the Constitution and due process requirements limit the use of special masters in federal court. Ruiz v. Estelle, 679 F.2d 1115, 1162-63 (5th Cir. 1982); Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975). See also Kaufman, 58 Colum. L.

Rev. at 453. In recognition of these constitutional limits, the Attorney General issued a memorandum addressing the propriety of the use of special masters. Department of Justice Policy Regarding Special Masters, March 13, 1986 ("Policy Memorandum") (copy attached hereto). The Policy Memorandum states that "as a general matter, the judicial power vested by the Constitution in the courts is to be exercised by judges and their legislatively created subordinates, such as United States Magistrates. . . . Special masters are an acceptable aid to judicial officers in a narrow range of case, but they are not a substitute for Article III judges." Policy Memorandum at 1.

The functions delegated to the special master under the Court's proposed order conflict with the guidelines set forth in the Attorney General's memorandum. In particular, the master's reports and recommendations will have to be reviewed by the Court in substantial detail. See Policy Memorandum at 2, Guideline No. 3. The master is being entrusted with issues "that are novel, difficult, closely related to the outcome of the case, or significant from the point of view of policy." Id. at 4, Guideline No. 5. Since the proposed role of the special master is as a substitute for the Court, his role is inconsistent with the constitutional limits on the use of a special master.

II. IF THE COURT DECIDES TO APPOINT A SPECIAL MASTER,
CERTAIN REVISIONS TO THE PROPOSED ORDER OF REFERENCE
ARE NECESSARY

A. The Master Cannot Monitor Any Plan Until The
Court Has Ordered One To Be Implemented

Defendants wish to point out that by filing the proposed remedial plan, HUD did not agree to voluntarily implement the plan. HUD's proposal was submitted specifically in response to plaintiffs' motion for injunctive relief to suggest to the Court what remedies HUD thought would be appropriate. As specifically noted therein, HUD did not concede the correctness of the Court's liability decision of July 31, 1985. Defendants' Proposed Remedial Plan at 2. The purpose in filing the proposed remedial plan was to expedite the issuance by the Court of a final order, ("[I]n the interest of moving these proceedings toward a conclusion, the following proposed remedial plan is submitted for the Court's consideration.") Id. Accordingly, unless and until the Court orders implementation of the plan, there will be nothing for the special master to monitor and the order of reference would not have to include any monitoring function.

B. The Master's Discovery Powers Should Not
Nullify Defendants' Rights To Certain
Evidentiary Privileges And Other Protections
Normally Available During Discovery

Under the proposed order, the special master acts as an investigator. He is directed "to study the operation" of the housing programs at issue in this case and the local housing providers. Proposed Order at 5. He is given "plenary

authority to interview employees and staff members of HUD local housing authorities, and other providers of federally funded housing" and "shall have complete and unrestricted access to the records of HUD". Id. Without providing for explicit protection of the privileges normally available to any party, the proposed order would grant excessive powers to the special master. Under the proposed order, there is no provision for the assertion of well-recognized privileges, such as the deliberative processes and attorney-client privileges. See Rules 26(b)(1); 53(c); 53(d)(2), Fed. R. Civ. P., and Rule 501, Fed. Rules of Evid.

The unrestricted access to HUD's employees and documents trenches upon HUD's need to maintain confidentiality in its formulation of policy. Disclosure of internal documents chills communications within an agency and thus affects the ultimate effectiveness of agency action. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 n.18 (1975). The attorney-client privilege also requires confidentiality "to encourage full and frank communication between attorney and their clients and thereby [to] promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The access by the special master to confidential information threatens the intimate relationship between an agency and its legal advisers. Furthermore, in his pursuit of information, the special master's unlimited access to any HUD employee, including its highest officials, threatens to disrupt the agency's functioning in a manner inconsistent with

that permitted in federal court litigation. See e.g., Capitol Vending Service v. Baker, 8 F.R.Serv. 2d 26a.33-4 (D.D.C. 1964).

The master's discharge of his assigned tasks will impinge upon legitimate executive operations. The exercise of the master's authority, absent limits, is inconsistent with the respective roles of the courts and the executive branch. See Sierra Club v. United States Corps of Engineers, 701 F.2d 1011, 1042-44 (2d Cir. 1983), where the court of appeals found that a master's unlimited discretion to meet with federal officials and review documents, while overseeing compliance by the federal agency with the district court's orders, was an impermissible intrusion on the agency's authority. Accordingly, defendants' revisions to the proposed order have included provisions to protect defendants' right to assert appropriate privileges, to have counsel present during interviews, and to reasonably limit the interviews of HUD's employees, if necessary, so as not to prevent them from performing their other functions.

With respect to the special master's "plenary authority to interview . . . local housing authorities, and other providers of federally funded housing," HUD must note certain potential feasibility problems with the proposed order. None of the local public housing authorities or other local providers of federally-assisted housing in East Texas are parties to this litigation. Accordingly, absent their joinder in this suit, they cannot be

bound by the Court's order. Furthermore, because HUD does not control the day-to-day operations of these projects, it cannot assure either the Court or the special master that such housing providers will cooperate in the master's investigatory activities. However, as indicated in the revised proposed order, HUD will use its best efforts to obtain such cooperation.⁴

C. The Master's Authority To Conduct Ex Parte Proceedings Should Be Limited

A special master is a judicial, not an executive, officer. Accordingly, any fact-finding duties assigned to him must preserve his posture as a neutral between adversaries. That fact-finding function must be exercised in a more traditional structure, as an officer of the Court, taking evidence while the parties are present, rather than as an investigator privately seeking the facts. A private investigator role for the special master would convert this case from an adversarial to an inquisitorial proceeding, a transformation fundamentally at odds with our legal tradition.

The parties should be allowed to be present during interviews to cross-examine witnesses and be offered the opportunity to comment on documents entered into the record. If the Court

⁴ HUD's role in the housing programs at issue here, and its authority to compel activity by the local housing providers, was discussed at length in the brief submitted in connection with the liability proceedings. Defendants, therefore, will not repeat this discussion herein.

finds the evidence developed by the master and presented by the parties to be inadequate, it may at a later stage, call its own witnesses. Moreover, the master as a hearing officer not subject to cross-examination, must function as such and not as a witness.

D. The Master's Authority To Hire Assistants
Must Be Subject To Express Limitations

Defendants believe that there must be specific limits on the use of assistants by the special master. These limits, as specified in defendants' proposed order, are necessary in order to ensure that the costs of the special master do not become exorbitant. See Kaufman, 58 Colum. L. Rev. at 453, noting excessive costs as grounds justifying limits on the use of special masters. In addition, these limits are necessary to ensure that the use of a special master does not burden HUD with the prospect of dealing with an army of assistants. This would clearly be an improper use of a master. Cf. Sierra Club v. United States Corps of Engineers, 701 F.2d at 1042-44.

E. Sovereign Immunity Bars Imposing The Costs
And Expenses Of The Special Master Absent
Congressional Authorization

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983). This equally true of suits against agencies and their officials, when the suit, such as this one, is against them in their official capacity. See, e.g.,

United States v. Testan, 424 U.S. 392, 399 (1976); Hawaii v. Gordon, 373 U.S. 57, 58 (1963). Courts are barred from ordering a federal agency to pay any money absent an express, congressional waiver of sovereign immunity. United States v. Testan, 424 U.S. at 399-402; Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 142 (1972).

Sovereign immunity, absent congressional waiver, precludes an award of costs or expenses against the United States. United States v. Chemical Foundation, Inc., 272 U.S. 1, 20-21 (1926). The fees and expenses of special masters are routinely regarded as costs. See, e.g., Newton v. Consolidated Gas Co., 259 U.S. 101, 103, 106 (1922); Ex parte Peterson, 253 U.S. 300, 314-317 (1920); Erickson's, Inc. v. Travelers Indemnity Co., 454 F.2d 884, 885 (5th Cir.), cert. denied, 409 U.S. 847 (1972). There is nothing upon which to base a conclusion that Congress has waived the immunity of the United States from liability for the compensation of special masters.⁵ Absent such a waiver, the defendants may not be compelled to pay any part of the fees and expenses of a special

⁵ While Rule 53 permits a district court to assess the costs of a master against either party, it omits any reference to the United States. Indeed, Rule 54(d) specifies that "costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law." Thus, under the rules of procedure governing the use of special masters, fees can be assessed against the United States only if some independent source of authority -- outside the scope of Rules 53 and 54 -- permits imposition of the costs of a special master against the United States.

master.

Defendants note in particular that 28 U.S.C. § 1920, which specifies six categories where the United States has waived its immunity from an award of costs, does not encompass the fees of a special master.⁶ Since a waiver of sovereign immunity cannot be implied by construction of an ambiguous statute, "but must be unequivocally expressed," United States v. Testan, 424 U.S. at 399, quoting, United States v. King, 395 U.S. 1, 4 (1969), 28 U.S.C. § 1920 cannot be read as waiving the government's immunity from payment of a master's fees or expenses.

Although the court lacks authority to order defendants to pay the costs and expenses of a special master, assuming the entry of an appropriate order of reference, the United States would agree to pay voluntarily one-half of all costs and expenses associated with the activities of the special master and his assistants.⁷ The practice of sharing the cost of the

⁶ The only possible category in which masters could fit would be that of "court appointed experts", 28 U.S.C. § 1920(6). The legislative history of this provision, however, precludes any attempt to infix special masters within the meaning of court appointed experts as used by Congress in 28 U.S.C. § 1920(6). See H.R. Rep. No. 1535, 89th Cong., 2d Sess. 1 (1978); H.R. Rep. 1687, 85th Cong., 2d Sess. 13 (1966).

⁷ The comprehensive litigating authority of the Attorney General, which includes authority to agree to the payment of a special master where appropriate, see 28 U.S.C. §§ 516-19, authorizes the expenditure of funds to pay a special master under 31 U.S.C. § 1341.

master is particularly appropriate where his services are "of equal importance to both parties." United States v. Cline, 388 F.2d 294, 296 (4th Cir. 1968). See also Bowen Motor Coaches v. New York Casualty Co., 139 F.2d 332 (5th Cir. 1943); Reid v. Silver, 354 F.2d 600 (7th Cir. 1965); Cold Metal Process Co. v. United Engineering & Foundry, 132 F. Supp. 597 (W.D. Pa. 1955), aff'd, 235 F.2d 224 (3rd Cir. 1956). The sharing of the costs of a master by both parties is appropriate even where one of the parties is insolvent. Southern Agency Co. v. LaSalle Casualty Co., 393 F.2d 907 (8th Cir. 1967). Accordingly, in their revised version of the Court's draft order, defendants have indicated a willingness to pay voluntarily for one-half of these costs.

F. Additional Discovery By Plaintiffs Must Be Stayed Pending Submission Of The Master's Report and Recommendations

Without protection against further discovery by plaintiffs, one of the dangers of the use of a special master would be a duplication of effort that would impose an unnecessary burden upon defendants. Prior to the Court's January 10, 1986 letter informing the parties of his request to Professor McGovern to serve as a special master, plaintiffs had served on defendants substantial discovery requests addressing remedial measures. The parties agreed to stay this discovery pending a determination of the involvement of a special master.

One of the functions of the special master under the proposed order is the discovery of information relative to a

remedy. Until the special master completes his work, any further discovery by plaintiffs would create the potential for duplication. Absent an order limiting further discovery by plaintiffs defendants would be faced with an unacceptable burden. They would have to participate in the process of providing information to the master. In addition, they would face the prospect of concurrently performing similar and additional tasks for plaintiffs. Depending upon the results of the special master's studies, plaintiffs' potential discovery could be both burdensome and unnecessary. Furthermore, the Court might be faced with prospect of resolving discovery disputes during the master's activities.

To avoid these consequences, defendants' revised order of reference proposes that further discovery be stayed pending the master's report and recommendations. Only at that stage, would it be appropriate to determine whether plaintiffs need any additional information from HUD for use at the proposed order's anticipated remedial hearing.

F. The Order Must Be Amended To Reflect HUD's Actions

While a stay of the parties' discovery is appropriate, the proposed order should explicitly state that HUD is not precluded from exercising its authority to investigate, monitor or enforce compliance with respect to the claims that are subject of this action. As the Court recognizes, HUD has engaged in useful actions in obtaining compliance with the civil rights laws at issue herein. Proposed Order at 4. Nothing in the order of

reference should limit further action in this respect.

Assuming that the Court orders HUD to implement its proposed remedial plan, a further amendment is necessary. The remedial plan anticipates completion of a significant portion of HUD's remedial efforts within sixteen months. The proposed order of reference requires the special master to submit his report ten months after the case is referred to him. The proposed remedial plan could substantially affect the necessity for any additional measures, i.e., the subject of the special master's final report. The due date for the special master's report should, therefore, be postponed to coincide with HUD's remedial actions, i.e., until sixteen months after the entry of an order directing HUD to implement its proposed remedial plan. In this way, the special master's report will be able to take into account the changes resulting from the implementation of HUD's proposed remedial plan.

CONCLUSION

For the reasons stated above, defendants object to the use of a special master. If the Court appoints a special master, defendants request that the order of reference be amended consistent with the revisions reflected in defendants' attached proposed order.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF TEXAS
PARIS DIVISION

LUCILLE YOUNG, et al.,)	
)	
Plaintiffs,)	
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v.)	Civil Action No.
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)	
Defendants.)	

ORDER

An order granting the plaintiffs' motion for summary judgment on the issue of liability in this civil action was issued on July 31, 1985. That order held that the Department of Housing and Urban Development and its officials ("HUD") knowingly created, promoted, and funded racially segregated housing in thirty-six counties in East Texas in violation of the Fifth Amendment of the United States Constitution and federal statutes. The order did not address the question of relief. On December 17, 1985, [without conceding the correctness of the Court's decision on liability], HUD filed a proposed remedial plan, in response to the plaintiffs' motion for injunctive relief. In its plan, HUD outlined proposed remedies for public housing authorities and privately owned, insured-assisted housing projects in the thirty-six counties included in the class action. Because the remedial phase of this action presents exceptional conditions, Francis E. McGovern, Esquire, shall be appointed to serve as special master, to monitor

[. . .] [this Court's interim remedial order which it shall issue forthwith concerning] desegregation of federally funded housing programs in East Texas and to supervise [and conduct] [. . .] discovery [. . .] [to determine whether any further remedial relief is necessary].

I.

[. . .] Rule 53 of the Federal Rules of Civil Procedure provides for the appointment and compensation of masters in extraordinary circumstances. "A reference to a master shall be the exception and not the rule. . . . [I]n actions to be tried without a jury, . . . a reference shall be made only upon a showing that some exceptional condition requires it." Fed. R. Civ. P. 53(b).

The advisory committee note explains that an outside master may be appropriate under Rule 53, when [. . .] lengthy and detailed supervision of a case is required. See id. advisory committee note. [. . .]

[The Court finds that] this action will necessitate detailed and perhaps lengthy [. . .] [oversight]. Not only does it involve residents of thirty-six counties with different demographic characteristics and housing needs, but it also encompasses, by the defendants' count, 177 autonomous projects operated by for-profit companies, non-profit organizations, and local government authorities. [Although HUD disagrees that individualized remedies are appropriate or constitutionally permissible], the variations in the housing programs, housing

providers, and localities suggest that no single remedy will work. Instead, a remedy [. . .] [may] need to be tailored to each public housing authority or housing project based on its peculiar facts. Although it is hoped that there will not be endless supervision in this action, it has taken more than five years to resolve the issue of liability. And the defendants propose quarterly reports for at least two years, to monitor the efforts of local authorities and ensure that public housing is available on a nondiscriminatory basis. [. . .] [Where there will be a great deal of information that must be processed for the Court's use,] Rule 53 provide[s] authority for the appointment of special master [. . .].

Other courts have appointed special masters in cases involving facts or problems similar to this action. For example, special masters have been appointed in school desegregation cases, to assist in the development of a remedy after a finding of liability. See, e.g., Amos v. Board of Directors, 408 F.Supp. 65, 822-24 (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 (1972), see also Gautreaux v. Chicago Housing Authority, 384 F. Supp. 37, 37-38 (N.D. Ill. 1974) (referring housing desegregation case to magistrate to develop methods for achieving compliance with orders on construction of public housing in City of Chicago), aff'd sub nom. Chicago Housing Authority v. Austin, 511 F.2d 82 (7th Cir. 1975). [. . .]

Moreover, the defendants' proposed remedial plan is merely a continuation of the efforts that HUD began prior to the finding of liability in the court's order of July 31, 1985. Although a useful beginning, the voluntary efforts of HUD appear to be inadequate to eliminate the segregation that exists. [In this regard, simultaneously with the entry of this Order appointing the special master, the Court will enter a separate Order that HUD shall implement the Proposed Remedial Plan submitted to the Court on December 17, 1985.] By appointing a master to monitor the implementation of HUD's remedial plan, poor persons in East Texas will have a better opportunity to obtain racially desegregated housing.

[The Court also notes that counsel for both parties have met with the proposed special master, Francis McGovern, and have reviewed his qualifications. Although HUD has objected to the appointment of any special master, nonetheless, both parties are in agreement that Mr. McGovern is capable and qualified to serve in the role of a special master in this case.]

II.

The special master shall have three primary responsibilities in this action:

1. to [. . .] [conduct fact-finding regarding] the remedial efforts of HUD [. . .] outlined in its proposed remedial plan [as ordered by this Court] [. . .];

2. to study the operation of the local public housing authorities, rent supplement programs, and section eight housing

programs in the thirty-six class action counties, in order to [assist the Court in] determin[ing what, if any,] additional [. . .] [steps beyond those contained in HUD's proposed remedial plan might be taken to facilitate racial desegregation in HUD-assisted housing]; and

3. . . . to report to the court on the results of HUD's remedial efforts and [. . .] [consider what additional action, if any,] [. . .] might be taken as part of an appropriate remedial decree, including a definition of substantial compliance.

To assist the special master in carrying out his responsibilities, he shall have all of the rights and powers provided under Rule 53, [including the following:]

a. [. . .] He shall have complete and unrestricted access to the records of HUD, including statistical data, contracts, reports, correspondence, plans, advertisements, notices, compliance reviews, and other documents; [provided that he shall give HUD reasonable notice of his intent to inspect such documents, and provided further that HUD shall have the opportunity to provide the special master and plaintiffs with reasonable notice of any assertions of privilege with respect to any such documents. Any claims of privilege that cannot be resolved among the parties shall be referred to the Court by the special master for resolution.]

b. In addition, he shall have plenary authority to [. . .] [examine] employees and staff members of HUD, local housing authorities, [. . .] other providers of federally-

funded housing [and any other persons whom the master may believe will provide relevant information] at reasonable times and places, [provided that both parties shall have at least ten days' notice of any such interviews and shall have the opportunity to be present at such interviews if they so desire. Both parties are also entitled to have such interviews conducted on the record, but the party so requesting shall be solely responsible for all costs associated therewith, including the stenographic reporter and the transcript. Counsel for witnesses shall be permitted to assert claims of privilege during any interviews at which they are present. The authority granted to the master by this paragraph shall in no event be construed to allow him to employ expert witnesses whose fees would have to be paid by one or both parties.]

c. [. . .] [In connection with the master's authority to examine persons employed by local housing authorities and other providers of federally-funded housing which is privately owned, the Court recognizes that such persons, housing authorities and housing projects are not parties to this action, and are not controlled by HUD. Nevertheless, HUD has assured this Court that it will use its best efforts to obtain the cooperation of such persons with the special master in this case.]

d. He also shall have the right to hire assistants as he deems necessary, subject to the approval of the court, and his [. . .] [authority, as described above,] shall extend to

any other individual whom he designates, [provided, however, that the number of assistants hired shall not exceed four at any one time. Any such assistant shall be compensated at a rate commensurate with his/her qualifications, but in no event shall the rate exceed \$50 per hour. The cumulative total hours expended by such assistants shall not exceed 20 hours per week on the average, unless otherwise ordered by this Court after providing the parties an opportunity to object.]

e. [. . .] [The master] may confer with the parties or their attorneys in ex parte communications, as required to fulfill his duties.

f. [The master's discovery activities shall be in lieu of any and all ongoing or outstanding discovery between the parties, and no additional discovery shall be undertaken by the parties until the completion of the master's report and recommendations. The parties are, however, free to suggest to the master areas of inquiry, including documents to be examined or witnesses to be interviewed.]

g. [Nothing herein shall be construed to limit, modify or otherwise interfere with HUD's existing authority to investigate, monitor or enforce compliance with respect to the claims of unlawful racial discrimination that are the subject of this action.]

The master shall file periodic reports every two months with the court with copies to the parties. The reports shall describe the monitoring activities in which he has engaged, the

results of the monitoring, and any other matters that he deems appropriate for the remedial phase of this litigation. A final report shall be due by [October 1,] 1987, [. . .]. After the filing of the final report, each party shall have thirty days in which to object to it or any of its provisions and to request a hearing. The hearings on any objections shall include the right to present evidence and to cross-examine adverse witnesses. The court retains the authority to reject or modify any recommendation by the master, regardless of whether any party has filed an objection.

III.

[With respect to payment of the costs and expenses of the special master and any assistants he may hire, HUD maintains that it cannot be compelled to pay such expenses based on sovereign immunity principles. The Court finds that it need not resolve this issue at the present time in view of Justice Department counsel's representation that the United States will agree, for purposes of this case, to pay one-half of all costs and expenses incurred by the master and his assistants that are reasonably necessary to perform the activities described in this order. In this connection, counsel has agreed, on behalf of the United States, to have the sum of \$12,500 deposited with the clerk of the court, as an interim payment for the special master's services and expenses, within 30 days of service of this order.]

The costs and expenses of the special master [therefore] shall be borne [. . .] [equally by the parties]. The special master shall be compensated for his services at the rate of \$100.00 per hour, and will be reimbursed for the necessary expenses he may incur during the performance of his duties. [In addition to the sum to be deposited by the United States, pursuant to its agreement, the plaintiffs are] directed to deposit [\$12,500.00] in the registry of the court, for reimbursement of the master's expenses. The master should submit periodically a voucher of his expenses as the basis for entry of orders directing payment to him [by plaintiffs, and further voluntary payments by the United States]. Accordingly, it is

ORDERED that Francis E. McGovern, Esquire, shall be, and he is hereby, APPOINTED special master in this action, [. . .] [for the purposes described above]. It is further

ORDERED that [. . .] [the plaintiffs] shall, within thirty days of service of this order, deposit the sum of \$12,500.00 with the clerk of the court, as interim payment for the special master's services and expenses.

SIGNED and ENTERED this ___ day of _____, 1986.

CHIEF JUDGE



Office of the Attorney General
Washington, D. C. 20530

13 March 1986

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III *EMW*
Attorney General

SUBJECT: Department Policy Regarding Special Masters

These guidelines are promulgated in order to give central direction to the government's positions in cases involving special masters. They set out the Department's policy on the use of masters, the criteria by which master appointments are to be assessed, and procedures which attorneys for the United States are to follow. For the first time, the Department of Justice here adopts a policy with respect to the costs of special masters in light of the doctrine of sovereign immunity. The guidelines are to be followed in all cases tried by counsel under the Attorney General's direction, except those in the Supreme Court of the United States and those in state courts under the McCarran Amendment, 43 U.S.C. § 666.

I. General Policy on the Use of Masters

It is the position of the Justice Department that, as a general matter, the judicial power vested by the Constitution in the courts is to be exercised by judges and their legislatively created subordinates, such as United States Magistrates. This policy accords with Rule 53 of the Federal Rules of Civil Procedure, under which the appointment of special masters and other non-legislative judicial delegates is to be considered the exception rather than the rule. Special masters are an acceptable aid to judicial officers in a narrow range of cases, but they are not a substitute for Article III judges.

The appropriate role for special masters is in situations where the demands on the decisionmaker's time are great but the need for judicial resolution is minimal. Masters can be useful where decisions are (1) routine, (2) large in number, (3) minimally connected to the substantive issues in a case, and (4) not sufficiently difficult or significant to require a constitutional or legislative officer. A principal example is the class of cases involving unusually extensive discovery proceedings, in which a large number of minor decisions must be made concerning

questions such as discoverability and privilege. In situations of that sort, the special master is a legitimate and valuable part of the judicial process. Masters can also play a role in the remedial stage of a proceeding, where there is a need for monitoring of a judicial order clear enough to require no adjudicative decisions by the master.

The fact that masters are not substitutes for judges has several significant consequences:

1. Masters should not be employed simply to alleviate congestion or lighten workloads, if to do so would result in a master performing a judge's function. The appropriate level of staffing for the federal courts is a decision for Congress, not for individual judges. The fact that a case is large or complex, and thereby represents an above-average burden on scarce judicial resources, will generally mean that the judge should spend more time on the case, not that ad hoc officers should be appointed.

2. The fact that a case presents difficult technical issues should not be considered as weighing in favor of the appointment of a master. Hard factual problems are to be addressed through the normal techniques of trial, including the presentation of expert testimony. If necessary, the trial court can appoint its own expert witnesses. It is a serious error, however, for a master, who is a hearing officer and fact-finder, to be confused with someone who develops and presents evidence. Masters should not be appointed for this purpose, and their use as de facto experts should be resisted when it occurs.

3. Masters are not appropriate when their decisions will have to be reviewed by the judge in substantial detail. Such an arrangement is uneconomic and, more importantly, inadequately serves the right of litigants to have any significant question resolved in the first instance by a constitutional or statutory judicial officer.

4. Masters should not be employed as part of non-judicial alternative dispute resolution methods. The United States favors the use of alternative dispute resolution methods such as minitrials, arbitration and mediation. Insofar as these methods are not part of the judicial process proper, masters, who are ad hoc judicial officers, should not be used as neutral parties in such situations. And insofar as encouraging or facilitating alternative dispute resolution requires the judgment or authority of the court, it is not appropriate for master involvement because the use of masters should be restricted to more ministerial functions.

5. Masters should not be entrusted with issues that are novel, difficult, closely related to the outcome of the case, or significant from the point of view of policy. Such issues demand the attention of life-tenured judges who have gone through the rigorous process of judicial selection, and are insulated in their decisionmaking by the constitutional protections surrounding their office.

6. It is inappropriate for a court to use a master to extend its own power. Masters should not be a tool for bringing under the control of the court matters that otherwise would be resolved elsewhere. This is particularly important when the United States is a party, because in such cases the enhancement of judicial power will usually be at the expense of a coordinate branch of government.

7. Masters should be employed only in cases where their utility justifies the additional cost. Judges and magistrates are already made available at public expense, as a result of the decision that certain services are to be provided without cost to litigants. The imposition on the parties of additional expenses can be justified only by the prospect of a substantial increase in litigation efficiency; such an imposition merely to save the time of officers that Congress has determined shall be available to all is improper.

II. Procedures in Master Cases

A. The Decision on Appointment

1. Application of the Criteria

The Department of Justice favors the use of special masters only in the narrow class of lawsuits discussed above. Accordingly, before proposing to the court that a master be appointed, attorneys for the United States must analyze the case in light of the principles set out here. A master should be suggested only if counsel judge that (1) the case (or order to be implemented) contains enough of the routine, minor issues that are appropriate for master resolution to justify the additional expense and delay, and (2) it appears very unlikely that the master would function in an improper fashion. The same considerations will govern the response of counsel of the government to another party's suggestion that a master be employed.

2. Sua Sponte Appointments

The Department believes that courts should appoint masters on their own motion only after consultation with the parties. Accordingly, any time a judge raises the possibility that a master be appointed sua sponte, government counsel should request the opportunity to be heard on both the advisability of

the appointment and the appropriate role of the master. When a court appoints a master without discussing the possibility beforehand, the United States will generally seek a reconsideration of the decision. This should be done even when we agree with the appointment, in order to encourage the court to make its reasons explicit and, if possible, to adopt the principles enunciated here. In the very exceptional case where a motion for reconsideration would seriously undermine the government's overall position, litigation strategy may dictate that a sua sponte appointment not be challenged at all.

3. Acquiescence in Appointments

Sound litigation strategy also may dictate that the government acquiesce in the appointment of a master even when the Department's policies would indicate opposition. Counsel may decide that a major concession by another party justifies such acquiescence, or that a clear intention by the judge that a master will be employed should not be resisted. Acquiescence should be the exception and not the rule, however, and should never occur when there is a significant danger that the master would perform essential judicial functions or operate significantly to increase the power of the court relative to that of another branch or level of government.

B. Selection of the Master

1. Procedures

Because a special master is an ad hoc officer appointed for a particular case and paid for by the litigants, selection of the individual who is to act as a special master should be as much in the hands of the parties as feasible. Whenever possible, the parties should consult together and agree on a master, or on a list of suggested names. Similarly, the litigants should have an opportunity to comment on any candidate the court is considering, and may request the judge to invite comments on several possible masters. Unless case-specific considerations strongly dictate otherwise, the United States will press for the exercise of these procedural rights. When a judge simultaneously announces his decision to appoint a master and the name of the individual who is to serve, the government will usually request that the appointment be reconsidered along with the decision to make it, and will then comment on the prospective master as well as on the advisability of using one.

2. Criteria for Selection

a. Qualifications. In choosing or commenting on proposed masters, the United States will be guided primarily by considerations of technical competence and impartiality. A master is a hearing officer, not an expert. Therefore, while it

is not always vital that a master be closely conversant with the subject matter of the case, it is necessary that he be thoroughly familiar with any procedural questions he is to handle -- privilege issues, for instance.

b. Independence. It is also important that the master be unbiased, not only as between the parties, but in his relationship with the judge: it is the duty of both the master and the judge to disclose to the parties any personal or business association between them that might impair this independence of judgment. Moreover, the master should exercise his independent judgment, and the judge should review the master's decisions on the merits. Accordingly, the United States must examine carefully the likely impartiality of any prospective master who is a close associate of the judge making the appointment.

c. Cost. Economy must also be considered in assessing possible masters. Individuals whose time is expensive, or who operate in institutions the services of which are costly, are to be avoided in favor of similarly qualified and unbiased candidates who will involve less expense.

d. Improper Role. Finally, in analyzing a candidate's desirability, counsel should take into account any indications that he would diverge from the appropriate role of the master. Any reason to believe that the master would wish to exercise significant judicial power, or would be disposed to seek to aggrandize the authority of the court, must weigh against the candidate.

Generally, the government will consider first United States Magistrates and semi-active judges, whose qualifications under these criteria will tend to be strong.

3. Implementation by Divisions

In implementing these guidelines, each litigating division of the Department shall decide whether its work involves masters often enough to warrant a review of possible candidates. It is anticipated that the Civil Division, Civil Rights Division, and Land and Natural Resources Division will probably find such a review appropriate; others may also. These divisions shall develop, by June 13, 1986, specific criteria of acceptability along the lines outlined here and shall, if the Assistant Attorney General finds it appropriate, prepare lists of possible appointees who would probably be acceptable to the Department in cases of various kinds. Division heads shall establish mechanisms to ensure that government litigators in cases that may involve masters have these criteria and lists available at the earliest possible stage. These mechanisms shall be reported to the Deputy and Associate Attorneys General and the other litigating divisions by July 13, 1986.

C. Statement of Masters' Functions

These guidelines delineate the functions of masters that the Department of Justice believes to be appropriate. It is important that, whenever a master is appointed, his role in the case be made explicit at the outset. Accordingly, the United States will always propose a clear statement of the work the master is to do, and, if appropriate, a reference to the functions he is not to undertake. Whenever possible, the parties should agree to such a statement and submit their agreement to the judge. When this is not feasible, the government will urge the court to make an explicit statement of function. The United States will press for a mandate for the master consistent with these policies.

It is also important that clear provision be made at the outset for fees and expenses. The parties should agree to, or the court should adopt after comment, an understanding as to the master's billing rate, his authority to employ assistants and their rate of compensation, the expenses that will be allowed, and any other funding matter, including the procedures that are to be used to monitor and verify spending. The United States will always resist any expenditures by the master in the absence of such an understanding. Of course, the government will also insist that the master be allowed only such expenses as are necessary to effective operation. Litigating divisions that employ masters frequently, by May 13, 1986, should establish more specific guidelines concerning proper categories and levels of expenditures.

D. Monitoring

Throughout any litigation involving a special master, government counsel shall pay close attention to the master's conduct of his office. Any deviation from the role assigned by the court, or the role endorsed for masters in general under these guidelines, should be reviewed with appropriate officers of the Department and should generally be brought to the attention first of the master and then of the court if that proves necessary. If this deviation persists in the face of objection by the government, serious considerations will be given to a motion to remove the particular master or to revoke the order of reference altogether.

Similarly, financial accountability must be maintained during the case. Counsel generally should raise immediately any doubts concerning the level or types of expenditure being made by the master. Frequently, of course, other parties (on both sides) will have interests similar to the government's, and should be consulted when cost issues arise.

III. Payments of Masters' Costs by the United States

The United States are sovereign, and are subject to suit only by their own consent. Courts will assess judgments against the sovereign only on a showing of an explicit and unequivocal waiver of this immunity. The fees and expenses of special masters are a cost of court, paid by parties pursuant to judgments; Congress has not enacted legislation generally waiving sovereign immunity with respect to this category of costs. Accordingly, except in cases where there is a specific statutory waiver that covers the costs of special masters, the United States may not be compelled to pay them. These principles are elaborated on in the first attached memorandum from the Office of Legal Counsel.

The government may elect, nevertheless, voluntarily to pay some or all of the costs of a master in a particular case (this point is elaborated on in the second attached memorandum from the Office of Legal Counsel). When the United States proposes a special master, or agrees to one proposed by another party or the court, arrangements will be made for the government to pay its proper share. Counsel may enter into an agreement under which each party will pay some portion of the costs approved by the court, or may provide that the losing party or parties will pay all of the master's expenses.

When a master is appointed over the government's objection, or with the government's acquiescence in a situation where these guidelines would normally call for opposition to appointment, the United States will refuse to pay any fees or expenses, and will notify the court of that refusal and the grounds therefore, when:

- (1) government counsel believe the master to be unqualified or seriously biased;
- (2) it appears clear that the master will be performing essential judicial functions with respect to issues closely related to the outcome of the case or sensitive from the point of view of policy;
- (3) there is strong reason to believe that the use of the master will increase the authority of the court over another branch or level of government in derogation of constitutional principles; or
- (4) the master's work will clearly have to be reviewed by the judge to such an extent as to render the master largely redundant.

Subject to procedures and policies established by the heads of litigating divisions, the United States may refuse to pay a

master's costs for any other reason comparable in importance to those set out here. The decision not to pay for an officer the court has appointed should be approved by the responsible Assistant Attorney General.

Only in the rarest of cases will litigation strategy lead to a payment in a case where these guidelines dictate otherwise. While litigators usually will be disinclined to offend the judge conducting their proceedings, the United States must be willing to rely on the judiciary's ability to put aside unrelated irritations in making substantive decisions. Refusal to pay for a court-appointed master should always be explained carefully, with stress laid on the gravity of the considerations that have led to the decision, and on the imperative nature of Department policy as set forth here.

IV. Internal Procedures for Payment

Once a special master has been appointed, and the government has determined that the appointment is appropriate or that the government will acquiesce and pay its share of the fees and expenses of the master, the government attorney will submit an obligation of payment form to the administrative office for the division or U.S. Attorney's office. Until the Justice Management Division prescribes a form for special masters, OBD-47, "Request and Authorization for Fees and Expenses of Witnesses," will be used. The attorney should note on the form that it is being used for a special master. The division administrative officer will forward the OBD-47 to Financial Operations Services; administrative officers for U.S. Attorneys' offices, to the U.S. Marshal's office for that district.

Internal procedures for paying the master will follow the same procedures used for payment to experts and consultants. The master will submit an itemized invoice (OBD-84 and 85, "Pay Voucher for Special Services," may be used for this purpose) to the government attorney who, in turn, will submit the invoice to the administrative officer to be forwarded either to Financial Operations Services or the U.S. Marshal's office, as prescribed above. Upon the order of the court, partial or advance payment of fees and expenses will be handled through these same procedures.

Fees and expenses of Land Commissioners will not be paid by the Department. Funds for the payment of Land Commissioners are appropriated to the Administrative Office of the U.S. Courts, and the commissioners should look to that office for their fees and expenses.

V. Review of These Guidelines

The principles set out here must be tested and reviewed in light of the Department's ongoing experience with special masters, and in particular its experience under these guidelines. Accordingly, as of this date, each Assistant Attorney General heading a division that uses masters will institute procedures for the analysis of cases involving masters, with special attention to the effect of these guidelines. Counsel in master cases should report any need for clarification or expanded coverage, and any difficulties with other parties or the courts that appear to result from the application of these policies. The Assistant Attorney General for Legislative and Intergovernmental Affairs will report on any congressional reaction. In order to coordinate review, the Litigation Strategy Working Group will continue to meet periodically to discuss masters issues; Assistant Attorneys General should call any significant court reactions to the guidelines to the Group's attention.

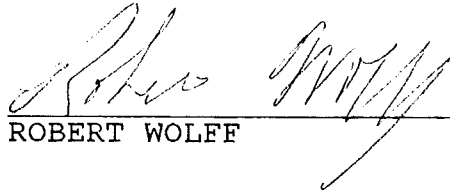
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Memorandum Raising Objections To The Proposed The Order Of Reference was served this 2nd day of May, 1986 by Federal Express ZAP Mail delivery, postage prepaid, addressed to the following:

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