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An Analysis of the Use of Special Masters for Assuring Compliance with Judicial Decrees in Corrections Litigation

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AN ANALYSIS OF THE USE OF SPECIAL MASTERS FOR ASSURING COMPLIANCE WITH JUDICIAL DECREES IN CORRECTIONS LITIGATION

by

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AN ANALYSIS OF THE USE OF SPECIAL MASTERS FOR ASSURING COMPLIANCE WITH JUDICIAL DECREES IN CORRECTIONS LITIGATION

Richard J. Liles, D.P.A.

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The purpose of this study was to analyze the recent practice of judges appointing remedial special masters to oversee the implementation of consent decrees and court orders. These orders are a response to the spate of inmate suits demanding compliance with the constitutional guarantees provided in the Fourth, Eighth, and Fourteenth Amendments. As more courts have become involved in adjudging the constitutionality of conditions in correctional institutions, there has been a trend toward the judge becoming a quasi-manager in assuring compliance with the court's orders. To conduct this oversight, they have turned more and more to the practice of hiring agents called remedial special masters to conduct the activities of compliance and report to them the defendants' efforts in reaching an acceptable level of compliance. Now that there is a 15-year history of this usage, it is timely to discover what these remedial special masters have learned about their role and, further, what future implications can be drawn regarding this unique addition to the judicial arsenal of techniques for social change.

The researcher concentrated on discussing and analyzing a recent Michigan case, Yokley v. Oakland County (C.A. 78-70625), in which the federal court judge appointed a monitor to both oversee and assist in the process of reaching compliance with a remedial court order. The study also examined the literature in this emerging field, and surveyed 20 other individuals who have served in a similar capacity across the nation in recent years. The case study approach presents a detailed description of the events that led to the filing of the suit; the decision to appoint a remedial special master; the actions taken by the master; and an analysis of the political, economic, and social factors that affected the mastership. The survey of the other remedial special masters who have been involved in insuring compliance with court orders to improve conditions in corrections institutions provides information on their experiences with this recently developed method of court intervention.

It was concluded that the use of remedial special masters to manage compliance with court-ordered constitutional achievement of basic rights does appear to have contributed to the defendants' efforts to reach compliance with the court decree. The need for this intervention is predicated on the existence of a condition of unwillingness or inability of the executive and/or legislative branches of government to implement the provisions of the court order without judicial management and direction.

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Richard J. Liles

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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 someone 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 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)

CHAPTER I

INTRODUCTION

General Discussion

In the last decade, federal courts have become deeply involved in restructuring living conditions in prisons and jails to assure compliance with the constitutional guarantees of the Fourth, Eighth, and Fourteenth Amendments. The courts have expanded traditional interpretations of these amendments to give greater protection to prison and jail inmates. The civil rights movement of the 1960s began to reach the large prison and jail population in the 1970s. The Supreme Court's first modern prisoner's rights case, in 1964, Cooper v. Pate, 378 U.S. 546, allowed Muslims to practice their chosen religion while imprisoned. By 1974, the floodgates for change were opened by Justice White's statement that "there is no iron curtain drawn between the constitution and the prisons of this country" when ruling in Wolff v. McDonnell, 418 U.S. 539. During the past 10 years, inmate plaintiffs have won more and more suits for a humane environment in their places of incarceration.

Often the consent decrees or agreements entered into by the parties to the suits, with the blessing of the federal bench, have been quite technical in their description of the minimal conditions

acceptable for correctional facility reform.[1] They required an in-depth knowledge of corrections well beyond the experience of many federal court judges. When voluntary compliance was not reached in a timely fashion, the courts turned increasingly to the use of experts referred to interchangeably as masters or monitors. These court-appointed representatives are entrusted with the responsibility of insuring compliance with court-ordered judgments.

Typically, the masters are required to observe, monitor, fact find, report or testify as to findings, and make recommendations to the court concerning steps that should be taken to achieve compliance. Masters have become engineers of court-ordered correctional reform. The engineering includes acts of interpretation, observation, reporting, consulting, and enforcement (Levinson, 1982).

There is little question that federal courts have the authority to appoint special masters. Rule 53 of the Federal Rules of Civil Procedure provides the basis for such appointments. The use of the procedure in correctional litigation, however, is relatively recent. The first documented instance was a case at Angola Prison in Louisiana in 1971. The appointment of masters had long been practiced in cases involving school desegregation, housing, mental

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[1]A consent decree is a decree entered in an equity suit on consent of both parties; it is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties, made under the sanction of the court, and in effect an admission by them that the decree is a just determination of their rights upon the real facts of the case, if such facts had been proved. It binds only the consenting parties; and is not binding upon the court (Black's Law Dictionary, 1979, p. 370).

health, and technical federal court intercessions, such as bankruptcy proceedings.

Because the practice is fairly new to the correctional litigation field, it is a topic of concern for federal, state, and local officials as well as judges, lawyers, and plaintiffs. In recent cases, the courts have expanded the role of masters from that of simply reporting levels of compliance to actually implementing federal court orders. This development raises important issues of discretion. It is time for systematic study and analysis to review the use of these individuals to bring about correctional reform and discuss the implications of this practice of judges hiring agents to manage their case and in effect supersede the executive and legislative branches of government in managing correctional institutions.

Statement of the Problem

There is a need to develop an approach that would guide judges and others toward making an appropriate decision on the use of a remedial master. Levine, in his 1984 article, "The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered," presented a definition that best describes the use of monitors and masters in institutional reform litigation cases. It was his suggestion to refer to a "remedial special master" as that type of master or monitor appointed to perform tasks for the court after the judge has

determined liability (p. 759). For the purposes of this dissertation, the term "remedial special master" is used to refer to those individuals who are appointed by the court with the broad duties and authority to develop remedies and implement decrees in correctional institutions.

Often decisions are made to appoint someone to assist the court without the benefit of critical analysis of the particular circumstances of the case. Even if the decision to appoint a remedial special master is sound, it is sometimes done not with a clearly defined result in mind, but with a vague hope of resolving the issue.

Sturm (1979) outlined some of the problems facing a master when he stated:

> The master attempts to play a number of roles that require conflicting skills and relationships with the parties. In his informal capacity as intermediary, adviser, and administrator, the master attempts to perform functions that require the consent of the parties, familiarity with the problems and personalities of the prison, and involvement in the daily interactions of the parties. In his formal capacity as fact-finder, arbitrator, and enforcer, the master is expected to impose judgments on the parties regardless of their consent. He must maintain a disinterested, impartial posture and provide the parties with equal opportunity to challenge his formal actions. If the formal and informal roles conflict or are perceived by the parties to conflict, the master's legitimacy and effectiveness will be compromised.
>
> Confusion over the master's role in a particular situation can cause tension among the parties. They may feel they have been treated unfairly when the master performs roles with conflicting purposes. Parties will sometimes discuss problems informally with the master, and perceive him to be performing an advisory or administrative role, only to discover that their extemporaneous comments were used against them in a compliance report. In addition, a master's informal suggestions may be interpreted as formal requirements for compliance. (p. 1082)

As Levinson (1982) pointed out in his article on special masters, "Nathan [referring to Vincent Nathan] is a special master, one of a handful of people who have assumed what may be the most controversial role in American corrections today" (p. 7).

The use of an expert in the role of remedial special master has significantly increased since the initial prison litigation usage in 1971. It has also broadened to assist the court in bringing about compliance rather than just acting as an expert observer for the judge. As Levinson (1982) mentioned:

> In a handful of recent prison cases, though, courts have assigned masters a much broader and far more difficult role--to bring about compliance after a court order has been issued. It is in these kinds of cases where the most controversial issues regarding special masters have come up. Among them:
> . When should a special master be appointed?
> . What should his relationship be with the prison administration?
> . What kinds of powers should he have?
> . Are there cheaper, more effective mechanisms to bring about changes? (p. 9)

Often judges and the magistrates who advise them on these issues do not have a complete understanding of the problems surrounding prisons and jails. They have been equipped to interpret the law, make decisions based on legal precedent, and officiate during the course of trials. They tend also to react to the pressures exerted by the attorneys representing the clients in a case. Based on the presentation of these attorneys, the judge often must make decisions in which he/she may have little understanding of the issues.

Recognition of this state of affairs brought about the creation of a key document that was designed to be a primer for masters. In 1983, the National Institute of Corrections published the Handbook for Special Masters. As Breed (1983) stated in the foreword, its purpose is "to provide judges with some insight into the practical workings of an institutional, correctional mastership" (p. v). He further elaborated that "it is an effort on the part of experienced masters to provide newly appointed colleagues, and judges considering the appointment of a master, with a general overview of mastering in correctional institutions" (p. v). This document is the only work that has attempted to describe the many ingredients that must go into the process surrounding correctional change brought about by litigation.

There appears to be a need for the development of a model for use by attorneys, judges, magistrates, and subsequently masters or monitors that defines the social, political, economic, and interpersonal relationships. To make the correct decision on when and how to use this unique judicial intervention, a description of the various processes involved in mastering and monitoring must be accomplished. From there, some conclusions as to the types of interventions based on the particular cases can be drawn. This should lead to a model that one can overlay on the case in question and make decisions based on systematic information.

Hypothesis

This paper submits that the relatively new development of appointing special masters to manage court-ordered remedies for correctional institutions when applied at the appropriate time in the process serves to bring about compliance by the parties and is thus a legitimate approach for the judiciary to use. The key to determining when to successfully employ the intervention can be found by analyzing the use of remedial special masters over the past few years and learning what is common to the experiences. The main condition that must exist is the demonstrated unwillingness or inability of the executive and/or legislative branches to implement the conditions contained in the court order.

The null hypothesis developed to focus this research is:

Hypothesis: The appointment of a special master to manage a remedial order in corrections litigation does not significantly contribute to the defendant's efforts to reach compliance with the terms of the decree.

The general approach used to probe this hypothesis, as detailed in the section on methodology, is to discuss and evaluate the recent experience I had as a remedial special master, review the literature on this subject to determine common themes and insights into the phenomenon, survey the other masters and monitors involved in corrections litigation to gain their views of this method of intervention, and analyze the data generated to isolate the common

experiences from which inferences may be developed that will shed light on the subject.

CHAPTER II

CONTEXT OF THE STUDY

Introduction

It is both fitting and ironic that I am discussing the concept of federalism and its relationship to the use of remedial special masters in corrections litigation on precisely the same day that our forefathers signed the United States Constitution 200 years ago. The basis for our form of federalism came about in England as far back as the Saxon period, when Englishmen were accustomed to governing themselves locally and carried forward to the relationship which the American colonies maintained with Britain. In fact, a perceived encroachment on this arrangement was the reason for the establishment of a separate nation under the Articles of Confederation in 1781, which prescribed autonomous state governments acting without any regard for the nation as a central government.

As stated by Chandler and Plano (1982), "Federalism is considered to be the cornerstone of the United States governmental system" (p. 62). This chapter, then, will discuss and examine the concept of federalism as it has evolved in the American system of government and focus on a newly identified form of federalism, which Carroll (1982) describes as "juridical federalism" and defines as the judicial concern "with the respective powers and rights and

duties among levels and types of government in the United States, as these relationships directly affect individuals and groups" (p. 91).

Federalism Defined

In the 1982 edition of the Public Administration Dictionary, Chandler and Plano provide a definition of federalism as a "structure of government that divides power between a central government and regional governments, with each having some independent authority" (p. 62). They further outline the ingredients of federalism as having a separation of powers between the entities, maintaining a system of checks and balances, and retaining the benefits of a centrally located government, while still recognizing the autonomy of some state and local powers. This system was originally defined in the Constitution and subsequently refined in the decisions of the Supreme Court, particularly the Marshall years, during the early period of our nation's existence.

Leach (1970) explained federalism as a device for dividing decisions and functions of government and characterized it further by stating:

> It ordinarily involves two major levels of government, each, at least in democratic societies, assumed to derive its powers directly from the people and therefore to be supreme in the areas of power assigned to it. Each level of government in a federal system insists upon its right to act directly upon the people. Each is protected constitutionally from undue encroachment or destruction by the other. To this end, federalism entails a point of final reference, usually a judiciary. The people in federal systems are held to possess what amounts to dual citizenship. Sovereignty, in the classic sense, has no meaning; divided as power is, the element of

> absoluteness which is essential to the concept of sovereignty is not present. Federalism is concerned with process and by its very nature is a dynamic, not a static, concept. In operation, it requires a willingness both to cooperate across governmental lines and to exercise restraint and forebearance in the interests of the entire nation. (p. 1)

Federalism, then, is a theory which recognizes two distinct and separate governments, one state and one federal, and accords to each a proper responsibility and duties. As stated by Chandler and Plano (1982),

> [The] characteristics of a federal system include a separation of powers, in which neither partner owes its legal existence to the other, and a system of checks and balances, in which neither partner can dictate the policy decisions of the other. (p. 62)

In summary form, federalism today means the system of authority which has been constitutionally divided between the federal (central) government and the states (regional).

The simple defining of this complex intergovernmental-relations phenomenon, though, leaves one without a full grasp of the intricacies involved in the American governmental process, and a history of the changing nature of federalism must be presented in order to understand the importance, particularly from a public administration viewpoint, of the topic.

As was mentioned earlier, the framers of the Constitution were dealing with a situation in which 13 states with wide geographic and population variations were trying to reach some accord on survival as a nation, not a world of today in which population, technology,

and knowledge have created an interdependence between all levels of government.

This conceptual framework for assuring a proper balance of powers, duties, and responsibilities was initially developed when the nation was small, both in size and population, and consisted of 13 colony-states. Now, according to the 1982 Census of Governments, there are some 80,000 American governments, which includes one national, 50 state, and the remaining 79,000 represented as counties, municipalities, townships, school districts, and special districts. As can easily be seen by the number of entities which can be classified as having governmental authority, the full range of federalism has become increasingly complex and interdependent. The goal of the framers of the Constitution, as pronounced by James Madison, was to combine the states into a formation which would minimize "instability, injustice, and confusion" as he stated in The Federalist Papers, and this has certainly been made much more difficult by the proliferation of local governments.

It is fortunate that federalism as pronounced by those attending the Constitutional Convention was not clearly defined and has been subject to change in relation to the evolution of our society since this flexibility is what has allowed it to remain a viable framework in the face of massive change.

Theories and Types of Federalism

Although there are as many different theories of federalism as there are theoreticians, I will present a summary of the six most commonly presented and discuss in some detail the recent judicial federalism as proposed by Carroll (1982).

Tracing the history of federalism can be a difficult task in that the different historians and political writers have categorized the different periods depending on their analysis of the particular social, economic, and political traits they see. In his recent work, Toward a Functioning Federalism, David Walker, Assistant Director of the Advisory Commission on Intergovernmental Relations (1981) depicts the evolution of American federalism as falling into four historical phases. These are: the pre-Civil War period (1789-1860), the firing on Fort Sumpter to the Great Depression (1861-1930), the Roosevelt era through Eisenhower (1930-1960), and the current era, which began with the election of John F. Kennedy (1960-present). Within these phases he basically postulates that dual federalism which restricts national power, requires an equality of power between state and federal governments, and requires a "tension" between the two levels is reflected during the period up to 1860.

Following this period of tension between the nation-centered and state-centered theory which culminated in the Civil War, the next phase (1861-1930) could still be considered to be dual

federalism. It shifts, however, in interpretation of the Constitution and application of its principles distinguish it from the earlier era. The thirteenth, fourteenth, and fifteenth constitutional amendments and the reconstruction of the southern states by a powerful central government began the process of an expanding federal role in intergovernmental relations which carries on to today. It is interesting to note that the civil rights activity, which was a part of this period as a response to the slavery issue, is paralleled in modern times by the civil rights movement in relation to prison and jail inmates. These lawsuits brought about judicial intrusions into what were formerly considered administrative matters.

The cooperative federalism period of 1930-1960 arose from the economic crisis and the world conflict which brought about a relationship in which federal-state-local governmental sharing of responsibilities became apparent. There began a shift from the idea that tension between state and federal government best maintained the balanced power to a concept in which the sharing of power among the three levels of government created a system of government serving its citizens. Walker (1981) quotes Grodzins (1964) and Elazar (1962) in his book Toward a Functioning Federalism in developing the seven premises on which cooperative federalism is based as:

1. The American federal system is principally characterized by a federal-state-local sharing of responsibilities for virtually all functions.

2. Our history and politics in large part account for this sharing.

3. Dividing functions between the federal government, on the one hand, the states and localities, on the other," is not really possible "without drastically reducing the importance of the latter.

4. No "strengthening" of state governments will materially reduce the present functions of the federal government, nor will it have any marked effect on the rate of acquisition of new federal functions.

5. [Real and reliable decentralization is that which exists] as the result of independent centers of power and . . . operates through the chaos of American political processes and political institutions.

6. Federal, state and local officials are not adversaries. They are colleagues. The sharing of functions and powers is impossible without a whole.

7. The American system is best conceived as one government serving one people. (p. 66)

One of the strongest expansions of the federal government's authority represented by the New Deal legislation of the 1930s was rejected soundly by the Supreme Court. As Walker (1981) points out, the expansion of federal authority at the expense of the states specifically was ruled unconstitutional by a majority of the Court. This contrasts significantly with the expansion of the federal role, particularly in constitutional-rights issues, with the Warren Court of the 1950s and 1960s.

As Goode (1983) demonstrated in his book, The New Federalism, three factors have concentrated power in the national government during the last 70 years. The first was the United States becoming a world power after World War I. This period brought about an

increase in central government that was unnecessary when the former isolationist policies were prevalent. The second factor was the reaction to the Great Depression, in which President Franklin D. Roosevelt and Congress established a multitude of federal programs to revitalize the economy. These have carried on and were expanded by subsequent leaders. A third factor has been the communications, transportation, and technological revolution, which has brought all of the nation's citizens closer to the central government. This new technology has placed Washington in the position of being able to respond to virtually every need. Under the general title of "permissive federalism" coined by Michael Reagan in 1972, new approaches to intergovernmental relations were spawned.

The fourth era, and the one we are currently still redefining, is the period from 1960 through the present, in which variations of cooperative federalism have been presented. These variations have taken the form of President Johnson's creative federalism, Richard Nixon's new federalism, Jimmy Carter's new partnerships, and President Reagan's new federalism.

Creative federalism is basically an expansion of the cooperative theory beyond states and the federal government to include as partners in the equation cities, counties, school districts, and even nonprofit organizations. Some 200 new grant-in-aid programs were targeted for states, cities, and counties to implement domestic programs. The system of cooperative federalism

in which the federal government and the states were sharing power, authority, and responsibility was expanded. It now includes local governments as allies, and virtually all governmental functions are shared by a federal-state-local partnership.

Nixon's new federalism was a reaction to the creative federalism of the 1960s and dedicated itself to being anti-central and noncategorical. Some of the revenue-sharing programs, particularly in law enforcement, rural and urban development, education, and transportation, pushed decision making down from the federal system to the state and local governments. Basically, this deviation, attributed to the Nixon presidency, aimed at sorting out the creative federalism system and defining more power and authority with the state and local governments.

Under the "new partnership" proposed by President Carter in 1976, some of the themes from the Johnson era were reintroduced. Key ingredients were a targeting of federal aid based on need, a reduction of paperwork and simplification of government red tape, allocation of more public funds to stimulate private investment, and better management of government. Fiscal control and fiscal conservatism also became themes that were part of the new partnership approach.

The final current variation of cooperative federalism, which some theorists still believe is prevalent, is the Reagan federalism or the Reagan new federalism. Goode (1983) points to the 1982 State of the Union Message, in which President Reagan proposed support

from Congress to return power to state and local governments. This redefining of the cooperative partnership is to return a balance to the state and federal system by having states take control of some 43 separate programs in health, welfare, transportation, community development, education, and income assistance. As Goode indicates:

> Reagan believed that this vast transfer of federal activity would accomplish three things. First, it would relieve Congress and the federal government of many responsibilities that now absorbed their time and leave them free to devote themselves to other issues. Second, it would help cut down on waste in government, because the programs, the president believed, could be run more efficiently by the states.
>
> And third, it would allow the states and localities themselves to decide what programs they wished to finance and which to eliminate. A significant amount of responsibility for decision-making would have been returned to the states and a new balance of federalism achieved. The drift of power and influence to Washington would be checked. (p. 133)

Although the Supreme Court defined the general bounds of federalism through their constitutional interpretations early in the nation's history, the nature of federalism has been dynamic rather than static. The traditional view of distinct and separate entities, which was called "layer-cake federalism," has given way to the cooperative and interlinking theory of federal-state-local partnership, which has been described as "marble-cake federalism." Recent activity has been aimed at simplifying and sorting out the jurisdictional disputes and duplication of effort which were common to the cooperative efforts prevalent after World War II.

Wildavsky (1983) describes dual federalism as a "layer cake" theory of federalism in which each level of government is clearly

defined, cooperative federalism as a "marble cake" in which the lines are blurred and flow in an uneven fashion, and proposes that we are now faced with "fruitcake" federalism. He defines this newest version primarily in terms of the time that the levels of government spend trying to outdo each other in grabbing resources. It has been brought about, in part, by revenue sharing and the proliferation of federal offices which has come about as a result of dollars flowing from Washington. His resolution for this problem would be to more clearly separate and distinguish state from federal activities and increase the competition between the levels of government. This harkens back to a more dualistic approach to federalism away from the current cooperative framework.

The Courts and Federalism

The framers of the Constitution in 1787 were proposing to set up an arrangement by which the 13 states could function with some degree of autonomy, yet still maintain the sense of security and protection of a centralized government. Through long debate and classic compromise, the eventual document specified the areas of authority and responsibility between the states and the federal government and also established as the cornerstone of our system the concept of a separation of powers among the legislative, executive, and judicial branches of government.

As prescribed by the Constitution:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. (Article I, Section 1)
>
> The executive Power shall be vested in a President of the United States of America. (Article II, Section 1)
>
> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. (Article III, Section 1)

Much of American political history has been focused on the tension brought about by this attempt to provide a balance of governance and a separation of powers designed to protect against a monarchy. Of particular concern recently, and the issue on which this paper focuses, is the judicial intrusion on primarily executive functions with regard to managing state and local corrections institutions. To establish the framework within which the American system functions, a brief description of the courts' role in shaping modern-day federalism is presented.

One of the key questions faced by those attending the Constitutional Convention was who would judge in the case of disputes between the federal government and the state and local governments. Some of the initial proposals, which were opposed strongly by the "states' rightists," were to empower Congress with the ultimate authority and power to determine whether state laws contravened the federal statutes. To resolve this impasse, a compromise which took into consideration the state interests, as well as providing for an arbiter of disputes, brought about the

creation of a Supreme Court. As Walker (1981) points out in his history of federalism:

> Subsequently, Madison and Wilson did succeed in getting Convention adoption of a resolution permitting the national Congress, at its discretion, to establish such tribunals. The right of appeals from state tribunals to the Federal Supreme Court already had been accepted by some delegates, though some authorities believe that the convention "did not regard the right of appeals as establishing a general power in the federal judiciary to interpret the extent of state authority under the Constitution." Nonetheless, the supremacy of national Constitution and laws, when linked with the establishment of a Supreme Court and the right of appeals from state courts (clearly detailed in the Judiciary Act of 1789, along with the establishment of lesser federal courts by that Act), laid the foundation of the Supreme Court's ultimate right to define the nature and extent of state and national authority. Ironically, the adoption of the New Jersey plan's "supreme Law of the Land" provision achieved the goal that Madison and Wilson sought, but by means that few in the Convention clearly understood. It was a crucial Convention decision that most of the nationalists opposed, but one that ultimately helped assure the legal supremacy of the national government. (p. 35)

This compromise, which forms the basis for a review of both executive and legislative power and fulfills a balance-of-power theory, has been fraught with problems. As Leach (1970) and others have indicated:

> Though the framers of the Constitution were careful to list the general kinds of cases in which federal judicial power might be exercised, they did not define the phrase "judicial power" itself. Nor has Congress attempted to do so. Thus the courts --and particularly the Supreme Court--have been able to define it themselves. The traditionalists have held that the judicial function is merely to maintain and enforce the law and to administer justice under it, while the activists hold that judges should use their power to achieve reform and bring about improvement, i.e., to legislate. In more recent years, the latter view has come to be predominant. Generally speaking, the federal courts have not often deliberately sought to encroach on either executive or legislative power. But since the courts sit continually in judgment on legislative and

> executive acts as they relate to the Constitution, even the restrained exercise of judicial power may well serve to qualify legislative and executive power. (p. 33)

As a number of judicial observers, both pro-activist and strict constructionist, have pointed out, this situation in which the court can exercise "judicial power" depending on its own definition of what that constitutes often puts the court at odds with the executive or legislative branch or both. This is particularly apparent when the federal court is judging state and local institutions and their operations.

Even though the scope of federal power for the judiciary was defined and the process for appointing judges stated in the Constitution, it was left for Congress to establish the framework for federal courts and to define their role. The Judiciary Act of 1789, which is essentially the basis for our court system of today, was passed on September 24, 1789. It provided for a Supreme Court consisting of a chief justice, 13 district courts, and three circuit courts. More important than the detailed procedures and mechanical make-up which was defined is the twenty-fifth section of the act, which gave the Supreme Court the authority to review the constitutionality of a treaty or statute.

The Marshall Era

In 1801 began the era of John Marshall as Chief Justice, who is without question the one man most responsible for shaping the role of the judiciary during the early years of the nation. It was the

early Marshall opinions that forged the Constitution as the final authority over legislative actions and the Supreme Court as the arbiter and interpreter of the Constitution.

During what is considered the Marshall Court, from 1801 to 1835, there were some 1,100 opinions handed down, of which Chief Justice Marshall wrote half. The most significant ones which involved the question of federalism are listed by Goode (1983) as follows:

> **United States v. Peters (1809).** This case involved the refusal of Pennsylvania to abide by rulings of federal courts. In 1779 and again in 1803, a decision by the Pennsylvania state courts was reversed by a federal tribunal. The state, however, ignored the reversal and asserted its right as a sovereign and independent government to decide matters for itself.
>
> The question before the Supreme Court was whether a state could be compelled to abide by the decision of a federal court. Marshall came down firmly on the side of the federal courts. The federal government, he wrote, has the power to enforce its laws by the "instrumentality of its own tribunals." Pennsylvania had to obey the reversal.
>
> At first, Pennsylvania attempted to resist the decision by calling out its state militia. But President Madison countered the threat of rebellion by calling up a federal posse of two thousand to enforce the reversal, and the state backed down. The Pennsylvania legislature then issued a statement accusing the Supreme Court of bias against states' rights and calling for the establishment of an "impartial tribunal" to decide matters involving disputes between the state and national governments. The request failed to find much support, either in Washington or the state legislatures.
>
> **Martin v. Hunter's Lessee (1816).** In this case, the Supreme Court upheld the constitutionality of Section 25 of the Judiciary Act of 1789, which gave the Court the right to review cases from state courts. It was a "doubtful course," wrote Justice Joseph Story for the Court, to argue that the Supreme Court did not have the power to review state decisions because it might abuse that power.
>
> "From the very nature of things," he continued, "the absolute right of decision, in the last resort, must rest

somewhere." And that "somewhere," he concluded, was with the Supreme Court, not the states. Story's decision was so significant that constitutional scholar Charles Warren has called it "the keystone of the whole arch of Federal judicial power."

McCulloch v. Maryland (1819). The issue at hand was the Bank of the United States (B.U.S.), which was chartered in 1816. The bank competed with state banks in speculation and overextension of credit. In 1818 the B.U.S. called in its loans to avoid an impending economic crash and in the process caused the collapse of several state banks.

Seven states retaliated by passing laws restraining the operation of the B.U.S. within their borders. The Maryland legislature chose to tax the Baltimore branch of the national bank, and B.U.S. officials protested to the Supreme Court that the state did not have that power.

Two questions before the Court were: (1) Did Congress have power to charter a bank and (2) did Maryland have the right to tax the operations of that bank? The case was of prime importance because it was the first time the Court considered the powers of Congress in relation to those of the states.

Marshall decided the first question on what he called the "great principle" of national sovereignty. The national government, he said, was a limited government, but within its sphere of powers it was supreme. In cases where national power conflicted with state power, state power had to give way. The national government was superior, he wrote, because "it is the government of all; it represents all, and acts for all."

The Constitution, he continued, was intended to be a source of power plentiful enough to meet all the "exigencies of the nation." "A government constructed with such ample powers," he went on, "on the due execution of which the happiness and prosperity of the nation so vitally depends, must be entrusted with ample means for their execution."

Therefore, Marshall concluded, Congress had the power to establish a Bank of the United States, even though that power was not specifically listed in the Constitution. The bank, he said, was necessary to the efficient functioning of the national government and therefore clearly within the "legitimate" and "appropriate" sphere of congressional action.

On the question of whether the states had the power to tax the bank, Marshall likewise decided against the states. "The Power to tax," he wrote, "involves the power to destroy." And the states, he concluded, "have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress."

Gibbons v. Ogden (1824). This case involved state regulation of commerce. The New York legislature granted the Fulton-Livingston steamboat company the exclusive right of steam navigation on New York's rivers. Thomas Gibbons, the owner of a rival company, challenged this monopoly and claimed that it violated the constitutional right of Congress to regulate commerce among the states.

Gibbons lost his case in state courts, but then took it to the Supreme Court. The Court decided in his favor. The power to regulate interstate commerce, Marshall wrote, was granted to Congress for the "general advantage" of the people, and was therefore a "plenary" or complete and full power.

Marshall went on to define commerce broadly. It was not the mere "interchange of commodities," he wrote. Rather, it included "every species of commercial intercourse" carried on between and among the states. This meant that the power of Congress to regulate interstate commerce did not stop at state boundaries but "may be introduced into the interior" of the states.

Marshall likewise gave a broad definition to what the Constitution meant by "regulate." The power to regulate, he said, was "complete in itself." It "may be exercised to its utmost extent" and it "acknowledges no limitations" other than those mentioned by the Constitution. The Congress, Marshall implied, had the power to establish commercial unity throughout the nation, and no state had the right to stand in the way of that power. (pp. 75-77)

Through these four decisions and the multitude of other opinions, it is clear that the Court defined federalism with a strong emphasis on national power as prescribed by the tenets of the Constitution.

The Courts and Dual Federalism

As was mentioned in the previous section on types of federalism, the term "dual federalism" is defined as a sharing of the responsibilities of government with the Supreme Court acting as the interpreter of the respective role for the national or state

governments. This was the period that Corwin (1962) determined was bound by the following four postulates:

1. The national government is one of enumerated powers only;
2. The purposes which it may constitutionally promote are few;
3. Within their respective spheres the two centers of government are "sovereign" and hence "equal";
4. The relation of the two centers with each other is one of tension rather than collaboration. (p. 188)

This model is often equated with the judicial model of federalism because the Supreme Court during this period supported the dualism concept and shaped decisions around arbiting the claims of states against the federal government and vice versa whenever one or the other felt their territory to be infringed upon.

The Taney Court (1835-1863) is credited with fostering this judicial view of how the nation and the states should operate in a constitutional sense and basically kept the federal government from moving into areas such as education, criminal law, labor law, and commerce that were preserved for the states. The court defined a system in which each level of government had its proper duties and responsibilities and fought against the intrusion of one into the other's sphere of power.

It was this attitude by the Court that blunted the civil rights movement after the Civil War, which culminated with the passing of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. A series of decisions in 1883 by the Supreme Court voided much of the Civil Rights Act of 1875, and, as written by

Justice Bradley, it is not the business of government to involve itself in "every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business." It was some 80 years later and under a Supreme Court with entirely different values that the use of these equal rights amendments was realized.

The judicial view of limited federal power carried through to World War II. In fact, one after another of the Roosevelt New Deal programs were declared unconstitutional due to court interpretations which favored a strict constructionist view of Congressional powers between 1933 and 1937. Only through the appointment of justices who favored his idea of using the federal government to bring social justice to the citizens was Roosevelt able to move forward. This began the period of "judicial activism," in which the Court significantly broadened its view of the constitutional authority of Congress in regard to enforcing the rights of citizens. Although this shift in judicial philosophy was slow to start, the appointment of Earl Warren in 1953 accelerated the social revolution as it has come to be known.

The Court and Contemporary Federalism

The demise of the dual federalism philosophy was rapidly brought about as a result of appointments to the Warren Court in the

1960s by Presidents Kennedy and Johnson. These new justices favored of judicial activism to bring about needed social equality. Working in conjunction with the cooperative federalism theorists in each of the modern administrations, the Court actively "assumed a novel role as a leader in the process of social change quite at odds with its traditional position as a defender of legalistic tradition and social continuity" (Walker, 1981, p. 135).

Goode (1983) and others have pointed to a series of landmark decisions that overturned state laws restricting equality and social justice:

> **Brown v. Board of Education (1954).** In this case the Supreme Court declared segregation of races in public schools to be unconstitutional. The following year, the Court ordered the states to begin integration of schools with "all deliberate speed." Subsequent decisions knocked down segregation in public transportation and accommodations, in housing, and in many other aspects of American life.
>
> **Baker v. Carr (1962).** In this case the Court ordered the states to reorganize voting districts so that every citizen was granted an equal voice in state government. A subsequent decision ordered reorganization of voting districts for members of the House of Representatives on the same basis. The result, noted the Washington Post, was " a massive change in the nation's political structure" as the states struggled to redistrict according to new population patterns. Many rural areas lost political power they once had, while urban areas gained.
>
> **The Mapp (1961), Gideon (1963), and Miranda (1966) Cases.** In these cases the Court established national guidelines for the handling of accused criminals that had to be followed in all states. These guidelines protected the accused criminal's right to remain silent and to have a lawyer.
>
> **The Engel (1962) and Schempp (1963) Cases.** In these two cases the Court declared that school prayer and Bible reading were unconstitutional. Such devotions, it said, when carried on in

> public schools supported by government funds, amounted to state support of religion, which was unconstitutional under the First Amendment. (p. 125)

Even the Burger Court, which was hailed as a move toward conservativism and a a strict-constructionist philosophy, has continued the practice of judicial activism and ruled many state laws as unconstitutional, thus continuing cooperative federalism. "Government by the judiciary," as it has been called, is reasoned as an unwarranted intrusion into the executive and legislative matters of state and local governments. The critics further claim that laws are only to be made by the Congress and the state legislatures and that the Court should only be interpreting those laws, not creating laws that impose the Court's views of an American system and society on the nation.

Birkby (1983), in his book The Court and Public Policy, presents the thesis that courts have an inherent power to make policy through their interpretive responsibility as designed by the framers of the Constitution. Their power, though, is to be differentiated from the legislative and executive policy-making powers by the following 10 characteristics:

1. The courts have no "self-starter." This phrase, coined by Justice Robert H. Jackson, simply means that judges have to wait for problems to be brought to them; they do not, despite occasional appearances to the contrary, have a roving commission to go out and cure whatever ills they consider worth eradicating. If there is no controversy, there is no litigation. If there is no litigation, there is no judicial policymaking even though a judge might wish to make law in the issue area. On the other hand, a legislature or executive can identify and define a problem, devise a solution for it, and adopt the solution without

any request from an outside source. Legislatures and executives may take the initiative; courts may not.

2. The courts decide on specific issues shaped both by the demands made by the litigants and the technical rules of the judicial process. Lawsuits are normally presented to the courts in specific, concrete, and particularized form. The judge is forced to take that particular set of facts and a specific plea for relief and make a rule that will resolve the immediate problem. That rule may or may not be applicable to other situations. Sometimes the facts are so idiosyncratic that the decision is pertinent only to the litigants of the moment. Other times the facts are sufficiently unusual for later litigants to assert that a different or contrary decision is warranted by them. A legislature, on the other hand, starts with rules of general application that are broad enough to cover a wide spectrum of similar but not identical facts. The reason and policymaking processes are different; the former is inductive and the latter deductive.

   . . . The way an issue is presented may have a profound effect on the solution adopted by the policymaker. A judge is presented with a specific person or persons seeking action on certain facts that have been adjusted to meet the rules of the judicial process.

3. The judge must make a decision. In practically all instances, judges do not have the legislative luxury of deciding not to decide. The facts may be too peculiar, the litigant the wrong person, the timing wrong for the acceptance of policy, and the state of the law too fluid for a good decision. But having started, the judge must move on to a conclusion and an order. . . . The U.S. Supreme Court has greater discretionary control over its caseload than has just been suggested, but even there, after the case has been accepted and argued, a conclusion must be reached. In addition, as in other areas, a decision not to decide is a policy choice because it leaves the status quo intact.

4. The judge is confined by the doctrine of stare decisis. What has been decided in previous and similar cases must be the starting point for the judge and in a majority of instances will be the end result as well. Adherence to precedent in the common law system gives to the law a degree of certainty which, along with adaptability, is one of its prime requirements. However, American courts have not been slaves to precedent; they have shown a willingness to overrule prior decisions when their usefulness has

passed and society has changed. In contrast, the legislative process encourages consideration of departures from the settled way of doing things.

5. The judge is often confined by statutory or constitutional language. In other words, the judge usually is not confronted with a blank slate. He or she generally will be constrained not only by precedent but by constitutional requirements that may not be ignored, and by legislative action which ought not to be. The legislature may have foreclosed several solutions to the problem presented by the litigation. Or it may have declared a preferred method of dealing with the problem. In either event, the judge must shape decisions within the imposed constraints or run the risk of conflict with the legislature or executive. Legislators, of course, are equally restrained by constitutional provisions as construed by the Supreme Court, but their earlier pronouncements on an issue may be repealed or ignored. The legislature is much freer than the courts to declare that the game henceforth will be played according to new rules.

6. The judge may not have access to a broad range of facts bearing on the issue. The rules of evidence may restrict the judge's view of the problem, the number of available solutions, and the nature and weight of the arguments for and against each possible choice. Subjective opinions, perfectly acceptable in the legislative chamber, usually are not germane in the courtroom. Only since the development of the "Brandeis Brief" have medical, economic, and social opinions become acceptable to the courts even though they have long had their place in legislative committee reports. There is still some doubt about the propriety of judicial use of such information. . . . Antitrust cases are sometimes decided without judges hearing the most detailed and sophisticated economic analysis. This is done because of some lingering doubt that such testimony is appropriate for the judicial forum. By contrast, legislatures have no compunctions about gathering every piece of information that might have a bearing on proposed statutes.

7. Judges and lawyers tend to be generalists rather than specialists. Legal education is a general education with little opportunity for the development of narrow expertise. Some practicing lawyers have the chance to specialize as they develop professionally, but attorneys who ascend to the bench are expected and even required to remain generalists. A judge of a court of general jurisdiction

(and this is the overwhelming majority of state court judges and all but a handful of federal court judges) must be able to shift from property to tax to contract to criminal to bankruptcy law all in the course of a day or a week. Even with nights and weekends for study it would be unreasonable to expect judges to become instant experts in each field presented to them for decision. This influences the ability and willingness of judges to consider highly technical data and arguments. . . .

The net effect of this lack of judicial specialization is that the more technical and intricate issues perhaps are not heard with the same degree of understanding in the courts as in the legislature and executive branch agencies. To compensate for this inadequacy, judges usually pay considerable respect to the decisions of "expert" agencies such as the regulatory commissions.

8. The judge must consider remedies in a piecemeal fashion. This repeats, from a different angle, a point already made about the form in which controversies are presented to the courts. The problems are specific and therefore the remedies must be specific and tailored to the controversy before the court. . . . The judicial decree is not well suited to the enunciation of broad, generally applicable remedies because so much of the stuff of litigation is fact and situation specific. Legislative actions, by their very nature, have a general applicability and breadth that a judge's order does not have. A legislator may have reason to believe that one action will put an issue to rest for a period of time; a judge knows that one decision will spawn more litigation as individuals and groups try to find out whether they are within or out of its scope. In short, judicial policy tends to be even more incremental than legislative policy.

9. The judge has no means for systematically following up on his or her orders. Typically a court issues a decree or order and assumes that everyone affected by it will do what they are supposed to do. However, unless they retain jurisdiction in the case and require further action by the parties, judges must rely on the litigants to come back with complaints of noncompliance before there can be official awareness of that fact. Follow-up is even more difficult for an appellate court which usually remands a case to the trial court for implementation of the decision. Under those circumstances, one of the parties has to complain to the trial court about implementation and be rebuffed before the appellate court knows that there is difficulty. Still worse is the situation when a court

> hands down a rule in a specific case with an intent to have it generally applied. Others not party to the original litigation can continue to ignore the ruling until a lawsuit is filed against them asserting the applicability of the precedent. . . .
>
> 10. Judges in a democratic system appear to feel constrained by the nonrepresentative nature of the judiciary. Judges, even when elected, as some state judges are, do not have the same quality of representativeness that legislators have. This removal from the mainstream of democratically chosen officials makes judges aware that their policymaking position is not as firmly rooted in the "will of the people" as is the legislators'; no judge could ever claim to have a "mandate." The effect of this constraint is difficult to evaluate. Some judges become timid in the face of it; others become defiant, but most become sensitive to the limits of their authority and often express that sensitivity by phrases such as "deference to legislative judgment." A presumed advantage of the nonrepresentative nature of the courts is their insulation from the vagaries and hasty shifts of public opinion and from the pressures of "special interests." But they are vulnerable to attack by majoritarians. The legislature is a better reflector of public opinion while the courts offer an opportunity for a "sober second thought." (pp. 2-6)

The court's response to the concern that judges have no means of following up on their orders, particularly in the "institutional suits," has been the appointment of masters or experts who act for the judge in various fashions. In these situations, as the judges have become involved in administering facilities or programs, they have in effect hired managers to facilitate the defendants' compliance. Clearly, the courts have adopted a practical solution through modifying the use of special masters to alleviate the problem they faced when attempting to manage their orders during the current judicial activism period.

Judicial Federalism

In deciding in favor of William Marbury in Marbury v. Madison (1803), Chief Justice John Marshall stated that "it is, emphatically, the province and the duty of the judicial department, to say what the law is." Since then, the courts have been involved in defining federalism in this country. As the branch of government created to adjudicate disputes between the levels and other branches of government, it is the courts that have interpreted constitutional intentions to apply to changing social, economic, and political situations.

The past 30 years have demonstrated an ever-increasing role for the judiciary in redefining the rights of individuals in relation to state and local governments. Lock and Murphy (1987) point to the fact that judges' decisions are important because they provide a framework for public policy, affect rights and duties, and determine costs and benefits.

The Fourteenth Amendment, though ratified in 1868, became a major vehicle for federal court intervention into what were previously considered state matters during the activist Warren Court years. Section 1 states that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is this section, often taken in conjunction with the First, Fourth, Sixth, and Tenth Amendment rights, which was used to bring forth a spate of cases which the Court used to further its goals of the 1960s to end racial discrimination, revise criminal justice procedures, protect civil liberties, and extend basic rights to accused and convicted prisoners.

Another feature of the activist court period became the extended use of Section 1983 of the Civil Rights Act of 1871, which provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

The primary effect of the renewal of this section of law was to allow direct access to the federal courts in cases in which officials were accused of violating the civil rights of individuals. Federal courts have relied heavily on this vehicle to enforce civil rights standards on state and local governments. Even though some limitations have been placed on this usage by the Burger court, it still remains one of the primary sources of legal redress for those who feel disenfranchised.

As Professor James D. Carroll (1982) and others have defined it, "the new juridical federalism is concerned with the respective powers and rights and duties among levels and types of government in

the United States, as these relationships directly affect individuals and groups" (p. 91). This contrasts significantly with the traditional legal federalism which emphasized the canons of the Tenth Amendment in assuring states' rights against national government power.

Carroll's (1982) theory emphasizes the distrust of government by citizens, combined with the maze of intergovernmental jurisdictions which often defy logical sorting, and the increasing role of the federal courts in determining public policy. These factors, in his view, have led to the public administration crisis which we currently face. He attributes the expanded activities of the court to general distrust of government by the people, which is in part caused by their confusion and lack of understanding of the complex governmental process. In short, we have become a litigious society which files suit in order to rectify perceived grievances.

The three factors that compose this new federalism, reviewed extensively in the public administration literature of recent vintage, can be broadly defined as grants law, the extension of personal liability to public officials, and the supervision of state and local institutions by federal courts. Carroll concluded:

> The history of federalism in the United States is a history of adaptive improvisations to changing circumstances. In response to distrust of and confusion over government in the United States, the courts, particularly the federal courts, are fashioning a new juridical federalism. They are fashioning a new distribution of powers, rights, and duties among governments in the United States by focusing upon the effects of intergovernmental arrangements on individuals and groups.

> The new juridical federalism has three components: (1) grants law, (2) extended liabilities of administrators and governments in money damages to parties injured by policy and administrative action, and (3) judicial supervision of institutions.
>
> The new juridical federalism is a substantial burden, financially and otherwise, for state and local governments and administrators. It is also a recognition of the mediative and integrative role public administrators play in American government. Public administration increasingly serves as a nexus for integrating and organizing constitutional and legal, political, economic, managerial, and scientific and technological elements into coherent courses of action. The new juridical federalism affirms the importance of incorporating constitutional and legal concerns into the calculus of intergovernmental action. (p. 103)

Conclusion

This brief survey of the evolving nature of federalism and the judicial role in influencing the direction that intergovernmental relations in this country take sets the stage for the following study of remedial special masters in corrections litigation. It appears that the framers of the Constitution were primarily interested in forming a stable national government without unduly infringing upon the powers of states, yet still preserving a flavor of individual freedom for its collective citizens. It is hard to imagine that they envisioned the complex intergovernmental conglomeration of federal, state, local, quasi-administrative, judicial, and other rule-making entities with which we currently must deal. Public administration under their ideal was to be a relatively straightforward process whereby the states and federal government retained their respective spheres of power, and any

disputes would be arbited by the Supreme Court. As Leach (1970) observed,

> The framers of the American constitution devised a number of ways--separation of powers, checks and balances, judicial review, and federalism--to prevent the abuse of power in the system they were creating and at the same time to preserve the largest possible area of independent action for the individual. (p. 57)

One of the changes, and one that seems to cause the most consternation among public administrators, is the role the judiciary has assumed as the social conscience of the nation by attempting to force change in institutions that were previously the purview of state and local government. As Goode (1983) points out, "For many Americans these actions by the court smack of what has been called 'government by the judiciary' and federal judges, the critics point out, are not elected by the people, nor do they in any way represent public opinion" (p. 14). As they would have it, the federal courts would be in the business of interpreting law and not making law in order to dictate social change.

In many cases this activism by the court has put judges in charge of institutions. School districts, mental hospitals, local governments, correctional institutions, housing authorities, and other formerly state or local functions have been placed under court jurisdiction until certain constitutional conditions are met. As Justice Harlan predicted in Ex parte Young in 1908, the day would come when federal courts would "supervise and control the official action of the states as if they were 'dependencies' or 'provinces.'"

As the judges have used their equity powers to assure compliance with constitutional-rights standards, they have moved beyond the simple declaration of a right and ordering the offending public official to cease and desist in the case of specific violations. They are now required, after finding a violation, to devise or see to it that a remedy is devised to undo the harm created to an individual or group of individuals.

Many judges, then, have assumed the role of administrator which was previously limited to those attached to the executive branch. This abrupt shift in American federalism, as it was historically designed, has major implications for the study of the judiciary, intergovernmental relations, and public administration. This new development in public administration has shown that as judges have become involved in institutional administration, they have appointed agents to manage these cases for them. In many cases these court-appointed managers have usurped the power and authority of the state and local administrators and policy makers.

Nowhere is such usurpation of power as clear as in the case of corrections institutions at the state and local level. Prisons, jails, and whole prison systems have come under the direction of federal courts. To properly administer the often detailed and complicated relief injunctions, judges have appointed what are referred to here as remedial special masters. This paper reviews this new and innovative development in public policy administration

and offers an analysis of this technique for judicial management of public institutions.

CHAPTER III

REVIEW OF THE LITERATURE

As stated in the introduction, there is not a great body of literature yet developed on the topic of correctional remedial special masters. Early publications consist primarily of legal treatises that discuss the legal underpinnings for appointment, articles in periodicals that profile a "master" and discuss in general terms the experience of these individuals, and government-sponsored publications that are "how to" booklets for use by either masters or monitors and judges. The exceptions are the 1977 research in four cases by Spiller and Harris and the 1983 Keating writings that overview the role of a remedial special master. This chapter reviews the literature on the topic to date and provides the backdrop for the discussion in the following chapter on the appropriate setting for the use of this judicial intervention.

Carroll, in his 1982 article "The New Juridical Federalism and the Alienation of Public Policy and Administration," pointed to the expanding role of the court, particularly in institutional reform cases, as significantly changing federalism in this country. He argued that the courts are becoming more active in entertaining, adjudging, and actively correcting situations in which individuals and groups are not guaranteed their constitutional rights. This

judicial activism, he felt, came about as a response to the distrust of and dissatisfaction with governmental policies and processes (p. 90). As his third basic element of this thesis, he pointed to

> the exercise of extensive supervisory powers by federal courts over institutions of state and local government found to be operating on an unconstitutional basis, particularly the imposition of requirements implicitly or explicitly requiring the expenditure of state and local funds. (p. 92)

It is this exercise of supervisory power in the form of appointing a remedial master that this writer will investigate.

A Summary of the General Use of Masters

Litigation which has brought about the reform of prisons, public schools, and mental health institutions has increased greatly over the past 30 years and has also developed in a unique manner. Implementation of the reforms drafted by plaintiff attorneys and judges has taken the courts into innovative and new methods reaching beyond the traditional remedies for these types of cases. One of these unique methods for implementing complex remedial orders has been the appointment of a special master whose responsibility it is to manage the decree for the judge.

The history of the master concept is rooted in the old English equity procedure developed during the fourteenth and fifteenth centuries, when "clerks" were trained to assist the chancery in drawing up writs, taking affidavits, and certifying documents (Brakel, 1979). In this country the concept carried down through time, and masters have been used historically to assist the court in

cases that involve complex or highly technical rulings, would consume a great deal of time, or might demand expertise that is not held by the judge. The classical use of a master has been in the litigation stage of the case, performing mostly ministerial functions.

The most drastic change to the classic use of masters has been seen in the institutional-reform cases which have focused on schools, mental health facilities, and more recently correctional institutions. Taylor v. Perini (1976) outlines the master's duties as implementing, coordinating, evaluating, and reporting on the defendant's progress toward fulfilling the court order. In a memorandum from the court, which accompanied the order of reference, it was declared that:

> [T]he special master [is] to supervise compliance with the Court's order . . . , to assume primary responsibility for implementing, coordinating, evaluating, and reporting on the progress of all institutional efforts to effectuate said order. . . . [He will] hold the necessary hearings to keep pressure upon the defendant to do the things still undone, and to evaluate the results of the things which have been done. . . . His function will be to study and evaluate all of the various reports that have been filed in this matter to date and to determine what further reports and evidence are necessary to show whether and to what extent the present administrative regulations and practices at [the institution] are in compliance with the [court's] order. In those respects in which he finds there is non-compliance, he will report to counsel for the parties what is necessary to be done, and what amount of time should be allowed to do it. . . . The special master shall have authority to seek orders from the Court to show cause why the defendant, or any of his agents, employees . . . should not be punished as for contempt for failure to comply with his instructions or orders, or the orders of this Court. He shall also have full power to hold hearings and to call witnesses . . . as he shall deem necessary, expedient, or

> desirable in carrying out his duties. The special master is authorized to have unlimited access to all [institutional] files, unlimited access to the premises of the [institution] . . . at any time or times of his choosing, and without the necessity of giving advance notice. . . . He is further authorized to have confidential interviews at any time with any staff member or inmate, an unlimited access to and the unlimited right to attend, institutional meetings and proceedings of every kind and nature whatsoever (italics added).

Masters have been used in a variety of civil rights cases. Brakel (1979) pointed to their use in the desegregation of public housing in Gautreaux v. Chicago Housing Authority (1974), election redistricting in Moore v. LeFlore County Board of Election Commissioners (1972), overseeing the reorganization of a police department as mandated by the court in Kidd v. Addonizio (1967), and the monitoring of union elections as with Cunningham v. Teamsters (1957).

Dobray (1982) discussed the use of a mastership in Texas to enforce court-ordered desegregation. The federal district court in United States v. Texas (1971) ordered the state to eliminate its practice of segregation and engaged the Texas Education Agency to monitor the efforts of 1,000 school districts to comply. The court further specified that the TEA would have the following eight areas of responsibility:

1. To review all requests for student transfers and disapprove those that increase segregation.

2. To investigate the racial effects of any proposed changes in school district boundaries.

3. To examine annually school transportation routes to determine if practices perpetuating segregation were being followed.

4. To evaluate the racial mix in the extracurricular activities of school districts during accreditation visits.

5. To report any discriminatory personnel practices to the commissioner of education.

6. To review annually those districts maintaining campuses where minority enrollment exceeded 66% and determine whether the student-assignment plans of those districts were in compliance with federal constitutional standards.

7. To conduct a study of the educational needs of minority students.

8. To notify the faculty and staff of complaint and grievance procedures.

In her review of the role of masters in court-ordered institutional reform, which focused on the 1971 order to enforce court-ordered desegregation, Dobray (1982) points out the reason for the rise and expansion of the use of "experts" to assist the court in implementing their orders as follows:

> Many, if not most, violations of such personal rights today occur in an institutional environment: in prisons, mental health facilities, school systems, and juvenile detention homes. The very complexity of modern institutional structures imposes a Herculean task on courts seeking to redress past institutional transgressions and to prevent future constitutional violations. While judges are capable of handling these controversies during the liability stage of litigation, they are ill-equipped to address the myriad of issues involved in the remedial stage that generally culminates in the necessity for institutional reform. Faced with this

> difficulty, federal courts have relied upon "implementation officers" to aid them in implementing decrees and monitoring compliance efforts. The tasks and roles of these officers--labelled masters, ombudsmen, receivers, expert panels, or human rights committees--are not well defined; however, they all possess broad, flexible powers to develop, implement, and monitor remedial plans for bringing public institutions into alignment with the constitutional requirements.

Mental health institutions, which have come under judicial scrutiny for failure to provide constitutional standards, closely parallel the experience of correctional facilities. The use of masters and monitors has been found effective for judges when faced with overseeing implementation of their decrees. Judge Frank M. Johnson ordered changes to three of Alabama's state mental hospitals after determining that patients were being denied a constitutional right to adequate care and treatment. A monitoring group was ordered to evaluate and report on the defendant's progress toward compliance.

The 1978 Columbia Law Review Special Project, which traces the history of the remedial process in institutional reform litigation (78:784), discusses the techniques available to the court when faced with implementing its decrees. Beyond the need to retain jurisdiction over the suit to develop revisions, it is also necessary to resolve disputes between the parties, monitor compliance, and supervise the defendant's actions with regard to the order.

To assure the prescribed outcomes, the judge has the option of administering the case personally by relying on the defendants to submit compliance reports and have the plaintiffs monitor or, and as

most courts implement, the use of court-appointed agents to carry out the orders.

Masters have also been used as arbitrators in many types of cases. As an example, the court in Calhoun v. Cook (1973) appointed a committee to assist the parties in negotiating a settlement plan for school desegregation. It was also stipulated that any disagreement between the parties had to be presented to the committee before motions would be heard by the judge.

Montgomery (1981) used the example of the work of a special master in the school desegregation case, Hart v. Community School Board (1974), to point out that broad powers and authority were vested by the court. As well as ordering the special master to formulate a remedial plan for the school, the master was given authority to develop a comprehensive plan to eliminate segregatory practices in housing, recreational facilities, transportation, and development that would contribute to the problems of segregation.

The Authority for the Use of Masters in Corrections Cases

During the past 15 years, a number of federal court cases have found that the general conditions of confinement can be a violation of inmates' rights as prescribed by the Eighth Amendment to the Constitution. To assist the court in granting relief to inmates in substandard prisons and jails, many judges have begun experimenting with the use of special masters to form and implement relief decrees.

As Panosh pointed out in a 1980 publication for the National Association of Attorneys General,

> Masters are probably the most commonly used mechanism for monitoring the implementation state of a "conditions" case. Masters, special masters, standing masters, hybrid masters, (and more recently monitors), and magistrates are all terms used by the courts more or less interchangeably to describe officers of this type, who are appointed to assist the court in implementation. Although a number of these terms tend to connote particular functions, there is no uniform understanding as to what the powers and functions of each officer are, or exactly what differentiates them. The traditional powers and duties associated with the office of master are set out in Rule 53 of the Federal Rules of Civil Procedure. (p. 11)

The reference to the Federal Rules of Civil Procedure is significant because this provides the legal basis for the court to appoint a surrogate for assistance. On page 53 of the Rules, the duties, responsibilities, and authority are described as follows:

> FED. R. CIV P. 53 (Masters).
> (a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party. (b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult and computation of damages, a reference shall be made only upon a showing that some exceptional condition require it. (c) Powers. The order of

> reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writing applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury. . . . (e) Report. (1) Contents and Filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. . . . The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions. . . . In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report. (4) Stipulation as to Findings. The effect of a master's findings of fact shall be final, only questions to law arising upon the report shall thereafter be considered. (p. 53)

Panosh also listed the cases in which this judicial decision to seek help has been used and outlined the various compliance mechanisms used by the courts (see Appendix C).

Nathan (1979) supported the authority of the court in using Rule 53 and further argued that Rule 70 also gives sanction to the use of a master, particularly in post-decretal roles. Rule 70

allows the court to appoint a third party to effectuate a mandatory provision of an injunction. Although this rule basically describes an enforcement function, it could be expanded to include monitoring in "conditions" cases. There has been no use of Rule 70 in the corrections field to date since Rule 53 has been determined as providing the appropriate authority for the judicial appointment of assistants.

Levine (1984) presented the most complete and comprehensive analysis of the question of federal court authority to appoint masters. He initially researched all of the major cases since the 1938 approval of the Federal Rules of Civil Procedure, but more significantly reviewed the primary-source documents of the reporter to the original advisory committee. His article discussed the intent of the drafters of Rule 53 and Rule 70, under which virtually all appointments of special masters are made, and he concluded that "the original Advisory Committee considered the use of remedial masters and explicitly decided to include them within the terms of rules 53 and 70" (p. 803). Levine further concluded that the Committee intended masters to be included under the terms of Rule 53 and that they may confidently use that authority. He recommended, though, that they should insure the qualifiers of Rule 53(b) be met and the masters be limited in their authority beyond finding fact and monitoring compliance, as is stated. He further recommended that courts could use the authority of Rule 70 when appointing a

remedial special master after it has been found that the defendant has failed to implement the conditions of a decree.

Nathan (1979) and Montgomery (1980) both agreed that courts must rely on outside help to ensure compliance with complex decrees. Montgomery further stated that "the use of monitors, even though masters or human rights committees pose difficulties, does not mean that the practice of appointing these assistants to help supervise the implementation of remedies ought to be abandoned altogether" (p. 122).

Levine (1984), in researching the authority of federal courts to appoint special remedial masters in institutional reform litigation, went to the primary-source documents created by the Advisory Committee on Rules for Civil Process, which drafted the 1938 Federal Rules of Civil Procedure. His conclusions were that the original Advisory Committee considered their use and included them within Rules 53 and 70. As he stated in his conclusion, courts

> may rely confidently upon the rule (53) as an adequate source of authority to appoint special masters. However, courts should also more scrupulously observe the requirements rule 53(b) in appointing remedial special masters than have some courts in the recent past. On the other hand, this article has shown that courts should no longer neglect rule 70 as a source of authority. A court may appoint a remedial special master under rule 70 after a defendant has defaulted on its obligation to implement a decree mandating the performance of specific acts. (p. 804)

He concluded, though, that courts should not rely on a doctrine of inherent power to appoint a remedial master.

Using the reference to 53(b), which discusses actions "to be tried," it is clear that Rule 53 would apply to masters in the fact-finding and investigation stage of a litigation and Rule 70 would more appropriately be used when the decree is not being implemented and an outside expert source is required to assist the court.

The Use of Remedial Special Masters in Corrections Litigation

The following discussion presents a review of the issue on which this dissertation focuses: the use of remedial special masters in corrections litigation. It provides a summary of the current written thought on the topic of special masters in jail and prison cases, in particular focusing on the problems this judicially imposed intervention technique raises for judges, attorneys, correctional administrators, remedial special masters, and others who are involved in this public policy process.

Brakel (1979) raised some issues regarding the use of monitors and masters in institutional "conditions" litigation. He felt that the subject deserves close attention for the following reasons:

> (1) While the use of masters by the courts is firmly established in the equity tradition, the essence of that tradition finds the master in a pretrial, fact finding role, as opposed to the post-decree implementation functions performed in some recent institutional cases. (2) As a result of this new twist in the application of the master concept, there is considerable uncertainty about the specific powers and procedures available to these masters and even about the basic authority of the courts to resort to masters with such functions. (3) Despite these uncertainties, the appointment of special masters is becoming an increasingly frequent consideration and fact in institutional litigation.

> (4) Because of the uncertainties, both courts and masters exhibit considerable discomfort with the procedure and have articulated an urgent need for a conceptual elucidation of its legal bases as well as for empirical study of, and practical guidelines for, its operational essence. (p. 544)

The significance of Brakel's analysis is that, eight years later, there still exists a need for practical guidelines under which judges and masters can operate.

Montgomery (1980) pointed to three problems that can raise questions regarding the use of a remedial special master. These are:

1. When the court order is ambiguous and the remedial special master must interpret significantly.

2. When the remedial special master is granted broad investigative powers and moves beyond the original complaint.

3. When the remedial special master acts as an arbitrator without specific findings of fact and law.

In the compilation of articles entitled Criminal Corrections: Ideals and Realities, published in 1982, three articles dealt with the dilemma faced by federal judges when they must act to enforce rulings under the "conditions" suits they have heard. Fair (1982) pointed out that there are basically four stages through which a prisoner's-rights suit must move. They include (a) a determination of whether there has been, in fact, a constitutional violation, (b) formulation of a decree that will remedy the situation, (c) monitoring of all the defendants' progress toward compliance with the order, and (d) enforcing the order if compliance is not

satisfactorily being accomplished (p. 156). He further developed a decision path model that the judiciary could apply in reviewing these complicated cases. (See Table 1.) This stands as one of the few attempts to assist judges in making more appropriate decisions through a systematic decision-making process.

Nathan (1979) also delineated the stages at which a master's appointment would be appropriate, but he combined the monitoring and enforcing functions. In his opinion a master may be appointed at three distinct points during the course of the case. Initially the court may appoint a master to assist in determining liability before the court finding of a constitutional violation. This is the classic instance as outlined under Federal Court Rule 53. A master may also be appointed after the determination that a constitutional violation has occurred, and he/she will engage in fact finding to recommend appropriate remedies to the court. The final point and the point at which this dissertation will focus is that of a master who is appointed by the court following the steps above for the purpose of monitoring and enforcing the remedial order.

Ostrowski (1982) provided a case study of a class-action suit of recent vintage: Alberti v. Sheriff and Commissioners Court of Harris County (1972). He analyzed the influence that a federal judge had on the jails in this Texas county. Even though a master or monitor was not used, the inescapable conclusion is that "just as judicial determination is essential to securing adherence to

Table 1

Decision Points in Possible Decision Paths in Prison-Condition Cases

Constitutional Decision	Decree Formulation	Monitoring	Enforcement
1.1 Violation exists	3.1 Court formulates	7.1 By plaintiffs' attorneys	10.1 Attorneys' fees awarded
1.2 No violation exists	3.2 Defendants formulate	7.2 By master	10.2 Money damages awarded
	3.3 Master formulates	7.3 By judge	10.3 Contempt citations given
2.1 Retain jurisdiction		7.4 By citizens' committee	10.4 Prisoners released
2.2 Relinquish jurisdiction	4.1 Hearings used		10.5 Prison closed
	4.2 Inspections used	8.1 Reports required	10.6 Receiver appointed
	4.3 Negotiations used	8.2 Deadlines set	10.7 Some of above threatened
	4.4 Conferences used	8.3 Inspections held	
		8.4 Inmate complaints heard	11.1 Retain jurisdiction
	5.1 Decree is specific	8.5 Hearings held	11.2 Relinquish jurisdiction
	5.2 Decree is general		
		9.1 Retain jurisdiction	
	6.1 Retain jurisdiction	9.2 Relinquish jurisdiction	
	6.2 Relinquish jurisdiction		

Note. From "Judicial Strategies in Prison Litigation," Criminal Corrections: Ideals and Realities (p. 158) by Daryl R. Fair, 1983, Toronto: D. C. Heath.

judiciary orders, so too is a comprehensive understanding of jail problems and their causes essential to achieving reform" (p. 175).

In this same series, McCoy (1982) felt that the movement toward federal court "activism" in reviewing and monitoring state and local compliance with institutional constitutional rights has halted with the Burger court. Her analysis was that the involvement of the federal judges has continued and will continue to move away from direct or indirect, through the use of masters and monitors and through deep involvement in the correctional management prerogatives, to a more traditional approach emphasizing the award of damages. This is a shift from the equity model adopted under the liberal Warren years to the money model favored by the Burger court for ensuring constitutional compliance. The significance is in the view that courts should not be "running the institution" until it meets constitutional guidelines, but rather simply awarding damages if violations are found (p. 180). This return to traditionalism obviously parallels the general societal shift that we have been experiencing for the past decade.

Perlman, Price, and Weber (1984), in their paper analyzing the policy implications of federal court intervention in a medium-sized midwestern county, concluded that even the intervention of a federal judge does not appear to affect the development of a coherent criminal justice policy, which is necessary when dealing with jail overcrowding. Their conclusion tends to agree with many other writers who have seen the need for a facilitator who can bring

together the diverse elements in the community necessary when the amelioration of unconstitutional conditions in correctional institutions is required.

Collins (1979), who developed a guide for district attorneys to use when faced with conditions cases, focused on strategies to use in the master-selection process. He emphasized the importance of the type of master to be selected and concluded that "it is probably advisable that anyone appointed as a master have some administrative experience in state government [sic] so they can understand the politics, the bureaucratic red tape, and the various other things that may impede compliance with the order" (p. 21). This same rationale would apply to those who are required to oversee local institutions in that they, too, should have local governmental knowledge.

Boatright (1980), in analyzing the sweeping changes required in Rhode Island under the 1977 decree brought about by Palmigiano v. Garrahy, joined others in questioning the federal intrusion into state prison management. He argued that intervention to the degree that a master or monitor acting under the cloak of the federal judge is deciding policy for prison administrators contravenes the principles of federalism. Specifically, Boatright stated, "the court should not have taken the initiative to perform what is essentially a state function" (p. 577). (This case, in which a master of unimpeachable credentials--Allan Breed, who was Director of the National Institute of Corrections--is one that is often cited as an

excellent example of sound federal intervention using masters as experts.)

Sturm (1979) echoed the preceding observation when he stated that federal intervention must have "the goal of empowering the actors in the prison context to develop constructive ways to resolve their own disputes" (p. 1091). He did not support the position that calls for the use of masters or monitors, but pointed out some of the inherent problems that were covered in the introduction to this paper.

Fried (1981) declared that:

> Federal district judges are increasingly, by acting as day-to-day managers and implementors, reaching into the details of civic life: how prisons are run, medication is administered to the mentally ill, custody is arranged for severely deranged persons, private and public employers recruit and promote. Though judicial authority and democracy have always existed in tension, as federal judges assume a more active managerial role, politicians and citizens chafe for quite pragmatic reasons. (p. 23)

The genesis of these "conditions" cases has sprung from Monroe v. Pape (1961), in which the liberal interpretation of Section 1983 of the Civil Rights Act of 1871 was granted to incarcerated individuals. Section 1983 allows those who, by some state action, have been deprived of constitutional or federal statutory rights to seek legal remedy against the official "person(s)" who have violated their rights (ACIR Report, p. 144).

The legal redress for these constitutional violations has often been declaratory or injunctive relief rather than compensatory or punitive damages. As Panosh (1980) observed:

> In most litigation, the entry of the judgment, such as a preventative injunction, will conclude the involvement of the court. In a "conditions" case, the entry of the judgment is many times the beginning of a difficult phase of the case rather than the conclusion of litigation. (p. 7)

Levinson (1982) touched on many of the problems surrounding the appointment of special masters when he profiled the experiences of Vince Nathan, the "dean" of mastering. He traced the history from the first appointed correctional master (Magistrate Frank Palozola) in 1971 at Angola Prison in Louisiana to the more recent appointments of Nathan and others. Levinson raised some of the questions that still have not been answered regarding special masters, such as:

> When should a special master be appointed?
>
> What should his relationship be with the prison administration?
>
> What kinds of powers should he have?
>
> Are there cheaper, more effective mechanisms to bring about changes? (p. 8)

In this comprehensive article on the subject, he also raised the key question that has plagued all who have been involved in these special cases: Are masters and monitors really necessary?

Taft (1983) pointed out that the jail or prison litigation case is long and difficult and that the court order is not the end of the case, but the beginning when all of the hard work really begins. During the sometimes decade-long involvement, he saw that "attorneys burn out; special masters quit" (p. 31).

In profiling the Rhode Island prison reform case, Palmigiano v. Garrahy, Morin (1979) pointed out the different style exhibited by the two special masters handling the case. One viewed himself as "an asset to be tapped by the corrections department and a 'scrupulously fair' evaluator of its compliance with the order" (p. 33). In contrast, the previous master had become so involved with the case that he was able to convince the governor to replace the department of corrections' director with someone of his own choosing.

In 1977, Spiller and Harris published a compilation of four studies of correctional litigation cases in which they described the process of decree implementation and specifically provided extensive data on the extent to which compliance with the decrees was achieved, the factors that influenced compliance and noncompliance, and the effect the decrees had on the institutions and the people connected with them. As they discovered during their research:

> In operation, the line between monitoring and enforcement was often blurred, with the same techniques or action serving both functions. In concept, however, they are distinct. The monitoring function involves investigating actions planned or taken to effectuate compliance and reporting on specific and general compliance status. It also involves describing problems encountered, unanticipated event or side effects of compliance efforts, and similar compliance-related information. Thus, monitoring is primarily a passive function. The enforcement function, on the other hand, is more active in intent. Enforcement actions are designed to hasten or impel action. (p. 18)

Spiller and Harris (1977) concluded, furthermore, that noncompliance with judicial decrees seems to be a function of two variables:

1. Unwillingness or inability to comply on the part of one or more of the necessary actors (not always defendants) and

2. Lack of judicial determination to compel compliance (p. 5).

A similar sentiment is echoed when Brazil, Hazard, and Rice (1983) quote Judge Harold Greene, who states that "the special master process will not work well, or at all, if the persons chosen for the master positions do not possess the temperament or if the parties are neither prepared to use the master nor willing to cooperate more generally in the process" (p. x).

This belief that judicial resolve to bring about compliance is the major factor in assuring appropriate action to resolve the unconstitutional conditions in corrections institutions has been echoed by virtually all of the authors on the topic. The remaining question is whether special masters or monitors are necessary to assist the court in overseeing the case and forcing compliance with its orders.

In the Edna McConnel Clark Foundation monograph on crowded prisons, Schoen (1982) agreed with others that:

> Just a decade ago it was a novel idea for a federal court to intrude on the running of a state or local institution. . . . Today the courts have clearly established their power to force the state and local government to deal with overcrowding and other issues. (p. 19)

The U.S. Supreme Court has also given sanction to appropriate conditions litigation. In Rhodes v. Chapman (1981), the majority opinion held: "The courts certainly have the responsibility to scrutinize claims of cruel and unusual punishment, and the conditions in a number of prisons, especially older ones, have been justly described as 'deplorable' and 'sordid.'"

Keating (1983), in editing and revising selections by Walter Cohen and Linda Singer, who had both been special masters, provided the most comprehensive document on the art of mastering as it has evolved to date. In the Foreword, Breed pointed out the need for a guidebook for newly appointed masters in saying that:

> Development of the manuals reflected the fact that numerous masters--often attorneys with limited experience in corrections or correctional administrators unfamiliar with functions of a judicial master--were being appointed by courts to play an innovative and demanding role, about which little information was available in legal or other literature. (p. v)

This 47-page document provides sections on many of the issues raised by other authors on the subject but falls short in dealing with the questions raised in this thesis. It does, though, provide a cursory view of the functions, powers, relationships, and skills that surround this judicially created entity.

It is this manual that provides the basic three roles that have evolved in cases in which masters have been appointed. The first and most typical role is that of a master performing exactly the tasks outlined in Rule 53, such as fact finding and reporting to the judge. The second and more extended role is as the master helping

to develop the remedial order after an unconstitutional conditions ruling has been made.

The third role, and the focus of this thesis, is that of the master who has the responsibility of policing implementation of the remedial order and ensuring that the defendants adhere to the order. It was at a May 1985 conference on the role of masters, which was attended by a variety of people who had been involved with the topic of "masters," that the following questions regarding their use were raised:

> Under what circumstances should a master be appointed?
>
> When are alternative compliance mechanisms preferable to the appointment of a master? What are possible alternatives? In what circumstances should particular alternatives be used?
>
> What specific powers should a master have? How should these vary depending upon the stage of the litigation, the personalities involved, and other factors?
>
> To what extent should masters involved in developing the remedial order continue as masters for purposes of compliance?
>
> If a situation warrants the appointment of a master, how can resistance to such an appointment be overcome?
>
> How should a master conceptualize his role and that of his office? How should the office be structured to reflect the scope of the master's powers and responsibilities?
>
> What types of backgrounds and skills are essential or desirable to maximize compliance with the court order?
>
> What staff and expertise (in addition to the special master) are necessary to carry out a master's duties?
>
> What specific powers should a master have for purposes of implementation of the court order?
>
> How should a master structure contacts between the master's office and the parties to the litigation?

What resources are necessary? How can these resources be obtained?

When and under what circumstances is it appropriate for the special master to serve as an intermediary between the prison system and the legislature?

How can the special master involve the larger political system in the compliance process without compromising his/her judicial role?

How can the special master involve non-parties whose cooperation is necessary to achieve compliance?

What, if any, relationship should the special master develop with the press and public at large?

How can the court's contempt powers, and other possible sanctions, be most effectively used to encourage compliance? What should the master's role be in this process? How may this role jeopardize his/her informal, constructive role in compliance?

Where the leadership in the prison system is clearly an obstacle to compliance, what role should the master play with respect to possible changes in leadership?

How can the master deal with the failure to provide adequate funding necessary to achieve compliance?

When, if ever, should the mastership be terminated? What does the finish line look like?

What mechanisms can be instituted by the special master to continue a process of monitoring the conditions within the prison?

How can alternative compliance mechanisms used during the implementation process be converted into long term policing mechanisms?

What incentives can the master create to encourage defendants to set up effective monitoring mechanisms?

How does the master balance the competing roles of mediator, arbitrator, expert and compliance monitor?

How should the master acquire and use information concerning the conduct of the parties?

How can the master encourage cooperation of hostile wardens, commissioners and guards, and at the same time preserve the integrity of his judicial position?

How can the master use the process of reporting to the court both to aid the defendants in their efforts to comply with the order and to establish a basis for imposition of sanctions in the event of non-compliance? How can the master deal with the inherent conflict between these two goals?

What alternative mechanisms may be used effectively in conjunction with the special master to encourage compliance and widen the impact of the court order?

How should experts be used by the special master in the compliance process?

As outlined by Nathan (1978) and others, the advantages of appointing a remedial master in correctional litigation suits appear to outweigh the disadvantages. The federal judge who chooses to use a remedial master gains the experience of another person in correctional or legal matters or both, reduces the amount of time he/she must spend in lengthy compliance hearings, has the disputed issues reduced to only those that require judicial attention, gains someone who is able to recommend feasible adjustments to the remedial order to correct unforeseen problems with compliance, and can signal the defendants that the court is serious about bringing about constitutional compliance.

The disadvantages, as presented by Collins (1985), are in the expense the appointment of this expert forces on the defendants, the judicial intrusion into what are considered to be management

prerogatives, and the undercutting of authority of the staff of the subject institutions.

The weighing of these advantages against the disadvantages is what each court must face when choosing whether the remedial-master intervention is appropriate for a particular case. Many of them have concluded that the use of remedial masters is advantageous because they now function in more than 20 jail cases, in a dozen state institutions, and in the entire correctional systems of Cook County, Illinois; New York City; and Rhode Island, Oklahoma, and Texas. As Nathan (1979) said: "The court gains the benefit of the master's expertise, whether it be legal or otherwise, for the purpose of monitoring and bringing about compliance with its injunctive order" (p. 438).

There have been notable exceptions in which federal court judges have felt that the response was not appropriate. For example, in the ruling in Finney v. Mabry (1978), the federal district court judge felt that his appointment of a remedial master would be too intrusive an action. He was convinced, though, to allow the parties to mutually appoint what was called a compliance coordinator but made it clear that this was an agreement between plaintiffs and defendants and that all expenses would be borne by them. A federal court judge in Newman v. Alabama (1977) ruled that monitors had no authority to intervene in the daily operations of the prison under order.

Judge Harold Green, writing the introduction to Managing Complex Litigation (Brazil et al., 1983), summarized the situation when he stated, "The special master process will not work well, or at all, if the persons chosen for the master positions do not possess the temperament or if the parties are neither prepared to use the masters nor willing to cooperate" (p. x).

Some of the individuals involved in reform litigation also have felt that the courts are severely limited in their ability to improve correctional facilities and services. Spiller (1977), in analyzing the effect of correctional reform on the Orleans Parish Prison in New Orleans, Louisiana, reported that:

> Both the presiding judge and the special master said that courts have few sanctions with which to enforce compliance--a handicap that presents problems when parties don't want to comply. The special master's misgivings extended to the nature of the litigation process, which he characterized as "too time-consuming" to be effective as a change factor, and to limitations upon the remedies available to the judiciary. He stated the belief that courts are powerless to order the creation of ideal correctional programs and must be satisfied with ordering changes that raise correctional facilities and services to a minimally constitutional level. The ultimate solution of correctional problems, according to both Judge Christenberry and the special master, rested solely with responsible officials and administrators, who are not limited to the standard of minimal constitutional acceptability that restricts the judicial response. They described litigation as a valuable tool that could assist administrative efforts to improve prison facilities and programs. In their view, litigation could be effective in elevating the status of corrections as a governmental priority and focusing the attention of administrators upon correctional deficiencies. (p. 247)

Summary

The preceding extensive review of the literature demonstrates that the practice of appointing remedial masters in corrections litigation cases has been found legally sound and is now used by a significant number of judges to bring about constitutional reform in correctional institutions. Although there are some legal scholars who question the intrusion into executive affairs that this type of intervention begets, it has proven sufficiently efficacious that it will in all likelihood be continued.

There are a great many questions, though, that have been raised regarding the practice. Primarily, the shift of judges toward actually managing what were previously considered to be exclusive executive or executive/legislative functions is a concern raised by many of the authors cited. Along with this concern, the question of whether judges have the knowledge to oversee complex institutions is a frequent refrain. Some practical guidelines have been developed for use as a resource by judges and remedial special masters, but no detailed map for managing a cause of this nature currently exists.

As Carroll (1982) pointed out, the "new juridical federalism" is contributed to by the exercise of supervisory powers over institutions of state and local government found to be operating unconstitutionally by the federal courts. In these instances, judges have in essence become quasi-managers of the institutions. To carry out the responsibilities of overseeing their orders for

change, they have hired remedial masters to manage for them. It is this extension of the role of court-appointed masters that needs to be investigated and analyzed. There is now enough history and a body of knowledge about these masters and monitors, referred to here as remedial masters, from which we can learn about their various roles which will give us direction for the future.

CHAPTER IV

METHODOLOGY

Introduction

This chapter presents the methods used to conduct this study of the use of remedial special masters in corrections litigation. The procedures are presented in two major sections. The first section discusses the case study of a recent federal court use of a monitor of compliance. It provides the details of the case study and the rationale for the use of this method.

The second section addresses the use of a survey of other remedial special masters to gain their unique insights into the topic. It presents the population of the study, the questionnaire used, and the analytic techniques employed.

The chapter contains an introduction, a discussion of the research focus, a description of the methods employed for the research, and a summary.

Research Focus

The previous chapter, which contained a review of the literature, suggested that there has been no comprehensive presentation of the many issues faced when appointment of a remedial special master is considered. The central question that remains in

the minds of many of the officials who have been involved in correctional litigation is whether the appointment of a remedial special master contributes to bringing about compliance or is really a detriment to successful adherence to a remedial order. Do they bring about compliance with remedial orders in correctional litigation cases? Are they the most effective means of insuring jails and prisons that meet minimal constitutional standards?

As McCoy (1982) pointed out in her article "Developing Legal Remedies for Unconstitutional Incarceration," the role played by the federal court judge is a major strength of the equity model for remedying constitution violations in prisons and jails (p. 182). In this equity model, the federal judge mediates between the parties who establish goals and timetables and then monitors compliance. The remedial special master, then, becomes the judge's manager of compliance. As they conduct the administrative business of the court, these individuals are often forced to intrude deeply into the executive and legislative prerogatives of the state or local government responsible for the institution(s) in question.

From a public administration viewpoint, the knowledge gained from research into this topic will provide previously unavailable information on the efficacy of these federal court interventions as sound public policy. Some of the questions answered in this research are:

1. Under what conditions would it be advisable to appoint a remedial special master?

2. What academic qualifications best suit a person to become a remedial special master?

3. What are the necessary administrative, political, and human-relations skills required for a successful mastership?

4. When is the appointment of a remedial special master the most appropriate action for a federal court judge to take?

5. Has the court resolved satisfactorily the cases in which a remedial special master has been appointed?

Case Study Approach

First, the questions raised by the various authors have been systematized and applied to a recent case in which this writer acted in the capacity of a remedial special master. This study presents the history of events which led to the filing of the suit by inmates in the mid-1970s through the decision by the court to suspend the use of the remedial special master. It focuses on the period from August 1983 through April 1985, during which time I was involved both in evaluating the level of compliance with the court order and in acting as an enforcer to further compliance. Specific details of the problems with county officials, the court, defense attorney, news media, jail staff, and others are highlighted.

This study provides insight into the dynamics and interrelations between county offices, the federal court, jail staff, attorneys, and the monitor. Some of the areas covered are:

1. The events that led to the judge's decision to appoint an expert monitor.

2. The relationship between the monitor and the various officials, including the judges, the sheriff, the county executive, their respective attorneys, the county board of commissioners, and others.

3. The critical decision points at which the monitor was required to act on behalf of the court.

This study of a recent case involving appointment of a "monitor" provides a chronology of events as seen by the primary participant--the remedial special master. Actual first-hand experiences are detailed, and the interactions with others involved in the process provides a basis for comparison with the other research techniques.

Second, the researcher conducted a survey of the 27 individuals who, as of 1987, have been remedial special masters in the corrections field to gain their insight on the issues involved. A questionnaire was developed that focuses on gaining information about the proper role for masters as seen by those who have been involved in this quasi-administrative judicial process.

Survey Questionnaire Approach

The second method employed to test the research hypothesis involves the use of a written questionnaire sent to the 27 identified remedial special masters.

Population of the Survey

The sample receiving the survey questionnaires represents the total population of masters and monitors identified throughout the country. In the 1983 National Institute of Corrections publication Handbook for Special Masters, 15 special masters were listed. Through an extensive review of the literature and with some assistance from the Edna McConnell Clark Foundation, I was able to expand the list by 12 to a total of 27. These 27 individuals, then, represent what is believed to be an all-inclusive listing of those individuals who have served in the capacity of remedial special master.

After the questionnaires were sent, follow-up consisted of a letter and a personal telephone call. Twenty remedial special masters eventually provided answers to the survey questions. The remaining seven consist of one who is deceased, one who felt the survey inappropriate while he was still serving as a master, and five who did not respond to letters and telephone calls where their telephone numbers were available. The first responses came in December 1986, and the last was received in March 1987. A complete listing of the jail and prison masters and monitors who were identified and sent surveys is presented in Appendix A.

The Survey Questionnaire

Based on a thorough review of the literature, a knowledge of the significant questions surrounding remedial special mastering from first-hand experience, and a review of a similar survey attempted by the Edna McConnell Clark Foundation, a questionnaire was developed that would gather data from the other remedial special masters regarding their experiences and perceptions of this intervention technique. The questionnaire was developed to elicit some responses that were measurable and comparable, as well as some that allowed the respondents to write in their own words. This combination of both closed-choice responses and open-ended responses provided the basis for a thorough analysis of the experiences of masters and monitors. A copy of the survey instrument and the letters of solicitation are included as Appendix B.

Draft copies of the survey instrument were reviewed by colleagues in the field, and their suggestions helped to shape the final questionnaire. As stated previously, the survey was designed to provide the remedial special masters with a structured approach and thus enable them to share their experiences in corrections litigation cases.

CHAPTER V

YOKLEY VS. OAKLAND COUNTY: A CASE STUDY

This chapter is a case study of a recent constitutional-rights litigation which resulted in the appointment of a federal court remedial special master. It presents a history of the events that led to the filing of the suit, the decision to appoint a remedial special master, actions taken by the master, and an analysis of the factors that affected the mastership.

The case study focuses on the period from August 1983 through April 1985, when the writer was involved as the remedial special master appointed to assist the court in overseeing compliance. The approach used is one that details a brief history of the events in chronological order, analyzes actions and motivations of the various participants in the litigation, presents the dynamics that surrounded the case, and details the first-hand experiences of a remedial special master.

The chapter is divided into several parts. First, a section that deals with the setting and the history of the litigation is presented. Then the consent judgment is summarized. Next is a discussion of the appointment of a compliance monitor and the initial meetings with the parties to the litigation. The final sections deal with the monitoring experience, significant factors

surrounding the case, and an analysis of the use of a monitor in achieving compliance with the consent judgment.

The information sources used for this study included:

1. Court documents filed in Yokley v. Oakland County
2. News accounts during the period 1980-1984
3. Numerous interviews and discussions with judicial officials, Sheriff's Department personnel, county officials, state staff, attorneys, and others involved in the litigation
4. Personal experiences of the monitor
5. Letters, memos, and other documents pertaining to the case

The Setting

The Oakland County Jail is located on the outskirts of Pontiac, Michigan, within the county governmental service complex, which houses a major portion of the offices of the Oakland County government. The jail is the main holding center for the justice system within the county. Oakland County is the second largest county in Michigan, with some one million residents. It is made up of a number of large cities and borders the city of Detroit and Wayne County, where the main population of the state resides. The county is considered affluent and has at times been cited as one of the richest counties per capita in the country. Pontiac, though, is an aging industrial city with deteriorating neighborhoods and significant crime problems.

In the mid- to late 1960s, the old county jail located in the city of Pontiac was determined to be outmoded and unsafe, and the decision was made to build a new jail that would fulfill the needs of Oakland County for the future. Ground was broken in 1970 on the county governmental complex on Telegraph Road.

The Facility

The Oakland County Jail, located in Pontiac, Michigan, was opened in 1972 and represents the traditional steel-bar, steel-plate, and concrete type of maximum security facility that was prevalent during that period. It is the principal confinement facility in Oakland County's detention system and was designed to accommodate the following classifications of prisoners:

Males (cell blocks)	375
Males (trusty dorm)	60
Infirmary	2
Receiving/holding	27
Females	40
Total	504

The Oakland County Jail was opened in 1972, and even though it is only 15 years old, the construction and design of the facility is not consistent with many modern architectural programs being implemented in county jail facilities. The jail is housed in a two-story structure that includes other services provided by the Sheriff's Department and the county morgue.

A current assessment of the facility shows that housing for prisoners is outmoded and inflexible. Almost all male adult prisoners are housed in eight-man, medium-security cells in spite of the fact that most of them do not require the high security imposed on them by this type of facility. There are 80 single cells, which assist the classification of inmates; however, neither the eight-man cells nor the single cells are provided day-room space where prisoners may move for leisure-time activities. These cells are also difficult to supervise, given the single-loaded-corridor configuration.

The present jail lacks what can be referred to as program space. As just stated, no day rooms exist where prisoners may eat, watch television, read a book, play ping-pong, or engage in other activities. Until recently, only a large multipurpose room was available for indoor activities. However, an indoor gymnasium was recently constructed to provide space for basketball, weight lifting, and other activities.

Lack of proper space for visiting in the jail is another problem. Space to accommodate sufficient numbers of visitors precludes adequate visiting within the facility. Space for consultation with attorneys or the public defender is minimal and awkward for the staff to accommodate during usage.

The jail consists of 36 eight-man cells and 80 single cells located on the second floor, which are designated as male detention. On the first floor, women's detention consists of six dorms of two

four-woman cells, two six-woman cells, two eight-woman cells, and eight single cells. The first floor also contains a trusty dorm, which accommodates six 10-man cells. The infirmary consists of five single isolation cells, four incorrigible cells, and a six-bed ward. Booking, receiving, and temporary holding occur on the main floor near the sallyport. The receiving area consists of three isolation cells and five holding tanks. The holding tanks are stark concrete-and-bar facilities that do not have beds. Each has a single toilet but no shower. Prisoners are detained in these holding tanks during their initial incarceration. Persons may be held for periods up to 72 or 90 hours when incarcerated on Friday afternoon. The intake area provides minimal privacy and very little, if anything, in the way of accommodations during this initial period. There is no program space in this area. The classification program is designed to accommodate inmates who move from the holding tank into the general population after their court appearance.

The flow of prisoners through the Oakland County detention system is similar to that of most other jurisdictions except for the availability of two additional housing options, a 100-bed trusty camp and an 80-bed work-release center.

All arrestees to be formally booked (those not receiving a summons) are received and processed in the Oakland County Jail's receiving area. Those not released during the first 72 to 90 hours are assigned to a cell block, pending disposition of their case.

Persons who are sentenced, other than those assigned to probation or the Michigan Department of Corrections, have six options available. These include the main jail for maximum- and medium-security prisoners; the trusty dorm or trusty camp for minimum-security prisoners, who will provide some form of work for the county either in the main jail or in the community under supervision; the Southfield facility for female prisoners; the work-release center for individuals who have been or are able to obtain gainful employment; and, for a limited number of prisoners, placement in an out-of-county jail either in Allegan, Lenawee, or Washtenaw Counties due to overcrowding of the main jail.

Chronological Perspective

The Oakland County Jail has been the subject of considerable attention since 1975, when the 3-year-old jail began first to experience overcrowding. Since that year, county officials have been involved in a substantial number of efforts to resolve the overcrowding. These include, in chronological order, the following:

June 1975. A study to examine prisoner population trends, including preliminary recommendations by the sheriff to expand jail facilities was initiated. Simultaneously with this recommendation, several actions were taken to reduce the jail population, including (a) increasing the population of the trusty camp and (b) reducing the number of federal prisoners.

August 1975. Recommendations were made by the Public Services Committee to investigate the possible need for expansion of jail facilities.

March 1976. A recommendation was made to expand the Courthouse Detention Facility.

August 1976. An inspection was conducted by the Michigan Department of Corrections.

January 1978. A contract was signed with Law Enforcement Assistance Administration to enter Oakland County into the Jail Overcrowding and Pretrial Detainee Program.

March 1978. Civil Action 78-70625, Yokley v. Oakland County, was filed citing constitutional violations within the jail.

April 1978. A report to the Corrective and Court Services Liaison Committee of the Oakland County Board of Commissioners regarding impending lawsuits, need for additional personnel, and construction alternatives to alleviate overcrowding was provided.

July 1978. Inspection by the Michigan Department of Corrections indicated violations.

February 1979. The Department of Corrections sent a letter to county advising them of problems and indicating that action was necessary.

April 1979. A comprehensive manpower study and staffing-position analysis was conducted by the National Institute of Corrections.

July 1979. An inspection by the Michigan Department of Corrections, which was critical of the Oakland County Jail, was conducted. Specifically, this inspection report cited the county for deficiencies in visiting areas, monitoring, communicating and surveillance systems, exits, exercise areas, electrical power and lighting, heating and ventilation, and overcrowding.

December 1979. A letter was sent to the Department of Corrections indicating that the county had no intention of complying with the Department of Corrections recommendations. A report was made by the Oakland County sheriff updating other Oakland County officials on jail overcrowding and estimations of future growth.

1980. A report by the Jail Study Committee of the Oakland County Board of Commissioners summarizing the Committee's progress in responding to jail overcrowding was presented.

April 1980. A report on staffing for the Oakland County Jail security program was given.

August 1980. A resolution approving the Jail Study Concept Paper and Jail Overcrowding and Pretrial Detainee Program was adopted.

December 1980. A report was sent to the Public Services Committee of the Oakland County Board of Commissioners pertaining to Jail Study Grant.

March 1981. A site review and staffing recommendations were made by the Michigan Department of Corrections.

February 1982. A Consent Judgment was entered into by Oakland County and plaintiffs.

Filing of the Lawsuit

Within 3 years of opening in 1972, the Oakland County Jail began to experience problems of overcrowding. This was not a singular phenomenon in the state or nation because virtually every corrections facility was becoming overcrowded. In discussions with the officials involved with the jail during that period, it became apparent that actions were necessary because the jail was at times holding 700 to 800 prisoners on a given night, which was far in excess of its designed capacity of approximately 500.

Initial attempts to relieve the pressure of too few beds resulted in expansion of the trusty camp to hold up to 100 prisoners and the county informing federal authorities that it could no longer detain federal prisoners. These actions did not resolve the problem, though, and on March 17, 1978, prisoners Anthony Yokley, Oskar Allen, Jr., Clarence Montague, and Joseph McConnell filed a civil action which claimed that they were being subjected to cruel and unusual punishment and that their constitutional rights were being violated, as protected by the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution (Complaint for Declaratory and Injunctive Relief, C.A. 78-70625, U.S. District Court, Eastern District of Michigan, Southern Division, March 17, 1978). The defendants named in the

suit included the sheriff, the Oakland County executive, the chairman of the Oakland County Board of Commissioners, and the director of the Michigan Department of Corrections. Even though the Michigan Department of Corrections did not run the facility, its director was named because of its supervisory responsibility over jails and lock-ups in the state.

In the 28-page document filed, it was alleged that overcrowding had created a situation in which cruel, inhumane, and unsafe housing was being provided for inmates. In summary, it was claimed that the conditions created a lack of due process; a lack of physical exercise, recreation, and constructive programs; inadequate medical services; unconstitutional policies regarding mail censorship, phone calls, visitation, reading material, and legal materials; a lack of personal hygiene; an unconstitutional mixing of inmates; mental harassment of inmates; and other deprivations of constitutional guarantees.

The plaintiffs also recommended that the Federal District Court assume jurisdiction of the case and set a time for a hearing, as well as insure the immediate protection of the inmates in the facility. They recommended that a "temporary ombudsman" be appointed to oversee the court's orders and that some 25 actions to rectify the situation be taken immediately by the defendants.

The Consent Judgment

The consent judgment agreed to by the sheriff, the plaintiffs, and the County Board of Commissioners after 2 years of negotiation represented "an attempt on the part of all the responsible parties to establish and maintain a jail facility which meets or exceeds the constitutionally mandated rights and services for inmates" (Consent Judgment, Yokley v. Oakland County, C.A. 78-70625, February 23, 1982, p. 3).

The document further stated that the parties negotiated this amicable resolution of the matter to avoid further litigation and agreed to this as a reasonable settlement of their differences. As a matter of fact, in 1983 and 1984 during the monitor's attempts to force the defendants to comply with various provisions of the judgment, some parties stated that they had not agreed to the consent judgment at the time it was signed and thus did not feel compelled to accept it now. This attitude on the part of some of the jail command staff constantly worked against the defendants' reaching compliance and is discussed in the final section of this chapter, which analyzes the case.

The judgment itself is a 22-page, legal-size document that spells out the responsibilities of the plaintiffs either to maintain or bring up to standards of confinement various conditions within the Oakland County Jail. It represents a fairly typical type of omnibus conditions agreement in that it provides for the basic

constitutional guarantees for inmates which have been found by the courts. These are the right to a safe and sanitary environment, the right to access to attorneys and families, the right to health and medical services, the right to practice religion, and the right to due process before disciplinary action.

In all, the parties agreed to 31 provisions of compliance, and on July 29, 1983, the further Order of Judgment added provisions. For the purposes of monitoring and reporting, these provisions were categorized under the following headings.

II. Inmate Population
III. Staffing
IV. Sanitation and Insect Control
V. Fire Detection and Evacuation
VI. Bedding, Clothing, and Personal Hygiéne
VII. Cell Space Lighting, Temperature, and Ventilation
VIII. Inmates' Surveillance and Summoning of Guards
IX. Exercise
X. Street Clothes for Court Appearances
XII. Inmate Treatment, Counseling, Education, and Recreation
XIII. Access to Courts
XIV. Classification
XV. Telephone Access
XVI. Visitation
XVII. Access to Radio and Television
XVIII. Inmate Guide

XIX. Medical Services

XX. Correspondence and Publications

XXI. Use of Segregation Cells, Including Behavior Modification Cells and Incorrigible Cells

XXII. Religious Services

XXXI. Racial Integration in Cell Assignments

In addition, the July 29, 1983, Order for Enforcement required that:

1. Roof repairs be made
2. Provisions VII and IX of the consent judgment be implemented
3. Air circulation system be maintained
4. A depopulation plan be submitted

The provisions that continued to be in the center of controversy were the ones that dealt with the limit on inmate population in the general housing area and, in particular, the holding cells; the minimum staffing configuration; the personal hygiene and bedding requirements; the temperature control; and the use of sanctions for unruly inmates.

Overcrowding of the general population constantly caused overcrowding of the reception cells, and this became the main outstanding issue of noncompliance. The jail was typically over by 10 to 60 inmates in the general population cells and often had an additional 50 or 60 inmates crowded into the holding cells. Attempts were made to reduce the inmate population by contracting beds with other counties, taking in only the more serious offenders,

expanding the trusty camp and work-release facility, and looking for other county facilities. These actions only temporarily proved useful, and overcrowding was prevalent during the entire course of the monitor's appointment.

Many of the other provisions of the consent judgment had been reached before settlement and only had to be monitored periodically after the initial observation of compliance. Some of the provisions, such as the provision for regular showers and hygiene means, were violated only when the overcrowded conditions caused inmates to be housed in the temporary holding cells or the court detention cells.

Events Surrounding the Appointment of a Monitor

I first became aware of the possibility that a master's appointment was being considered in Oakland County in the spring of 1983, when I was called by the Deputy Director of the Michigan Sheriffs' Association. The purpose of his call was to request my assistance in supplying him with a list of individuals who in my view would have the experience and expertise to become a jail master. This information was being gathered for Sheriff Johannes Spreen of Oakland County because Federal Court Judge Ralph Guy had requested that the parties to the suit submit lists of potential masters for the court to consider. During our conversation, I recommended three individuals who seemed to have the qualifications

for this type of mastership and was asked if my name could be added to the list. I suggested that I was not sure if my credentials were appropriate, but that I had no objection to being included.

In late June 1983 I was contacted by the plaintiffs' attorney, Richard Amberg, who wanted to receive a copy of my resume and inquire as to my viewpoints on jail-conditions litigation and federal court interventions in local corrections situations. I discussed these subjects with Mr. Amberg and also expressed my opinions on the type of individual who could successfully monitor the Oakland County Jail. I also recommended two individuals I felt were well qualified for the case.

At the court hearing on July 29, 1983, Federal Judge Ralph Guy issued an order for the enforcement of the February 23, 1982, judgment and found that the defendants were not complying with the consent judgment in reference to overcrowding, exercise, and maintaining a reasonable interior temperature. Based on these findings, he ordered that "a monitor of consent judgment be appointed to monitor compliance with the previously entered February 23, 1982, Consent Judgment" (U.S. District Court Order, Yokley v. Oakland County, C.A. 78-70625, July 29, 1983, p. 2). Judge Guy further ordered that the monitor "is further empowered to meet with all defendants herein and their respective agents, employees, attorneys and assigns in order to effectuate compliance by all defendants herein with the Consent Judgment" (p. 2). The judge also

decided to give the defendants and plaintiffs 14 days to agree on a monitor or appoint one himself if agreement was not possible.

Based on conversations I had for this study while interviewing the attorneys, sheriff, and county officials, this period brought about a great amount of negotiation as each party attempted to get the others to agree to its nominee for monitor. Sheriff Spreen, through his attorney, pushed for a former retired sheriff who had also served as the state's jail inspector, feeling that he would be inclined to favor the sheriff's point of view. It appears that his ulterior motive was to force the county officials to supply him the resources for more manpower and the additional facilities that in his view were necessary for him to comply with the court order. This was his constant plea throughout the course of the litigation.

The county executive representing the Oakland County Board of Commissioners nominated a retired former assistant executive for the position. Although this person had had no correctional experience, it was felt that his administrative capabilities and political allegiances would assist the executive and board in their quest to keep costs at a minimum and require the sheriff to better manage his existing resources.

The plaintiffs' attorneys were interested in having someone who was interested in correctional reform become the monitor. Their obvious bent was toward persons who would be willing to adhere strongly to the consent judgment's stipulations and bring about some immediate changes to the jail. In this light, they recommended

Dr. Tom Coffee, a correctional reformer who had also been one of their expert witnesses in establishing the constitutional violations, and Frank Donley, the state jail inspector, who had also assisted them in their case against the county. In fact, a deposition taken December 16, 1982, of Frank Donley, in which he recommended the appointment of a master, also showed him indicating that he was interested in serving as the master in this case (Deposition of Frank Donley, Yokley v. Oakland County, C.A. 78-70625, December 16, 1982, pp. 24-27).

Although the various parties met and negotiated to gain agreement per the court's order, they were unable to agree on a monitor and so stated to the court. This being the case, Judge Guy entered an order of appointment on September 16, 1983. The text of this order of appointment is as follows:

> The parties in this matter have agreed to the appointment of a monitor to supervise compliance with a previous consent judgment entered by the Honorable Patricia Boyle. The parties were unable to agree on the selection of a monitor, however. Upon this matter being brought before the court on the plaintiffs' motion for appointment of a monitor, the court ordered the parties to submit nominations to the court for consideration. The parties have submitted their nominations for the position of monitor and, the court having carefully reviewed and considered this matter:
>
> IT IS ORDERED that RICHARD J. LILES is APPOINTED AS MONITOR in this matter. This appointment shall take effect on September 26, 1983.
>
> IT IS FURTHER ORDERED that the Monitor shall meet with the parties, as soon thereafter as is possible, for the purpose of discussing such action as shall be necessary to properly monitor the compliance with the consent judgment. An initial report from the Monitor shall be submitted to this court by October 24, 1983, and subsequent reports shall be submitted at such intervals as the Monitor deems appropriate, provided that

> such reports shall be submitted at no less than forty-five (45) day intervals.
>
> IT IS FURTHER ORDERED that, not later than September 23, 1983, the Monitor shall submit to the court, with copies to the parties, his proposed rate and method of compensation.
>
> IT IS FURTHER ORDERED that the County of Oakland shall be liable for the payment of the fees of the Monitor as approved by the court. (Order of Appointment, Yokley v. Oakland County, C.A. 78-70625, September 16, 1983)

One of the more interesting features of this process was that I was contacted by attorney Amberg at work on September 22, 1983, and congratulated on my appointment as the monitor for Oakland County. This came as a surprise, for I had previously been unaware that I was a nominee since the court had not contacted me for an interview or discussion.

The Initial Meetings

Upon verifying that I had, in fact, been appointed by Judge Guy as monitor by telephoning his law clerk, I immediately requested that a copy of the consent judgment, the order of appointment, and other pertinent materials be sent to me. This review represented my first exposure to the case, other than having generally been aware of the fact that the Oakland County Jail was operating under federal court supervision. Plaintiffs' attorney Amberg, at the direction of Judge Guy, set up an initial meeting for me with himself, Oakland County Corporation Counsel John Ross; Sheriff Spreen's attorney, Steve Hitchcock; and Frank Donley of the Michigan Office of Facility Services. The purpose of this meeting was to brief me on the issues

before the court and to provide a historical perspective on the litigation.

This first meeting provided an opportunity for the attorneys to become familiar with the monitor. It also provided each of the attorneys an opportunity to express his opinion on how he felt the monitor should proceed and what he expected would result from the monitorship. All of these individuals had been with the case representing their respective clients for 5 years, and it immediately became clear that they had formed positions regarding their expectations of a monitor which were not shared by their colleagues.

For example, the plaintiffs' attorney, who also provided the major impetus for the appointment of a master or monitor, declared that he believed that the monitor should use his powers to order the sheriff and the Oakland County Board of Commissioners to end the overcrowding immediately by constructing new facilities. If they failed to respond, he further believed the monitor should petition the court to order the changes. It was clearly communicated that he felt a strong and vigorous enforcement of the consent judgment provisions was in order. Attorney Amberg's position, which remained constant throughout my term of monitoring, was basically that there was no excuse for Oakland County and the sheriff to continue to defy the court order. As the plaintiffs' attorney, he was the catalyst advocating change. The impatience and pugnaciousness he demonstrated at this initial meeting eventually created friction

between us, which led to his lack of faith in my activities as monitor. This subject is covered later in the case study.

John Ross, who as corporation counsel represented the County Board of Commissioners and the Oakland County Executive, expressed a contrary position that the monitor was to evaluate the terms of the consent judgment against the current conditions and recommend to the county officials actions that would help them come into compliance. He felt that a technical advisor could suggest innovative ways in which the sheriff and the county executive could resolve the overcrowding problems, which caused some of the other noncompliance features. Ross also looked for the monitor to act as a conduit of information to the executive and the Board of Commissioners so that they could actually see what was going on within the jail. This issue was essentially that the county executive and the County Board of Commissioners lacked faith in the sheriff to provide them with accurate information. It reflected a long-standing political and subsequently personal battle between the elected sheriff, a Democrat, and the majority of the County Board of Commissioners and the county executive, who were Republicans. The animosity and distrust that prevailed among the major political figures made cooperative resolution of the lawsuit virtually impossible. Ross's expectations, which were reflected by the Board of Commissioners, also became a point of conflict later on, when it became clear that the monitor was more than a paid consultant to them.

Sheriff Spreen's attorney also expressed the position that the monitor was to observe, find fact, and report to the federal judge. His interest was in protecting the sheriff and outlining an expectation that a monitor would not supersede the elected sheriff's state constitutional responsibilities, but would work with the sheriff to compel the county commissioners to provide adequate financial resources.

The remaining member of the meeting, Frank Donley, the state jail inspector who had been closely involved with the litigation and who had anticipated being appointed as monitor, expressed a position in which he and the Office of Facility Services would not be involved during the period of monitorship. It was later discovered that this attitude was not officially sanctioned, but was a personal feeling of Mr. Donley. Much of it was attributed to the fact that he and Sheriff Spreen had been involved in attacks on each other's credibility, and, in fact, Spreen had tried to pressure the Department of Corrections through the Governor to remove Donley from his position as jail inspector.

As can be seen by this short synopsis of the initial meeting with the primary individuals involved in the litigation, there was little common understanding of the role of the monitor, and expectations also varied widely as to what the monitor should do. This lack of agreement about the monitor's role is one of the issues that inhibited progress toward compliance with the consent judgment. The county commissioners, through their counsel, were expecting a

consultant who would provide them information and direction on the steps to take. The plaintiffs' attorneys were expecting a vigorous enforcer of the consent judgment, who would recommend that stringent measures be taken by the court. The Sheriff's Department anticipated having someone who would basically observe the situation and report to the court. In fact, the jail captain made much of the fact that the monitor was to be an observer and not be actively involved in internal departmental matters. In fact, his memo to staff regarding the appointment of the monitor stated that the "function is to gather information regarding the Federal Consent Agreement and to report findings to Judge Guy" (memorandum from Captain Matheny to Correctional Services personnel, October 30, 1983).

The next step was to meet with the federal court judge and determine what expectations he had for the monitor to fulfill.

Judicial Direction

Armed with a history of the situation, a knowledge of the consent judgment, and a feel for the various roles that masters and monitors play, which I gained from reading a National Institute of Corrections publication entitled Handbook for Special Masters (1983), I met with Federal District Court Judge Ralph Guy on October 6, 1983.

Judge Guy had inherited the Yokley case in Spring 1983, when Judge Boyle, who had initially supervised the litigation, resigned the federal bench to accept an appointment to the Michigan State Supreme Court. Judge Boyle was assigned the litigation in 1978 and had taken an active role in instigating the formulation of the consent agreement. She supervised long negotiating sessions between the parties on a number of occasions during the time between the filing of the suit and the signing of the consent agreement on February 23, 1982. Judge Boyle's interest in the case was such that she went against the recommendation of the federal court magistrate in 1980, which basically stated that the only issue for which relief should be granted was one whereby law clerks and paralegals were not allowed to visit inmates (Magistrate's Report and Recommendation, Yokley v. Oakland County, C.A. 78-70625, August 29, 1980). Instead of following this recommendation, Judge Boyle ruled that sufficient constitutional violations did exist and requested the attorneys to draft a consent judgment that would respond to the situation.

Based on a review of documents of record and interviews with the litigants in the case, it is evident that Judge Boyle assumed an "activist" role in relation to this case. She was involved in directing the elements of the consent agreement and oversaw a number of working sessions with the attorneys as they negotiated the settlement. Her departure from the federal bench shortly after the signing of the consent agreement slowed progress toward compliance. As the plaintiffs' attorney stated during a conversation with the

monitor, "Judge Boyle's continued involvement probably would have negated the need for a monitor."

Judge Guy was not as inclined to be directly involved in the case and was disposed to having an outside person manage the litigation if the attorneys agreed. The session with Judge Guy lasted about 20 minutes. He explained his view of the proper role of the federal court in this situation, suggested some managerial methods, and requested that reports be sent to him on progress as delineated in the September 16, 1983, Order of Appointment.

With regard to his views on federal court involvement, he made it clear that nonintervention and noninterference in the area of local governmental matters were primary concerns. He stated that his approach would be to allow the monitor the latitude to meet with county officials, determine a priority of issues to be resolved, and establish a timetable for compliance. He was especially concerned that all parties be involved in correcting the practices within the jail to reach compliance with the consent judgment. He was adverse to issuing contempt citations unless there was a clear disregard for the court-ordered changes. He indicated his strong preference for a process in which the parties reached mutual understanding and agreement on the necessary actions to bring them into compliance with the consent agreement.

In fact, Judge Guy stated that his choice of me as the monitor was based on the fact that beyond local jail and correctional

knowledge, I also appeared to have a strong background in intergovernmental relations at the local, state, and federal levels. It also did not hurt that I had been previously appointed as Director of the Office of Criminal Justice by Governor William Milliken, a fellow Republican whom Judge Guy respected.

All in all, the direction supplied by the judge was somewhat general to the point of indicating that whatever I did, consistent with the terms of appointment, would be appropriate, particularly if it would bring about resolution of the differences.

Judge Guy also briefed me on the political problems within the county that existed between the Republican county executive along with the Republic county commission majority and the Democratic sheriff. It was this political disagreement, particularly the animosity between the Democrat Spreen and members of the Republican county commission, which kept the parties from working together to resolve the problem. In fact, members of the commission were accused of not wanting to reduce the overcrowding in order continually to embarrass the sheriff. Sheriff Spreen, in turn, was said to be keeping the jail overcrowded so that he could continue receiving free publicity. Whatever the ulterior motives, it became apparent during the course of my involvement in Oakland County that the mutual trust and respect necessary for the defendants to work together was lacking. This condition of mistrust was the primary factor that worked against compliance with the consent agreement.

The Monitoring Experience

During the course of the 16 months that I acted as monitor in the Yokley v. Oakland County case, I filed, as required in the order of appointment, an evaluation of compliance every 45 days, starting with the initial assessment on October 24, 1984. These 12 reports ranged from 15 to 30 pages and covered the progress made toward compliance in each of the provisions of the consent judgment, detailed comments, and observations made by the monitor. They also offered recommendations for the sheriff and county, which were designed to help them achieve progress.

To gather the information necessary to evaluate the status of compliance and offer suggestions for improvement, I made more than 30 inspections of the jail, reviewed materials that were provided, and maintained a weekly communication by telephone and mail with the jail staff. These inspections ranged from 4 to 6 hours each and included a visual inspection of the entire facility and usually a discussion with inmates to determine their perceptions of the treatment by staff. During these inspections I would also interview jail staff, county officials, and in some cases the plaintiffs' attorneys when they were included in the tour. Visits to the facility were generally scheduled in advance, except for five monitoring inspections I made without notifying the jail, in order to assure that conditions were consistent regardless of my presence.

After the initial novelty of my visits wore off, I was viewed by many of the staff as a periodic fixture and could basically roam about the jail at will, requiring looks at log books, inmate files, and population reports. Most of the staff were cordial and helpful in providing information and comments regarding the situation, and it appeared that there was no prompting by the sheriff or command officers of the staff on what they could or could not discuss with the monitor.

As a matter of courtesy, I would request a meeting with the sheriff at some point during my visit to brief him on what I had observed and to tell him the problems that I perceived with compliance. As Sheriff Spreen became more familiar with me and seemingly more confident about my judgment, these interviews became sessions in which he would ask for my advice on how to proceed with a number of changes within the jail. He asked for opinions on staff, methods of security, policies and procedures, political strategy, and a variety of other topics. It was during these sessions that I was able to convince the sheriff to request technical assistance from the National Institute of Corrections, the Michigan Corrections Training Academy, and the National Sheriffs' Association. In fact, I wrote the letters for him to sign, which asked these groups for their help. When the sheriff was unavailable, I would meet with the undersheriff and provide him with a briefing on the day's observations. Relationships with all of the command staff, with the

exception of the captain in charge of the jail, were good and are discussed in more detail in the analysis section of this case study.

A Summary of Compliance Activities

The appointment of a monitor by the court, as requested by the plaintiffs' attorneys, in itself indicated a lack of substantial progress toward compliance, and the initial compliance report on October 24, 1983, certainly verified it. As I observed on my initial inspections, although many of the provisions of the judgment had been complied with, problems still existed in regard to overcrowding and staffing. In the Comments and Observations section of the report, it was stated:

> The issues which basically linger and contribute to the questions of compliance with the consent agreement center around overcrowding and inadequate staffing. Many of the other provisions are directly related to the inability of the jail staff to manage the jail population. The lack of appropriate housing and an insufficient number of corrections officers to meet inmate needs is obviously related to the overpopulation problem. It is clear that the constant battle to regulate the population in order to try to maintain substantial compliance with the consent judgment maximum capacity, restricts the ability of staff to address other types of activities such as adequate supervision, treatment and counseling, exercise, and visitation. (Initial Compliance Report, Yokley v. Oakland County, C.A. 78-70625, October 24, 1983, p. 3)

This battle with overcrowded conditions became the thread that ran through every monitoring report. Lack of compliance with many of the other provisions was due, in part or in total, to the fact that overcrowding of the facility caused other problems, which resulted in noncompliance. A classic example was the consent

judgment provision that required adequate hygiene. This was translated to mean that showers were to be permitted daily for each inmate. The holding-cell areas had no shower facilities, so the inmates who were being housed there temporarily until a bed was free in the housing section were unable to take daily showers. This, then, became a noncompliance issue that had to be cited in the report even though 90% of the inmates were receiving adequate hygienic opportunities as specified by the consent judgment.

As mentioned earlier, the main theme of the 12 compliance reports was the overcrowded conditions and their contribution to causing other noncompliance features with the judgment. Each report would cite the extent of the overcrowding and detail its effects on the overall condition of the facility and either present a new recommendation or reiterate a recommendation to relieve overcrowding.

These reports were prepared every 45 days, as required, and sent to the federal district court judge, the sheriff, the county executive, the County Board of Commissioners, and the defendants' and plaintiffs' attorneys. Generally, a briefing was held with the sheriff before writing the report to allow him an opportunity to review and reply to the findings. The local press obtained copies of the reports and on more than one occasion wrote articles regarding the efforts. The compliance reports thus became the main vehicle for communication by the monitor with the parties in the suit as well as the official report on activities to the federal

judge. I often used the comments and observations section to send a message to those involved in the litigation, as was the case in the second compliance report, which had comments and observations as follows:

> The inmate overcrowding conditions really represent only a portion of the consent judgment provisions, and even though overcrowding overshadows the whole situation, attention must be paid to ensuring the basic constitutional rights of inmates. This means that the people entrusted to the care of the Sheriff must have a reasonable expectation that they will be guaranteed their basic rights from cruel and unusual punishment if they are sentenced and afforded due process considerations if they are unsentenced inmates. Modern jail management requires that the Sheriff and the jail staff ensure that an inmate is granted the primary right of personal safety and welfare. It is the jailer's role to keep those individuals entrusted to his care both secure and protected from other inmates and staff, as well as provide a reasonably healthy living situation. This is an extremely difficult task and requires that the persons in charge of a correctional facility be professionally aware of the rights of inmates and understand the fine balance between security and inmate well being. Within the criminal justice context, correctional administration is seen as one of the most difficult and unrewarding jobs. Only through the dedicated efforts of those in charge of the jail facility, will the changes required by this consent judgment be accomplished. The Sheriff, the jail administrator, and command staff must make the implementation of consent judgment provisions their top priority, and they must train, retrain, and provide support to the staff in order to ensure the constitutional provisions outlined in the consent agreement. This has not been accomplished to a reasonable extent during the ensuing 22 months from the February 23, 1982, Order of Judgment, and efforts by the parties must be increased in order to comply. (Second Compliance Report, Yokley v. Oakland County, C.A. 78-70625, December 21, 1983, p. 12)

Many of the recommendations made in the compliance reports were accepted and implemented by the defendants as though they had been ordered by the court. As a matter of fact, the federal judges did not order any actions during the monitoring period, leaving that up

to the monitor through his reports and the voluntary compliance demonstrated by the county officials and the sheriff.

A number of significant recommendations were implemented by the defendants without a formal order of the court. These included the hiring of a jail administrator, retaining the National Institute of Corrections for a population and projected facility study, contracting for additional beds in other counties, rewriting the inmate guide, and revising the disciplinary system to include a high-level command staff review. Compliance reports, then, served a number of purposes. The first, and clearly the most legitimate, was to evaluate and report the level of compliance reached with the consent agreement for the judge. The second was to serve as a vehicle for the monitor to express concerns or issue warnings with regard to the jail operations. The third purpose met by such reports was to provide a means for recommending techniques that would help achieve compliance.

The Extent of Compliance With the Consent Judgment

At the time of the appointment of a monitor, September 26, 1983, 19 months had passed since the signing of the consent judgment, and it was close to 5 years since the initial complaint had been entered into federal court. During this period a number of the original concerns raised by the plaintiffs were resolved as part of the litigation process. Of the consent judgment provisions that

required actions on the part of the defendants, about 70% had been resolved by the time of the signing of the agreement on February 23, 1982.

The primary unresolved issues at the time of appointment of the monitor centered on overcrowding, staffing, and management. The management issues related to inmate discipline, classification, and hygiene. Inadequate staffing and overcrowding at various times caused noncompliance with other provisions of the judgment, but efforts to come into compliance with many of the less-complicated provisions had already taken place.

The state of compliance with the consent judgment was evaluated in November and December 1983, and, as the following section from the monitor's December 21, 1983, report indicates, many of the provisions were met.

> **INMATE POPULATION**
>
> As noted in the Initial Compliance Report, one of the most critical problems which faces the defendants is the severe overcrowding of the facility. This constant concern over where to house inmates has severely restricted the ability of the jail personnel to address the necessary activities with which a correctional facility must be involved. The situation has not changed to a great degree, and even though there were less inmates being handled by the jail during October and November, the overcrowding still exists. In regard to the established night time capacity of the holding cells, it was discovered that though the staff had implemented procedures to insure that the five cells were limited to a maximum of 20 with bedding, there were numerous times when the jail was in violation by housing more than four in a cell during night time hours. This was rectified immediately upon being brought to the Sheriff's attention, and it is anticipated that the holding cell capacities will be limited to consent judgment maximums unless documented extraordinary circumstances arise.
>
> It must be noted that the total inmates established consent judgment figure of 450 is not a reliable gauge of overcrowding

in the facility. Until it was noted by the monitor, the practice of having 10 male inmates crowded into an 8 man cell with mattresses on the floor was prevalent. An order to stop this practice was given during the week of November 21, 1983, and indications are that male inmates are not sleeping on the floors in general population.

The female section of the jail was inspected on December 14, 1983, and it was discovered that severe overcrowding existed there. A temporary limit of 48 had been granted, but the situation is that overcrowded conditions exist when more than 38 or 40 women are housed. The monitor recommended that no women be housed in cells without bunks.

The total figure of 450, as agreed to in the consent judgment, has been adhered to on a few occasions during this past two months, but in no way can that be construed as indicative of relief to overcrowding conditions. Efforts must increase in order to reduce the population to a minimally acceptable number. Relief to the persistent overcrowding must be accomplished in order to successfully address the overall conditions of confinement, and a discussion of recommended strategies will elaborate on this issue.

STAFFING

It is yet too early to completely evaluate the staffing concerns which have been raised, primarily because a stable, manageable population level would require certain staffing which is not reflected in overcrowded conditions. There is clearly a need for additional assistance in classification and census. The D.O.C. jail inspection of July 25, 1983, recommended a census officer and a classification officer. The monitor concurs that even with the assignment of a classification officer, it is evident that another trained classification officer is necessary. These two positions could combine the classification and census tasks, and perhaps, function without additional assignments to classification and census. The position of Jail Administrator is of a critical need also. The later section on recommendations will discuss these items in more detail.

SANITATION AND INSECT CONTROL

The jail staff has determined that the Terminex Company has a contract to spray once a month and is to monitor the control procedure.

FIRE DETECTION AND EVACUATION

The smoke detectors have not been checked for some time. The staff is working out a plan and responsibilities have been assigned.

BEDDING, CLOTHING, AND PERSONAL HYGIENE

Basically, this provision is being complied with and verification of each of the requirements is being put in place. The recommended procedure is to sign off at intake on receiving each of the items. Daily showers are the rule, and exceptions are going to be documented by jail staff.

CELL SPACE LIGHTING, TEMPERATURE AND VENTILATION

Temperature checks are taken each day. Lighting, with the exception of the infirmary cells, is up to standard. Inmates, though, often shadow the lights because they claim they are too bright.

INMATES' SURVEILLANCE AND SUMMONING GUARDS

Verification and monitoring must be put in place. The two way communication system has been dysfunctional and a meeting with the company representative on December 14, 1983, has brought about the possibility of changes which may make this system useful. Captain Metheny is working with the contractor and will develop a policy for use. The security staff is required to punch time clocks. A system of checking and monitoring the security staff activities is not apparent and must be implemented if assurances of the staff observing inmates each hour are made.

EXERCISE

The requirement for exercise of 2 hours per week is claimed to be met by the jail staff. This, though, included what was called walk time on the blocks, which is not exercise as intended in the agreement. A procedure for recording the exercise of each inmate is supposed to be in place, and a full review of compliance will be accomplished.

ATTORNEY-CLIENT RELATIONS

There seems to be no problems with this provision, and compliance is being continued.

INMATE TREATMENT, COUNSELING, EDUCATION, AND RECREATION

The Jail Treatment supervisor, Polly Herley, states that the programs are being offered and conducted, and that inmates have reasonable access to inmate services. Recreation is being offered, but the facility constraints and overcrowding are not conducive to recreation to the extent that it should be available.

ACCESS TO COURTS

There appears to be a discouragement to the use of the Law Library, even though requests are filled for specific legal documents. The Women's section and the women held in the

Southfield facility do not appear to have access to the Law Library. Sections of legal documents are missing. A more functional Law Library must be established and inmates must have access to both the library and legal documents.

CLASSIFICATION

Efforts have been made to improve the virtually nonexistent system of determining the most safe and secure confinement for the individuals entrusted to the Sheriff's care. Officer Don Key has attempted to provide an elementary system of classification. These efforts, though, fall short of the needs for a facility of this size and nature. A professional classification section with adequate resources is necessary. Further discussion of this issue will be in the section on recommendations.

TELEPHONE ACCESS

There are an abundance of telephones available for inmate use, and there seems to be no major violations in this area. Inmates are not complaining about telephone usage, except in exceptional instances, such as with high security individuals. A system of inmate interviews will verify this. A system of monitoring must be established to document the phone accessibility.

VISITATION

The staff has established a system whereby contact visitation is afforded inmates on a regular basis. Hours are staggered so that qualified inmates can receive visits from a limited number of family and friends. A monthly report is submitted which details quantity and type of visit. Individual records should be kept on each inmate, the same as the records on recreation. It appears that this provision is being substantially complied with. Inmate interviews will document any concerns over visiting rights.

ACCESS TO RADIO AND TELEVISION

The jail command has been assuring inmates of a television system that has not been forthcoming. Plans should be expedited to purchase these sets and provide them throughout the facility.

INMATE GUIDE

As reported previously, an Inmate Guide is provided to those inmates who are classified.

MEDICAL SERVICES

AMA accreditation is expected again. The jail is in violation with regard to one vacant Detention Officer position in medical service. This position should be filled immediately.

CORRESPONDENCE AND PUBLICATIONS

There appears to be compliance with this provision. The inmate interviews will assist in documenting any problems if they exist.

USE OF SEGREGATION CELLS, INCLUDING BEHAVIOR MODIFICATION CELLS AND INCORRIGIBLE CELLS

This provision is one which must be scrutinized in much greater detail because of the relationship with discipline, "due process rights," "cruel and unusual punishment standards," and staff implementation. Although a policy exists, it is clear that the staff has not been well trained in the application, and there is a wide discretion; and subsequently, discrepancies in its application. For example, on December 14, 1983, staff members were in disagreement as to whether there was a 10 day or 30 day limit on segregation of an inmate for disciplinary purpose. The cells that are proposed in the policy of December 7, 1983, are a violation of the standards for segregation.

DISCIPLINARY PROCEDURE

The disciplinary procedure which was developed and is part of the policies and procedures, is violated on a regular basis. This can be primarily attributed to a lack of training for the security staff and a lack of appropriate management sanction when staff violations are reported. The jail administrator should personally review the disciplinary sanctions placed each day and determine their propriety. Since discipline and inmate segregation go hand in hand, training for the administration and staff is essential in these areas.

RELIGIOUS SERVICES

A system has been established and no complaints regarding this provision have surfaced.

REVIEW OF STATUS OF PREVIOUS RECOMMENDATIONS

The Initial Compliance Report recommended five separate actions to assist in the implementation of the consent judgment. These included the mutual development of depopulation strategies, technical assistance from the National Institute of Corrections and the Department of Corrections, development of management procedures to monitor compliance with the consent decree provisions, and repair for the leaking roof.

> The County of Oakland did comply, and a small committee was appointed to work on a depopulation plan as per the July 29, 1983 order. Although the Sheriff participated, he chose to submit his own plan for reducing the overcrowding. The monitor's efforts have been to bring about agreement and have the County and Sheriff mutually solve their overcrowding problem. On December 14, 1983, the appointed small task group met and agreed to the immediate depopulation plan.
>
> A system was set up in which the county maintenance staff immediately respond to leakage problems, and a temporarily acceptable solution to complete roof repair is in effect.
>
> The Sheriff's Department has been instituting procedures to monitor, in detail, the provisions of the consent judgment. A "consent judgment team" consisting of Polly Herley, Captain Metheny, Lieutenant Cooper, and Undersheriff Jones was established by the Sheriff, and primarily through the efforts of Ms. Herley, procedures, forms, and management practices are being developed to meet the requirements of the consent judgment.

Factors That Affected Compliance With the Consent Judgment

A number of factors worked against a straightforward compliance effort by the defendants. The fragmented governmental structure, the local political atmosphere, attitudes regarding the litigation, and a lack of leadership led to a situation in which compliance with the consent judgment often became only of secondary importance to the officials involved. The length of negotiations, some 4 years, contributed to an animosity and distrust between the plaintiffs' attorneys and the defendants, the sheriff and the county commissioners, and the sheriff and the state jail inspector. Each of the county entities--the sheriff, the executive, and the Board of Commissioners--shifted blame on each other for the situation, including in some instances the agreement to the consent judgment. Some of the major factors are discussed in this section.

Local Governmental Structure

Oakland County, Michigan, was the first county to adopt the elected-county-executive type of governmental structure of the major counties in the state. This consists in having an elected partisan county executive, elected partisan sheriff, elected partisan prosecutor, elected partisan county commissioners, and elected partisan circuit and district court judges. The basic delineation of responsibilities follows a pattern frequently found in midwestern local government. The county executive is in charge of the executive management of the county; the county Board of Commissioners acts as the legislative body; the sheriff, prosecutor, and judges carry out their constitutional authority; and a great deal of overlap and role conflict pervades the system.

At the time the original litigation was filed, each of the officials with some responsibility for the jail was named separately as a defendant. This included the sheriff, each of the 27 county board members, and the county executive. Furthermore, the State Department of Corrections maintained some regulatory and standards-setting responsibilities through the state jail inspector, who was also named as a defendant in the suit.

As the monitor conducted the initial interviews in September and October 1983, it became clear that the compliance effort was hampered by the fragmentation of authority and a lack of clearly defined responsibilities. Each of the defendants at one time or

another would point toward the others and claim that it was their inaction or lack of commitment that caused the problems of noncompliance.

The clearest division pitted the county board and the county executive against the sheriff. As mentioned previously, this was in part a result of the sheriff being a Democrat and the county executive and three-fourths of the County Board of Commissioners being Republicans. There were also longstanding political disputes, which only served to fan the flames. On a number of occasions, the monitor was told that the sheriff was shirking his responsibility and caused the overcrowding in order gain more staff for the jail, or that the county officials were withholding adequate support for the jail in order to embarrass the sheriff.

The local governmental structure caused delays and proved cumbersome in that actions the sheriff could initiate that would cost money were reviewed by the county executive and the board for approval and the provision of resources. This process would usually take at least 3 months, due to the committee structure of the board and the need to receive approval from the executive and at least two committees before board approval. Since the county executive and the county board were committed to protecting the budget, it was virtually impossible for the sheriff to initiate the process of constructing additional facilities to handle the overcrowding.

Throughout the monitoring effort, this problem of identifying accountability and forcing appropriate action prevailed.

The Local Political Atmosphere

The local political atmosphere thus contributed negatively to the compliance efforts. It pitted a popular Democratic sheriff against the remainder of the major county Republican politicians. The sheriff refused to meet with the county executive in his office, and the executive, in turn, would not travel across the street to the Sheriff's Department. The sheriff more than once complained that the attacks on him by other county officials had contributed to his wife's premature death. It was also apparent that the sheriff had plans to run against the incumbent county executive in the November 1984 election, which increased the level of both personal and political animosity.

This political situation was clearly detrimental to achieving compliance. In fact, the issue of noncompliance was seen as a useful tool by the combatants to use against each other in their quest for votes. As I tried to build a coalition of the appropriate county officials behind proposals to solve the overcrowding problem, I was frustrated at virtually every turn by the animosity.

A recommendation by the judge in January 1984 represents an excellent example of the officials' inability to work together. The monitor had arranged a meeting to include the sheriff, the county executive, and the chairman of the Board of Commissioners in order

to resolve some of the issues amicably. On February 16, 1984, the date of the meeting, it was communicated that the county executive was going to be unavailable, but would meet with the monitor alone to discuss problems. This was accomplished, and the monitor proceeded to meet with the sheriff and the chairman of the board. This session fell apart within 5 minutes, when the sheriff accused the Board of Commissioners of personal attacks, and I had to call an end to the meeting. This type of animosity was common, and for a long time the sheriff would not even attend county commission meetings.

Attitudes Regarding the Litigation

Another factor that inhibited full compliance with the consent judgment was the attitudes of the people involved regarding the suit. Few, if any, of the officials felt that the jail was a "bad" place. During the initial tour of the jail, the captain of corrections kept pointing out how clean and neat the jail was and how it seemed inconsistent that prisoners were afforded better care than the poor in the community. This attitude prevailed throughout the jail and the county.

The captain of corrections constantly attributed the lawsuit not to conditions within the facility but to the fact that the plaintiffs' attorneys chose Oakland County because of its wealth.

They could thus receive substantial fees from the county as part of the judgment.

The sheriff also was not convinced that he had jail problems, which seemed ironic because he only made one inspection of the facility during the period of my monitorship. As sheriff, he felt that running the jail was a secondary concern and that protecting the citizens through law-enforcement activities was his primary responsibility. This attitude caused him to use jail duty as a staff punishment for mistakes while on patrol. A number of the jail staff were placed there for punishment.

There was little support for the consent agreement among the other county officials either. In fact, the prevalent attitude, although not as blatantly displayed, can be summarized in the response of one circuit court judge to the sheriff regarding the federal court consent agreement. He expressed his opinion as follows:

> Dear Sheriff Spreen:
>
> I am in receipt of your letter of November 18th advising me that Judge Ralph B. Guy, Jr. has been named to replace Judge Patricia Boyle and has requested an immediate plan to reduce the population in the jail.
>
> It is my understanding of the law that I am bound to sentence according to the law and not according to advice given me, by either a Sheriff and Judge Robert B. Guy.
>
> Therefore, whether it is your own idea or somebody else's, it is my intention to completely ignore your advice. I intend to continue sentencing in the future according to the law and not at the suggestion of either you or Judge Guy, if he has seen fit to give you such advice. (Letter from James S. Thorburn to Sheriff Spreen, November 22, 1983)

For the plaintiffs' attorneys, the issue had also become somewhat personal. The attorney who was primarily involved felt that the sheriff's staff were constantly thwarting his attempts to receive information on compliance activities and had even subjected some of his clients to segregation-cell housing to "get at" him.

The conditions necessary for problem resolution through mutual effort were thus not at all in place. These factors affected compliance in a clearly negative fashion and contributed to the need for a monitor in the first place.

Significant Events That Determined the Course of the Monitorship

The litigation Yokley v. Oakland County, it must be remembered, was accepted by the federal judge first assigned the case in 1978, Patricia Boyle. As explained earlier in this chapter, she overruled the magistrate's findings and recommendations and determined that significant enough constitutional violations were apparent to warrant her intervention into correcting jail conditions. Based on interviews with the officials involved during the formative stages of the case, it can be seen that Judge Boyle took a strong hand in managing the litigation proceedings and at one point in 1981 required all of the attorneys to remain in chambers until late at night while they hammered out an agreement. She personally heard testimony, asked questions of the litigants, and directed the sheriff and other county officials to act. It was her determination

in early 1982 that contempt proceedings would spur action by the defendants to gain compliance with the judgment (Consent Judgment, Yokley v. Oakland County, C.A. 78-70625, February 23, 1982).

Judge Boyle stepped down from the federal court and accepted appointment to the Michigan Supreme Court in spring 1983. This event certainly affected the resolution of the litigation because of her deep involvement with the case and her determination to manage consent judgment compliance with a firm hand. Interviews with the plaintiffs' attorneys indicated that they felt Judge Boyle would have ordered the county to implement a plan for construction of the additional beds necessary and not waited, as the other judges who followed her, for voluntary compliance.

When Judge Guy was assigned the case, he was put in the position of formulating orders with which he had no previous familiarity and based on his directions to the monitor would have approached in a much more removed fashion than Judge Boyle. During the October 6, 1983, meeting with Judge Guy in which he outlined his suggestions for monitoring, he indicated that he wished the monitor to act as a catalyst for action by the county officials and did not want to place the court in the position of requiring specific changes. It was his view that the court should show great restraint in meddling in the affairs of local government and would best serve by acting as an arbiter between the litigious parties. It was his wish for the monitor to evaluate compliance, report on compliance, establish a timetable for compliance, and develop recommendations

for the county and the court. Basically, I inferred that his directions were to manage the compliance efforts as best I could without requiring federal court orders and to negotiate between the parties for voluntary solutions.

A late-November discussion with Judge Guy regarding the progress of the case reinforced these directions. He indicated that he wished the monitor to continue making recommendations to the county and use persuasion and the threat of court-imposed sanctions without actually involving the court. It was his wish to keep the court at an appropriate distance from actual implementation.

In January 1984, the case was reassigned to Judge James Churchill due to a realignment of the workload at the federal district court. Judge Churchill scheduled a status conference on the case, which was to include the attorneys and the monitor. At this conference Judge Churchill requested that I continue as monitor and proceed with plans to work with the parties in achieving an amicable resolution. It was during this session that the attorneys for the defendants became aware that the court was not going to take aggressive action to force compliance, but rather would look for areas of mutual agreement and accord. The judge directed me to set up a meeting among the sheriff, the county executive, and the chairman of the county board to negotiate resolution to the outstanding issues. The previous section of this chapter discussed

the failure of this attempt to gain voluntary compliance due to the political and personal animosity of the parties.

It is significant to the course of the litigation that at this point a strained relationship between the plaintiffs' primary attorney and the monitor developed. This was due, in part, to frustration on the attorney's part with the lack of aggressive action being demonstrated by the court and the unrealistic expectation that the monitor was going to request contempt proceedings against the sheriff. The extent of his frustration with the process was initially communicated to the monitor by telephone and then formalized in two letters written in February and March 1984, in which his concerns were expressed. The March 17, 1984, letter specifically stated that "it is obvious to me that the Consent Judgment, as well as your presence as Monitor means nothing to the County Defendants and that they will continue to violate the orders of the Court on a regular basis" (letter from Richard J. Amberg, Jr., to Richard J. Liles, March 12, 1984).

In discussions with the attorney upon receipt of this letter, it became clear that the years of battling with the defendants had made it difficult for him to recognize the often-slow nature of building consensus and that he felt the only answer was in specific court-ordered remedies. A review of the monitor's prescribed role and the directions of the federal judges did little to soothe his feelings. His lack of faith in the monitor's ability to take

decisive and quick action continued throughout the monitoring period.

The Public Services Committee of the County Board of Commissioners also became involved at this point. On March 6, 1984, the monitor attended a meeting with the committee, ostensibly to discuss my findings and recommendations--in particular, the recommendation that the county hire a professional jail administrator, which I had made as the cornerstone to building the impetus for gaining compliance with the consent judgment (see Fourth Compliance Report, Yokley v. Oakland County, C.A. 78-70625, March 30, 1984). One of the major stumbling blocks to achieving compliance, in my opinion, had been the lack of leadership and management within the jail. The various captains who were assigned responsibility for the jail operations were either untrained in correctional administration, uninterested in corrections, or both. Often they were assigned the jail as punishment for involvement in a dispute with the sheriff.

In February 1984, members of the Public Services Committee met and reviewed the Second Compliance Report submitted on December 21, 1983, and basically felt that it was a waste of taxpayers' money (see "$20,000 Jail Report Under Fire," 1984). At the suggestion of the deputy county executive, I was invited to attend the next Public Services Committee meeting to review my actions as monitor and discuss my recommendations for compliance.

During this meeting, which some commissioners unsuccessfully tried to turn into criticism of the monitor's actions, the need for a professional jail administrator was communicated and accepted by the committee. It was also explained that the key to successfully avoiding the expense of paying a monitor was to "meet the terms of the agreement they've signed" ("'Suspicions' Play a Role," 1984).

Agreement was thus reached between the county board, the sheriff, and the county executive to hire a professional correctional administrator who could provide the management skills necessary for a jail that had become equal in size to many state prisons.

During spring 1984, the political battle between the sheriff and the county executive became a war, upon the sheriff's announcement that he was running for the position of county executive on the Democratic ticket. This basically ended any possibility of developing a mutual problem-resolution process between those two officials. Also, it put the Sheriff's Department in limbo because it meant that a new sheriff would be elected in November and assume office on January 1, 1985. With members of the department choosing sides concerning whom to support for sheriff, the incumbent sheriff seeking another office, and the county executive and the county board members involved in their re-election activities, the issues of compliance became secondary, and little was accomplished during the summer and fall of 1984.

The November 1984 elections saw the re-election of the county executive and the election of a new sheriff, who was of the same political party as the majority of other elected officials. For the first time in 12 years, it appeared that the partisan politics that had kept the sheriff at odds with the County Board of Commissioners and the county executive could be eliminated. All of these officials pledged to work together, and the sheriff-elect stated that his primary focus as sheriff would be to "get out from under" the federal court's jurisdiction. During the first 4 months of his term of office, he claimed that he spent 99% of his time trying to place the jail into compliance ("Nichols Sets Goals," 1985).

Nichols also allowed free access to the state jail inspector and hired a corrections consultant to assist him in training the corrections staff. Based on the dramatic change in activities of the county in working toward compliance and the proposals for additional facilities, the sheriff's attorney on February 11, 1985, petitioned the court for elimination of the position of monitor. After gaining the concurrence of the other parties to the suit, this request was forwarded to the court. It was based on the argument that the court had appointed a monitor because the Michigan Department of Corrections had been unable to work with the previous sheriff. Now that this problem was resolved, there was no need for a monitor (see "Motion for Order to Eliminate Position of Jail Monitor for Oakland County Jail, Yokley v. Oakland County, C.A. 78-70625, February 11, 1984).

The brief that the defendants supplied in support of the motion stated:

> In the Summer of 1983, counsel for Plaintiffs petitioned this Court to appoint a jail monitor to aid in the compliance with the Consent Judgment that had been entered on February 23, 1982. After each of the parties had the opportunity to submit recommendations, this Court, pursuant to an order of September 16, 1983, appointed Richard J. Liles as monitor for the Oakland County Jail. Pursuant to the Order of Appointment, Mr. Liles was to monitor the jail to ensure compliance with the Consent Judgment, and was to submit periodic reports to the Court. Since his appointment, Mr. Liles has effectively carried out the duties of his office, and his efforts have been appreciated by the involved parties to this case.
>
> It is believed that the major reason that counsel for Plaintiff petitioned this Honorable Court for the appointment of a monitor, was because of the lack of involvement and contact the Michigan Department of Corrections had with the Oakland County Jail. In late 1982 or early 1983, a difference of opinion arose between then Sheriff Johannes Spreen and certain officials of the Michigan Department of Corrections, regarding certain practices at the jail and other related matters. As a result of this dispute and pursuant to the Sheriff's desires, officials of the Department of Corrections ceased taking an active role in ensuring that the Consent Judgment was being complied with. Thus counsel for Plaintiff were denied a source which they had been utilizing to determine whether the Consent Judgment was being complied with.
>
> On January 1, 1985, John F. Nichols became the new Sheriff of Oakland County. Shortly before he assumed office, Sheriff-elect Nichols contacted Frank M. Donley, Supervisor of Facility Inspections, Office of Facility Services, Michigan Department of Corrections, to advise that he would again invite and welcome that Department's active involvement in the Oakland County Jail. Pursuant to this invitation, Mr. Donley, and other employees of the Department of Corrections, have spent numerous hours in that facility. These individuals have assisted the Oakland County Sheriff's Department in establishing a training program, studying the deployment of jail staff required by the Consent Judgment, and by studying and recommending long range and short range plans for the elimination of the jail overcrowding problem. Furthermore, the Department of Corrections has pledged its continuing assistance to the Oakland County Sheriff's Department in its effort to fully comply with the Consent Judgment.

> On January 28, 1985, a meeting was held at the office of Sheriff Nichols. Present at that meeting were Sheriff Nichols, Mr. Donley, Attorney for Plaintiffs, Richard J. Amberg, Attorney for the Sheriff, Gilbert Gugni, and other key Oakland County Jail personnel. This meeting was called to inform Mr. Amberg of the many changes that had already occurred within the Department, and of the plans for the future that the Sheriff's Department was contemplating to ensure compliance with the Consent Judgment. At this time Mr. Donley also stated that his office would agree to assume all the duties and obligations previously delegated to the jail monitor. This offer was made subject to the approval of this Honorable Court.
>
> Since Mr. Donley, who is well qualified and has been recognized as the Court's expert witness in this case, has agreed to assume the duties of jail monitor, it is no longer necessary for Mr. Liles, or any other individual, to also continue this function. Accordingly, the parties have stipulated to the entry of an order which calls for the elimination of the position of jail monitor, and for the Michigan Department of Corrections to immediately assume the duties and obligations previously delegated to the position of jail monitor. Such an order will not only avoid duplicity of functions, but will also save the County of Oakland funds which it is presently expending for compensation to the jail monitor (Defendants' Brief in Support of Motion for Order to Eliminate Position of Jail Monitor for Oakland County Jail, Yokley v. Oakland County, C.A. 78-70625, February 11, 1986).

On April 19, 1986, District Court Judge Richard F. Suhrheinrich issued an order that eliminated the position of monitor and assigned the Michigan Department of Corrections all of the duties and responsibilities previously assigned the monitor (Order Eliminating Position of Jail Monitor for Oakland County Jail, Yokley v. Oakland County, C.A. 78-70625, April 19, 1985).

An Assessment of the Effectiveness of the Monitor

As Nathan (1983) stated in the Handbook for Special Masters, "Masterships terminate in a variety of ways. Some have ended with a formal decree spelling out in detail what the defendants must do in

the future to maintain compliance. Others have simply faded away with no final report or order" (p. 13). The latter circumstance is basically how the monitor ended involvement in Yokley v. Oakland County. Based on the newly elected sheriff's dedication to gaining compliance with the federal consent decree and the drastic improvement of relations with the County Board of Commissioners and the county executive, it was determined by the defendants' and plaintiffs' attorneys that the Department of Corrections could resume its monitoring role. The plaintiffs' attorneys also agreed to assist in making inspections and were welcomed by the sheriff. Since the initial petition for a monitor had been brought by the plaintiffs and since they were agreeable to terminating the monitor, the federal judge on April 19, 1985, issued an order eliminating the position of monitor. It is somewhat ironic that I heard about the elimination of the position in much the same way as I had heard about the appointment 16 months before. On April 21, 1985, while drafting the compliance report for the previous period, I called the county attorney to ask him some questions. He informed me that he had just received an order eliminating the position of monitor and would send me a copy. Thus, it ended as it had begun, with no communication from the court.

One of the key questions surrounding the use of remedial special masters, as focused on by most of the persons who have studied this technique, is: Did the appointment of a remedial

special master accomplish the goal of furthering efforts toward compliance with the consent decree? The following discussion evaluates that question and provides an assessment of the effect of the monitor as a compliance-achieving technique in Yokley v. Oakland County.

The appointment of the monitor by Federal Court Judge Ralph Guy was initiated upon the reluctant agreement of the defendants with the plaintiffs' position that compliance was not being achieved to an acceptable degree. The parties were at a standstill on the case, and the animosity between Sheriff Spreen and the state jail inspector, who had been providing an evaluation of compliance activities, had escalated to the point that the sheriff had barred him from the jail. From the federal court perspective, the request from the plaintiffs' attorneys to have an expert manage compliance with the consent decree offered an alternative to the next step of issuing contempt citations to the defendants and imposing fines for noncompliance. This threat, as well as the possibility that Judge Guy might move even to the point of ordering expensive construction remedies, was enough to gain the agreement of the county's attorneys. The sheriff and his counsel saw an opportunity to gain an ally in the battle against the county's seeming recalcitrance in providing the funds to construct an addition to the jail and hire more staff. Although the expectations may have been different, it appeared that all of the parties were looking forward to the appointment of a monitor to assist in the compliance process.

An assessment of the effect of the monitor has to include an evaluation of the situation with regard to compliance before the appointment and a review of the monitor's efforts against the state of compliance before his termination. A basic question would be: Did the defendants come into compliance with the consent decree, and could that be traced to the presence of a monitor? With regard to the level of compliance attained by the end of the monitoring period, a review of the compliance reports by the monitor shows that compliance was reached in many of the provisions of the consent judgment.

The earliest complete assessment of the level of compliance was reported on December 21, 1983, and it was determined that many of the provisions of the consent judgment were not fully complied with by the defendants. This second compliance report charged that overcrowding was still prevalent and that ensuring the constitutional provisions contained in the consent judgment had "not been accomplished to a reasonable extent during the ensuing 22 months from the February 23, 1982, Order of Judgment, and efforts by the parties must be increased in order to comply" (Second Compliance Report, Yokley v. Oakland County, C.A. 78-70625, December 21, 1983, p. 12).

Compared to the twelfth and final compliance report on May 1, 1985, it can be seen that substantial compliance with many of the provisions had been achieved. The monitor provided the following overall assessment of the conditions of the facility:

> It appears that the County Executive, the County Board of Commissioners, and the Sheriff are in accord on the goal of reaching compliance with the Consent Agreement of February 23, 1982. The previously mentioned plans for construction finally indicate a solid commitment to attempting to alleviate the overcrowded conditions which have plagued Oakland County since the mid-seventies. If this cooperative problem solving approach continues, and if the construction activities are expedited, it may be that relief for the current jail can be accomplished by the fall of 1986. The cost estimates produced so far, though, seem extremely low and national correctional construction experience tends to indicate a much higher cost will eventually surface. The architectural drawings and the cost estimates of the project managers should resolve this question shortly. (Twelfth Compliance Report, Yokley v. Oakland County, C.A. 78-70625, May 1, 1985, p. 2)

This final report, then, listed the efforts made toward compliance and reported that a resolution of the overcrowding problem would in all likelihood bring the remaining outstanding provisions into compliance with the consent judgment. After the monitor's departure from the case, it actually took another year or so of negotiations, but eventually decisions were made. It is anticipated that construction of a 200-bed addition will be completed in 1987.

The level of compliance attained by the defendants before the appointment of the monitor was not acceptable to the court. The judge did not wish to use the sanction process to force the achievement of compliance, but felt that a facilitator, or monitor, might spur the defendants into action. After some 16 months, it was judged by the court that sufficient action had been taken so that a constant monitoring was unnecessary. The period of monitoring thus did result in positive actions, and the original purpose of "effectuating compliance" was realized.

Problems With Implementation of the Consent Judgment

As Yarbrough (1982) commented regarding the Alabama prison conditions case, Pugh v. Locke (C.A. 74-57-N), "Implementation of any comprehensive court order is never easy. In this case the protracted tension between state personnel and the committees monitoring compliance did not help" (p. 393).

In the case of Yokley v. Oakland County (C.A. 78-70625), a number of problems worked against the implementation of the consent judgment. First and foremost was the animosity and distrust between the sheriff and the county commissioners, the sheriff and the county executive, and the sheriff and the state jail inspector who originally monitored compliance with the consent decree. At one point early in 1983, when I arranged a meeting between the chairman of the County Board of Commissioners and the sheriff to discuss the proposal to hire a qualified jail administrator, the full extent of the hatred between the parties was revealed when the sheriff accused the chairman and the board of contributing to his previous wife's death with their political attacks on him. The meeting was quickly called to a halt when I realized the fruitlessness of trying to bring the parties together, and I used the technique of "shuttle diplomacy" by meeting independently with the parties and arranging agreements.

The sheriff's decision in the spring of 1983 to run for the office of county executive did little to resolve the problem and

forge a better working relationship. This political and personal dislike between the defendants in the case made the job of monitoring extremely difficult. It was only upon the election of a new sheriff in late 1983 that the parties began working together to achieve compliance with the consent judgment. A great many of my efforts before the election were in simply trying to build communication and consensus between the sheriff, the county commissioners, and the county executive.

A second problem inhibiting compliance was the instability of the federal court during the monitoring period. During my 16-month period as monitor, I reported to three different federal court judges, none of whom was the judge who initially tried the case. Other than the initial direction by Judge Guy, who appointed the monitor, there was little contact with the court. Judge Churchill met with me once and held one hearing on compliance, and Judge Suhrheinrich only indirectly communicated with the monitor when he signed the order to eliminate the position.

The difference in viewpoints on the nature and extent of judicial activism between the original judge, Patricia Boyle, and her predecessors on this case also contributed to the problems of implementation. Judges Guy, Churchill, and Suhrheinrich were not inclined to delve too deeply into what they considered to be local governmental responsibilities and thus did not provide the monitor with specific orders for compliance activities.

If one were to take the two variables that Spiller and Harris (1977) discovered as key contributors to noncompliance, which are (a) "unwillingness or inability to comply on the part of one or more of the necessary actors (not always the defendants)" and (b) "lack of judicial determination to compel compliance" (p. 5), one could conclude that compliance in Yokley v. Oakland County would be very difficult. It appears that the intention of both Judge Boyle and Judge Guy was to resolve the issue of noncompliance rapidly, but Judge Churchill, who was assigned the case on an interim basis, and Judge Surheinrich, who finally assumed responsibility, did not share the same determination. Neither of the last two judges became involved in the details of the controversy, and both left hearings and decisions to the magistrate. The defendants' attorneys were aware of the lessening of judicial direction and shared those views with their clients.

This, along with the unwillingness of the county to enter into an expensive construction program, particularly with the 1983 elections coming up, did not create an ideal atmosphere for compliance. The sheriff, who was willing to comply, but tried to use the consent decree to hire more staff and expand his facility beyond the wishes of the county executive and the county board, was often unable to resolve the issues, particularly the overcrowding, over which he had little control since the courts and police departments held the responsibility for the number of inmates sent to the jail. Leadership was lacking from all of the parties, and it was not until newly

elected Sheriff Nichols made compliance with the consent judgment his top priority that unified action involving the sheriff's department, the county board of commissioners, and the county executive became a part of the process.

Perhaps it was as Yarbrough (1982) speculated:

> The typical civil liberties case raises fairly narrow issues and leads to a limited grant or relief. A law is upheld or invalidated, a conviction reversed or affirmed; a rule of evidence or procedure is announced, a constitutional interpretation of relatively limited impact established. In cases of the omnibus variety, however, the issues are so complex, the relief granted so extensive, and the burdens on administrative resources so heavy, that the initial decree inevitably is simply the beginning of a protracted process. In that process, moreover, one wonders whether the judge is actually committed to jot-for-jot compliance or, instead, is simply trying to push the defendants in the "right" direction, stimulating them to some sort of remedial action, however short it falls of full compliance. Obviously, no judge will reveal such thoughts, even if he entertains them. In the context of the omnibus case, however, this could be the only feasible objective a judge logically may pursue. (p. 398)

Summary

This chapter presented a description of the events that surrounded the appointment of a remedial special master to oversee compliance with a federal court order requiring executive and legislative action. It detailed the history of the litigation and the dynamics of the appointment, presented an analysis of the results of this appointment, and discussed the various parties to the action and their interests in the case. It also provided insight into the motivations of the various actors in the case and

described their interactions with the court, the master, and each other. This first-hand account of a recent remedial special master's odyssey into a federal-local conflict placed the subject of the use of special masters in a practical situation that actually happened and viewed the process from a participant's standpoint.

CHAPTER VI

RESULTS OF THE SURVEY OF REMEDIAL SPECIAL MASTERS

This chapter details and discusses the results of the survey of remedial special masters in the corrections field. It is based on their experiences and observations as participants in this recently adopted form of court intervention. A list of the other individuals who have been appointed by federal and local courts as masters and monitors was compiled from a variety of sources, including those noted during the literature review, the partial listing included in the 1983 National Institute of Justice Handbook for Special Masters, and contact with a researcher with the Edna McConnell Clark Foundation who was also trying to compile a list. These techniques yielded a comprehensive listing which totals 27 individuals appointed in recent years (1970 to 1986) in this capacity. The list of jail and prison remedial special masters with addressees and case citations, where available, is included as Appendix A.

On November 24, 1986, letters were sent to these individuals, requesting that they fill out the enclosed questionnaire. By January 1987, approximately half had responded. A follow-up letter was sent to the remaining nonrespondents on January 14, 1987, which resulted in a few more returned questionnaires. Finally, a handwritten note on a copy of the original letter was sent and

follow-up telephone calls made to the rest of the population in March 1987. The final response rate was 74%, with 20 out of 27 remedial special masters participating in the study. The letters sent and a copy of the questionnaire included in Appendix B.

Profile of the Respondents

The 20 respondents were generally representative with regard to their involvement with jails, prisons, or prison systems. Seven, or 35%, were appointed in jail cases. The same number was appointed to oversee prison systems, whereas only four, or 20%, were involved with a single prison. Two identified "other," so their response indicated that they enforced an order directed at a house of correction, which is very similar to a jail and a juvenile detention facility. (See Table 2.)

Table 2

What Type of Case Did the Masters Oversee?

	Number	Percent
Jail	7	35
Prison	4	20
Prison system	7	35
Other	2	10
Total	20	100

The primary occupations were as follows: nine classified themselves as attorneys, five practicing correctional administrators, three full-time consultants, one criminologist, one social worker, and one teacher.

Responses to the Questions

This section provides a descriptive summary of the responses to the questionnaire. Each is listed with a table that provides the number of responses to the different choices available for each response. The table also compares the percentage of response to an item to the total number of responses, thus providing a group comparison.

Based on the survey responses, it is evident that remedial special masters in corrections litigation are primarily engaged in monitoring and enforcement activity. Ninety percent (18) of those surveyed perceived such activity as their primary function. Two people indicated that they were involved in formulation of the decree, whereas none was involved in assessing the extent of violations. (See Table 3.)

The Order of Reference

The order of reference appointing the masters differed in terms of the authority granted by the judge. Only two respondents, or 10%, thought that their written direction was detailed and specific.

Fifty-five percent (11) thought that it was moderately specific, and the remaining 35% (7) stated that the order was general in nature. When asked whether the detailed specifications in the order, or lack thereof, affected their ability to perform, 80% (16) responded that it affected them positively, whereas only 20% (4) reacted negatively. (See Table 4.)

Table 3

When, in the Judicial Process, the Remedial Special Master Was Appointed

	Number	Percent
Violation assessment	0	0
Monitoring/enforcing	18	90
Decree formulation	2	10
Other	0	0
Total	20	100

Judicial Determination

Respondents were asked whether the judicial will to resolve the litigation exhibited by the judge was a key ingredient to bringing about compliance with court orders. Only 5% (1) responded that the judge exhibited only slight determination. Ninety-five percent assessed the judge as either highly determined (14) or moderately

determined (5). All 20 respondents felt that judicial determination was an important factor in bringing about compliance by the defendants. (See Table 5.)

Table 4

Degree of Specificity of the Order of Reference

	Number	Percent
Detailed and specific	2	10
Moderately specific	11	55
General	7	35
Total	20	100

Table 5

Extent of Judicial Determination to Promote Compliance

	Number	Percent
Highly determined	14	70
Moderately determined	5	25
Slightly determined	1	5
Total	20	100

The masters were asked to explain their rationale for agreeing or disagreeing with the statement that "judicial determination to resolve the litigation has been identified as a key ingredient for compliance with remedial orders."

The following responses were given:

"Judge's insistence on compliance is critical."

"Judge must be willing and interested."

"Parties will take monitoring activities seriously in direct proportion to the backing of the judge."

"The judge's interest in resolving the issue is the most important factor."

"A special master is no more effective than the backing he receives from the court."

"The support of the judge is essential to success."

"Parties take the case more seriously."

The remaining 13 respondents made no comment on this question but, as identified above, were in agreement with the seven who did comment in identifying judicial determination as a key factor in gaining compliance.

Judicial Involvement

Judges, however, were not deeply involved in monitoring activities. Only 15% (3) of the remedial special masters characterized the judge as deeply involved. The others reported judicial involvement as either moderate (9) or minimal (8). (See

Table 6.) Yet even this involvement by the judge was deemed significant in comments accompanying the closed-ended responses. Seventy-five percent (15) stated "yes," whereas 25% (5) reported "no."

Table 6

Involvement of the Judge in Gaining Compliance

	Number	Percent
Deeply involved	3	15
Moderately involved	9	45
Barely involved	8	40
Total	20	100

The masters were asked to explain their rationale for agreeing or disagreeing with the statement that "involvement by the judge in monitoring activities is also considered to be critical to the successful implementation of remedial orders." Those answering said:

"All we needed from Judge Warner was his support at critical junctures and his continuing interest and confidence in us."

"Such involvement is an index of commitment, but may not be necessarily significant."

"He provides our mastership with a great deal of latitude and he almost solely relies on our independent judgments."

"Under our brand of monitoring, as set out in the consent judgment, it was less important." (Note: In this case the judge would only be involved again if the committee assigned to monitor compliance petitioned for a reopening of the case.)

"I disagree because I do not think it is appropriate for the judge to be doing the actual monitoring. The master/monitors were appointed for that purpose, and the judge should preserve his objectivity by allowing his officers to perform the monitoring function."

"The court's position/determination about the case is clear; significant involvement by the court is not necessary to prove that."

"The judge was not actively involved outside of court hearings. However, by the questions he asked and comments he made it was clear that this was not going to slide under the table."

"The judge must provide some degree of direction."

"A master/monitor is powerless unless the judge for whom (s)he works is prepared to act on recommendations and findings."

"It increases defendant's motivation to comply."

"As long as he is aware of and approves of the monitoring performed, there is no need for him to become directly involved."

"That is why masters and monitors are appointed" (disagreeing with significance of involvement).

Education, Experience, and Training

The background and experience of the remedial special masters who responded indicated that they were fairly evenly drawn from the field of corrections or law. Forty-five percent (10) responded that they had legal training, education, and experience. Fifty percent (11) were from a corrections background, and 5% (1) indicated "other." One person characterized himself as a teacher. Two respondents checked both the legal and correctional choices when asked what their experience was. (See Table 7.)

Table 7

Education, Experience, and Training of the Masters

	Number	Percent
Legal	10	45
Correctional	11	50
Other	1	5
Total	22[a]	100[a]

[a]Multiple responses.

Masters' Assessment of Administrators' Compliance

The remedial masters generally thought that the facility administrators, with whom they interacted closely, were willing to

comply with the terms of the court order. Fifteen percent (3) thought the administrators were eager to comply, 65 (13) evaluated them as willing, and 20% (4) felt they were reluctant. None was characterized as unwilling to comply with the judgment. (See Table 8.)

Table 8

Willingness of the Facility Administrators to Comply With the Court Order

	Number	Percent
Eager to comply	3	15
Willing to comply	13	65
Reluctant to comply	4	20
Unwilling to comply	0	0
Total	20	100

Primary Role of Masters

When asked to describe their primary role as remedial masters, the respondents provided multiple responses to the four choices of negotiator, mediator, arbitrator, or enforcer. More than half responded more than once. The responses thus totaled 34. Twenty-two percent (7) depicted themselves as negotiators, 38% (13) saw their role as mediators, 20% (7) acted as arbitrators, and 20% (7)

were enforcers. (See Table 9.) Many also commented that they assumed the various roles identified in the questionnaire, depending on the circumstances at the time. They also added the following roles in responding to the question: resource locator (2), consultant, evaluator, advisor, persuader, fact finder (3), and reporter (2).

Table 9

The Primary Role Played by the Remedial Master

	Number	Percent
Negotiator	7	22
Mediator	13	38
Arbitrator	7	20
Enforcer	7	20
Total	34[a]	100[a]

[a]Multiple responses.

When asked about their various roles played during the course of the litigation, the responses were:

"Some mediation of complaints by the plaintiffs, some of which were not justified."

"Advisor relative to planning and resources."

"Once our office was forced to assume an intimidator's posture, in order to persuade the Department of Corrections to agree to provide enhancements to a particular facility.

"We have played a broad role in making suggestions, aiding the corrections officials in finding ways to comply and working out ways to achieve results without court intervention."

"We served as fact finder and mediator."

"Evaluator--Finder of Fact--program, policy, procedure suggester."

"Worked with legislature in effecting passage of legislation and worked with the Governor in choosing a new administrator."

"When compliance got to be an issue, it was necessary to be an enforcer within the organization to assist the defendants."

"Locator of resources."

"The role is highly situational."

"Early in the case (the first 2-1/2 years) we mediated negotiation of compliance plans. More recently we have returned to our role as observer/reporter."

"Quasi-judicial finders of fact when alleged violations occurred."

The majority of the remedial special masters worked on a part-time or less than 40-hour-per-week basis. Only 25% (5) indicated that they were involved 40 or more hours per week as full-time overseers. Ten percent (2) were involved from 30 to 39 hours per week. The majority reported either 10 to 19 hours (45% or 9) or 9

or fewer hours (25% or 5). None of the respondents reported working 20 to 29 hours per week as remedial special masters. (See Table 10.) Ninety percent (18) did not feel that more time devoted to monitoring would have brought about more rapid compliance, whereas 10% (2) felt that it would.

Table 10

The Hours Per Week Devoted by Remedial Masters to the Case

	Number	Percent
40 or more	4	20
30-39	2	10
20-29	0	0
10-19	9	45
9 or less	5	25
Total	20	100

Time Devoted to Monitoring

The remedial masters were asked whether more time devoted to monitoring would have brought about more rapid compliance. Almost all of the respondents indicated that the time they spent was adequate for the intended purposes. Only two respondents thought that, by spending more time on the job, they could have been more effective.

Contact With the Judge

Their contact with the judge was deemed adequate for the purpose of bringing about compliance. Only 5% (1) felt that contact was infrequent and discouraging. Forty-five percent (9) responded that their contact was both frequent and satisfying, whereas the remaining 50% (10) thought that the contact occurred only as minimally necessary. (See Table 11.) On the follow-up question as to whether the frequency of communication affected compliance, 75% (15) answered positively, 5% (1) answered negatively, and 20% (4) did not feel it was a factor.

Table 11

Contact Between the Judge and Remedial Master

	Number	Percent
Frequent and satisfying	9	45
Only as minimally necessary	10	50
Infrequent and discouraging	1	5
Total	20	100

Titles Used in Orders of Reference

The titles given to the individuals who provided these services were primarily either special master (40% or 8) or monitor (35% or

7). The five who responded "other" were two who were members of an implementation committee, two who were called consultants for compliance, and one member of a review panel. (See Table 12.)

Table 12

The Titles Given to the Individuals Upon Appointment

	Number	Percent
Master	0	0
Monitor	7	35
Special master	8	40
Other	5	25
Total	20	100

Authority Granted by the Judge

The remedial masters differed on the extent of their mandate. Responses to the question that asked participants how they would characterize the authority granted to them by the judge indicated that 60% (12) felt that it was broad, whereas 40% (8) felt they were limited in their authority. (See Table 13.) Each felt, though, that the authority granted was appropriate, even though they split on whether it was limited or broad.

Table 13

The Extent of the Authority Given by the Judge to the Remedial Master

	Number	Percent
Broad	12	60
Limited	8	40
Total	20	100

When participants were asked if the judged had granted sufficient authority, the narrative responses were as follows:

"Yes. When questions over the breadth of my authority arose, I could always discuss them with the judge."

"Yes. We made every effort not to attempt to administer the prison system and the order of reference gave us limited authority to observe and report."

Methods of Selection

A variety of responses was given to the question concerning the method of selection of the remedial special master. Some gave more than one response to the question. The array of selection methods was as follows: 8 by recommendation of the plaintiffs, 6 by recommendation of the defendants, 10 by having been known to the judge, and 4 as a result of another master's recommendation,

1 chosen by judge's review, 1 by agreement between the plaintiffs and defendants, and 1 chosen by a special master to assist. (See Table 14.)

Table 14

The Methods by Which Masters Were Selected

	Number	Percent
Recommendation of plaintiffs	8	40
Recommendation of defendants	6	30
Judge's knowledge	10	50
Other	4	20
Total	28[a]	100[a]

[a]Multiple responses.

Length of Time to Monitor

The remedial special masters worked with their institutions for a considerable period of time. Sixty percent (12) were involved for 20 or more months, 10% (2) between 19 and 24 months, and 30% (6) for 13 to 18 months. None was involved fewer than 13 months. (See Table 15.)

Table 15

The Number of Months of Involvement With the Case

	Number	Percent
1-6 months	0	0
7-12 months	0	0
13-18 months	6	30
19-24 months	2	10
25 months or more	12	60
Total	20	100

Evaluation of the Success of Efforts

The remedial masters generally viewed the results of their labor positively. When asked about their feelings regarding the success or failure of their efforts, none of the respondents thought that he or she was unsuccessful, whereas 75% (15) indicated partial success and 25% (5) full success. (See Table 16.)

Judges were also perceived as pleased with the process. Ninety percent (18) of the remedial special masters indicated that they felt the judge was highly satisfied with their efforts, and 10% (2) felt the judge was moderately satisfied. None of the respondents felt the judge was dissatisfied. (See Table 17.)

Table 16

Remedial Masters' Evaluation of Compliance

	Number	Percent
Fully successful	5	25
Partially successful	15	75
Not successful	0	0
Total	20	100

Table 17

Judges' Evaluation of Compliance as Perceived by the Remedial Master

	Number	Percent
Highly satisfied	18	90
Moderately satisfied	2	10
Dissatisfied	0	0
Total	20	100

Masters' Judgment of Appropriateness of the Appointment

When asked if they felt the use of a remedial special master is an appropriate method for bringing about compliance, all but one responded "yes." The one dissenter stated that good administrative

leadership from the facility administrators is a better method than the appointment of an outsider. (See Table 18.)

Table 18

Self-Evaluation of the Role of Master/Monitor in Bringing About Compliance

	Number	Percent
The role is appropriate	19	95
The role is not appropriate	1	5
Total	20	100

Masters' Suggestions for Improving Their Use

The remedial masters provided several recommendations on how to enhance the ability of an individual playing this role to bring about compliance. Respondents suggested that training would be beneficial to those who are appointed. The key to success, they felt, depended on the master or monitor establishing trust, credibility, and an open line of communication with the plaintiffs and defendants, particularly the correctional administrators. The suggestion was also made that clear and specific duties, along with strong support from the court, would help bring about more rapid compliance. One respondent felt that the perfect team for bringing

about rapid compliance would consist of an attorney and an experienced correctional administrator. They could thus complement each other with both the necessary legal knowledge to work effectively with the court and the correctional experience to provide guidance to the administrators of the facilities.

The masters and monitors all felt that judicial resolve to solve the case is an important factor in compliance. This view was reflected in a number of the narrative comments. When asked why they consider this important, respondents were almost unanimous in saying that interest in the case, willingness to act, and support for the remedial special master's actions are necessary for success. Some felt that the parties take the case seriously only if the judge is also determined. As one respondent stated, "A special master is no more effective than the backing he receives from the court."

As mentioned earlier, all but one remedial special master felt that the court's use of these individuals to assist in bringing about compliance is appropriate. When asked why, they responded:

"There would be little compliance without a constant review of operations and judges can't afford the time expenditure."

"It keeps the pressure on defendants."

"It provides someone who can keep the defendants honest in their efforts to comply."

"Without some oversight, defendants would not be eager to comply."

"The experience of the master tends to keep the defendants honest."

"Keeps the judge focused on the important issues."

The one respondent who did not feel the use of a master or monitor is appropriate explained his feelings by presenting the proposition that good administrative leadership is the solution to reaching compliance with the court's orders.

Discussion of the Survey Results

Reasons for Appointment

Keating et al. (1983), in developing the Handbook for Special Masters, cited a number of reasons for the appointment of a remedial special master. Most often, the authors declared, the reason is recalcitrance on the part of the defendants to come into compliance with the remedial order. Other reasons were the lack of time and resources of the judge, insufficient knowledge of corrections philosophy or programs by the judge, and the need for an objective, uninvolved party to work for the court with both plaintiffs and defendants.

In reviewing the survey data, it appears that the main reason for appointment by the judges is, in fact, the lack of prior movement toward compliance with the court orders. In the survey of the 20 respondents, 18 reported that monitoring and enforcing the decree were their primary functions. None of the respondents

indicated that he or she was involved in the violation-assessment process, and only two assisted in formulating the decree for the court. It could also be construed that most judges who made these appointments were interested in having a remedial special master handle the details of monitoring and enforcing the decree because they were characterized as moderately or barely involved in monitoring as reported by the survey respondents. Only three masters thought the judge was highly involved in monitoring activities.

The remedial special masters participating in the survey also agreed that the purpose of an appointment was to reduce the judge's involvement in the actual monitoring and enforcement of the court order. What they did communicate, though, is that the judicial commitment can be demonstrated in ways other than involvement in the day-to-day activities of monitoring. As one respondent put it, "As long as he is aware of and approves the monitoring performed, there is no need for him to be directly involved."

The survey results thus tend to support the proposition that judges appoint remedial special masters in order to assure that defendants comply with the court orders when they (the judges) realize that they are unable to monitor the details of the order.

Timing of the Appointment

One of the questions raised by many authors on the subject of mastering in corrections litigation has been the appropriate time

when a judge should appoint a master. The survey indicated that during the course of the litigation, the predominant point at which a master's services are acquired by the court is at the monitoring/enforcing stage. The survey results do not indicate whether the appointment of a remedial special master came as a part of the consent judgment or at the instigation of the plaintiff class after a period of time in which the defendants were not able to comply satisfactorily with the order.

A review of the court orders included by some of the respondents with their completed questionnaires indicates, though, that the appointments came in response to a lack of appropriate action in complying with the terms of the court order. The common process followed by the courts appears similar to the process outlined in the case study Yokley v. Oakland County (C.A. 78-70625), in which the plaintiff's attorneys encouraged the court to appoint a remedial special master in order to spur the defendants' efforts to come into compliance. Often the use of a remedial special master has come after a lengthy period in which the defendants have not been in compliance with the court order. Usually the appointment of the remedial special master was made by the judge, based on an acceptance of the master by the parties involved in the conflict. The methods for selecting the remedial special masters also indicated that the parties were fairly evenly distributed regarding who influenced the ultimate selection. Twenty-nine percent felt

they were selected primarily by the recommendation of the plaintiffs, 21% by the recommendation of the defendants, 36% through the judge's knowledge of them, and the remaining 14% through a method identified as "other." The other selection method applied to those who were brought on to assist a master in the case. The multiple responses showed that many of the appointments were again made by the judge after agreement was reached by the parties. Six of the remedial special masters indicated that their appointment came as a result of their reputation as having served previously in this capacity.

Judicial Determination and Judicial Involvement

The survey respondents almost all felt that the judges to whom they reported either were highly or moderately determined to resolve the case. Only 1 out of 20 indicated that judicial determination was slight. Further analysis of this particular response shows that during the course of the remedial special master's 16-month appointment, there were three different judges assigned to the case, the last two of whom did not take a strong interest in resolving the issues of compliance.

All of the respondents agreed that judicial determination is an important factor, and a number of them declared it to be the single most important factor for bringing about compliance on the part of the defendants in these types of cases. As one remedial special

master stated, "A special master is no more effective than the backing he receives from the court."

Determination and involvement in the case do not appear, though, to be related. Only 3 of the 20 remedial special masters responded that the judge to whom they reported was anything more than moderately involved in monitoring activities. Eighty-five percent, then, reported that their judges were either moderately or barely involved. When asked if the degree of involvement was significant, though, the majority of respondents answered "Yes." This appears to indicate that, whatever the level of involvement by the judge, it is significant. In fact, the narrative responses seemed to be split, with some feeling that the involvement is important, and others indicating that judicial involvement in monitoring activities was inappropriate and that monitors are hired for that purpose.

Orders of Reference

Some authors addressing the subject of remedial masters have expressed concern about the extended use of remedial special masters in bringing about compliance, with particular reference to the issue of specific and detailed direction being provided by the court to the master. Both Brakel (1979) and Montgomery (1980) pointed to the problem of ambiguity of the court order as one of the problems surrounding these appointments. Of particular concern to these and other authors is the involvement of the court through a surrogate

into areas of prison administration, which should remain the domain of state and local government.

The survey responses appear to support this concern because only 2 monitors reported the order of reference as specific and detailed, while the remaining 18 were divided, with 11 orders identified as being moderately specific and 7 being categorized as general. Eighty percent of the monitors felt that the lack of specificity in the order was of benefit to them in performing their duties. This finding could serve as a concern to those who have felt that the intrusion of the master into affairs beyond the purview of the court is indicative of these types of appointments. It does appear that court orders are rather general, as was the order in Yokley v. Oakland County (C.A. 78-70625), when the monitor was directed to "effectuate compliance" with the consent decree.

The masters surveyed, though, all indicated that the authority granted them by the court was appropriate and reported that they were able to function adequately within the broad or limited bounds that were set for them.

Time Period for Appointments

It is clear from the responses that the length of involvement in a case for a remedial special master is apt to be at least 1 year and could easily accumulate to 2 or more years. Table 15 shows that 12, or 60%, of those surveyed indicated that they had been involved

for at least 25 or more months. The remaining eight responded that they had been appointed for a minimum of 12 months or up to 24 months. When one takes into consideration that some of these cases were still ongoing at the time of the survey, it is seen that a long process of monitoring compliance is to be expected.

The amount of time spent on the case as measured by hours, though, shows that over 70% (14) spent 19 or fewer hours per week as masters or monitors. Only four were involved on a 40 or more hour-per-week basis. These positions have for the most part been part-time appointments, with the amount of time spent being substantially less than might be expected.

It is interesting to note that when asked if they could have brought about more rapid compliance if they spent more time on the case, 18 or 90% said "No." It would appear that the amount of time spent in monitoring compliance does not have a direct relationship to accelerating the reaching of compliance.

Success and Satisfaction With the Mastership

The series of questions measuring the respondents' feelings about the success of the mastership in bringing about compliance with the court order strongly demonstrated that their perception that the role of remedial master proved useful. The remedial special masters evaluated their efforts to bring about compliance positively. All 20 indicated that they felt they were either fully

or partially successful, with 75% feeling partially successful and 25% reporting that they were fully successful. Not one of the respondents indicated that he/she was unsuccessful in bringing about compliance with the court order.

All but one of the survey respondents thought that the use of a master/monitor is an appropriate method for the judiciary to use in gaining compliance with its decrees in corrections litigation cases. The lone dissenter indicated that the most appropriate method for reaching compliance is the retention of good administrative leadership. In reviewing the other responses provided by this particular master, it came out that this case was one in which the Director of Corrections was less than cordial and extremely reluctant to accept the court-ordered reforms. It was only after the administrator was replaced that movement toward reasonable compliance began.

Some of the comments by the other remedial special masters provided strong evidence of their usefulness in bringing about compliance. These responses are as follows:

"The defendants knew they couldn't steer us wrong and that we could be helpful."

"It [compliance] seldom happens without such enforcement and assistance."

"Because of expertise, issues can be resolved between parties more often."

"Reduces amount of time spent in court for non-legal issues."

"It is the only way short of having a very active judge who is willing to spend enormous amounts of court time on the case."

"Orders without monitoring by some entity are virtually worthless."

"Imposition of fines does nothing more than cause defendants to become more unwilling to effect change. However, the appointment of a master can and often does provide the defendant class with someone to consult with to resolve these issues. Very often the defendants are willing to bring these issues to finality but they don't know how to go about doing it."

"It works by keeping the pressure to reform inexorably on the defendants."

"I don't see how the court can be assured that compliance has been reached without the review of operations that no judge can afford to make."

The remedial masters exhibited confidence that the judges appreciated their efforts. When asked how the judge evaluated their efforts to bring about compliance, 90% stated that he/she was highly satisfied, 10% felt he/ she was moderately satisfied, and not one remedial special master felt the judge was dissatisfied.

Based on this set of questions regarding success, satisfaction, and the appropriateness of the use of masters and monitors, there emerged virtual unanimity of opinion that the technique is useful,

appropriate, and successful in bringing about compliance with the court's orders.

CHAPTER VII

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary

This final chapter summarizes the study, highlights the findings, and then presents the conclusions and recommendations that emerge from the data.

This research endeavor had the primary purpose of analyzing the experiences of remedial special masters to determine what has been learned about this recently adopted innovation of using court-appointed experts in order better to define their appropriate use in the future. The study further attempted to evaluate the appropriateness and usefulness of the judicial use of this technique for bringing about compliance with court-ordered corrections institutional reform. It also presented an in-depth case study, Yokley v. Oakland County (C.A. 78-70625), in which the court's decision to use a monitor and the experiences of that monitor over 16 months were detailed and evaluated.

Chapter II traces the evolution of the concept of federalism as proposed by the drafters of the United States Constitution from a relatively straightforward federal versus state balance-of-powers approach through to the now-complex and complicated model in which the federal judiciary has assumed an activist role in defining and

bringing about social change. The current model, which Carroll (1982) has defined as "juridical federalism," involves an active federal judiciary that has responded to societal concerns by becoming deeply involved in the redistribution of powers, rights, and responsibilities between levels of government. Nowhere is this more clear than in the recent cases where federal courts have assumed the responsibility of supervising change in local and state institutions. This judicial activism has involved a range of functions in which it has been determined that basic constitutional rights have been violated, including school districts, mental hospitals, housing authorities, local governments, and many other previously thought to be local prerogatives. One of the most dramatic outcomes of federal actions in civil rights litigation has been the recent practice of some judges using court-appointed remedial special masters to oversee compliance with their orders. Judges have become managers of correctional institutions through their acceptance of consent decrees or orders of equity compliance and in most cases have neither the ability, knowledge, nor time successfully to oversee the defendants' efforts to comply. They, in turn, have hired agents to conduct, in varying degrees, their business in these instances and essentially have created a new public administrator. This study reviews the role of this addition to the judicial arsenal aimed at constitutional compliance and presents some conclusions that will further define the subject.

The literature review, which is contained in Chapter III, reviewed the writing to date on the topic of remedial special masters for correctional institution litigation, as well as selected writings on the general topic of the use of masters as court-appointed assistants. This usage of "experts" has an historical basis in old English equity procedure and has been relied on extensively by the federal courts in highly technical or complex cases, such as bankruptcy proceedings or administering school and housing desegregation orders. Recent years, though, have seen the use of masters or monitors by judges to draft and even oversee the defendants' compliance with the court order or consent decree. Of particular concern to those involved in correctional administration has been the appointment of remedial special masters by judges to review, report on, and, in many cases, assist in bringing about compliance with the court decrees to attain constitutional standards in prisons and jails. The literature review also examined in detail the question of appropriate authority for these types of appointments and presented questions on the use of remedial special masters which have surfaced over their 15-year history.

The procedures used to conduct this research were the case study technique mentioned previously and a survey of individuals who have been identified as masters or monitors of correctional institutions. A questionnaire which combined both closed-choice and open-ended questions was sent to them. Twenty out of 27 of the remedial special masters filled out and returned the questionnaire,

which represents a 74% response rate. A descriptive summary of the responses to each question was presented, and a detailed discussion of the survey results followed.

Findings

Effectiveness of Remedial Special Masters

The case study and the conclusions of the 20 respondents to the questionnaire indicate that the appointment of remedial special masters to manage a remedial order in corrections litigation does contribute to the defendants' efforts to reach compliance with the terms of the decree. In the case of Yokley v. Oakland County, the reason for the appointment of a monitor was that the judge determined that insufficient progress toward compliance with the consent decree had been accomplished after 22 months of leaving it to the defendants. In a 16-month period, the monitor was able to move the county to the point where all of the provisions of the consent judgment were in compliance except for those few directly related to overcrowding. These violations, though, would likely be resolved when the county constructed the additional cell blocks that it was committed to building. Thus, the court felt it was able to terminate the position of monitor due to the defendants' reaching substantial compliance with the decree, which was based on an

agreement between the plaintiffs and defendants that conditions had improved.

The survey respondents also indicated that the use of a remedial special master did, in their view, bring about compliance. Two questions in the survey focused on this issue, and both were answered in the affirmative. The masters felt successful in their efforts and reported that the judges who appointed them were satisfied. When asked about their own evaluation of efforts to bring about compliance, 25% felt fully successful, 75% felt partially successful, and none claimed they were unsuccessful. When asked how they felt the judge would evaluate their efforts, the remedial special masters surveyed reported that 90% were highly satisfied, 10% were moderately satisfied, and none was dissatisfied.

Although it was not possible to measure the effect of the appointment of a remedial special master in this study, it appears that the intervention was adjudged successful in bringing about compliance by both the masters who were involved in the practice and the judges who appointed them to oversee compliance.

Judicial Determination and Judicial Involvement

The issue of judicial determination to assure compliance with the court order is one of the key points discussed by many who have written on this topic. It is considered one of the two most important variables by Spiller and Harris (1977). Such extensive

judicial involvement often conflicts with the amount of time the judge can actually spend in administering the consent decree or court order.

All but one of the remedial special masters who participated in the survey indicated that judicial determination to resolve the case was either moderate or high. On one hand, 14 evaluated the judge(s) to whom they reported as highly determined, and 5 described the judge(s) as moderately determined. On the other hand, their involvement in actual monitoring activities is much lower, with only three remedial special masters evaluating the judge as more than moderately or barely involved.

The apparent conclusion, based on the results of this survey, is that judicial determination is a factor in bringing about compliance and that although the concomitant involvement may not be high, the judge's appointment of the remedial special master fulfills the need for judicial "eyes and ears" during the course of the monitoring period. As one of the respondents stated, "That is why masters and monitors are appointed." The appointment provides an indication of significant determination, and involvement in day-to-day oversight is then inappropriate and duplicatory.

In the case of Yokley v. Oakland County, though, the appointed monitor describes a situation in which there is little direction or interest by the three judges who inherited the case after the original judge moved to the Michigan Supreme Court. Only Judge Guy, who appointed the monitor, provided directions on how to proceed.

Judges Churchill and Suhrheinrich left compliance assessment up to the monitor, who sent them periodic reports. All of the hearings were handled by magistrates, and no instructions were given the monitor other than those contained in the order of appointment.

This extremely removed arrangement did work, though, in that the monitor did file detailed compliance reports to the court that assessed the level of effort, interpreted the consent decree, and ultimately had a hand in bringing about changes in jail operations as the court had instructed. The experience appears to parallel that of the survey respondents in that the judges in this case maintained a level of determination in a removed fashion by delegating a great deal of the compliance activities to the monitor. Determination and involvement do not necessarily depend on each other in these types of cases.

Education, Experience, and Training

Attorneys writing on this topic have stressed the importance of legal training as a prerequisite to successful monitoring; correctional experts felt that an understanding of the institutional system is important. Judicial appointments were found to be fairly evenly split between the two groups. Ten persons reported that they were legally trained; 11 reported they were correctionally oriented; and 1 categorized himself as a teacher. Two classified themselves as belonging within both the correctional and legal categories.

Based on the survey, literature review, and the experience of the case study, it would seem that the nature of the judge's need for assistance should determine the background and experience of the remedial special master. A knowledge of correctional administration would seem essential for the individual whose charge is to be a technical advisor to the judge and the litigants in ways to reach compliance and to report on the level of compliance. A highly formal judicial hearing type of arrangement would necessitate a master who possesses the legal training and credentials to hold hearings, take depositions, and prepare formal documents for the court's execution of orders for reform.

Nonetheless, both a correctional administrator and an attorney should possess some background and experience in the art of consensus building. Much of the effort required to bring about the changes necessary to accomplish compliance with the court-ordered reforms falls on facility managers, local or state legislative officials, and executive-branch administrators and often involves assistance from other criminal-justice or non-criminal-justice agencies. Whether trained legally or correctionally, the need to be sensitive to and understanding of the intergovernmental nature of corrections reform is important. Focusing the necessary human and financial resources that are often required to resolve constitutional deficiencies takes a great deal of skill and perseverance as the remedial special master communicates judicial

decrees in an understandable fashion to a less-than-eager audience of local or state officials.

Correctional Administrators' Intent

Based on the literature and a commonly held view that the reason for the litigation in the first place is recalcitrant wardens, sheriffs, and guards, it would have seemed that most of the facility administrators would have been either reluctant or unwilling to comply. The remedial special masters, however, found the correctional administrators to be ready and willing to comply with the court order. Only 4 of the 20 remedial masters felt that the correctional administrators with whom they interacted demonstrated reluctance to come into compliance, while the remaining 16 were found either willing to comply (13) or eager to comply (3). Not one remedial special master felt that the correctional administrators demonstrated an unwillingness to comply with the court order. This appears to dispel the commonly held picture of a warden who is standing at the prison gate holding back the attorneys and prison reformers in Horatio-at-the-bridge fashion.

Primary Role Played and Title Given

The survey was designed to discover the predominant role or roles that a remedial special master plays. In identifying a primary role, the results were inconclusive because of multiple responses to the four questionnaire categories of negotiator,

mediator, arbitrator, and enforcer; the fairly even distribution of responses; and the other roles that respondents described during the course of the litigation. The various other roles included advisor, fact finder, mediator, evaluator, observer, reporter, consultant, persuader, and resource locator.

It appears that a great variety of roles must be played at various points in the process and in interacting with various people during the course of a case. As one of the respondents aptly put it, "The role is highly situational." Sturm (1979) pointed to the possibilities for conflicting roles and cautioned that establishing a sound role is critical to success.

The official titles given individuals in these situations do not appear to have any relationship to the role played. Seven remedial special masters were called monitors, eight were special masters, two were members of an implementation committee, two were consultants, and one was a member of a review panel. Even though the literature refers to the most common title as "master," none of the individuals who completed the survey stated that as his or her title.

Authority

The question of authority does not seem to hold any major implications for situations in which a remedial special master is appointed because, as one responded: "When questions over the

breadth of my authority arose, I would always discuss them with the judge." Sixty percent felt that broad authority had been granted by the judge, and 40% thought they had limited authority. Yet all felt that the authority granted them was appropriate.

Methods of Selection

There appear to be many ways in which a remedial special master is selected and appointed by the judge. Most often the selection is made by the court, based upon the particular judge's knowledge of the individual through personal contact, previous monitoring experience, or some other referral. Defendants and plaintiffs often recommend individuals for the court to consider when making the appointment. In the case of two masters, Allen Breed and Vince Nathan, their national reputations bring their names to the forefront, particularly when large prisons or prison systems are involved.

Often, the process is one in which the court requests that the counsel for the defendants and the counsel for the plaintiffs agree on a party who is acceptable to both as a monitor, even while withholding the ability to make that appointment or substituting the court's judgment if for some reason the judge does not feel comfortable with the attorney's choice. In Yokley v. Oakland County, Judge Ralph Guy asked for a list of names for possible appointment which were acceptable to the defendants and the plaintiffs and then made his selection based on the twin criteria of

intergovernmental problem-solving experience and an understanding of corrections.

Time Involvement

Almost three-fourths of the remedial special masters indicated that the amount of time invested per week in the case was 20 or fewer hours. The remaining six reportedly were involved 30 or more hours in monitoring activities. This contrasts with the other measurement of the time needed to complete the job, namely, the length of time involved with the case. Over one-half of the respondents stated that they were involved with monitoring for more than 2 years. None reported involvement less than 13 months. When one considers the fact that at least some of these cases were still in progress at the time of the survey, it is evident that one can expect a long time duration as a monitor. However, on a per-week basis, the commitment may be half-time or less.

Appropriateness of the Intervention

All but one of the respondents reported that their experience indicated that the use of a remedial special master was an appropriate method for bringing about compliance with a court order. The one who responded "no" did not say that it was inappropriate to appoint a master or monitor but felt that "good administrative leadership" was a better method. In this case, the turning point at

which compliance with the court-ordered changes came about apparently was when the Director of Corrections resigned under pressure and a new administrator appointed who made compliance a priority for action.

A successful compliance action were reported as one in which a master or monitor could establish credibility and trust with all of the parties involved in the suit and had the strong support of the court, as evidenced by a declaration of clear and specific duties and responsibilities.

Conclusions

The main purpose of this study was to gather data on the recent phenomenon of judges appointing individuals to manage compliance with court-ordered remedies to constitutional violations in correctional institutions; to analyze that information to determine whether there exist common experiences between cases; and to extract what may be useful for assisting those who in the future will have a role in the process of monitoring these institutional remedies. It was also envisioned that an evaluation of the effectiveness of these kinds of judicial interventions could be made.

Based on the experiences and observations shared by the 20 remedial special masters surveyed as part of this study and through tracing the 16-month exodus of a monitor in the case study, Yokley v. Oakland County, it appears that the use of individuals to assist the court in this capacity does significantly forward the process of

compliance with court-ordered remedies. The remedial special master in Yokley v. Oakland County was removed at the point at which the plaintiffs and the court were satisfied that significant progress toward compliance had been attained. All but one of the survey respondents deemed the appointment as successful and claimed that the judges were satisfied with the results. This lone dissenter, as was mentioned before, felt that the particular problem in his case was the administrative recalcitrance of the Director of Corrections. Once this individual had been removed, progress toward compliance became acceptable.

All of the remedial special masters pointed to the primary purpose of the appointment as a means of insuring judicial supervision and scrutiny while minimizing the amount of time the court must spend on an individual case. When one considers the demands that litigation has placed on the judicial system, this approach of using "experts" to manage these time-consuming and highly detailed court orders seems rational and useful. Looking at the number of hours per week spent on each case and the length of time it takes for defendants to reach an acceptable level of compliance, it is evident that most judges would simply not be able to manage successfully a case of this nature and conduct much other court business.

The question of whether the appointment of a remedial special master is appropriate in terms of constitutional authority has been

settled in the minds of the legal community. A review of the literature and the challenges offered by defendants has demonstrated that courts have both the authority for these types of appointments under the Federal Rules for Civil Procedure and precedent dating back to old English equity procedure, when clerks were appointed to conduct activities.

The question of whether an appointment of this nature is appropriate with regard to the constitutional concept of separating powers among the executive, legislative, and judicial branches and the issue of federal, state, and local prerogatives is much more difficult to answer. Juridical federalism is clearly the prevailing active model under which many of the current federal judges are operating, and recent cases have mostly upheld the courts' responsibility to determine appropriate relief when faced with individual or institutional violations of civil rights.

On the other hand, the authority and responsibility for managing governmental institutions, such as jails and prisons, has rested with the executive branch, while the legislative branch passed the laws and allocated funds for program operations. Interventions by the courts into these arenas of responsibility, particularly when they appoint a remedial special master who can dictate fund expenditures or change management procedures, puts the courts deeply into what were previously state and local prerogatives.

Extreme judicial discretion in the use of remedial special masters, coupled with a specific understanding of their role by the parties involved, would alleviate many of the interjurisdictional problems that might arise. Clear directions in the form of orders of appointment as to what is expected by the court could also provide masters, defendants, plaintiffs, and judges an improved atmosphere within which compliance could be more readily achieved.

The types of individuals who would best serve in these roles would be those who can maintain a strong sense of purpose with little direct supervision and who have a fair knowledge of corrections and/or a legal background. The situations in which a detailed order must be monitored and complied with would seem to be best accomplished by a remedial special master who has a knowledge of corrections and could offer suggestions and recommendations as well as simply report compliance. If the primary emphasis is in interpretation of the law and mediating between the various parties, a master with legal underpinnings and an understanding of how to conduct hearings, accept depositions, and draft legal redresses would seem to best serve the purpose. It appears on the surface that the "ideal" remedial special master would be an attorney who also has a wide range of corrections experience and expertise. The person, though, should be chosen based on the focus of the remedial order and the particular role the judge wishes him or her to play.

This seems to be the most important consideration when appointments of this nature are made. If the role of the remedial

special master is to include being an advisor to the parties or acting as a technical assistant in developing ways to remedy the institutional deficiencies, much more than a legal background is important. Some of those surveyed described their efforts as mediation and dispute resolution. The skills to bring about agreement between factions in this type of situation might not be held by either an attorney or a corrections professional. As Judge Guy commented when discussing his selection of a monitor for the Oakland County jail, his interest was in appointing someone who had experience in intergovernmental relations as well as an understanding of jails. Monitoring efforts often require a much broader understanding of the criminal justice system and government than one might expect.

Methods for the selection of the remedial special masters who participated in this study were varied and inconclusive as to a "best" means of choice. Some agreement among the parties to the suit would make sense, though, since one of the keys to successful results has been identified as trust and communication between the master and the plaintiffs, the master and the defendants, and, most important, the master and the judge to whom he/she must report.

As hypothesized by some of the authors who have written on this subject, it appears that judicial determination to assure that the court-ordered remedies are, in fact, implemented is one of the primary factors that brings about eventual compliance. All of the

survey responses indicated the importance of determination by the judge, and many felt it to be the single most important factor. Involvement by the judge, though, was not thought to be important as a way of evaluating determination. Some of the remedial special masters even felt that involvement by the judge was inappropriate.

Orders of reference, which specify the responsibilities and duties granted the remedial special master by the court, appear to be too general. The remedial masters in the survey stated that their general or only moderately specific orders caused them concern. A clearer delineation of powers, duties, and expectations would provide a stronger basis for clear communication between the respective parties.

As Jacobs (1980) commented in his analysis of the prisoners' rights movement:

> Reform through litigation is time-consuming, frustrating, and often unsuccessful; of course, so are efforts to solve intractable social problems through comprehensive legislation or agency activism. Litigation moves slowly. Progress oft-times is measured in years. Judicial proceedings are expensive and time-consuming. Plaintiffs are paroled, or die, or lose interest. The career structures of prisoners' rights lawyers are unstable: funding is uncertain and career progressions are ambiguous. Lawyers for the state and for agency personnel come and go. Election outcomes bring new political regimes, and lawsuits can often be disrupted by the disappearance of prison administrators. When cases are resolved and injunctions are issued, compliance is not always obtained: sometimes because of willful obstructionism, sometimes because of bureaucratic incapacity to make changes, and sometimes because of political problems and inadequate resources. (p. 452)

It is at this point that the appointment of remedial special masters seems most appropriate. Judges are often reluctant to use

their powers of contempt to punish administrators for noncompliance. This reluctance increases the need for individuals to monitor compliance, gather information, resolve disputes between the parties, and effectuate compliance with the often-complicated remedial special orders that arise from the complex totality of conditions litigation.

Recommendations for Further Research

Based on the findings contained in this study, additional research on the use of remedial special masters appears warranted. The information gathered and analyzed here represents an initial review of the technique of using "experts" to assist judges in controversial correctional cases. There is much more research that could be examined in this public policy area.

One of the goals of the appointment, beyond insuring immediate compliance with the court order, would be to institutionalize change brought about by the litigation. An in-depth longitudinal study of some of these cases could determine whether the effects of appointing a remedial special master are long term or merely temporary while the master is active.

The question of the cost of a remedial special master arose frequently throughout the review of these appointments. Direct costs of the mastership, which include fees, office space, assistants, and other charges, and the costs to the defendants in bringing about changes to their institutions that result from the

master's recommendations warrant investigation. An overall assessment of the costs associated with implementing the master's recommendations would prove useful in assessing this technique.

Further study of the circumstances that require the appointment of a remedial special master is necessary. There appear to be a variety of different points in the process at which individual judges have appointed these special assistants.

A question largely untouched by the research completed for this study, but which is a key part of the whole process, is the issue of the powers of the special master. What are the appropriate specific powers that should be granted by the court? Do these powers remain constant, or do they alter as the stages of the litigation change?

A survey of the others affected by these appointments would provide another view of the phenomenon. Questions directed to the judges who made the appointments regarding their assessment of the action compared to responses from the correctional administrators and executive and legislative policy makers who had to respond to a master's demands could provide excellent research opportunities.

This study did not provide a definitive answer to the question of whether the appointment of a remedial special master is the most appropriate response for judges to take when faced with the complex problem of insuring compliance with their remedial orders. But it should contribute to greater understanding of the nature, role, and

function of the remedial special master--a significant new actor in the public-policy realm.

APPENDIX A

LIST OF JAIL AND PRISON MASTERS

Name	Case
H. John Albach IV, Esq. 3267 Howell St., Suite 217 Dallas, TX 75204	Battle v. Anderson, 564 F. 2d 388 (10th Cir 1977)
Howard Messing, Esq. Nova University Law School 3100 Southwest 9th Ave. Fort Lauderdale, FL 33315	Carruthers v. Stark, C.A. 76-6086 (S.D. Fla. 1976)
John Larivee Crime and Justice Foundation 19 Temple Place, 5th Floor Boston, MA 02111	Department of Corrections v. Commissioner of Penal Institutions, City of Boston, C.A. 47463 (E.D. Mass. 1981)
Michael Mahoney John Howard Association 1982) 67 East Madison St., Suite 1216 Chicago, IL 60603	Duran v. Elrod, C.A. 74C-2949 (N.D. Ill.
Stephen La Plante P.O. Box 615B San Francisco, CA 94101	Finney v. Mabry, 458 F. Supp. 720 (E.D. Ark. 1978)
Vincent M. Nathan 644 Spitzer Bldg. 520 Madison Ave. Roledo, OH 43604	Taylor v. Perini, 413 F. Supp. 189 (N.D. Ohio 1976) and others
Robert Force Tulane University New Orleans, LA 70118	Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970)
John Richert, Ph.D. Stockton State College Pamona, NJ 08240	Ippolito v. Howell
Walter W. Cohen Office of Consumer Advocate 14th Floor, Strawberry Sq. Harrisburg, PA 17127	Jackson v. Hendrick, 457 Pa. 405 (1974)
Timothy Doyle 32523 Grand River Ave. Farmington, MI 48024	Jones v. Wittenburg 440 F. Supp. 60 (N.D. Ohio 1977)

Allen F. Breed Box 220 San Andreas, CA 95249	Palmigiano v. Garrahy, C.A. 75-032 (D.R.I. 1977) (13 other instances of being appointed master or monitor)
J. Michael Keating 1 Old Stone Sq. Providence, RI 02903	Palmigiana v. Garrahy C.A. 74-172 (D.R.I. 1977)
Linda R. Singer 918 16th St., N.W. Washington, DC 20006	Powell v. Ward, 487 F. Supp. 917 (S.D. N.Y. 1980)
Richard J. Liles 1715 Roseland East Lansing, MI 48823	Yokley v. Oakland Co., C.A. 78-70625 (E.D. Mich. 1978)
John Conrad 544 Reid Dr. Davis, CA 95616	Pugh v. Locke, 406 F. Supp. 318 (N.D. Ala. 1979)
Gerald A. Mitchell 320 E. 25th St. New York, NY 10010	
Ralph Knowles Drake, Knowles, & Pierce P.O. Box 86 Tuscaloosa, AL 35402	Newman v. Alabama, 74-203-N (M.D. Ala. 1984)
William Babcock Pennsylvania Prison Society 311 S. Juniper St. Philadelphia, PA 19107	Ruiz v. Estelle, C.A. H-78-987 (S.D. Tex. 1978)
David Arnold Remer, Arnold, Zimring 132 Carnegie Way, Suite 30 Atlanta, GA 30303	Ruiz v. McCotter (S.D. Texas)
Marci White 1301 Canterbury Rd. Raleigh, NC 27608	Willie M. v. Martin, C.C. 79-294 (W.D. N.C. 1980)
M. R. Nachman Balch & Bingham P.O. Box 78 Montgomery, AL 36101	Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976)

George Beto Criminal Justice Center Sam Houston State College Huntsville, TX 77341-2296	Newman v. Alabama
Neil Houston Gardiner Howland Shaw Found. 73 Tremont St. Boston, MA 02108	Department of Corrections v. Commissionser of Penal Institutions, City of Boston, C.A. 47463 (E.D. Mass. 1981)
William Nagel 404 Colony Dr. North Myrtle Beach, SC 29582	
Suzanne Richards 52 East Gay St. Columbus, OH 94215	Stewart v. Rhodes, 473 F. Supp. 1185 (E.D. Ohio 1979)
Sue Grant Office of the Special Master U.S. Court House 500 Camp St. New Orleans, LA 70116	
Edward Dauber Suite 815, Gateway 1 Newark, NJ 07102	Valentine v. Englehardt, 474 F. Supp. 294 (D.N.J. 1979)

APPENDIX B

CORRESPONDENCE AND QUESTIONNAIRE

RICHARD J. LILES
1715 Roseland, East Lansing, Michigan 48823
[517] 351-2160

November 24, 1986

Dear Colleague:

My purpose in writing is to request your assistance to help me in conducting research on the topic, "The Use of Masters and Monitors in Corrections Litigation." This subject became important to me while acting as the federal court monitor in the case Yokley v. Oakland County, Michigan (78-70625) in 1983-84. Subsequently, I chose to write my doctoral dissertation for Western Michigan University on the impact that federal court masters have on corrections litigation and have spent the last two years reviewing the literature and developing a proposal for research.

This proposal has been accepted and a critical portion of my research includes learning from others who have also been involved in corrections litigation, their perceptions of the appropriate role for masters and monitors. To accomplish this, I have developed the enclosed survey which I ask that you complete. It has been tested and even though it will only take approximately 15 minutes of your time, will provide valuable information on the subject.

I am asking you to fill out the questionnaire and return it to me in the enclosed, stamped, self-addressed envelope by December 15, 1986.

If you have any questions, please feel free to contact me at (517) 373-2748.

Sincerely,

Richard J. Liles

Richard J. Liles

Enclosures

RICHARD J. LILES
1715 Roseland, East Lansing, Michigan 48823
[517] 351-2160

January 14, 1987

Dear Colleague:

On November 24, 1986, I sent you a letter and a questionnaire which asked about your experiences as a federal master/monitor in corrections litigation (see attached).

Since I have not received a response, I am contacting you again to assure that you received my request and ask that you take about fifteen minutes to fill out the questionnaire and return it to me.

It is critical to my research that I receive an evaluation of your experiences with this unique technique since there are only a few individuals who have served as masters or monitors.

Please take the time to fill out this questionnaire at your earliest convenience and send it to me in the enclosed envelope.

Thank you for your cooperation.

Sincerely,

Richard J. Liles

Richard J. Liles

SURVEY QUESTIONNAIRE FOR
MASTERS AND MONITORS

Name: _____ Occupation: _____

1. Please identify the case name and the number to which you were appointed.

_____

Was this a case involving jail ___ prison ___ prison system ___

other (please identify) _____
(If you were involved in the case as other than a master or monitor, please explain.)

2. There appears to be three distinct points at which a master/monitor is appointed in the course of litigation. These have been identified as (1) prior to a judicial decision to assist in the determination of violation; (2) to assist in formulation of the decree; and (3) to monitor or enforce the decree. Please indicate at which point(s) you were involved in the litigation.

- Violation assessment _____
- Decree formulation _____
- Monitoring/enforcing _____
- Other _____

3. Was the order of reference appointing you to the case outlining your duties and authority

- very detailed and specific _____
- moderately specific _____
- general (i.e., not specific) _____

Did this affect your ability to perform? Positively _____

Negatively _____

Please enclose a copy of the order of reference.

4. Judicial determination to resolve the litigation has been identified as a key ingredient for compliance with remedial orders. Would you assess the judge(s) to whom you reported as:

- Highly determined _____
- Moderately determined _____
- Slightly determined _____

Do you agree that this is an important factor? Yes _____

No _____

Please explain your rationale for agreeing or disagreeing.

_____

_____

_____

5. Involvement by the judge in monitoring activities is also considered to be critical to the successful implementation of remedial orders. Would you characterize the judge to whom you reported as:

   • Deeply involved _____

   • Moderately involved _____

   • Barely involved _____

   Do you agree that this is significant? Yes _____

   No _____

   Please explain your rationale for agreeing or disagreeing.

   _____

   _____

   _____

6. It has been stated that the background and experience of the person who is appointed as a master or monitor is important to the successful implementation of the order. Would you categorize your education, training, and experience as:

   • Legal _____

   • Correctional _____

   • Other _____ If other, please specify _____

   Please send, if possible, a copy of your most recent vita or resume.

7. Would you categorize the administrators of the facility(ies) which you monitored as:

   • Eager to comply with the consent judgment _____

   • Willing to comply with the consent judgment _____

   • Reluctant to comply with the consent judgment _____

   • Unwilling to comply with the consent judgment _____

3

8. In the literature, the role of the master or monitor has been alternatively described as negotiator, mediator, arbitrator, or enforcer. Would you judge your primary role to be:

   • Negotiator _____ • Arbitrator _____

   • Mediator _____ • Enforcer _____

   Why? _____

   _____

   _____

9. What other, if any, roles did you assume during the course of your appointment?

   _____

   _____

   _____

   _____

10. One of the conditions which has been theorized to inhibit the master's or monitor's ability to facilitate compliance with a court decree is that many were only spending part-time on the endeavor while fulfilling other full-time responsibilities. How many hours per week were you involved with the case?

    40 or more ____ 30-39 ____ 20-29 ____ 10-19 ____ 9 or less ____

11. Do you feel that if you had been able to devote more time to monitoring, compliance would have occurred more rapidly?

    Yes _____ No _____

    Please explain. _____

    _____

    _____

    _____

4

12. Interaction and close communication with the judge has been pointed to as an important element with regard to successful implementation of consent decrees. Do you feel that your contact with the judge was:

- frequent and satisfying _____
- only as minimally necessary _____
- infrequent and discouraging _____

Do you feel that the extend of your communication with the judge affected compliance?

Positively _____ Negatively _____ Not at All _____

13. There are many different names associated with these appointments. Were you appointed as a:

- Master _____ • Monitor _____ • Special master _____
- Other _____ • If other, what? _____

14. How would you characterize the authority given you by the judge?

- Broad _____ • Limited _____

Did you feel the authority granted was appropriate?

_____

_____

_____

_____

15. Through which of the following methods were you selected to be involved in the case?

- By recommendation of the plaintiffs _____
- By recommendation of the defendants _____
- Through the judges knowledge of you _____
- Other _____ If other, please specify _____

5

16. How many months were you involved with the case?

1-6 ____ 7-12 ____ 13-18 ____ 19-24 ____ 25+ ____

17. Do you feel that your efforts were:

fully successful _____ partially successful _____ not successful _____

Why? _____

_____

_____

18. How do you feel that the judge(s) evaluated your efforts to bring about compliance? Did the judge(s) appear:

- Highly satisfied _____
- Moderately satisfied _____
- Dissatisfied _____

Why? _____

_____

_____

19. Do you feel that the role of master/monitor is an appropriate method for bringing about compliance with consent decrees?

Yes _____ No _____

Why? _____

_____

_____

_____

20. What recommendations would enhance the ability of the master/monitor to bring about compliance?

_____

_____

6

APPENDIX C

SPECIAL REMEDIAL MEASURES

V. SPECIAL REMEDIAL MEASURES

The first part of the following outline of cases delineates the particular compliance mechanism the court used to ensure compliance with its remedial decree. The second portion of the outline delineates the specific mechanism the court used to deal with overcrowding. Overcrowding is probably the single most persuasive factor in a court's decision that the "totality" of conditions violates the Eighth Amendment.

The court's remedial order normally deals with overcrowding by prescribing the minimum number of square feet of living space per inmate which must be provided by the institution to meet constitutional standards. The courts have not established a specific standard minimum amount of living space because square footage is only one of the many factors considered. This outline attempts to cover the various standards established by the courts and the methods used to implement those standards, including population reduction and closing or limiting admittance to a facility.

A. COMPLIANCE MECHANISMS

1. Human Rights Committees

a. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), aff'd in part sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977). The district court established and appointed a "Human Rights Committee" composed of thirty-nine members of the community to monitor implementation of the court orders. The committee was given the authority to inspect the prisons, interview inmates and inspect records, review plans for implementation, engage independent specialists, employ a full-time staff consultant at the same rate of compensation received by the Commissioner of Corrections and to take any action reasonably necessary to accomplish its function. The court of appeals later specifically rejected this method of monitoring compliance.

b. Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977). This action arose as a consolidated class action brought by five inmates in the Rhode Island Correctional Institution, challenging the conditions of confinement in the institution. The action resulted in a finding for the plaintiffs, and the court entered a remedial decree setting forth the changes which had to be made for the institution to meet constitutional standards, as well as a specific timetable for these remedial actions. To monitor compliance the court ordered that a human rights committee be appointed. This committee was given a great deal of authority in order to carry out its duties. The court later modified its order to appoint a special

master to oversee compliance, rather than a human rights committee. (Order No. 74-172, Sept. 12, 1977, set forth in Appendix C.)

2. Expert Panels

a. Ahrens v. Thomas, 434 F. Supp. 873 (W.D. Mo. 1977), aff'd in part and mod'd in part, 570 F.2d 286 (8th Cir. 1978). This action began when inmates at the Platte County Jail challenged their conditions of confinement. The district court held for the plaintiffs and ordered the jail closed for the purpose of housing convicted criminals, and further ordered the jail renovated and cleansed before it could be used to house pretrial detainees. The court then retained jurisdiction over the matter and appointed a panel of three persons knowledgeable in the field of corrections to inspect the jail, report to the court on renovation that had taken place and recommend specifications for a new jail. The court then laid down seventy-two specific standards to be met in construction of the new jail.

On appeal, the Eighth Circuit held that the court's order limiting the use of the old jail was not an abuse of its authority. However, the appellate court modified the second portion of the court's opinion. The court found that prescribing seventy-two specific standards for jail construction, and retaining jurisdiction to review jail plans, was an impermissible intrusion into the affairs of the state prison administration. The court then modified the lower court's order, but urged the local authorities to consider the seventy-two standards established by the court in planning the new jail. (570 F.2d at 290.)

b. Nelson v. Collins, 455 F. Supp. 727 (D. Md. 1978), and Johnson v. Levine, 450 F. Supp. 648 (D. Md. 1977), aff'd in part and rev'd in part, 588 F.2d 1378 (4th Cir. 1978). In these cases, which were consolidated on appeal, inmates of the Maryland Penitentiary, the Maryland Reception and Diagnostic Center, and the Maryland House of Corrections brought § 1983 actions alleging that the conditions of confinement in these institutions violated their constitutional right to be free from cruel and unusual punishment. In each case the court ordered the parties to meet and agree on a plan to reduce the population of the prison and take other steps to alleviate the unconstitutional conditions in the prisons.

On appeal the Fourth Circuit reversed that portion of the lower court's decision calling for immediate alleviation of the overcrowded prisons because such action would have too severe an impact on the defendants. The court of appeals noted that the constitutional violation here was not as extreme or as shocking as reported in some cases and that, under these circumstances, it would be appropriate to allow the state to enact its own plan for gradually constructing new facilities and alleviating the unconstitutional overcrowding.

Subsequently, the Governor of the state of Maryland appointed a

Task Force on Prison Conditions and requested a fresh evaluation of the overcrowding in the state's prisons. That Task Force based its report on the data and testimony presented to it in hearings and upon the overall pattern suggested by that information. The Task Force concluded that the state's plan to build large modern prisons was an inappropriate response to current overcrowding problems. The Task Force recommended that less emphasis be placed on building more prisons, and more emphasis be placed on making greater use of community-based alternatives to incarceration and programs which divert eligible offenders out of the criminal justice system. The recommendations have been submitted to the Governor.

3. Special Masters

a. Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd, 442 F.2d 304 (6th Cir. 1972); 73 F.R.D. 82 (N.D. Ohio 1976) (Master appointed). This action began in 1970 when inmates of the Lucas County Jail filed a § 1983 action alleging that the conditions of confinement in the jail arose to a constitutional violation. The court found for the plaintiffs and ordered that extensive improvements be made at the jail. After a period of noncompliance, during which the defendants constructed and occupied a new jail, the court found it necessary to appoint a special master, with the authority to seek contempt citations, in order to prompt the defendants to comply with the court's earlier decree. After ordering that a special master be appointed, the court gave the parties to the suit 10 days to recommend an individual to act as master. The master was given the responsibility of determining whether the defendants were in compliance with the court's orders and, if not, what steps would be necessary to bring the defendants into compliance. In order to carry out his duties, the master was given the authority to: seek show cause orders from the court; hold hearings and call witnesses; have unlimited access to all involved facilities; conduct confidential interviews with staff members and inmates; and file reports with the court. (See Appendix B, p. 53 for text of order.)

b. Costello v. Wainwright, 387 F. Supp. 324 (M.D. Fla. 1973), 397 F. Supp. 20 (M.D. Fla. 1975). This was a class action brought by prisoners in the Florida prison system, challenging the conditions of confinement in the system and, in particular, alleging that the inadequate health care in the system arose to an Eighth Amendment violation. The court held that because the prisoners had shown the likelihood of success at trial the court would enter a preliminary order appointing a special master to conduct a pre-decretal survey of the medical system. The purpose of the appointment was to determine what improvements, if any, should be made. (387 F. Supp. at 325.)

The court ordered the appointment of a general physician, a hospital administrative officer, a dentist and a sanitarian to serve as members of the master's survey team. This team was given the authority to enter all named facilities, and inspect and evaluate

the medical, dental, optical, psychiatric, sanitary, dietary and pharmaceutical services provided to inmates. After making an extensive survey the special master made a comprehensive report to the court which served as a basis for the court's remedial order. Subsequently, the court, by orders dated March 29, 1979 and June 6, 1979, appointed a group of medical experts to perform a new medical case survey to determine whether medical care has been brought up to constitutional standards. A final report concerning medical care was sent to the court on October 21, 1979. This report may lead to a settlement agreement.

The parties to the suit, after 7 years of litigation, have examined the cost of this protracted litigation and have now agreed to enter into a consent decree which, if approved by the court, will settle all the issues except the medical issues now before the court. The proposed settlement expressly states that the agreement does not constitute an admission of constitutional violations nor does it establish constitutional minimum standards. The parties have entered into the agreement solely as a means to put a reasonable end to this controversy which has been pending since 1972, and to avoid the further costs, time and risks involved in litigation. The detailed settlement agreement deals almost entirely with overcrowding, and has no provision for a master or other compliance mechanism. The court has ordered that notice of the proposed agreement be given to all members of the plaintiff class. The court will then hold a hearing to consider any objections to the settlement. If the agreement is approved, the court will then enter a consent decree. As a method of monitoring compliance with that decree, the settlement agreement requires the state to file a report on July 15 of each year through 1985. The report shall state the design and maximum capacity of all institutions available for occupancy at the time of the report, any changes in capacity since the previous report, and the actual population in the system. (Settlement agreement, Oct. 23, 1979.)

c. Taylor v. Perini, 413 F. Supp. 189 (N.D. Ohio 1976). In 1969 prisoners at the Marion Correctional Institution in Marion, Ohio brought an action challenging several aspects of the conditions of confinement in the prison. After several years of study, litigation and negotiation, a consent decree was approved and entered on September 12, 1972. (413 F. Supp. at 194.)

In a special order dated December 1, 1975, the court, pursuant to Rule 53 of the Federal Rules of Civil Procedure, appointed a special master to monitor compliance with the court's order. The master was given authority to: interview specific members of the prison staff and inmate population; create an inmate liaison committee, consisting of one inmate from each cell block to represent the perspective of the entire prison population; supervise and coordinate compliance efforts; negotiate issues with the prison directors; and to advise prison officials of the actions required of them to effectuate full compliance. (413 F. Supp. at 189.) Thereafter, the master submitted five compliance reports over a period of 3-1/2 years. [Compliance reports are set forth at:

413 F. Supp. 189, 198 (1976); 421 F. Supp. 740, 742 (1976); 431 F. Supp. 566, 570 (1977); 446 F. Supp. 1184, 1186 (1977); 455 F. Supp. 1241, 1255 (1978).] Each report indicated the degree of compliance which had been reached at that point and that prison officials were making a good faith effort to comply with the court's orders.

After examining and adopting the master's final report the court found that prison officals had substantially complied with its 1972 remedial decree and issued a final order, detailing specific improvements which must be made to bring the jail into full compliance. For the purpose of reviewing defendant's compliance with that final order, the special master shall retain the authority granted to him in the court's original order of April 9, 1975. If the state is in substantial compliance with the final decree, the special master shall be dismissed. (455 F. Supp. at 1254.)

d. Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977). This action is an appeal from Williams v. McKeithen, No. 71-98 (M.D. La. 1975), in which the inmates of the Louisiana State Penitentiary at Angola filed a suit alleging unconstitutional prison conditions pursuant to § 1983. Following unsuccessful attempts to resolve the case by consent judgment, the district court appointed a U.S. Magistrate to act as special master in this case. Over a period of 18 months the special master considered pleadings, depositions, stipulations and evidence gathered from on-site inspections of the penitentiary. In April 1975 the special master filed a 55-page report which outlined the existing unconstitutional conditions and set forth appropriate remedies. In June 1975 the district court adopted the special master's report without change.

On appeal the Fifth Circuit approved the district court's use of the special master and affirmed the relief ordered by the court. The court of appeals specifically found that the remedies ordered by the district court were within the broad authority of the court to rectify constitutional violations, and by ordering remedies which required substantial expenditures the order did not run afoul of the Eleventh Amendment. It is within the authority of the court to order that constitutional violations must be rectified if the prison is to remain open. (The court of appeals affirmed the district court order, except for the portion requiring 80 square feet per prisoner, which was remanded for reconsideration.) It is also within the authority of the court to require a detailed long-range plan to be submitted to the court within a reasonable time (180 days) for its approval. The purpose of such a plan is to allow the prison administration the self-determination they have often requested under judicial supervision which ensures that they face up to their responsibility to provide proper facilities. (547 F.2d at 1218.)

e. Finney v. Mabry, 458 F. Supp. 720 (E.D. Ark. 1978) (consent decree consolidating Finney v. Hutto and other related cases). The parties to various prison conditions suits involving the Arkansas Department of Corrections entered into a consent decree consolidating and settling the issues raised by those suits. As a method

of ensuring compliance with the court's decree the parties to these actions agreed, contingent upon funding approval from the Arkansas legislature, to select a person possessing legal, administrative, and humanistic skills to act as a "Compliance Coordinator." The decree gave the coordinator unlimited access to the prison's facilities, records, personnel, and inmates. It emphasized that the sole function of the coordinator was to determine the state of compliance with the court's orders, and not to interfere with the prisons' administration, or to act as an arbitrator.

The coordinator's mandate included filing quarterly reports with the court and all parties to the action, showing: (1) the state of compliance; (2) applicable correctional regulations and practices; (3) the degree of cooperation shown by correctional officials; and (4) timetables for full compliance in those areas in which the prison has not fully complied with the court's orders. The decree requires that any conclusions reached by these reports be supported by observations, interviews, statistics or hearings and that the basis for the conclusion be stated in the report. The coordinator has the authority to make non-binding recommendations to the Department of Corrections and these recommendations are reviewable by the court. The decree provides for the termination of the court's jurisdiction over the prison system by requiring that the coordinator make a final comprehensive report to the court when there has been substantial compliance with its orders. If the court is satisfied with the prison conditions reflected in the report it will relinquish further jurisdiction over the Department of Corrections, and will discharge the compliance coordinator. (458 F. Supp. at 724-725.)

f. Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977), 448 F. Supp. 659 (D.R.I. 1978). The court appointed a nationally-recognized expert in the field of corrections to serve as a special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, and oversee compliance with its remedial orders. In contrast to other cases, such as Finney v. Hutto, supra, in which the master's powers were restricted to actions which would not interfere with the everyday workings of the prison, the special master in this case was given a very broad mandate.

The court charged the special master with the responsibility of making periodic reports to the court detailing the level of compliance which had been achieved at the time of the report and making appropriate recommendations regarding any supplemental relief which may be necessary to achieve full compliance. (443 F. Supp. at 989.) To accomplish this task he was given the authority to: conduct an unlimited number of announced inspections; conduct confidential interviews with the inmates and staff of the prison; require written reports from any staff personnel in regard to compliance; recommend the court order the prison to obtain additional personnel, terminate current personnel, or transfer personnel; hire the necessary administrative staff and delegate his authority to appropriate specialists; institute grievance procedures; and conduct hearings in regard to compliance. (443 F. Supp.

956, 989.) The master has the power to file a report concluding that the Department of Corrections has failed to comply with a specific provision of the court's order and that it has no legitimate administrative or penological reason for its noncompliance (443 F. Supp. at 986), thereby giving the court grounds to begin contempt proceedings. (See Appendix C, p. 55 for full text of order appointing special master.)

The special master filed such a report in regard to the issue of classification, and on several occasions the plaintiff inmates moved that the Department be held in contempt for its failure to meet the deadlines set forth in the court's order. In each instance the court was extremely reluctant to find a state official in contempt, and based on some showing that the Department had acted in good faith in its attempt to comply, the court extended the deadline. (448 F. Supp. at 672.) The Department of Corrections has since substantially complied with every aspect of the court's order. The parties to the suit foresee full compliance within the next few months. At that time a final order will be entered dismissing the special master. The maximum security facilities which were ordered to be closed are now scheduled for extensive renovation and will be maintained as a maximum security facility to be used only in emergency circumstances.

In a related appeal, the First Circuit has declined to decide whether the district court exceeded its authority by ordering expenditures of state funds as a remedial measure when the court was aware the Governor did not have the necessary funds available in the budget. The district court, knowing that the state had made a good faith effort to obtain funding and had been unable to do so, ordered that the state must still comply with the scheduled improvements. The state then brought this appeal arguing that in so doing, the court had invaded the fiscal authority of the state and had thereby exceeded its authority. During the pendency of this appeal the legislature appropriated the funds necessary to improve the living conditions in the Adult Correctional Institute. The court of appeals, noting that direct confrontations between the federal judiciary and state government should be avoided whenever possible, found that the issue was no longer ripe for decision. [599 F.2d 17 (2d Cir. 1979).]

g. Trigg v. Blanton, No. 6047 (Davidson Co., Tenn. Ch. App., Aug. 23, 1978). The court here found that conditions in the state prison system violate inmates' rights under the state and federal constitutions and under state law. The principal deficiencies found by the state court in its lengthy opinion were: (1) failure to properly classify inmates so as to separate violent inmates from others; (2) overcrowding; (3) inadequacy in the health care delivery system due to lack of centralized coordination; (4) idleness among inmates from lack of meaningful work and educational opportunities; and (5) the system's inability to protect inmates from excessive violence. The court found that, due to the unique question involved in this case, the judgment of the appellate courts should be final before it appointed a special master. Therefore,

the court entered a final appealable order and gave the parties an opportunity to appeal before appointing a master to oversee implementation of the decree.

The court went on to state that the special master, once appointed, shall be empowered to monitor compliance with and implementation of the relief ordered. In order to carry out these duties the court gave the master authority to: recommend further action to comply with the orders; make announced inspections of any facility; conduct confidential interviews with the staff or inmates of the prison; conduct hearings; and make findings in periodic reports with the court. The court's order also provided that the defendants shall pay the salary of the master and provide any assistance or equipment he needs. Such compensation and expenses shall be taxed against the defendants as part of the cost of the case. At the end of each year the master shall make a comprehensive report outlining the need for the future services of a master.

Subsequently, the court reconsidered and issued a final injunctive order coupled with the order appointing a special master to supervise compliance. The court concluded that this case required the appointment of a master to assist the court in bringing the prison system into compliance with the Constitution without further delay. The master chosen should have a broad, general background in the field of corrections. This change in position was prompted by the court's fear that without a master the inertia of the state bureaucracy would prevent swift compliance. (Supplemental order, issued Dec. 20, 1978.)

h. Jordan v. Wolke, 460 F. Supp. 1050 (E.D. Wis. 1977), 75 F.R.D. 696 (E.D. Wis. 1977). The plaintiffs in this case were pretrial detainees in the Milwaukee County Jail. The plaintiffs brought an action alleging that conditions in the jail amounted to a deprivation of their due process rights. Prior to entering a preliminary injunction, the court appointed a master for the purpose of receiving recommendations on the type of relief that should be contained in the injunction. The court empowered the master to make personal inspections of the jail, to hold formal hearings and to take testimony under oath. The master was directed to report on appropriate methods of correcting various abuses, including visitation rules and other jail policies. The master was also given the authority to recommend appropriate remedial actions.

The court emphasized the Fifth Circuit's language in Newman v. Alabama, 559 F.2d 283, 290, that the person selected to be a master should be a person of undeniable qualifications, carefully chosen, and experienced in the operation of a prison which has not been involved in a "conditions" suit. The court selected a local attorney in whom the court had "special confidence," and appointed him as master, pursuant to the court's general equity powers, and not under Rule 53 of Federal Rules of Civil Procedure. (75 F.R.D. at 701.)

In a subsequent opinion, the district court decided to suspend remedial measures it had incorporated in the preliminary injunction pending the defendants' appeal. The court stated that even though the plaintiffs would probably suffer irreparable harm during the stay, unless the injunction was suspended the court would have no way of compensating the defendants if they succeeded in their appeal. "I do not believe the defendants have demonstrated substantial likelihood of success on the merits. Moreover, in my judgment substantial harm befalls the pretrial detainees for every day the court's order is delayed. Nevertheless, I am persuaded that the defendant's motion should be granted. The injunctive relief granted by this court [460 F. Supp. 1080] will in effect require the defendants to make substantial expenditures and take other remedial actions within the next 60 days. It is unlikely that the plaintiffs or this court would have any way of compensating the defendants or restoring the status quo should the defendants prevail upon their appeal. Thus, the defendants would be effectively denied their right to appeal this case, if their application for stay is denied. The stay, as noted, will clearly cause irreparable harm to the plaintiff class." (463 F. Supp. 641, 643.)

4. Monitors

a. Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972). This case began when inmates at the Mississippi State Penitentiary brought a class action seeking declaratory and injunctive relief to alleviate a wide range of unconstitutional conditions and practices in the maintenance, operation and administration of the penitentiary. The court entered an initial decree, finding that the totality of conditions within the prison amounted to cruel and unusual punishment, and held public hearings in which all interested parties could participate to determine appropriate relief measures.

Thereafter, the court retained jurisdiction over the case, including all litigation involving the conditions of confinement and related law suits (such as attorney's fees). To ensure compliance with its various decrees the court on August 22, 1973 appointed a federal monitor to check all phases of prison administration, management and operation and to determine the degree of compliance with its October 20, 1972 order. (501 F.2d at 1321.) The monitor was given no authority to intervene in prison affairs, but merely was charged with the duty of reporting to the court. As a result of the court maintaining direct control over the implementation of its decree, it has been necessary for the court and the Fifth Circuit to make many subsequent decisions (See: 371 F. Supp. 1368, vacated, 522 F.2d 81, 390 F. Supp 482, aff'd, 525 F.2d 665; 407 F. Supp. 1117; 423 F. Supp. 732, aff'd in part, 548 F.2d 1241; 70 F.R.D. 341, aff'd in part, rev'd and rem'd in part, 559 F.2d 241; 500 F.2d 1382; 501 F.2d 1291; 522 F.2d 81.)

In a recent opinion concerning attorneys' fees, the court commented that it appears a final decree will be entered in the case. Liti-

gation has now reached the stage in which the court is convinced that, although the prison environment still contains many unconstitutional conditions, a permanent injunctive order, couched in explicit terms to assure monitoring and implementation of the order, can bring the prison system up to constitutional standards. (454 F. Supp. 567.) This final decree may include the appointment of a master and will certainly include some mechanisms for reporting progress to the court.

b. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977). In an appeal to the decision in Pugh v. Locke, supra, the court held that prison officials cannot be expected to perform in an efficient or effective manner if they are required to stay in line with the numerous desires of the "Human Rights Committee," and at the same time be constantly confronted with the spectre of a federal contempt citation. The court specifically rejected the appointment of such a committee and recommended that the district court appoint one monitor for each prison to report his observations to the court, but that the monitor be given no authority to intervene in daily prison operations. The court suggested that these monitors be paid a reasonable compensation, and that the cost of their salaries be assessed against the state as part of the reasonable costs of the litigation. (559 F.2d at 289.)

5. U.S. Magistrate/Special Master

a. Bell v. Hall, 392 F. Supp. 274 (D. Mass. 1975). This is an action which originated when inmates of the "BX" unit of the Massachusetts Correctional Institution brought a § 1983 suit alleging that the conditions of confinement in that unit violated the Eighth Amendment. The district court referred the case to a U.S. Magistrate to act as special master for the purpose of conducting evidentiary hearings. In addition to the duty of taking testimony, the Magistrate was given authority to visit the prison and make a personal evaluation.

The Magistrate conducted three visits to the facility and then filed a report which concluded that the conditions of confinement violated the prisoners' rights to be free from cruel and unusual punishment. The court found that, pursuant to Rule 53(e)(2) of the Federal Rules of Civil Procedure, the Magistrate's report would be accepted unless one of the parties could show that the report was clearly erroneous. Accordingly, the court adopted the Magistrate's report. (392 F. Supp. at 275.) The court then remanded the case to the Magistrate and instructed him to continue to act as the special master in this case, and to use his report as the basis for formulating specific remedial measures. (392 F. Supp. at 277.)

6. U.S. Magistrate/Ombudsman

a. Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975), aff'd in part, rev'd in part, 563 F.2d 741 (5th Cir. 1977). In 1974 prisoners at

the Duval County Jail challenged their conditions of confinement as being violative of the Eighth Amendment. The court made a determination that the plaintiffs would probably succeed at trial and entered a preliminary injunction ordering the jail officials to alleviate existing unconstitutional living conditions. As part of its preliminary order, the court created an ombudsman's office and appointed a U.S. Magistrate to act as ombudsman and monitor compliance with the court's temporary injunction, and with any subsequent orders. The court gave the ombudsman authority to formulate remedial programs to bring the jail up to constitutional standards.

In a comprehensive opinion accompanying the court's final decree, the court found that many of the problems in the jail arose from a lack of communication between the jail's staff and inmates. Therefore, as a part of its final decree containing comprehensive remedial measures, the court ordered that the office of ombudsman should become a permanent part of the jail administration, and that the defendants should bear the expense of this office in the future. (401 F. Supp. at 898.) On appeal the Fifth Circuit found that it was within the scope of the district court's equitable powers to appoint an ombudsman to facilitate the implementation of the court's remedial order. However, creating a permanent remedial instrument was beyond the scope of the court's remedial powers and an impermissible intrusion into the state's administration of the prison. (563 F.2d at 751.)

7. Receivership

a. Newman v. Alabama, 466 F. Supp. 628 (M.D. Ala. 1979). In September 1978, hearings were held to determine the degree of compliance with the court's orders in these consolidated cases: Newman v. Alabama, 349 F. Supp. 278 (1972) (order requiring adequate medical care for inmates), and Pugh v. Locke, 406 F. Supp. 318 (1976) (order requiring alleviation of unconstitutional conditions of confinement). The overwhelming weight of the evidence established that there had been no substantial compliance since 1972, and the Alabama penal system continued to contravene the constitutional rights of the plaintiffs. The evidence revealed that the Board of Corrections had failed to make a genuine effort at compliance, and that living conditions constituted an imminent danger to health; inadequate medical care posed a threat to life; and insufficient security provisions made the penal system so unsafe that a state of emergency existed, demanding decisive action. Therefore, the court rejected the possibility of appointing a monitor or any other measure to insure compliance and resorted to placing the prison system in receivership. (466 F. Supp. at 635.)

8. Jurisdiction Retained by Court

a. Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976), aff'd, 548 F.2d 740 (8th Cir. 1976), aff'd, 437 U.S. 678 (1978). This action is a

combination of individual and class actions which were brought by inmates in the Arkansas prison system. The inmates alleged that the living conditions in the prison amounted to cruel and unusual punishment. The court found for the plaintiffs and retained jurisdiction over the case. That original decision was reported at 309 F. Supp. 362 (1972). Since that decision the case has returned to the court for supplemental dispositions on numerous occasions. (See: 442 F.2d 304, 363 F. Supp. 194, 505 F.2d 194.) In this, the latest decision, the court entered a third supplemental decree outlining its directives and the requirements necessary to bring the institution up to constitutional standards. The court also ordered the Commissioner of Corrections to file a report outlining compliance with the court's orders within 4 months. The report must include data on the prison's population including a cell-by-cell breakdown of the population. The court reserved the right to order further such reports. (410 F. Supp. at 286.) The findings of those reports were consolidated and led to a consent decree which was entered 2 years later. (See Finney v. Mabry, infra.)

b. Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974); Battle II, 447 F. Supp. 516 (E.D. Okla. 1977), aff'd in part and rem'd in part, 564 F.2d 388 (10th Cir. 1977), opinion on remand, 457 F. Supp. 719 (1978); see also 594 F.2d 792 (10th Cir. 1979). In its original decision in this case, the district court found violations in almost every aspect of prison life, and ordered immediate comprehensive relief. Following that order the court held compliance hearings every 6 months to monitor the Department of Corrections' compliance. Over a period of 3 years, these hearings demonstrated that the Department was not complying with the remedial orders. The Department's noncompliance triggered a motion for supplemental relief, specifically in the area of overcrowding.

The court granted this relief in its Battle II decision which ordered inter alia the Department to begin reducing its prison population at the two most crowded facilities at rates of one hundred and fifty inmates per month, respectively. (446 F. Supp. at 516, aff'd, 564 F.2d at 388-400.) To monitor this population reduction and compliance in general, the court ordered the plaintiffs and the United States as plaintiff intervenor to prepare and submit to the court a report on the level of compliance achieved by August 1978. On appeal, the Tenth Circuit found that the district court had failed to provide the Department with an adequate opportunity to accomplish the remedies ordered by the court, and remanded the matter for reconsideration. Citing Jordan v. Wolke, 460 F. Supp. 1050, 1080 (E.D. Wis. 1978), the court noted that the matter of cost to the state should be carefully considered when the court fashions an affirmative remedy.

On remand the district court stated that inhumane conditions of confinement created by 70 years of neglect understandably cannot be remedied overnight, and the court adopted the Department's plan and timetable for remedial action. In adopting the state's plan, the court noted that the plan does not challenge the court's original finding which delineated the unconstitutional conditions in the

prison system. The court commented that it was impressed by the testimony of elected state officials who pledged strong support to the proposed plan. Because of these "good faith" commitments, and because the plan embraced the substantial aspects of the court's previous decision, the defendants were entitled to a reasonable extension of time to complement the plan and advise compliance.

The state's plan, which is now adopted by the court and thereby supercedes any previous court orders, establishes a realistic timetable to alleviate unconstitutional conditions in the following areas: (1) overcrowding, (2) conditions of confinement, (3) health care, (4) access to the courts, and (5) racial segregation. Some of the most notable requirements in the plan are: (1) a minimum of 40 square feet of living space per inmate with the eventual goal of one man per 60 square foot cell; (2) the replacement or renovation of the state reformatory to comply with American Correctional Association standards, with a provision that unless these improvements are completed by 1982 the reformatory will be closed; and (3) the construction of two new minimum security housing units, constructed by prison labor. The court order also required an impartial audit of each prison facility be conducted and filed with the court 2 years after the order goes into effect to demonstrate compliance. The court rejected the defendant's plan to create a monitoring committee composed of legislators and gubernatorial staff, and retained jurisdiction over the action.

Thereafter, the district court held a compliance hearing in September 1978 and found that substantial compliance had not occurred, and issued a new set of all-inclusive remedies. The remedies were specific, and various deadlines concerning compliance with the court's orders were established. The court stated that these deadlines, if not met, could result in severe penalties, including closing of the offending facilities or fines of up to $250,000 per day. (R., Vol. 1, p. 334, reported at 594 F.2d 786, 791.)

Finally, the court of appeals on March 15, 1979 declined to affirm, reverse or modify the lower court's order. Instead, it remanded for the purpose of allowing the district court to conduct further compliance hearings, and retained jurisdiction. (594 F.2d at 793.) In regard to the reference to a daily fine of up to $250,000 for failure to comply, the court commented by quoting from Gates v. Collier, 407 F. Supp. 1117, 1120 (N.D. Miss. 1975): "Nevertheless, in achieving constitutional compliance, no court is bound to envoke draconian measures, particularly when another course, less drastic and already initiated, seems more likely to produce satisfactory results." This implies that less drastic measures should be used if possible.

c. Chapman v. Rhodes, 434 F. Supp. 1007 (S.D. Ohio 1977). The plaintiffs, inmates at Ohio's maximum security penitentiary at Lucasville, brought a § 1983 action alleging that the conditions of confinement in the facility violated the Eighth Amendment. The district court ruled that double celling, as used in the insti-

tution, was unconstitutional. No other unconstitutional conditions were found. The court ordered both parties to submit plans for alleviating this condition.

The state submitted five proposals for a gradual reduction of the population. The plaintiffs submitted a proposal which called for immediate incremental population reductions (120 prisoners per month). The court, in rejecting the defendant's proposals, commented on each alternative. Alternatives proposed that double celling be allowed to continue, but that inmates so housed be allowed to be outside their cell from 6:30 a.m. to 9:30 p.m. The court commented that this proposal would actually eventually increase the population, thus further overtaxing the institution. Alternatives 2 and 3 involved the creation of dormitories. These facilities would be even less desirable than double celling. Alternatives 4 and 5 were contingent upon further action by the Ohio legislature and voter approval. These plans would take too long to implement and are too speculative.

The court concluded that the plaintiffs' suggestion that the population be reduced incrementally until it is lowered to the single-cell capacity of the prison is workable and can reasonably be accomplished. The court left the choice of method (reducing admissions, transfers, etc.) to the defendants. Finally, the court ordered that the incremental number of prisoners be reduced from the one hundred prisoners proposed by the plaintiffs to twenty-five prisoners per month. (Order C-1-75-251, March 21, 1978.)

d. Burks v. Walsh, 461 F. Supp. 454 (W.D. Mo. 1978). This action arose when inmates at the Missouri State Penitentiary challenged the conditions of confinement in the penitentiary. The court stated that most of the prison's facilities and conditions were acceptable and that since the prison was not overcrowded the "totality of the circumstances" did not violate the Constitution. However, certain units were overcrowded and the court ordered the population in those units reduced "with reasonable dispatch." (Order Nov. 3, 1978.)

In a later opinion the court expanded on its rationale by stating that although "the plaintiffs' proposal for population reduction should be considered does not believe it to be necessary, at this point in the litigation, for the Court to become too deeply involved in how the state achieves the reductions...." There is little reason for the court to concern itself with administering the details of the population reduction program since there is no reason to question defendants' good faith. The court set the following compliance dates: January 1, 1979 for the administrative segregation unit; February 10, 1979 for the diagnostic center; and December 31, 1980 for the general population units. The means of complying were left up to the defendant. (Order 77-4008-CVC-1979.)

e. Stewart v. Rhodes, No. C-2-78-220 (E.D. Ohio, Dec. 4, 1979) (consent decree). The parties to these consolidated suits, including

the U.S. Department of Justice, have stipulated and agreed to a consent decree settling conditions suits which have been pending since 1976. The suits alleged inter alia that the conditions of confinement at the Columbus Correctional Facility (CCF) violated the inmates' constitutional rights. The consent decree settles all issues currently being litigated without making a finding of liability or any other determination based on the merits of the case.

The decree requires that the defendants file a plan to achieve compliance with the provisions of the decree within 30 days. Plaintiff and amicus shall have a opportunity to file objections to the compliance plan. If the defendant's compliance plan is approved, the defendants shall file compliance reports at 3-month intervals for the first year and at 6-month intervals thereafter. The consent decree makes no provision for a master or other monitoring device; however, the decree does require that the defendants arrange for thorough and professional fire safety inspections twice a year, thorough and professional public health inspections monthly during the first year and quarterly thereafter, and file reports after each such inspection with the court and counsel of record. The decree became effective on the date of entry, with the conditional approval of the court. The defendants were required to provide notice to the class by providing copies to all class members in the CCF, all new inmates, and by posting copies of the decree in all housing units. The defendants were also required to make copies available to all parolees through their parole officers. Members of the class have 60 days to submit written comments or objections which the court will consider before entering final approval of the decree.

f. Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), rev'd and rem'd sub nom. Bell v. Wolfish, 99 S. Ct. 1861 (1979). The court of appeals affirmed but modified the district court's decrees in this suit which challenged the conditions of confinement at the Metropolitan Correctional Center. The court of appeals commented that on remand more deference should be shown to the expertise of the prison administrators. (The lower court's broad-ranging order can be found at 439 F. Supp. 114.) Specifically, the court of appeals upheld the injunction against double celling and other policies which lead to overcrowded conditions. On appeal to the Supreme Court, the broad-ranging injunctive order was overturned and the case was remanded with instructions to the lower courts to defer to the judgment of prison officials unless their "judgment calls" clearly violated the Constitution. (99 S. Ct. at 1886.)

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