



The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered

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INTRODUCTION

Litigation aimed at reforming prisons, public schools, and mental health institutions has greatly increased over the past three decades and has developed in unique ways.¹ Institutional reform litigation has com-

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¹ The seminal commentary on this phenomenon is Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). For two recent articles that cite many of the basic sources, see Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 635 n.1, 636 n.2, 637 n.7 (1982); Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 377 nn.7 & 9-10 (1982). For symposia devoted to aspects of the topic, see *Judicially Managed Institutional Reform*, 32 ALA. L. REV. 267 (1981); *Court-Ordered Change in Social Institutions*, 6 L. & HUM. BEHAV. 97 (1982); *Problems of Intervention in Public Law Litigation*, 13 U.C. DAVIS L. REV. 211 (1980).

pelled courts to struggle with the problems of implementing their innovative and allegedly unprecedented decrees.² The problems of enforcement have led judges to experiment with a variety of ways to increase the likelihood of successful implementation.³

One method frequently used is the appointment of a special master⁴

² See, e.g., P. SCHUCK, *SUING GOVERNMENT* (1983); Starr, *Accommodation and Accountability: A Strategy for Judicial Enforcement of Institutional Reform Decrees*, 32 ALA. L. REV. 399 (1981); Yudof, *Implementation Theories and Desegregation Realities*, 32 ALA. L. REV. 441 (1981); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977) [hereafter Note, *Implementation Problems*]; Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). But see generally Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (discussing ancient roots of court supervision and implementation of complex remedies).

³ Many of these methods are reviewed in Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 826-35 (1978).

⁴ As used here, "special master" refers to "an experienced private attorney, a retired judge or a law professor or other professional to whom a federal court delegates frontline judicial responsibility" on a *pro hoc vice* basis. Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, in W. BRAZIL, G. HAZARD & P. RICE, *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* 1, 5 (1983); accord Brazil, *Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule*, in W. BRAZIL, G. HAZARD & P. RICE, *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* 305, 305 n.1 (1983) [hereafter Brazil, *Authority*]; Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 AM. B. FOUND. RESEARCH J. 143, 143 n.1 [hereafter Brazil, *Referring*]. One student author has suggested that use of the term "special master" is confusing because the role being played by the judge's agent in the institutional reform cases is so unprecedented and unlike a traditional master's. Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161, 1162-63, 1174-75 (suggesting use of "neoreceiver" to avoid confusion with traditional terms) [hereafter Comment, *Equitable Remedies*]; see also Weinberg, *The Judicial Adjunct and Public Law Remedies*, 1 YALE L. & POL'Y REV. 367, 368 (1983) (recommending "judicial adjunct"). Others have attempted to keep distinct the roles attributed to the traditional terms used for different court-appointed agents. See, e.g., Special Project, *supra* note 3, at 826-35; Note, *Monitors: A New Equitable Remedy?*, 70 YALE L.J. 103, 106-18 (1960). Nevertheless, the term special master is used in a general sense in this Article to conform to the standard practice.

The term "remedial special master" will be used to signify a special master appointed to do tasks after a court has determined liability. Cf. Comment, *Equitable Remedies*, *supra*, at 1163 n.7 (neoreceiver is "a court-appointed officer whose duties are broader and more flexible than those associated with traditional remedial forms and who is instrumental in developing remedies and implementing decrees . . . which result in large-scale institutional change"). Unless the context makes it clear that a nar-

to act as the court's agent in the remedial phase of the litigation.⁵ As the courts have turned to remedial special masters, commentators have remarked upon the apparent novelty of the use and the transformation of the master into an almost wholly new role.⁶ Some commentators question whether the federal courts, with their limited jurisdiction, are acting with adequate authority when they seek to create a new remedy, or so utterly to transform a traditional one.⁷ By contrast, the courts themselves have not been so troubled about the source of their authority.⁸ Rules 53 and 70 of the Federal Rules of Civil Procedure and the inherent power of courts are the basic sources of authority that commentators have discussed and courts have relied upon in appointing remedial special masters.⁹

rower meaning is intended, "remedial special master" encompasses an appointment made either before or after the court has issued its final judgment or decree. Cf. Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOL. REV. 419, 428 (1979) (distinguishing "pre-decretal" from "post-decretal" masters).

⁵ See cases cited *infra* notes 22-25. Such appointments are now so common that the Department of Justice has prepared a manual on the topic for judges and masters. U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORRECTIONS, HANDBOOK FOR SPECIAL MASTERS (Judicial Version 1983) [hereafter U.S. DEP'T OF JUSTICE].

⁶ E.g., Aronow, *The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation*, 7 HASTINGS CONST. L.Q. 739 (1980); Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RESEARCH J. 543; Dobray, *The Role of Masters in Court Ordered Institutional Reform*, 34 BAYLOR L. REV. 581 (1982); Kirp & Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L. REV. 313 (1981); Nathan, *supra* note 4; Comment, *Force and Will: An Exploration of the Use of Special Masters to Implement Judicial Decrees*, 52 U. COLO. L. REV. 105 (1980) [hereafter Comment, *Force and Will*]; see also Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 56-57 (1979).

⁷ E.g., Kirp & Babcock, *supra* note 6; Nathan, *supra* note 4; Comment, *Force and Will*, *supra* note 6.

⁸ See *infra* text accompanying notes 22-43.

⁹ Another potential source of authority, consent of the parties, is not discussed because there was nothing in the papers of Charles E. Clark, Reporter for the original Advisory Committee, to add to the careful discussion already in the literature. See Brazil, *Authority*, *supra* note 4, at 307-14; Silberman, *Masters and Magistrates — Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1354 (1975). The present Advisory Committee has acknowledged but not yet addressed the question whether the exceptional condition requirement in rule 53 applies when courts appoint private special masters, i.e., not federal magistrates, with the consent of the parties. Advisory Committee's Note to FED. R. CIV. P. 53(b) (Aug. 1, 1983 amendments). It is impossible to predict the impact, if any, on consent as a source of authority of the recent circuit court opinions, holding that Congress constitutionally authorized federal magistrates to enter binding findings of fact with the consent of the parties. *Collins v. Foreman*, 729 F.2d 108 (2d Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir. 1984); *Pacemaker*

The issues in the debate over the authority to appoint remedial special masters can be briefly summarized. First, does rule 53, with its prominent references to trial-stage appointments of special masters, give courts that have already decided upon the liability of the defendants authority to appoint special masters to perform complex tasks up to and including running a state institution such as a prison or a mental hospital? Second, does rule 70, with its language referring to the appointment of "some other person" to perform specific acts on behalf of a party, authorize courts to appoint remedial special masters to perform complex tasks? The term "master" does not even appear in the rule, and the rule expressly mentions only limited tasks such as conveyances of property. Finally, do courts have inherent power to appoint remedial special masters and, if so, what is the relationship between that power and these two rules, which may fully regulate those appointments?

This Article discusses the ongoing controversy over the adequacy of these sources of authority, which federal courts have used to appoint special masters to assist in the development and implementation of institutional reform decrees.¹⁰ Each source of authority will be discussed in light of an important but largely unknown and unpublished primary source concerning the intent of the original Advisory Committee on Rules for Civil Procedure, the drafters of the Federal Rules of Civil Procedure.¹¹ This source is the extensive collection of papers maintained by Charles E. Clark, then Dean of the Yale Law School and Reporter for the original Advisory Committee. To understand fully the intent of the drafters, which was to preserve existing tradition and practice, this Article then discusses, in the context of rules 53 and 70, the use of special masters for remedial purposes in the period prior to the promulgation in 1938 of the Federal Rules of Civil Procedure.¹² This Article draws the implications of this history for the appointment of remedial special masters in modern institutional reform cases.¹³ Finally, to preserve expressly the clear intent of the drafters, this Article proposes some clarifying amendments to rules 53 and 70 to confirm the authority of the courts under the federal rules to appoint remedial spe-

Diagnostic Clinic, Inc. v. Instrumedix, Inc., 725 F.2d 537 (9th Cir. 1984) (en banc); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).

¹⁰ See *infra* text accompanying notes 15-43, 107-15.

¹¹ See *infra* text accompanying notes 63-89, 116-30.

¹² See *infra* text accompanying notes 94-106, 131-38.

¹³ See *infra* text accompanying notes 198-242.

cial masters.¹⁴

It is important at the outset to recognize what the Clark Papers do and do not prove about the Advisory Committee's intent regarding the appointment of remedial special masters. The Clark Papers clearly show that the Committee considered the long tradition in equity of using special masters to perform tasks after a court had determined liability or declared the rights of the parties. Some of these tasks were trivial, such as executing land conveyances, and some more complex, such as running a corporate election. The Committee revised the draft rules, which ultimately became rule 53, to ensure that that tradition would be maintained in the new rules. In addition, the drafters clearly intended to include masters within the reference to "some other person" in the draft rule that ultimately became rule 70. Moreover, the Committee intended to preserve the American practice: a practice present as early as the nineteenth century and which was provided for in the Equity Rules the Supreme Court had promulgated in 1912, permitting courts to appoint third persons to do more than simply sign documents when a party failed to do so. Finally, it appears that the Committee did not intend to leave a significant role for inherent power to appoint remedial special masters outside of the new rules that incorporated the practices existing at the time of its deliberations.

Obviously, the members of the Committee did not foresee the expansion, which would not begin for nearly twenty years, of the federal courts into previously sacrosanct state and local government bailiwicks, such as prisons or school systems. The Committee did not expressly intend to provide that special masters could be appointed to perform the precise type of complex tasks that they have performed in the recent past. Without a doubt, there is a significant difference between appointing a special master to run a corporate election or to repair a severely damaged building, and appointing one to supervise the care of institutionalized retarded children in State X or the operation of the prison system of State Y. What is important, however, is that the Advisory Committee, conscious of the practice in equity of using special masters after a finding of liability had been made, acted to preserve that practice in the new rules. In contrast to the way some modern commentators have interpreted the rules, there is no evidence in the Clark Papers that the Committee sought to limit appointments of special masters to trial-stage references only or to the performance of merely trivial tasks after judgment, such as formally conveying title to

¹⁴ See *infra* text accompanying notes 243-47.

land.

I. THE SOURCES OF AUTHORITY FOR THE APPOINTMENT OF REMEDIAL SPECIAL MASTERS

A. Rule 53

1. The Modern Debate

The sole express source of authority for federal courts to appoint special masters is rule 53 of the Federal Rules of Civil Procedure. The rule grants the court authority to appoint a special master in any pending action.¹⁵ Other provisions of the rule, however, have caused commentators and a few courts to question whether rule 53 suffices as authority for the appointment of masters to do anything other than to make accountings or to assist courts in fact-finding at the trial stage of complex cases.

The frequent references in the rule to trial-stage activities make this common inference understandable. For example, the rule twice refers to actions "to be tried."¹⁶ The rule also provides for a master's authority to hold hearings and to compel testimony and the production of documents, and specifies how and when the hearings take place.¹⁷ In addition, the rule specifies how the master's report is to be made and how the court is to treat the master's findings of fact and conclusions of law.¹⁸

These provisions in the text of rule 53 have led many of the commentators who have considered the problem carefully to conclude that the rule is an inadequate source of authority for the appointment of remedial special masters.¹⁹ Other commentators, however, have not seen

¹⁵ FED. R. CIV. P. 53(a).

¹⁶ FED. R. CIV. P. 53(b).

¹⁷ FED. R. CIV. P. 53(c), (d).

¹⁸ FED. R. CIV. P. 53(e).

¹⁹ Over twenty-five years ago, Judge Irving Kaufman concluded that "the rule seems to have been written in contemplation of references of issues of fact only." Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 455 n.18 (1958); see also Brazil, *Authority*, *supra* note 4, at 353 (rule 53 "only . . . guide[s] conventional, trial-stage references"); Special Project, *supra* note 3, at 831 (rule 53 "largely concerned with the master as a fact finder").

Vincent Nathan, a law professor who frequently has been appointed as a special master, has concluded that the text of the rule "fits uneasily in the context of an appointment for the purpose of monitoring or effectuating compliance with a court's order in an institutional reform case." Nathan, *supra* note 4, at 428. One student author has similarly concluded that "the Rule does not specifically contemplate the use of court

any need to discuss the adequacy of the rule as authority,²⁰ even when directly addressing the appointment of remedial special masters.²¹

appointed agents to supervise the implementation of remedies." Comment, *Force and Will*, *supra* note 6, at 111; accord Dobray, *supra* note 6, at 587-88. Professors David Kirp and Gary Babcock have gone so far as to argue that the federal courts should "abandon even the pretense of a linkage between" remedial special masters and their conventional counterparts provided for expressly in the rule. Kirp & Babcock, *supra* note 6, at 386.

²⁰ Several writers have stated in passing, without explanation, that the courts have power to appoint remedial special masters under rule 53. Altman, *Implementing a Civil Rights Injunction: A Case Study of NAACP v. Brennan*, 78 COLUM. L. REV. 739, 741 n.12 (1978); Cox, *The Effect of the Search for Equality Upon Judicial Institutions*, 1979 WASH. U.L.Q. 795, 807-08; Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 989 nn.112-13 (1971); Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1, 65 n.320 (1978); Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 60 CORNELL L. REV. 53, 56-57 (1974) (rule 53 not only source of authority); Lottman, *Paper Victories and Hard Realities*, in PAPER VICTORIES AND HARD REALITIES: THE IMPLEMENTATION OF THE LEGAL AND CONSTITUTIONAL RIGHTS OF THE MENTALLY DISABLED 93, 94 n.5 (1976) (rule 53 not only source of authority); Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1256 n.274 (1982); Scalia, *The Hearing Examiner Loan Program*, 1971 DUKE L.J. 319, 327 n.27; Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 294 n.65 (1979); Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474, 1483 n.40 (1982); Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513, 516 n.18 (1980). In those articles that simply contain tangential references to the appointment power, the writers rely on perfunctory citations to rule 53 and/or Judge Kaufman's article. Kaufman, *supra* note 19. Citations to this article as support are particularly interesting because of Judge Kaufman's position on the scope of rule 53.

²¹ For example, in one recent article supporting early appointment and active involvement of special masters, the author barely referred to the source of authority for the appointments, let alone that it might be inadequate. The only hint of a reference is in a footnote quoting a judge's order appointing a master with the powers set forth in rule 53. Rebell, *Implementation of Court Mandates Concerning Special Education: The Problems and the Potential*, 10 J.L. & EDUC. 335, 349-50 n.37 (1981). Another writer expressed considerable distaste for the use of special masters in institutional reform, but did not contend that the rule itself is inadequate authority for the practice. Jennings, *The Chancellor's Foot Begins to Kick: Judicial Remedies in Public Law Cases and the Need for Procedural Reforms*, 83 DICK. L. REV. 217, 235-36 (1978-79); see also Aronow, *supra* note 6, at 743 (use "strictly delineated by rule 53"); Brakel, *supra* note 6, at 549-51; Lottman, *Enforcement of Judicial Decrees: Now Comes the Hard Part*, 1 MENTAL DISABILITY L. REP. 69, 69, 75 n.5 (1976); Smithson, *The Special Master in Correctional Cases: A Preliminary Survey*, 9 CLEARINGHOUSE REV. 15 (1975) ("rule 53 is a general enabling act"); Weinberg, *supra* note 4, at 387 (refusal to appoint a master under rule 53 may be appealed); Note, *Implementation Problems*, *supra* note 2, at 451 n.127 ("appointments are made under" rule 53); Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062, 1068-71, 1091 (1979) (citing

In light of the doubt cast by some commentators on the adequacy of rule 53, it is somewhat surprising that the courts have so rarely responded with any discussion of the rule's appropriateness as a mandate for the use of an extremely intrusive remedy. Some courts have appointed remedial special masters without relying on any authority.²² Other courts have simply referred to rule 53 as the source of authority for the appointment, without making any attempt to explain why it was adequate authority.²³ Occasionally, courts have accompanied their

rule 53 as authority but also suggesting revision of rule to encourage and educate judges to expanded use of masters) [hereafter Note, "*Mastering*" Interventions]. *But see* Comment, *Equitable Remedies*, *supra* note 4, at 1190-91 (although "rule 53 is a general enabling act" for appointment of masters, it does not "fully cover" appointment of a neoreceiver).

²² *E.g.*, *Jones v. Wittenberg*, 73 F.R.D. 82, 85-86 (N.D. Ohio 1976) (with concurrence of parties); *Reed v. Rhodes*, 422 F. Supp. 708, 797 (N.D. Ohio 1976), *remanded mem.*, 559 F.2d 1220 (6th Cir. 1977), *aff'd*, 607 F.2d 714 (6th Cir. 1979), *cert. denied-sub nom.* *Ohio St. Bd. of Educ. v. Reed*, 455 U.S. 1018 (1982); *Morales v. Turman*, 383 F. Supp. 53, 120-21 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1266 (E.D. Pa. 1971) (three-judge court) (consent decree); *see also* *United States v. City of Parma, Ohio*, 661 F.2d 562, 578 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982) (no authority cited; appointment of master reversed on other grounds); *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12, 25 (2d Cir. 1971) (directing district court to consider appointing federal monitors without specifying source of authority).

²³ *E.g.*, *Morgan v. Kerrigan*, 530 F.2d 401, 411 n.13, 427 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1390 (S.D. Tex. 1980), *aff'd*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1438 (1983); *Jose P. v. Ambach*, 3 Educ. Handicapped L. Rep. 551:245 (E.D.N.Y. 1979), *aff'd*, 669 F.2d 865 (2d Cir. 1982); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 986 (D.R.I. 1977), *aff'd*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Davis v. Watkins*, 384 F. Supp. 1196, 1212 (N.D. Ohio 1974); *Costello v. Wainwright*, 387 F. Supp. 324, 325 (M.D. Fla. 1973); *Moore v. Leflore County Bd. of Election Comm'rs*, 361 F. Supp. 603, 609 (N.D. Miss. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866, 877 (D.D.C. 1972) (master might be appointed under rule 53); *Kapral v. Jepson*, 271 F. Supp. 74, 81 (D. Conn. 1967); *see also* *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 87 F.R.D. 463, 465 (E.D. Pa. 1980) (three-judge court) (no need for master at time, but rule 53 cited as authority).

In reviewing a reference to a master in a case not involving institutional reform, an Eighth Circuit panel declared, "[e]very reference to a master, no matter what the litigation incident involved may be, and regardless of what may be the form or scope of the task sought to be referred, is within the application of the Rule." *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28, 32 (8th Cir. 1966). In discussing this case, Professor Brazil contends that this sweeping language "should not be read as supporting the notion that Rule 53 authorizes and limits references of discovery matters" to special masters. Brazil, *Authority*, *supra* note 4, at 326. However, Professor Brazil does think that the judge writing the panel opinion was "contemplating . . . the conventional uses of spe-

nod in the direction of the rule with a string citation to prior cases in which remedial special masters have been appointed.²⁴

Not all courts, however, have purported to rely on rule 53, with or without bootstrapping from previously decided cases, as the source of authority for the appointment of remedial special masters. Their search for other authority may reflect a dissatisfaction with the adequacy of rule 53, even if it is not expressed in the opinion.²⁵ Most often this search for authority leads judges to rely on both rule 53 and a court's inherent power²⁶ as distinct alternative sources of power for the reference. For example, in *Ruiz v. Estelle*, a case involving the conditions of Texas prisons, the district court judge announced that he would appoint a remedial special master under the authority of rule 53.²⁷ However, in actually making the appointment in a subsequent opinion, the judge relied "upon two independent sources of authority,"²⁸ rule 53 and inherent power.²⁹ The reason for this change was not explained. The judge did not elaborate on how the rule, his original source of authority, differed from the additional source, inherent power; nor did he dis-

cial masters, that is, to help make findings of fact or to help implement decrees." *Id.*

²⁴ *E.g.*, *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 111-12 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981), *aff'd en banc*, 673 F.2d 647 (3d Cir.), *rev'd on other grounds and remanded*, 104 S. Ct. 900 (1984); *Gary W. v. Louisiana*, 601 F.2d 240, 243-45 (5th Cir. 1979); *United States v. Board of School Comm'rs*, 503 F.2d 68, 77-78 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975); *cf.* *Armstrong v. O'Connell*, 416 F. Supp. 1325, 1336 (E.D. Wis. 1976), *vacated and remanded mem.*, 566 F.2d 1175 (7th Cir. 1977) (although fact that other district courts have appointed assistants to help formulate a desegregation decree "is not dispositive of the question of authority the frequency of such appointments is not altogether without significance").

²⁵ For example, once in an opinion appointing a master, *Jordan v. Wolke*, 75 F.R.D. 696, 701 (E.D. Wis. 1977), and again in an opinion contemplating such an appointment, *Jones v. Milwaukee County*, 441 F. Supp. 455, 458 (E.D. Wis. 1977), Judge Gordon of the Eastern District of Wisconsin stated that such appointments were "pursuant to the courts' general equity powers" and specifically not pursuant to rule 53. In neither opinion, however, did the judge elaborate on why he felt it necessary that the appointments should be made under "general equity powers" rather than the rule or on what difference the source of authority might make to the master, the court, or the parties.

²⁶ *See infra* text accompanying notes 153-97.

²⁷ 503 F. Supp. 1265, 1390 (S.D. Tex. 1980), *aff'd*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1438 (1983). For discussion of *Ruiz*, see *Dobray, supra* note 6, at 592-94, 597-99.

²⁸ *Ruiz*, 679 F.2d at 1169 (district court's order published as appendix to circuit court's opinion).

²⁹ *Id.* at 1169-70. The Fifth Circuit panel adopted the same approach. *Id.* at 1160-61 & n.240.

cuss whether one source might be broader than the other or whether there was any relationship whatsoever between the two sources of power.³⁰

Some courts treat the relationship between rule 53 and inherent power even more casually than those courts that merely distinguish the two without further explanation. Typical of this type of opinion is *Reed v. Cleveland Board of Education*,³¹ in which a Sixth Circuit panel discussed the lower court's authority to appoint a remedial special master. The entire discussion consisted of a single paragraph beginning with a citation to rule 53 and ending with a reference to inherent power.³² It is unclear from the opinion whether the circuit panel intended this short paragraph to be an analysis of one source of authority or two.

Only a very few courts have recognized that the source of authority for appointing a remedial special master might matter. The most probing examination of authority occurred in *Armstrong v. O'Connell*,³³ a school desegregation case that carefully discussed the authority issue in the context of defendant's motion for revocation of the appointment of a remedial special master. The defendants contended that the appointment was contrary to the requirements of rule 53.³⁴ Although recognizing that other courts had appointed remedial special masters in similar circumstances,³⁵ the judge carefully reviewed the authority issue. The court was troubled that such an appointment might be an improper delegation of a judicial function. The court then contrasted a special master appointed under rule 53 with a remedial special master. The critical difference was that the report of a traditional rule 53 master, which would contain findings of fact, would be entitled to a presumption of validity under rule 53(e)(2).³⁶ The court reasoned that because the remedial special master was not a traditional rule 53 master, his

³⁰ Other courts have similarly referred to inherent power and rule 53 as separate and independent grounds of authority without attempting to explain the relationship between the two sources of power. *E.g.*, *Powell v. Ward*, 487 F. Supp. 917, 935 (S.D.N.Y. 1980), *aff'd per curiam*, 643 F.2d 924 (2d Cir.), *cert. denied*, 454 U.S. 832 (1981); *see also* *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956) (inherent power is "beyond" rule 53).

³¹ 607 F.2d 737 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980).

³² *Id.* at 743.

³³ 416 F. Supp. 1325 (E.D. Wis. 1976), *vacated and remanded mem.*, 566 F.2d 1175 (7th Cir. 1977).

³⁴ *Id.* at 1336.

³⁵ *Id.* at 1336-37.

³⁶ *Id.* at 1338. Rule 53(e)(2) requires the court to "accept the master's findings of fact unless clearly erroneous."

report and recommendations would not be entitled to the same presumption of validity.³⁷ Thus, because the court had not made the appointment under rule 53, the master's subsequent recommendation would be entitled to "only such weight as its merit commands and the sound discretion of the judge warrants."³⁸ Due to this distinction, the court denied the motion to revoke the appointment because there had been no unlawful delegation of an exclusively judicial function.

In reaching this result, the district court relied upon the Supreme Court's then-recent distinction between the appointment of a United States Magistrate to serve as a special master under the Federal Magistrates Act and under rule 53. In *Mathews v. Weber*,³⁹ the Court held that the appointment of a federal magistrate under the Act was not bound by the rule's restrictions.⁴⁰ Thus, entire categories of cases could be referred to magistrates *qua* special masters, in disregard of the "exception and not the rule" and "exceptional condition" provisions of rule 53. The Court emphasized the distinction between rule 53 and other sources of authority when it stated that by approving the references to federal magistrates, it was not retreating from the strict requirements for all references to special masters under rule 53⁴¹ that it had established previously in *La Buy v. Howes Leather Co.*⁴² The district court's distinction in *Armstrong* between special masters who are and are not appointed under rule 53 resembles the distinction the Supreme Court drew in *La Buy*.⁴³

³⁷ *Id.* at 1338-39; see also *Morgan v. Kerrigan*, 523 F.2d 917, 921-22 (1st Cir. 1975) (quoted in *Armstrong*); *Chicago Hous. Auth. v. Austin*, 511 F.2d 82, 83 (7th Cir. 1975).

³⁸ *Armstrong*, 416 F. Supp. at 1338 (quoting *Mathews v. Weber*, 423 U.S. 261, 275 (1976)). More recently a Fifth Circuit panel unanimously required as a matter of due process that an order of reference to a remedial special master be amended to provide that findings of the master were not to be afforded any presumption of correctness unless based on hearings on the record after proper notice. *Ruiz v. Estelle*, 679 F.2d 1115, 1163 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1438 (1983).

³⁹ 423 U.S. 261 (1976).

⁴⁰ *Id.* at 274-75.

⁴¹ *Id.* at 274.

⁴² 352 U.S. 249 (1957). For further discussion see *infra* text accompanying notes 226-28.

⁴³ Few other opinions have attempted to analyze the relationship between the inherent power of the court and rule 53. One interesting suggestion made many years ago was that rule 53 "serves but to outline the procedure to be followed when the [independent inherent] power is exercised." *Connecticut Importing Co. v. Frankfort Distilleries*, 42 F. Supp 225, 227 (D. Conn. 1940). This suggestion appears to be substantially correct. See *infra* text accompanying notes 160-77. Unfortunately, these few words are the extent of the court's analysis. In addition to the issue raised in *Armstrong*, the other

2. The Advisory Committee

The controversy over the adequacy of authority to appoint remedial special masters will undoubtedly continue in the absence of a definitive statement from the Supreme Court.⁴⁴ As previously noted, a generally neglected but important primary source exists that no commentator or court has yet used to resolve the controversy. This source, which sheds light on the problem, is the records of the members (especially Dean Charles E. Clark) of the original Advisory Committee on Rules on Civil Procedure, who were appointed by the Supreme Court to draft the Federal Rules of Civil Procedure in the 1930's.⁴⁵ Before proceeding

issues that have been raised when rule 53 has not been the source of authority for the appointment of a special master are whether the rule's restrictions, such as the "exceptional condition" requirement, as interpreted by the Supreme Court in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), and the provision that references "be the exception and not the rule," FED. R. CIV. P. 53(b), apply. See *Ruiz v. Estelle*, 679 F.2d 1115, 1160 n.235 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1438 (1983); Special Project, *supra* note 3, at 807-08. In general, however, these issues have been ignored and have not been treated in the cases.

⁴⁴ The Supreme Court recently had before it a vehicle that it could have used to decide this issue. *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900 (1984). One of the questions upon which the writ of certiorari was granted was whether it was a proper exercise of judicial power for a federal court to maintain a special master to supervise decisions of state officials regarding the proper placement of retarded citizens under state law. 51 U.S.L.W. 3039 (U.S. Aug. 3, 1982). The Court did not reach the issue, however, in its recent decision. 104 S. Ct. at 906.

⁴⁵ As Professors Brazil and Burbank both note, the official working papers and correspondence of the original Advisory Committee are restricted at present and cannot be quoted. Brazil, *Authority*, *supra* note 4, at 318 nn.65-66; Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1132 n.529 (1982); see also Whalen v. Ford Motor Credit Co., 684 F.2d 272, 281 (4th Cir.) (en banc) (Butzner, J., dissenting), *cert. denied*, 459 U.S. 910 (1982). The papers of several members of the Advisory Committee, however, are freely available at universities with which they were affiliated. Professor Burbank noted that papers were donated by Edmund M. Morgan to the Harvard Law Library, by Edgar B. Tolman to the University of Chicago Law Library, by Edson R. Sunderland to the Bentley Historical Library at the University of Michigan, and by Charles E. Clark to the Sterling Library at Yale University [hereafter Clark Papers]. Burbank, *supra*, at 1132 n.529. Professor Burbank also mentioned "a few unpublished drafts" of the rules at the University of Virginia Law Library. *Id.* These drafts were donated by Armistead M. Dobie, who was Dean of the University of Virginia Law School while he served on the Advisory Committee. In a case using the unpublished records of the Advisory Committee, the Fourth Circuit noted that Monte M. Lemann left his papers with Tulane University. *Whalen*, 684 F.2d at 275 n.8. Other members of the Advisory Committee may have donated their papers to other law school or university libraries. However, inquiries to the University of Pennsylvania regarding George Wharton Pepper, the University of Minnesota Law Library regarding Wilbur Cherry, the University of Washington Law Library regarding George

with discussion of the evidence that comes from the Clark Papers and published sources, it is appropriate to consider whether the courts should give any weight to the Advisory Committee's intent in the interpretation of the rules.⁴⁶

a. The Use of the Intent of the Advisory Committee in Rule Interpretation

Although at first glance the views expressed by the drafters at the time they were formulating the rules would seem entitled to great weight, this has rarely been the case. Since the promulgation of the rules in 1938, the Supreme Court, despite some ambivalence, has discouraged the use of the nonpublic views of the original Advisory Committee as part of the history of the drafting process, because it would inevitably restrict the potential range of the Court's interpretation of the rules. The Court has taken various steps to seal this interpretative Pandora's box. Each Chief Justice since 1938 has kept the official unpublished records of the Advisory Committee under wraps.⁴⁷ In addi-

Donworth, and the Harvard Law Library regarding Warren Olney, Jr. and Robert G. Dodge failed to lead to other sets of Advisory Committee materials (inquiry correspondence on file in U.C. Davis Law Review office).

All quotations and citations in this Article concerning the deliberations of the Advisory Committee are from the Clark Papers for the years 1935-1938, which were the only papers reviewed by the author. The Archivist at the University of Virginia Law Library, Marsha Trimble Rogers, reviewed the pertinent draft rules in Dean Dobie's limited papers but found no helpful written notations. The Clark Papers are maintained in the Manuscripts and Archives Department at Yale University's Sterling Memorial Library. I am grateful for permission to quote from the Clark Papers. Because Dean Clark was the reporter for the Advisory Committee, the Clark Papers are the most extensive records presently available. See Burbank, *supra*. The *Whalen* court and Professor Brazil relied exclusively on the Clark Papers to determine the intent of the Advisory Committee. *Whalen*, 684 F.2d at 275-78; Brazil, *Authority*, *supra* note 4, at 353 n.310. Professor Burbank examined several sets of papers, but relied most heavily on the Clark Papers. See, e.g., Burbank, *supra*, at 1133 n.530, 1136 n.539.

⁴⁶ See generally 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 48.11-12, at 212-16 (4th ed. 1973) (discussing how courts have weighed value and ruled on admissibility of sources not connected with legislatures); Note, *Nonlegislative Intent as an Aid to Statutory Interpretation*, 49 COLUM. L. REV. 676 (1949) (considering whether courts should use any nonlegislative expression of intent as an aid). For an example of the difference between the official legislative history and the "real" history of a statute, see Mangum, *Legislative History in the Interpretation of Law: An Illustrative Case Study*, 1983 B.Y.U. L. REV. 281.

⁴⁷ Brazil, *Authority*, *supra* note 4, at 317-18 & nn.65-66. Chief Justice Burger apparently has stated, however, that the decision was made by the Judicial Conference of the United States. See *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272, 281 & n.6

tion, the Court refused permission for the members of the Advisory Committee to write books on the history of the writing of the rules to avoid creating "too official" information that might have limited the court's ability to interpret the rules.⁴⁸

Despite these efforts to maintain interpretive independence when the rules first came into being, the Court has been ambivalent about the necessity of keeping this source completely closed. For example, Chief Justice Hughes allowed Advisory Committee members to donate their personal copies of the proceedings to various university libraries, apparently knowing their use would be unrestricted.⁴⁹

(4th Cir.) (citing letter from Chief Justice to Circuit Judge Francis D. Murnaghan, Jr. dated Dec. 18, 1981), *cert. denied*, 459 U.S. 910 (1982).

⁴⁸ Brazil, *Authority*, *supra* note 4, at 318 n.67 (quoting Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 555 (1939), and citing Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261 (1939)); *see also* letter from Charles E. Hughes to William D. Mitchell, at 1 (Nov. 24, 1936), Clark Papers, Box 110, Folder 51 (books would appear to be an official explanation and "could easily prove to be embarrassing").

The original Advisory Committee members were sensitive to the problem of stealing the Court's thunder in the interpretation of the new federal rules. All of their published materials were carefully labeled as unofficial expressions of opinion. *E.g.*, Hammond, *Foreword to American Bar Association, Proceedings of the Institute at Washington, D.C., October 6-8, 1938 and of the Symposium at New York City, October 17-19, 1938* at v (E. Hammond ed. 1939) [hereafter ABA, *Washington Inst. and New York Symposium*]; Vanderbilt, *Foreword to American Bar Association, Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 21-23, 1938* at v-vi, 179 (W. Dawson ed. 1938) [hereafter ABA, *Cleveland Inst.*]; Report of the Advisory Committee on Rules for Civil Procedure at i (1937).

⁴⁹ This author found hearsay evidence in the Clark Papers that the Supreme Court knew that several members of the Advisory Committee planned to donate to prominent law schools their personal copies of the records from the period when the rules were drafted. In a letter written about a year after promulgation of the rules, several Committee members learned that "the Chief Justice sees no objection to the members of the Advisory Committee giving their individual sets of materials to law schools." Letter from Edward H. Hammond to Edmund M. Morgan, at 2 (Dec. 13, 1938) (with carbon copies to others), Clark Papers, Box 104, volume XIX. In the letter, Hammond, senior member of the Washington staff of the Secretary of the Committee, said that he had spoken to the Chief Justice (evidently upon request of members of the Advisory Committee) about furnishing official copies of the Committee's materials to certain law school libraries. Hammond stated that both the Chief Justice and the Court felt that if the Advisory Committee were to supply official material to law schools represented on the Committee, it would in fairness have to meet requests from law schools of "comparable standing." The Court was concerned that those schools selected would almost amount to a Supreme Court or Advisory Committee list of approved law schools. In addition, the Court felt that the expense of copying the material could not be justified. It was in the context of relaying the Court's denial of the request for distribution of

Although the Supreme Court took steps to limit the impact of the views of the Advisory Committee, lower federal courts almost immediately began using published Advisory Committee notes and public statements by Committee members as interpretive devices.⁵⁰ The Supreme Court itself, in deciding one of the first challenges to a rule to reach it, affirmed that the construction given the rules by the Advisory Committee was "of weight."⁵¹ Recognizing that it had promulgated the federal rules virtually as they had been drafted by the Advisory Committee, the Court nonetheless stated that it would not refrain from independently considering the validity, meaning, or consistency of the rules. The Court then relied on statements made by members of the Advisory Committee in 1938 and 1939 during the institutes the American Bar Association sponsored to introduce the new rules to the practicing bar.⁵² As recently as 1980, the Court turned to the published Advisory Committee notes for aid in a case concerning the interpretation of rule 3.⁵³

Although these opinions relied only on the notes that were officially published with the rules in 1938⁵⁴ or upon the published statements of committee members at the ABA's institutes,⁵⁵ at least one appellate

official copies that Hammond reported that the members of the Committee were free to donate their personal sets of material to law schools. *Id.* at 1-2. There is no hint in this letter, written months after the new rules had gone into effect, that the Chief Justice or the Court wanted to prohibit public access to the members' personal materials. The letter does not mention that access would have to be restricted as a condition of the donation, as one would expect if the Court had been determined to keep the Committee's deliberations totally out of the interpretive process.

⁵⁰ See cases collected in Commentary, *Use of Notes and Statements of Advisory Committee in Construction of Rules*, 2 FED. R. SERV. (Callaghan) 632 (1940) and 3 FED. R. SERV. (Callaghan) 663 (1940). Lower courts began using the published notes to the rules and remarks of the Committee members to interpret the new rules at least as early as December 1938. See *Food Mach. Corp. v. Guignard*, 26 F. Supp. 1002 (D. Or. 1938). Charles Clark himself, who as reporter was principally responsible for the Advisory Committee's work product, had occasion to cite the Committee's published notes as interpretive authority soon after joining the federal bench. *Sherwood v. United States*, 112 F.2d 587, 590, 591 n.4 (2d Cir. 1940), *rev'd*, 312 U.S. 584 (1941).

⁵¹ *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

⁵² *Id.*; see also *Gomez v. Toledo*, 446 U.S. 635, 641 n.8 (1980) (citing Dean Clark's remarks at Washington Institute regarding allocation of burden of pleading elements of cause of action under federal rules).

⁵³ *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 & n.10 (1980).

⁵⁴ The Advisory Committee's published notes are reprinted as an appendix in 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* 363 (1973).

⁵⁵ ABA, *Cleveland Inst.*, *supra* note 48; ABA, *Washington Inst. and New York Symposium*, *supra* note 48.

court recently has looked to the Clark Papers to ensure that its interpretation of a rule matched the intent of the Committee. In *Whalen v. Ford Motor Credit Co.*,⁵⁶ the Fourth Circuit interpreted rule 63 in the context of a judge's death during a trial. In reaching its decision, the en banc majority relied in substantial part on the Clark Papers to determine the intent of the Advisory Committee and quoted a long section of transcript from a 1953 meeting exploring, but rejecting, a proposed amendment to the rule.⁵⁷

The Fourth Circuit majority acted over a dissent signed by four judges that criticized reliance on the Clark Papers. The dissent opposed use of the papers for several reasons: (1) they were not part of the published notes that the Committee deemed necessary for proper understanding of the rules; (2) the Committee's 1953 discussions occurred many years after the rule was originally adopted; and (3) the working papers could not be used to make an authoritative interpretation, because the material quoted by the majority did not directly address the issue before the court.⁵⁸ The dissent contended that "the primary sources for interpretation of the rules are rightfully limited to the text itself, published Notes of the Advisory Committee, decisions of the courts, and published commentaries."⁵⁹ Although the private papers were "undoubtedly of great interest to scholars of the federal judicial system," the dissent asserted that the working papers were not intended to be and should not be authoritative guides for rule interpretation.⁶⁰

Despite these views, it appears appropriate for a court to consider materials available from the records of the Advisory Committee because its members served, in effect, as a legislative committee for the drafting of the rules.⁶¹ It is important to bring this material to the fore, so that

⁵⁶ 684 F.2d 272 (4th Cir.) (en banc), *cert. denied*, 459 U.S. 910 (1982).

⁵⁷ *Id.* at 275-77. For critical discussion of the merits of *Whalen*, including the court's interpretation of the Advisory Committee's intent regarding rule 63, see Comment, *The Case of the Dead Judge*, 67 MINN. L. REV. 827 (1983).

⁵⁸ *Whalen*, 684 F.2d at 281 (Butzner, J., dissenting).

⁵⁹ *Id.* at 282.

⁶⁰ *Id.* In response to this point, the majority noted that the Clark Papers were "primarily relevant . . . to remove completely any lingering doubt that, however logical and persuasive, the result might just possibly be contrary to what the Rules Committee actually intended." *Id.* at 275 n.8. The majority also pointed out that federal judges were as much "scholars of the judicial system" as any law professor. *Id.*

⁶¹ Even on the dissent's terms, there is a much stronger case for considering the historical material presented in this Article. First, there is evidence in the Clark Papers suggesting that the Committee planned to make their official records available to supplement the brief published notes. *E.g.*, Letter from Charles E. Clark to Edward H. Hammond (June 11, 1937), Clark Papers, Box 111, Folder 56. The Supreme Court

the present Advisory Committee and the courts may use it as they amend and interpret these rules in the future.⁶²

b. The Development of Rule 53 by the Advisory Committee

Dean Clark's records of the Advisory Committee indicate that the Committee thoroughly considered the rules on masters. Without a doubt, in the course of its deliberations, the Committee confirmed that it intended the provisions that became rule 53 to include special masters appointed for remedial purposes.⁶³

In the Committee's second full session, held in February of 1936, it thoroughly reviewed what were then several rules on masters⁶⁴ and expressly considered remedial special masters.⁶⁵ In the course of the delib-

prevented this from occurring. Second, the Advisory Committee discussions and records analyzed here are from the period before the rules were promulgated; unlike the *Whalen* majority, this Article does not rely on after the fact recollections to determine the Committee's intent. Finally, the issues to be discussed here were handled far more directly by the Committee than was the issue presented in *Whalen*.

⁶² See Brazil, *Authority*, *supra* note 4, at 316-19. For analogous discussion of the interpretive value of the extra-legislative history of the Rules Enabling Act of 1934, see Burbank, *supra* note 45, at 1098-1106. Burbank also provides an excellent example of how the Advisory Committee's unpublished materials illuminate the published materials, such as the notes to the rules. *Id.* at 1159 n.620.

⁶³ In contrast, Professor Brazil has found that the Advisory Committee considered, but then withdrew, separate express authorization that would have permitted courts to appoint masters to supervise depositions of adverse parties. Brazil, *Authority*, *supra* note 4, at 353-64. However, in view of the evidence described in this Article, this author cannot concur in a literal reading of his statement that rule 53 was "only to guide conventional trial stage references." *Id.* at 353.

⁶⁴ The discussion on masters covers 54 legal-size pages of the transcript. Proceedings for Feb. 24, 1936, at 1067-1120, Clark Papers, Box 96, Folder 12.

⁶⁵ In its first meeting in November 1935, the Advisory Committee did not expressly discuss remedial special masters; however, it reviewed a tentative set of rules on masters that Dean Clark said was "almost all a copy of the equity rules," and would not need extensive consideration. Proceedings for Nov. 19, 1935, at 1899, Clark Papers, Box 94, Folder 6 (remarks of Dean Clark); see also Rules 90-97, Tentative Draft I (Oct. 25, 1935), Clark Papers, Box 97, vol. I (predecessor from Equity Rules placed next to each new proposed rule). The most important decision the Committee made at this first meeting concerning masters was to leave fully in force the terms of Rule 59, Rules of Practice for the Courts of Equity of the United States, 226 U.S. 628, 666 (1912) [hereafter 1912 Equity Rules] that a reference to a master "shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it." Proceedings for Nov. 19, 1935, at 1902-03, Clark Papers, Box 94, Folder 6 (remarks of Dean Clark).

In response to a question from American Bar Association President Scott M. Loftin concerning the possibility of relaxing this position, Dean Clark read to the Committee

erations, former Senator George Wharton Pepper⁶⁶ asked whether the rules on masters were designed to cover more than the usual sort of references. He sought assurance that the "Committee on Style will have authority, if necessary, so to modify the language as to cover a case that is not the ordinary case of a reference, but such a case as arises when a court appoints a master to conduct a corporate election."⁶⁷ Chairman Mitchell replied "that is not exactly a change of substance."⁶⁸ Senator Pepper agreed and the Chairman reiterated, "it is covering an oversight."⁶⁹ Senator Pepper wanted to "mould the language so that there will be no implication that the only jurisdiction of a master is where there is a matter of reference in the ordinary sense of that word, as distinguished from something to be done under the supervision of the

from a statement by Chief Justice Hughes reporting on a conference he had held with the senior circuit judges just a few weeks earlier. Proceedings for Nov. 19, 1935, at 1902-03, Clark Papers, Box 94, Folder 6. The report, Dean Clark told the Committee, contained a recommendation for more judges. The recommendation was partially justified with the statement that more judges were needed in order for the courts to comply with 1912 Equity Rule 59. According to the report, due to a shortage of judges, the exception-not-the-rule language of 1912 Equity Rule 59 had been ignored in some districts; judges had been imposing a massive and unfair financial burden on the parties by freely appointing masters in equity cases. Although the transcript does not provide a complete citation to the report from which Dean Clark quoted, it is clear from the context that the Committee was examining Hughes, *Report of the Judicial Conference*, 21 A.B.A. J. 731, 732 (1935). After Dean Clark read from the report, both Loftin and the Chairman of the Committee, former Attorney General William D. Mitchell, stated that in view of its clear expression of the Chief Justice's opinion, the Committee should not tamper with the basic provisions of the rule. Proceedings for Nov. 19, 1935, at 1902-03, Clark Papers, Box 94, Folder 6. Judge George Donworth then asked whether the rule was not "good enough for present purpose," *id.*, and with that comment, the Committee moved on to consider another rule.

⁶⁶ George Wharton Pepper, a former United States Senator and Professor at the University of Pennsylvania Law School, was a late appointment to the Advisory Committee. He was appointed by the Supreme Court a few days before the February 1936 meeting to replace George W. Wickersham, President of the American Law Institute. Order, 297 U.S. 731 (Feb. 17, 1936). Wickersham, who attended only the November 1935 meeting, died January 25, 1936. 1 WHO WAS WHO IN AMERICA 1342 (7th ed. 1968). Senator Pepper, who was Vice President of the American Law Institute when Wickersham died, *see* G. PEPPER, PHILADELPHIA LAWYER 378 (1944), became a member of the Advisory Committee by virtue of succeeding Wickersham as ALI president. *Id.* at 381.

⁶⁷ Proceedings for Feb. 24, 1936, at 1101, Clark Papers, Box 96, Folder 12. The Committee on Style was a subcommittee, chaired by Senator Pepper, "with responsibility of making all the rules readable and clear" after the full committee had agreed on substance. G. PEPPER, *supra* note 66, at 381.

⁶⁸ Proceedings for Feb. 24, 1936, at 1101, Clark Papers, Box 96, Folder 12.

⁶⁹ *Id.* at 1102.

master as representing the court."⁷⁰ Robert Dodge gave as an example a special master appointed to conduct a receiver's sale.⁷¹ No one directly took issue with the Senator's position.

Dean Clark agreed that Senator Pepper had raised a good point but suggested that the Committee think of it "a little in connection with execution etc."⁷² Dean Clark noted that "Rule A-22 provides that the court may appoint a third person to perform an order."⁷³ He added, "In a way, this seems to me a little more like execution than a master. . . . The court has granted a judgment, now, and has directed some way of carrying out the judgment."⁷⁴

Senator Pepper replied that he was thinking of cases in which a special master might be appointed, such as a "hot contest" in a corporate election in which a stockholder had filed an action questioning the right of certain classes of stockholders to vote, or when the validity of a voting trust was at issue. He said there could be other instances when the court thought it important to appoint a master "to preserve order and see that the thing [such as an election] is done regularly."⁷⁵ Senator Pepper said he wanted to make sure that "in some appropriate place" there was language to show that these examples were included in the rules.⁷⁶ Dean Clark asked the Senator to consider Rule A-22 and "give him a note" stating whether the language should come in the latter rule or in the rule for masters.⁷⁷ Senator Pepper quickly agreed to do so,

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* It is assumed that Dean Clark meant to refer to rule A-30 at this point and not rule A-22. In the draft under consideration at this meeting, rule A-22 covered appeals, and rule A-30 covered the appointment of third persons to execute a judgment. Compare Rule A-22 with Rule A-30, Tentative Draft II (Jan. 15, 1936), Clark Papers, Box 98, vol. II. Rule A-30 ultimately became the present rule 70. See *infra* text accompanying notes 125-27.

⁷⁴ Proceedings for Feb. 24, 1936, at 1102, Clark Papers, Box 96, Folder 12.

⁷⁵ *Id.* at 1103.

⁷⁶ *Id.* Senator Pepper was speaking from his personal experience as a lawyer when he insisted on this point. See *infra* text accompanying notes 101-06.

⁷⁷ This author's search of the Clark Papers did not disclose such a written note or letter from Senator Pepper. Evidently Senator Pepper was satisfied with the subsequent change made in the language concerning the power of the master. See *infra* text accompanying notes 84-85. There is a chance that he conveyed that feeling to Dean Clark at the Style Committee meeting, which was held in New Haven seven weeks later, in April 1936, to consider a draft dated March 1936. See, e.g., Letter from Charles E. Clark to William D. Mitchell (Apr. 20, 1936), Clark Papers, Box 109, Folder 46 (reporting on meeting and noting that Senator Pepper presided). If one was made, a transcript of this meeting of the Style Committee was not preserved in the Clark

and the Committee went on to other business.

Although there are no direct references in the Clark Papers to the remedial uses of masters other than during the February 1936 meetings,⁷⁸ strong circumstantial evidence suggests that a change was made in response to his remarks in what is now rule 53(c). This evidence takes the form of changes made in the subsequent drafts of the rules on masters and published comments of Advisory Committee members, particularly Robert Dodge, which were made soon after the rules were promulgated. Admittedly, some evidence in the drafts, standing alone, might support an argument to the contrary. However, the evidence as a whole shows that the provisions pertaining to masters, now rule 53, were revised to meet Senator Pepper's concern that under the new rules, special masters should not be limited to duties as factfinders at the trial stage of litigation.

The first piece of supporting evidence concerns a change in the use of the word "acts" in the provision that eventually became rule 53(c). In the draft before the Committee in February 1936, when Senator Pepper spoke, the rule regarding the powers of a master began without any reference to doing "acts," and dealt entirely with trial-stage activities.⁷⁹

Papers.

⁷⁸ See also *infra* text accompanying notes 119-22.

⁷⁹ Rule A-14, Tentative Draft II (Dec. 26, 1935), Clark Papers, Box 98, vol. II:

The order of reference to the master may specify particular powers and functions of the master with respect to the action and limit his powers to particular issues, or to receiving and reporting evidence without ruling thereon or otherwise. Subject to any restrictions stated in the order of reference, the master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to examine all depositions duly taken and filed and to rule upon the admissibility of evidence, *and generally to do all other acts*, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

When matters of accounting are in issue before the master, he may direct that the parties accounting shall bring in their respective accounts in the form of debtor and creditor or in such other form of statement, including a statement by a certified public accountant, as he may think proper and convenient under the circumstances; and upon objection of a party to any of the items thus stated, or upon a showing by such party that the form of statement is insufficient, the master may require that the accounts

The rule's sole reference to "acts" related exclusively to standard appointments of masters to conduct fact-finding hearings.⁸⁰ This language was to change after Senator Pepper's remarks reflected his concern.

In March 1936, when Dean Clark and his staff prepared the next version of the rules, the first sentence of the rule concerning the powers of a master had been changed significantly. In the new draft, the rule on powers began: "The order of reference to the master may so specify or limit his powers as the court may deem wise and may direct him to report only upon particular issues *or to do or perform particular acts* or to receive and report evidence only."⁸¹ Unlike the previous draft, which through context and the use of the conjunctive implied that doing "acts" was limited to references to masters for fact-finding only, the revised draft used the disjunctive to distinguish doing "particular acts" from quasi-trial activity such as reporting on issues or receiving evidence.

Although no transcript portion or other record confirms that this change in the rule on powers was intended to satisfy Senator Pepper's concern, the "stimulus-response" quality of the timing of the change is unmistakable. Furthermore, no more than one month after this draft was prepared, it was reviewed in New Haven by the Style Committee, which included Senator Pepper and Dean Clark.⁸² It is reasonable to infer that if he had not been satisfied with the new draft, Senator Pepper would have sought further changes. However, the "do or perform particular acts" language stayed intact throughout the subsequent drafts of the rules and remains in rule 53(c).⁸³

The second piece of evidence concerns additions to the draft of what became rule 53(e) that the Committee made after Senator Pepper spoke. Because the changes did not survive in subsequent drafts, how-

or specific items thereof be proven by examination of the accounting parties viva voce, or upon interrogatories, or in such other manner as he shall direct.

Id. (emphasis added).

⁸⁰ See *id.* (at italics).

⁸¹ Rule A-15, Tentative Draft III (Mar. 1936), Clark Papers, Box 98, vol. III.

⁸² See *supra* note 77.

⁸³ See Rule 60, Preliminary Draft I (Apr. 1936), Clark Papers, Box 99, vol. IV; Rule 60, Preliminary Draft II, at 105 (Oct. 1, 1936), Clark Papers, Box 99, vol. V; Rule 60, Preliminary Draft III (Dec. 1936-Jan. 1937), Clark Papers, Box 100, vol. VII; Rule 60, Preliminary Draft of Feb. 1937, Clark Papers, Box 100, vol. VIII; Rule 53(c), Report of Advisory Committee on Rules for Civil Procedure: Proposed Rules of Civil Procedure for the District Courts of the United States at 129 (Apr. 1937); Final Report of the Advisory Committee on Rules for Civil Procedure at 35 (Nov. 1937) (showing no change in language since Apr. 1937 draft); FED. R. CIV. P. 53(c).

ever, an argument could be made on the basis of this fact that the Committee changed its mind and overruled Senator Pepper. When examined in context, however, the treatment of the revised rule in subsequent drafts is consistent with the interpretation presented in this Article.

After the important February 1936 meeting discussed above, rule A-16 of Tentative Draft III, entitled "Master's Report - Objections - Judgment Thereon," was revised to refer to the master's performance of particular acts.⁸⁴ The notes to the draft of the rule show that the Committee added this language partly in response to Senator Pepper's suggestion concerning the court's power to appoint remedial masters.⁸⁵ The Committee's ultimate intent on this point remains uncertain because the revision failed to survive subsequent drafts, and the abridged transcripts of the later meetings⁸⁶ do not explain the deletion.

During the next session of the Advisory Committee, Robert Dodge was asked to present a proposed amendment "to clear up the expression '*prima facie* evidence,'" that appeared in the draft of the rule on the master's report that had been altered, as described above, to meet Senator Pepper's concern.⁸⁷ Rather than submitting a simple amendment clarifying the meaning of this single expression, Dodge submitted a new draft of the entire rule. In a note to the Advisory Committee concerning Dodge's proposed version of the rule, Dean Clark (or one of his staff) wrote that Dodge's draft did not "set forth specific details as

⁸⁴ A completely new first sentence to the revised rule provided:

[T]he master shall prepare a report touching the matters submitted to him in the order of reference, *and when such order is for the doing of a particular act* or the stating of an account or the reporting of evidence, he shall set forth the details as to *performance of the act* or shall state the account or shall report the evidence as directed.

Rule A-16, Tentative Draft III (Mar. 1936), Clark Papers, Box 98, vol. III (emphasis added). There is no comparable language in the previous draft of this rule. Rule A-15, Tentative Draft II (Dec. 26, 1935), Clark Papers, Box 98, vol. II.

⁸⁵ See Notes to Rule A-16, at 3, Tentative Draft III (Mar. 1936), Clark Papers, Box 98, vol. III (citing the transcript pages in which Senator Pepper's point was discussed).

⁸⁶ The transcripts of meetings subsequent to February 1936, unfortunately are not verbatim. They only record in summary fashion the decisions reached on each rule. Neither the debate nor the reasons for any changes are given. See, e.g., Transcript of Proceedings for Aug. 28-Sept. 2, 1936, Clark Papers, Box 96, Folder 14.

⁸⁷ *Id.* at 38. The draft under consideration at that meeting had provided:

In a case tried by a jury the findings of the master on the issues shall be *prima facie* evidence of the matters therein contained and may be read to the jury, subject to the action of the court upon objections to such findings filed prior to or made at the time of such reading.

Rule 61, Preliminary Draft I at 106-07 (May 1, 1936), Clark Papers, Box 99, vol. V.

to the report, particularly as in lines 4-9 [referring to a master's report on the doing of a particular act or stating an account]."⁸⁸ Nonetheless, the Advisory Committee during the February 1937 meeting apparently adopted Dodge's version of the rule without explanation.⁸⁹ No reason for the change is given in the truncated version of the transcript made of this meeting.

Despite Dean Clark's comments on Dodge's draft, the Committee most likely decided that the additional detail in the Reporter's draft rule was unnecessary and that Dodge's briefer version was adequate. This interpretation is more consistent with the facts than using the substitution of drafts to infer that the Committee no longer intended to back Senator Pepper's position concerning the use of masters in the post-judgment phase of litigation. For example, although the Committee adopted Dodge's draft of the rule on the master's report, it did not amend the rule on the powers of the master that had been changed immediately after Senator Pepper spoke at the February 1936 meeting. If the Advisory Committee desired to overrule Senator Pepper's suggestion and its previous agreement with his statements, undoubtedly it would have changed the rule referring to the master's powers after it substituted a new rule on the master's report.

This view is strongly supported by the third piece of evidence: the public comments of Robert Dodge, the author of the new version of the rule pertaining to the master's report. Dodge undertook the task of explaining rule 53 at the series of three institutes sponsored by the American Bar Association in 1938 to introduce the new rules to the bar. At each institute, Dodge noted that because rule 53 was based on the former equity rules with only slight changes, it was "in the main intended to cover the more common kind of Master, one to whom a case is referred for a preliminary decision."⁹⁰ Dodge also reiterated, however,

⁸⁸ Rule 61, Further Note to the Committee, Preliminary Draft II (Oct. 1, 1936), Clark Papers, Box 99, vol. V. On this point, Dodge's draft merely provided: "The master shall prepare a report upon the matters submitted to him by order of reference, in which report he shall set forth his findings of fact and conclusions of law." *Id.* ("Rule 61. By Mr. Dodge.")

⁸⁹ The term "apparently" is used because Rule 61, Preliminary Draft III (Dec. 1936-Jan. 1937), Clark Papers, Box 100, vol. VII, has an undated, typed note that Dodge's draft was adopted with amendments. The rule itself is crossed out in pencil. The abridged transcript of the meeting does not reflect a vote being taken. *See* Transcript of Proceedings for Feb. 1-4, 1937, at 33, Clark Papers, Box 96, Folder 16. The draft prepared after the February 1937 meeting, however, only contains Dodge's version of the rule. Rule 81, Preliminary Draft of Feb. 1937, Clark Papers, Box 100, vol. VIII. This provision eventually became rule 53(e).

⁹⁰ ABA, *Washington Inst. and New York Symposium*, *supra* note 48, at 168.

that the rule was intended to allow the master to “report only upon particular issues *or to do or perform particular acts.*”⁹¹ He explained that a new first sentence to rule 53(c) had been “inserted so as to cover all kinds of Masters, including the Master who is appointed to effect a judicial sale or to do a specific act.”⁹² Obviously, if Dodge’s version of the rule pertaining to the reports of masters had been adopted because of a change in the Committee’s previously clear desire to preserve the power to appoint masters for tasks other than preliminary fact-finding, he of all people would never have made these comments at the institutes.⁹³

In sum, the record is clear that the Advisory Committee expressly considered the use of special masters in the somewhat unusual context of the remedial phase of a civil action. To ensure that the new rules authorized those types of references, the Committee revised the draft provisions on the powers of masters, now rule 53(c). The Committee apparently did not retreat from that position after Senator Pepper emphatically expressed it in the February 1936 meeting, and the relevant language was included in all subsequent drafts of the rule. Given that the Advisory Committee’s records and all the public statements and writings of its members confirmed that it was preserving equity’s special master practice, particularly under the 1912 Equity Rules, it is appropriate to examine the pre-1938 cases and treatises to determine the practice of the federal courts in equity.

Dodge’s remarks on rule 53 at New York were said to be a repetition in substance of his Washington remarks, so they were not reproduced. *Id.* at 290. *See also Federal Rules Institutes Enjoying Widespread Popularity*, 24 A.B.A. J. 887, 890 (1938) (noting that at N.Y. Symposium, Dodge discussed the appointment of masters under rule 53).

⁹¹ ABA, *Cleveland Inst.*, *supra* note 48, at 330 (emphasis added).

⁹² ABA, *Washington Inst. and New York Symposium*, *supra* note 48, at 168; *accord*, ABA, *Cleveland Inst.*, *supra* note 48, at 330 (“clause has reference to the kind of master who is to make a judicial sale of some kind or do some act of that sort”).

⁹³ The few other contemporary published references to the rules concerning masters are consistent with the view expressed by Senator Pepper and others on the Committee in the February 1936 meeting and by Dodge at the three institutes. For example, in testimony before the House Judiciary Committee, Major Edgar Tolman, Secretary of the Advisory Committee, noted that in rule 53, “[t]he equity rules in regard to masters [were] preserved.” *Rules of Civil Procedure for District Courts: Hearings on H.R. 8892 Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess. 122 (1938). Dean Armistead M. Dobie, in an article published soon after the rules were adopted, noted that the Committee had made “no startling changes in the existing practice” with respect to masters. Dobie, *supra* note 48, at 291. The official notes to the rule are also consistent with this view. *See* 12 C. WRIGHT & A. MILLER, *supra* note 54, at 492-93.

3. Pre-1938 Use of Remedial Special Masters

As all members of the Advisory Committee accepted when Senator Pepper raised the matter, federal equity practice prior to 1938 allowed the use of special masters for remedial purposes. For example, in 1902, in *Bartlett v. Gates*,⁹⁴ the circuit judge appointed a special master and instructed him to call a meeting of stockholders of a large corporation and to supervise the election of a new board of directors. The judge noted that he entertained no doubt of the court's power to make such an appointment. He relied on the remarks of Supreme Court Justice Brewer who, when sitting as circuit justice, once wrote, "The powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand."⁹⁵ *Bartlett* is but one example of appointment of a remedial special master before the promulgation of the Equity Rules of 1912.⁹⁶

One important early use of masters for remedial purposes was for the supervision or operation of judicial land sales. It is clear that masters had been supervising or running judicial land sales for decades before the Advisory Committee was formed.⁹⁷ For example, in *Mayhew*

⁹⁴ 118 F. 66 (C.C.D. Colo. 1902).

⁹⁵ *Id.* at 71 (quoting *Chicago, R.I. & P. Ry. v. Union Pac. Ry.*, 47 F. 15, 26 (C.C.D. Neb. 1891)). An interesting account of what happened in *Bartlett* after the court appointed a master appears in Note, 37 AM. L. REV. 124 (1903).

⁹⁶ See 2 R. FOSTER, FEDERAL PRACTICE: CIVIL AND CRIMINAL § 384, at 1871 (6th ed. 1920) (citing early cases). Dean Dobie, a member of the Advisory Committee, frequently cited Thomas Street's earlier work on federal equity practice concerning the role of masters in his 1928 treatise. *E.g.*, A. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE § 192, at 747 n.55 (1928) (praising Street's work on masters as "one of the sanest and most scholarly to be found"). Dobie quoted a section of Street's work entitled "Enforcement of Decree Through Master or Other Officer." *Id.* § 195, at 768-69 n.46 (quoting 2 T. STREET, FEDERAL EQUITY PRACTICE § 2208, at 1300 (1909)). Street stated that an equity court "can accomplish its ends by the appointment of a master . . . and by conferring on such officer the authority to do various acts necessary to effectuate the purpose in view." *Id.* Dobie noted that 1912 Equity Rule 8 "doubtless[ly] confirms, makes clearer, and extends the former practice" that Street discussed. A. DOBIE, *supra*, § 195, at 768. For further discussion of 1912 Equity Rule 8, see *infra* text accompanying notes 131-51. Earlier in his treatise, Street had noted that "the matters properly referable to a master are almost as numerous as the matters subject to the jurisdiction of the court." T. STREET, *supra*, § 1399, at 848.

⁹⁷ *Blossom v. Railroad Co.*, 70 U.S. (3 Wall.) 196, 205 (1865) (master or marshal may serve); *Williamson v. Berry*, 49 U.S. (8 How.) 495, 546-47 (1850); *Westmoreland Brick Co. v. United States Malleable Iron Co.*, 16 F.2d 371, 371 (6th Cir. 1926); *Elgutter v. Northwestern Mut. Life Ins. Co.*, 86 F. 500, 501 (8th Cir. 1898); *Seaman v. Northwestern Mut. Life Ins. Co.*, 86 F. 493, 496-97 (8th Cir. 1898). For discussion

v. West Virginia Oil & Land Co.,⁹⁸ Chief Justice Morrison R. Waite, sitting as circuit justice, approved a land sale conducted by a special master pursuant to a decree of the court. The Supreme Court later cited *Mayhew* when it approved another land sale by a court-appointed master.⁹⁹ The appointment of a master to do this task was so unexceptional that Justice Brewer, writing for the Court, called it "a mere ministerial matter."¹⁰⁰

For present purposes, the most significant case in which a remedial master was appointed is *DuPont v. DuPont*.¹⁰¹ In this 1917 case, the court appointed a special master to call and conduct an election, because the majority of directors were disqualified by a conflict of interest from summoning a qualified quorum or otherwise acting upon a matter before the company.¹⁰² The case's importance rests not so much on the holding but on the identity of one of the lawyers involved. George Wharton Pepper is listed as an attorney of record for appellee in the Third Circuit¹⁰³ and on the brief in opposition to the petition for review in the Supreme Court.¹⁰⁴ Thus, although he did not mention it at the meeting of the Advisory Committee,¹⁰⁵ Senator Pepper was speaking from his personal experience as an attorney when he sought to confirm that under the new rules, a court would still have the power to appoint special masters even after it had determined that the plaintiff was entitled to relief.¹⁰⁶

These cases, especially *Bartlett* and *DuPont*, prove that special masters had been appointed for remedial purposes both before and after the

of land sales by masters prior to 1912, see 2 C. BATES, *SUITS IN EQUITY* § 724, at 772 (1901); J. HENDERSON, *CHANCERY PRACTICE* § 567, at 855 (1904); O. SHIRAS, *EQUITY PRACTICE IN THE UNITED STATES CIRCUIT COURTS* 136-37 (2d ed. 1898). For discussion of land sales by masters under the 1912 Equity Rules, see 4 G. LONGSDORF, *CYCLOPEDIA OF FEDERAL PROCEDURE: CIVIL AND CRIMINAL* § 1132, at 276 (1929); W. SIMKINS, *FEDERAL PRACTICE* § 867, at 812 (A. Schweppe rev. ed. 1934).

⁹⁸ 24 F. 205, 215 (C.C.D. W. Va. 1885).

⁹⁹ *Pewabic Mining Co. v. Mason*, 145 U.S. 349, 364-65 (1892).

¹⁰⁰ *Id.* at 363.

¹⁰¹ 242 F. 98 (D. Del. 1917), *aff'd*, 256 F. 129 (3d Cir.), *cert. denied*, 250 U.S. 642 (1919).

¹⁰² 242 F. at 138.

¹⁰³ 256 F. at 130.

¹⁰⁴ 250 U.S. 642.

¹⁰⁵ Transcript of Proceedings for Feb. 24, 1936, at 1101-02, Clark Papers, Box 96, Folder 12.

¹⁰⁶ Not surprisingly, Senator Pepper's client was seeking to uphold the appointment of the special master at the Supreme Court and the Third Circuit. See *DuPont*, 250 U.S. at 642; *DuPont*, 256 F. at 130.

promulgation of the 1912 Equity Rules. Furthermore, the cases and the treatises demonstrate that some members of the Advisory Committee knew of the practice either from their professional experience or their own writings. Given this personal knowledge, the fact that they acted to preserve the practice in the new federal rules for future use is especially noteworthy and provides further confirmation of the Committee's intent.

B. Rule 70

Although rule 53 is the most commonly discussed authority for appointing remedial special masters in institutional reform cases,¹⁰⁷ rule 70 has also received some scholarly attention as a source of authority,¹⁰⁸ even though the rule refers only to performance by "some other person" and does not refer expressly to masters.¹⁰⁹ Surprisingly, no court in an institutional reform case has yet considered rule 70 as a possible source of authority for the appointment of a special master, even when citing one or more of the scholarly works endorsing the use of the rule.¹¹⁰ This is particularly strange because the history of the development of both rule 70 and its antecedents in English and American equity practice show that with respect to the enforcement of a judgment, the rule is a valid source of authority for the appointment of remedial special masters.

1. The Modern Commentators

In general, the commentators discussing rule 70 in this context have not gone beyond simply expressing their opinion on the validity of the rule as a source of authority for the appointment of a remedial special master. For example, Samuel Brakel states that rule 70 "is strictly a one-dimensional enforcement function . . . that . . . is still a long way, both conceptually and practically, from the open-ended managerial/monitoring/implementation functions performed by masters in the latter day institutional case."¹¹¹ On the other hand, Professor Vincent Na-

¹⁰⁷ See, e.g., Comment, *Force and Will*, *supra* note 6, at 109.

¹⁰⁸ E.g., 5A J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 53.05[2], at 53-61 n.46 (2d ed. 1982); Brakel, *supra* note 6, at 552; Kaufman, *supra* note 19, at 463 n.54; Nathan, *supra* note 4, at 428-29, 433-34; Smithson, *supra* note 21, at 15-16; Comment, *Equitable Remedies*, *supra* note 4, at 1190-91.

¹⁰⁹ The provision in rule 70 discussed by the commentators is quoted *infra* note 124.

¹¹⁰ E.g., *Ruiz v. Estelle*, 679 F.2d 1115, 1159-63 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1438 (1983).

¹¹¹ Brakel, *supra* note 6, at 552; see also Kaufman, *supra* note 19, at 463 & n.54

than, also using *a priori* reasoning, states that rule 70 "would appear to sanction the appointment of a master to effectuate a mandatory provision of an injunction that the defendant has failed to obey."¹¹² As an illustration, he uses the hypothetical of a jail administrator who fails to submit a court-ordered plan for contact visitation with prisoners. Under those circumstances, Professor Nathan contends that rule 70 would provide the basis for appointment of a master to develop the plan in lieu of the recalcitrant defendant.¹¹³

Since Professor Nathan's article appeared, a few opinions have been published in institutional reform cases in which rule 70 was at issue, but in none did the court directly address its authority under the rule to appoint a remedial special master.¹¹⁴ Even in an opinion citing Professor Nathan's article in the context of the court's examination of the sources of authority for the appointment of a remedial special master, the Fifth Circuit did not discuss the use of rule 70 as an alternate source.¹¹⁵

2. The Advisory Committee

The lack of judicial precedent for appointments under rule 70 suggests a return to the Advisory Committee's deliberations. It is informative to determine its intent in including in rule 70 the language that some writers have suggested as an alternate source of authority for the appointment of remedial special masters. The evidence shows that the Committee intended to include masters within the meaning of rule 70

(ministerial acts).

¹¹² Nathan, *supra* note 4, at 433; see also Comment, *Equitable Remedies*, *supra* note 4, at 1191 (concluding that rule 70 was "broadly phrased to cover use of court-appointed officers to execute judgments, even those requiring a large-scale institutional change").

¹¹³ Nathan, *supra* note 4, at 433. The commentators should not be faulted for lack of research because there are no reported cases deciding this issue. Thus, in covering related ground in 1979, Professor Nathan reported that he was unable to find any cases in which a master had been appointed pursuant to rule 70. *Id.* He could only refer to *United States v. Manning*, 215 F. Supp. 272 (W.D. La. 1963), a voting rights case in which the three-judge court referred to the predecessor in equity of rule 70 in the course of a review of the potential sources of authority for the appointment of "judicial officers." Nathan, *supra* note 4, at 433 (citing *Manning*, 215 F. Supp. at 293).

¹¹⁴ *Spain v. Mountanos*, 690 F.2d 742 (9th Cir. 1982); *Gary W. v. Louisiana*, 622 F.2d 804 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); *Gates v. Collier*, 616 F.2d 1268 (5th Cir.), *cert. denied*, 448 U.S. 911 (1980); *La Raza Unida v. Volpe*, 545 F. Supp. 36 (N.D. Cal. 1982).

¹¹⁵ See *Ruiz v. Estelle*, 679 F.2d 1115, 1160 n.234, 1161 n.240 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1438 (1983).

and to preserve the judicial practice of appointing persons (including masters) to perform tasks beyond mere formalities such as land conveyancing.

The relevant recorded discussions of the Advisory Committee took place during its February 1936 meeting. As discussed previously,¹¹⁶ when Senator Pepper asked the Committee about the less common uses of a master, such as to conduct a corporate election, Dean Clark suggested that this use might be "a little more like execution than a master."¹¹⁷ He asked the Senator to examine the rule dealing with executions.¹¹⁸

During the deliberations the next day, a second colloquy concerning remedial masters took place. The Committee discussed various methods for enforcing a court order requiring conveyancing of land or an order requiring the delivery of documents. Judge George Donworth¹¹⁹ wanted the rules clearly to refer to the appointment of a commissioner or master to make such conveyances and deliveries, which he called "the usual remedy,"¹²⁰ in addition to the procedure under discussion, which was the writ of sequestration.¹²¹ The responses indicate that the members of the Committee agreed that such appointments were the standard procedure. Warren Olney pointed out that that type of reference to a master was covered by another proposed rule that the Committee would be discussing; the rule Olney mentioned ultimately became rule 70.¹²²

¹¹⁶ See *supra* text accompanying notes 66-77.

¹¹⁷ Proceedings for Feb. 24, 1936, at 1102, Clark Papers, Box 96, Folder 12.

¹¹⁸ *Id.* at 1103.

¹¹⁹ Judge Donworth was on the United States District Court for the Western District of Washington from 1909-12. 2 WHO WAS WHO IN AMERICA 159 (5th ed. 1966).

¹²⁰ Proceedings for Feb. 25, 1936, at 1394, Clark Papers, Box 96, Folder 13; see also *id.* at 1397-98 (remarks of Judge Donworth).

¹²¹ A writ of sequestration is a process or commission, directed either to the proper officer of the court, or to certain persons nominated by the plaintiff and accepted by the court, commanding him or them to enter upon and take possession of the property of the defendant, receive the rents and profits thereof, and pay or dispose of the same as the court shall direct, until the party in contempt shall comply with the decree. Its object is thus to enforce performance of the decree, but the proceeds realized may be applied directly in payment of the plaintiff's demand.

W. CLEPHANE, HANDBOOK OF THE LAW OF EQUITY PLEADING AND PRACTICE § 314, at 398-99 (1926).

¹²² Proceedings for Feb. 25, 1936, at 1397-98, Clark Papers, Box 96, Folder 13 (remarks of Olney). The draft rule to which Olney referred provided:

If a mandatory order, injunction, or judgment for the specific performance of any act or contract be not complied with, the court, besides, or

The Clark Papers contain no record of other oral comments that are relevant to the use of a special master to perform specific acts.¹²³ The development of the "specific act" language in rule 70¹²⁴ from Equity

instead of, proceeding against the disobedient party for a contempt or by sequestration, may by order direct that the act be done, so far as practicable, by some other person appointed by the court, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him. When any order or judgment is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the order of judgment, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Rule A-30, Tentative Draft II (Jan. 15, 1936), Clark Papers, Box 98, vol. II. This draft rule, which was based on 1912 Equity Rules 7-9, was the genesis of the present rule 70. The language that, for present purposes, is most important was derived from 1912 Equity Rule 8. *Compare* FED. R. CIV. P. 70, *infra* note 124 with 1912 Equity Rule 8, *infra* note 125.

¹²³ To the extent the Committee was concerned during its meetings with the predecessor drafts of rule 70, it concentrated on the development of the language now contained in rule 70 that, "the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others." FED. R. CIV. P. 70. *See, e.g.*, Proceedings of Feb. 25, 1936, at 1395-98, Clark Papers, Box 96, Folder 13. The reason for this concentration of effort was that some states did not have a statute authorizing vesting title by judgment and there was some concern that this would constitute an ultra vires substantive change through what were to be procedural rules only. *Compare* Rule 84, Abstracts of Suggestions on the Tentative and Preliminary Drafts of the Rules of Civil Procedure (Oct. 1935-Jan. 1937), Clark Papers, Box 103, vol. XVI (questioning propriety of new provision) with Reporter's Comment to Rule 84 at 2, Preliminary Draft III (Dec. 1936-Jan. 1937), Clark Papers, Box 100, vol. VII and J. Friedman, Some Problems Arising From the Provisions of Rule 84 for the Conveyance of Title to Property Without Participation of the Legal Owner (Jan. 22, 1937), Clark Papers, Box 106, vol. XXII (both concluding that despite some doubt expressed, provision was valid and should be included).

For published references to the problem by Advisory Committee members, see Dobie, *supra* note 48, at 305 n.202; ABA, *Cleveland Inst.*, *supra* note 48, at 338-39 (remarks by Dodge); ABA, *Washington Inst. and New York Symposium*, *supra* note 48, at 195-96 (remarks by Judge Donworth). For contemporaneous discussion of the problem under rule 70 by a nonmember, see Evans, *Problems in the Enforcement of Federal Judgments*, 4 MO. L. REV. 19 (1939). For discussion of the problem under the 1912 Equity Rules, see C. HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY § 2, at 25-38 (1915); Cook, *The Powers of Courts of Equity (Part II)*, 15 COLUM. L. REV. 106, 126-27 (1915).

¹²⁴ If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party.
FED. R. CIV. P. 70 (emphasis added).

Rule 8¹²⁵ through the various drafts of the rules was direct and untor-tured.¹²⁶ For present purposes, the only change of any interest occurred between February and April of 1937. In the Preliminary Draft of Feb-ruary 1937 the rule provided: "if judgment, interlocutory or final, di-rects the performance of any specific act, as for example, the execution of a conveyance of land where the delivery of deeds or other docu-ments."¹²⁷ By April, however, the phrases had been re-arranged so that the rule provided (as rule 70 now does): "if a judgment directs a party to execute a conveyance of land, or to deliver deeds or other documents, or to perform any other specific act."¹²⁸ In view of the controversy over the methods of involuntary land title conveyance provided by the rule,¹²⁹ a subject of concern during the Great Depression,¹³⁰ the Com-

¹²⁵ If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

Rule 8, 1912 Equity Rules, *supra* note 65, at 651.

¹²⁶ See Rule 113, Tentative Draft I (Oct. 25, 1935), Clark Papers, Box 97, vol. I; Rule A-30, Tentative Draft II (Jan. 15, 1936), Clark Papers, Box 98, vol. II; Rule A-35, Tentative Draft III (Mar. 1936), Clark Papers, Box 98, vol. III; Rule 84, Preliminary Draft I (Apr. 1936), Clark Papers, Box 99, vol. IV; Rule 84, Preliminary Draft II, at 152-53 (Oct. 1, 1936), Clark Papers, Box 99, vol. V; Rule 84, Preliminary Draft III (Dec. 1936-Jan. 1937), Clark Papers, Box 100, vol. VII; Rule 84, Preliminary Draft of February 1937, Clark Papers, Box 100, vol. VIII; Rule 76, Report of the Advisory Committee on Rules for Civil Procedure: Proposed Rules of Civil Procedure for the District Courts of the United States, at 196-97 (Apr. 1937); Rule 76, Rules as Sent with Final Report (Nov. 1937), Clark Papers, Box 101, vol. X; FED. R. CIV. P. 70.

¹²⁷ Rule 84, Preliminary Draft of February 1937, Clark Papers, Box 100, vol. VIII.

¹²⁸ Rule 76, Report of the Advisory Committee on Rules for Civil Procedure: Pro-posed Rules of Civil Procedure for the District Courts of the United States, at 196 (Apr. 1937). The abridged transcript of the meeting that considered the February 1937 draft does not record that the Committee ordered this change. See Proceedings for Feb. 1-4, 1937, at 43, Clark Papers, Box 96, Folder 16. It could not be determined whether, perhaps, Dean Clark's staff or the Style Committee made this minor change.

¹²⁹ See *supra* note 123.

¹³⁰ For example, in 1932, just three years before the Committee was appointed, over 250,000 families nationwide lost their homes through mortgage foreclosures. In 1933, foreclosures averaged one thousand per day. 2 A. SCHLESINGER, THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 297 (1958).

mittee may have thought that the more specific execution and delivery language deserved greater prominence than the catch-all language, "any other specific act."

3. The Use of Masters to Perform Specific Acts Before the Adoption of the Federal Rules

Given the intent of the Advisory Committee to retain the existing practices under Equity Rule 8 with respect to specific acts and that rule's connection to masters, it is appropriate to examine the equity practice of the time to determine what the Advisory Committee thought it was preserving in the new federal rules. Treatises written both before¹³¹ and after¹³² the introduction of the Equity Rules of 1912 assert that the courts could appoint masters to do specific acts, particularly under the terms of Equity Rule 8. Although the cases and the commentators made it clear that the most common task that masters performed in lieu of disobedient defendants was to convey title to real property,¹³³ there is no indication in any of these sources that the court's power under the rule was limited to appointing masters to perform only that task.

For example, Dean Dobie of the Advisory Committee referred in his treatise to cases¹³⁴ in which a master had been appointed to execute an assignment of a patent right,¹³⁵ or in which a court had ordered other officers to remove buildings interfering with a right of way,¹³⁶ or to demolish a structure built in violation of a court order.¹³⁷ Because the cases Dobie cited preceded the introduction of Equity Rule 8 in 1912, writing in 1928 he felt justified in stating that the rule, which for the first time included the specific act language, "doubtless confirms, makes clearer, and extends the former practice."¹³⁸

¹³¹ 2 T. STREET, *supra* note 96, § 2208, at 1300.

¹³² A. DOBIE, *supra* note 96, § 195, at 767-68; 2 R. FOSTER, *supra* note 96, § 398, at 1972-73.

¹³³ *E.g.*, Deck v. Whitman, 96 F. 873, 891 (C.C.E.D. Tenn. 1899); O. SHIRAS, *supra* note 97, at 138.

¹³⁴ See A. DOBIE, *supra* note 96, § 195, at 768. A similar list of cases appears in R. FOSTER, *supra* note 96, § 441, at 2163.

¹³⁵ Underfeed Stoker Co. v. American Ship Windlass Co., 165 F. 65 (C.C.D.R.I. 1908).

¹³⁶ Gormley v. Clark, 134 U.S. 338, 342 (1890).

¹³⁷ Indianapolis & N.W. Traction Co. v. Consolidated Traction Co., 125 F. 247, 250 (C.C.D. Ind. 1903).

¹³⁸ A. DOBIE, *supra* note 96, at 70 (praising new provision of 1912 Equity Rule 8). One of the more interesting opinions showing the complex nature of the tasks that a

The new language in Equity Rule 8, expressly permitting the court to appoint a third person to do specific acts not performed by a party, was adapted from an English statute.¹³⁹ The differences between the English statute and the American rule, however, suggest that Equity Rule 8 was not intended to confine courts to the appointment of masters to perform only limited tasks such as signing documents to convey title to land involuntarily. Moreover, unlike its English counterpart, the American rule did not require a finding that a party had failed intentionally or negligently to do what had been ordered before the court could appoint a substitute to perform the specified act.

The English act used as a model for the American rule provided that "where any person neglects or refuses to comply with an order . . .

court might delegate to a master for remedial purposes was reported in an early 18th century English case, *Vane v. Lord Barnard*, 2 Vern. 738, 23 Eng. Rep. 1082 (Ch. 1716). In *Vane*, the defendant divided ownership of the family castle into a life estate for himself, without waste, and gave the remainder to his eldest son as a wedding present. Later, when Lord Barnard became displeased with his son, he directed a crew of two hundred workmen to strip the castle of all lead, iron, glass doors, and boards. The damage was estimated to be £3000. In the son's action for waste, the judge ordered a court officer to restore the castle at the expense of the father and directed a master to see that the extensive repair work was done. This case was discussed with approval by Professor Charles Huston, who was writing in support of greater use of specific performance remedies by courts of equity. C. HUSTON, *supra* note 123, at 68. Huston saw 1912 Equity Rule 8 as a significant positive step in that direction. *Id.* at 70. Huston's book was cited extensively and with approval by one of Dean Clark's assistants, Professor Joseph M. Friedman, in a research memorandum that he wrote for the Committee on the conveyancing of title to real property by action of the court or by a person appointed by the court. *See* J. Friedman, *supra* note 123, *passim*.

¹³⁹ There is some confusion as to which English statute was the inspiration for the addition of a new last sentence to 1912 Equity Rule 8. Dobie, by relying on Foster, traced the new language to The Contempt of Court Act, 1830, 11 Geo. 4 & 1 Will. 4, ch. 36, § 15, ¶ 15. A. DOBIE, *supra* note 96, § 195, at 768 n.41 (citing R. FOSTER, *supra* note 96, § 441, at 2162). James L. Hopkins, however, stated that the provision came from the Supreme Court of Judicature Act, 1884, 47 & 48 Vict. 165, ch. 61, § 14. J. HOPKINS, *THE NEW FEDERAL EQUITY RULES* 26, 151 (B. Babbitt 8th rev. ed. 1933). Hopkins made this statement in every previous edition of his book. *See, e.g., id.* (1913). Unfortunately, none of these commentators cite a source supporting their assertions. Because *Halsbury's Statutes of England* states that the 1884 Act and a later nonsubstantive re-enactment, the Supreme Court of Judicature (Consolidation) Act, 1925, § 47, made the 1830 Act "in effect, obsolete," and because the terms of 1912 Equity Rule 8 are much closer to it, this author has followed Hopkins and has used the 1884 Act for almost all the comparative analysis. 4 *HALSBURY'S STATUTES OF ENGLAND* 647-48 (R. Burrows 2d ed. 1948). This choice is indirectly supported by the fact that the Advisory Committee's official note to rule 70 contains a citation to the 1925 Act, the successor to the 1884 Act. 12 C. WRIGHT & A. MILLER, *supra* note 54, at 518.

directing him to execute any conveyance, contract or other document, or to indorse any negotiable instrument, the court may . . . order that such . . . document shall be executed . . . by such person as the Court may nominate for that purpose."¹⁴⁰ A standard British reference, *Halsbury's Laws of England*, notes that under the 1884 Act, a master was "usually nominated as the person to execute" the document.¹⁴¹

It is evident, however, that the English act allowed the court to delegate considerably more circumscribed power than did Equity Rule 8. The English act, which only regulates the execution of documents by an appointed surrogate, contains no language comparable to the broader provision of Equity Rule 8 that third party performance could have been substituted for that of a disobedient party upon non-compliance with any mandatory order, injunction, or decree for the specific performance of any act or contract.¹⁴² Consequently, in contrast to the American sources commenting on Equity Rule 8, there is no hint in the standard commentary to the English act that under that statute the court had any power broader than the power to appoint a third party merely to execute documents.¹⁴³

A second important difference exists between the English act and the equity rule. Under the English act, the court was not empowered to appoint a third person to execute a document until the party had neglected or refused to comply.¹⁴⁴ The reference to a refusal in their statute has caused the British courts to be very reluctant to appoint a third person to act as a substitute without first inquiring into why the party did not execute the document as required.¹⁴⁵ Equity Rule 8, with its provision that the court could act if the order, injunction, or decree "be not complied with,"¹⁴⁶ apparently permitted the court to appoint a third

¹⁴⁰ Supreme Court of Judicature Act, 1884, 47 & 48 Vict. 165, ch. 61, § 14.

¹⁴¹ 26 HALSBURY'S LAWS OF ENGLAND ¶ 570, at 291 (Lord Hailshaw 4th ed. 1979) ("Judgments and Orders") (citing *In re Edwards* [1885] 33 W.R. 578) [hereafter 26 HALSBURY'S LAWS].

¹⁴² See Rule 8, 1912 Equity Rules, *supra* note 65, at 651.

¹⁴³ Compare 26 HALSBURY'S LAWS, *supra* note 141, ¶ 570, at 291 with A. DOBIE, *supra* note 96, § 195, at 768; R. FOSTER, *supra* note 96, § 398, at 1260-62; and C. HUSTON, *supra* note 123, at 69-70.

¹⁴⁴ Supreme Court of Judicature Act, 1884, 47 & 48 Vict. 165, ch. 61, § 14.

¹⁴⁵ *E.g.*, *Savage v. Norton*, [1908] 1 Ch. 290, 297; *Beale v. Bragg*, 1902 1 Ir. R. 99. This reluctance also may stem in part from the requirement in the 1830 Act that the defendant had to be in jail because he had refused to comply with the court's order before a master could be appointed to execute a document *jus tertiae*. Contempt of Court Act, 1830, 11 Geo. 4 & 1 Will. 4, ch. 36, § 15, ¶ 15.

¹⁴⁶ Rule 8, 1912 Equity Rules, *supra* note 65, at 651. A prior sentence of the same rule required that the decree prescribe the time within which the act shall be done. *Id.*

person to act once the defendant's deadline had passed without similarly pausing to inquire into the reasons for failure to comply with the court's order.¹⁴⁷

In view of the differences between the Equity Rule and the English act on which it was based, it appears that the drafters of the American equity rules made certain conscious choices in 1912 when they amended the rule that became Equity Rule 8. As discussed, the language in the American rule seems to be intentionally broader than the language in the English act. In particular, the American rule did not incorporate the neglect or refuse language from the English act. Upon the failure of a party to comply with a remedial order under the American rule, a federal court acting in equity could appoint a third party nearly automatically, while an English court would have to inquire into the circumstances of the lack of compliance. These differences justify Dean Dobie's comment in 1928 that "the new rule doubtless confirms, makes clearer, and extends the former practice."¹⁴⁸

The differences between the English act and Equity Rule 8, taken together with the clear intent of the Advisory Committee in 1936 to preserve the then-existing power of the federal courts in equity under that rule, suggest that rule 70 of the Federal Rules of Civil Procedure should be read fairly expansively with respect to the types of acts that are included within the phrase "any other specific act."¹⁴⁹ In addition, rule 70 continues to use the "fails to comply" language from Equity Rule 8 rather than the English act's "neglects or refuses to comply" language and underscores that difference by separately providing that "the court may also in proper cases adjudge the party in contempt."¹⁵⁰ These differences compel the conclusion that a court has the discretion to appoint a third person under rule 70 to perform specific acts without first finding either that the noncomplying party has failed to act with contemptuous intent or has been negligent.¹⁵¹

¹⁴⁷ See *Gormley v. Clark*, 134 U.S. 338 (1890) (court order provided that if party did not remove buildings by specified date, marshal was to remove buildings; no provision for hearing inquiring into the reason for the failure to remove before marshal was to act); cf. Advisory Committee Note to Amendment to Rule 37 (1970) (explaining substitution of "failure" for "refusal" in rule 37 to clarify that wilfulness was not required before sanctions could be imposed).

¹⁴⁸ A. DOBIE, *supra* note 96, § 195, at 768.

¹⁴⁹ FED. R. CIV. P. 70.

¹⁵⁰ *Id.*

¹⁵¹ Cf. *Indianapolis & Nw. Traction Co. v. Consolidated Traction Co.*, 125 F. 247, 249-50 (C.C.D. Ind. 1903) (marshal directed to take up railroad tracks put down in violation of court order, even though individual defendants acted in good faith).

Although there are no cases either supporting or refuting this view, the analysis of the history presented here suggests that those commentators proposing that rule 70 authorizes appointment of special masters upon defendants' failures to comply with court orders in institutional reform suits are more correct than those contending that the rule is strictly limited to appointments to perform trivial tasks such as signing documents.¹⁵² Undeniably, the Advisory Committee did not specifically contemplate that rule 70 would be used as a vehicle for the appointment of a master to perform tasks of the complexity of reforming a prison system or supervising the closure of a large state hospital for the mentally ill. The Committee, however, did intend to preserve in rule 70 the open-ended nature of the tasks that could be referred under Equity Rule 8. There is no evidence in the history of the American practice prior to the meetings of the Advisory Committee or in its deliberations to suggest that the scope of rule 70 or its predecessor was intended to be as limited as the provisions of the English statute or as some commentators have suggested.

C. *Inherent Power*

In addition to the sources of authority found in the federal rules, courts have relied upon their inherent power to appoint masters.¹⁵³ As a result, several commentators have also made at least passing references to inherent power as an alternate source of authority.¹⁵⁴ This section will briefly review the use of inherent power as a source of authority to appoint special masters and consider whether inherent power may be used as a source of authority when federal rules already govern the area. It will also discuss the limited evidence concerning the Advisory Committee's intent when it cited in the official notes to rule 53 the leading Supreme Court opinion that permits courts to rely upon inherent power to appoint helpers such as auditors and masters.

1. *Ex Parte Peterson* and the Limits to Inherent Power

The primary precedent that courts have relied upon to support the view that they have inherent power to appoint special masters is the

¹⁵² See *supra* text accompanying notes 111-13. For discussion of the limitations imposed by rule 70, see *infra* text accompanying notes 199-214.

¹⁵³ See *supra* text accompanying notes 26-32.

¹⁵⁴ Brazil, *Authority*, *supra* note 4, at 364-84; Dobray, *supra* note 6, at 588; Kaufman, *supra* note 19, at 462-63; Kirp & Babcock, *supra* note 6, at 386-97; Comment, *Force and Will*, *supra* note 6, at 111; Comment, *Equitable Remedies*, *supra* note 4, at 1176-80; see also U.S. DEP'T OF JUSTICE, *supra* note 5, at 17-19.

Supreme Court's decision in *Ex parte Peterson*.¹⁵⁵ In *Peterson*, an action at law, District Judge Augustus Hand had appointed an auditor to separate disputed from undisputed items in an account between the litigants.¹⁵⁶ After concluding that the reference to an auditor did not offend the seventh amendment's guarantee of the right to trial by jury, the Supreme Court turned to the question of whether the trial judge had inherent power to appoint the auditor.¹⁵⁷ In his opinion for the Court, Justice Brandeis answered this question in the affirmative, stating:

Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our Government, it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners.¹⁵⁸

With this broad statement, the Court had no trouble affirming the lower court's appointment of an auditor.

One problem with reliance on inherent power is that this source of authority does not circumscribe the trial court's discretion.¹⁵⁹ Resort to inherent power leaves the trial court (and the appellate courts) without procedural guidelines to assess the propriety of an appointment of a special master for any purpose.¹⁶⁰ The contemplation of unfettered federal judicial power has disturbed even commentators who assert that inherent power is an independent source of authority for the appointment of remedial special masters. Consequently, they have sought to limit that power in ways that resemble the restrictions imposed by rule 53.

For example, Professor Nathan, while vigorously contending that rule 53 was separate from inherent power, nonetheless concluded that special masters appointed under the federal court's inherent power should be subject to the limitation that references to special masters

¹⁵⁵ 253 U.S. 300 (1920).

¹⁵⁶ *Id.* at 306-07.

¹⁵⁷ *Id.* at 309-312.

¹⁵⁸ *Id.* at 312-13 (citation omitted).

¹⁵⁹ *E.g.*, Kirp & Babcock, *supra* note 6, at 389.

¹⁶⁰ *See* Jennings, *supra* note 21, at 219. Some writers have created schemes that would impose structure and limits on the courts' otherwise almost unbounded actions in the general context of the remedial phase of the institutional reform cases. Fletcher, *supra* note 1, *passim*; Goldstein, *supra* note 20, at 57-80; *cf.* Hinkle, *Appellate Supervision of Remedies in Public Law Litigation*, 4 FLA. ST. U.L. REV. 411 (1976).

cannot be made as a matter of course.¹⁶¹ He contended that the propriety of such appointments should be tested on appeal by an abuse of discretion standard. According to Nathan, appointments should not be reversed as an abuse of discretion whenever the remedial phase of the litigation is sufficiently complex to suggest that the court would be unable to rely on the parties to comply with its orders in a reasonable period of time.¹⁶² It is somewhat difficult to see how the limits that Professor Nathan would impose differ substantially from those imposed by rule 53, which he simultaneously asserts do not apply to the exercise of inherent authority.

Judge Kaufman took a similarly paradoxical view of the relationship between inherent power and rule 53. Relying on *Peterson*, Judge Kaufman asserted that “[o]ver and above the authority contained in rule 53 . . . , there has always existed in the federal courts an inherent authority to appoint masters as a natural concomitant of their judicial power.”¹⁶³ Although contending that the power to appoint remedial special masters “must be found outside the pale of the rule,” and that “the operation of the rule in this area is questionable,”¹⁶⁴ Judge Kaufman still asserted that the “‘exception not the rule’ policy applie[d] to references generally” and limited the court’s power even if the reference stemmed from inherent authority.¹⁶⁵ Unfortunately, Judge Kaufman did not explain why the rule 53 limitations should apply to a reference made pursuant to an independent source of authority.

In assessing Judge Kaufman’s view, Professor Brazil has noted the seeming inconsistency between the assertion that inherent authority is separate and independent from rule 53 with the simultaneous contention that the rule 53 limitations should apply.¹⁶⁶ Professor Brazil contended that Judge Kaufman’s position actually is consistent, because the risk of abuse of the power to appoint special masters, whatever the source of that authority, is equally great whether the court relies upon rule 53 or the inherent power formula.¹⁶⁷

¹⁶¹ Nathan, *supra* note 4, at 432 n.81 (citing Special Project, *supra* note 3, at 808).

¹⁶² *Id.* at 432-33.

¹⁶³ Kaufman, *supra* note 19, at 462.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Brazil, *Authority*, *supra* note 4, at 380.

¹⁶⁷ *Id.*; accord Nathan, *supra* note 4, at 432-33.

2. Inherent Power After the Promulgation of the Federal Rules

Even if one assumes that in 1920, when *Peterson* was decided, the district courts had inherent power to appoint remedial special masters, the question arises whether that power survived as an independent source of authority after the promulgation of the federal rules in 1938. Professor Nathan, relying on *Schwimmer v. United States*,¹⁶⁸ and *First Iowa Hydro Electric Cooperative v. Iowa-Illinois Gas & Electric Co.*,¹⁶⁹ has contended that it did survive.¹⁷⁰ As Professor Brazil has pointed out, however, *Schwimmer* and *First Iowa* supported the delegation of pretrial discovery tasks to special masters,¹⁷¹ a task that, in his view, was not encompassed by the terms or the history of the drafting of rule 53.¹⁷² Thus, as in *Peterson* before them, the *Schwimmer* and *First Iowa* trial courts had to rely on inherent power to appoint discovery special masters, or they could not appoint them at all. In contrast, if one accepts the conclusion that the Advisory Committee intended rules 53 and 70 to authorize and regulate the appointment of remedial special masters, one must consider whether inherent power also remains a source of authority for such appointments.

In *Peterson*, Justice Brandeis did not take the position that inherent power was superior to legislation. He contrasted the situation presented in *Peterson*, in which legislation neither authorized nor forbade the reference to a master, with a prior case in which Congress had directly or by implication forbidden trial courts to make appointments of agents such as auditors.¹⁷³ He did not, however, discuss the potential effect on the judiciary's inherent power of a federal statute or a Supreme Court rule explicitly conferring the power to make the appointment under certain conditions.

Professor Brazil has stated that references under inherent power to appoint discovery special masters are not justified when the established machinery is adequate to prepare the case for trial.¹⁷⁴ He supported this view in part with a quotation from Carl Wheaton concerning the

¹⁶⁸ 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956). Judge Kaufman also relied upon *Schwimmer* to demonstrate the continued existence of inherent power. Kaufman, *supra* note 19, at 462 n.51.

¹⁶⁹ 245 F.2d 613 (8th Cir. 1957).

¹⁷⁰ Nathan, *supra* note 4, at 425.

¹⁷¹ Brazil, *Authority*, *supra* note 4, at 374, 376.

¹⁷² *See id.* at 336, 364.

¹⁷³ *Ex parte Peterson*, 253 U.S. 300, 312 (1920) (citing *Ex parte Fisk*, 113 U.S. 713 (1885)).

¹⁷⁴ Brazil, *Authority*, *supra* note 4, at 379.

scope of the power of a court to make its own rules. Wheaton acknowledged that there was an inherent power to make special rules if there were no statutes regulating procedure or the rules were not inconsistent with other legislation. He stated, however, that “rules of court are subservient to a statutory mandate on matters covered by such rules.”¹⁷⁵ In sum, if it is reasonable to accept that legislation to the contrary is superior to a court’s inherent authority, as did Justice Brandeis in a majority opinion for the Supreme Court,¹⁷⁶ then sanctioning legislation should also be superior and should govern a court’s power in that area.¹⁷⁷ When a rule of a higher court with the power to supervise the lower court, rather than legislation, is involved, there should be even less controversy regarding the power to regulate. The issue of a coordinate branch of government attempting to regulate a core function of another branch is simply not present. A fortiori, a district court should not use inherent power inconsistently with the policies of an applicable rule promulgated by the Supreme Court under authority delegated by Congress.

3. The Advisory Committee

Consideration of the Advisory Committee’s thinking on the relationship between inherent power and rules 53 and 70 would be instructive, but the record on this question is much less clear than on others discussed in this Article. The Committee simply did not focus on the problem. Tantalizing hints provided by citations to *Peterson* have not led to helpful interpretive evidence; the citations turn out to be related to other issues.

No court or commentator — including Professor Nathan, Professor Brazil and Judge Kaufman — has attempted to explain why the Advisory Committee cited *Peterson*, the leading inherent power case regarding the appointment of masters, in its brief published notes to rules

¹⁷⁵ Wheaton, *Courts and the Rule-making Powers*, 1 MO. L. REV. 261, 262 (1936) (cited in Brazil, *Authority*, *supra* note 4, at 379 n.488).

¹⁷⁶ *But see* Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). The Wigmore piece should be read with caution. It has been called “an impish editorial . . . not intended to be taken as a serious legal argument.” Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U.L.Q. 459, 504-05 (1937).

¹⁷⁷ *See* Gertner, *The Inherent Power of Courts to Make Rules*, 10 U. CINN. L. REV. 32, 47-48 (1936) (court-made rules must be consistent with statutes if, but only if, rulemaking power is based on an enabling statute); Williams, *supra* note 176, at 474 (legislative power is concurrent with court’s inherent power so long as it is not “exercised so as to destroy, cripple or frustrate the administration of justice”).

53(b) and (e).¹⁷⁸ Furthermore, it is unclear from the context of the short notes whether the Committee intended the new rule to replace *Peterson* totally or to leave a role for *Peterson*'s inherent power doctrine beyond the terms of the rule. Unfortunately, the Advisory Committee did not discuss *Peterson* in a context that would clarify this issue. It relied upon *Peterson* only to settle the questions of the constitutionality of an appointment of a special master in a jury case and of the weight of the master's findings.

The Committee first mentioned *Peterson* at its November 1935 meeting in a discussion concerning the group of court-appointed helpers included within the word "master." Mr. Dodge and Judge Donworth wanted to be sure that the rule embraced auditors,¹⁷⁹ because in the draft, Dean Clark had merely provided that the word "master" included referees.¹⁸⁰ Judge Donworth noted that in *Peterson* the Supreme Court had upheld the appointment of an auditor in a complicated jury case.¹⁸¹ In the next draft of the rules, auditors were added to the list of appointees included within the term "master."¹⁸²

The Committee discussed *Peterson* further at its next general meeting, in February 1936. Chairman Mitchell noted that while auditors may have the function of simplifying issues for a jury, a matter that was covered by the rule under consideration,¹⁸³ auditors occasionally were responsible in an action at law for producing prima facie evidence. Judge Donworth said he thought there was a draft rule on that subject based on *Peterson*.¹⁸⁴ The Committee took up the matter again

¹⁷⁸ Notes to Rule 53, 12 C. WRIGHT & A. MILLER, *supra* note 54, at 492-93.

¹⁷⁹ Proceedings for Nov. 19, 1935, at 1900, Clark Papers, Box 94, Folder 6.

¹⁸⁰ Rule 90, Tentative Draft I (Oct. 25, 1935), Clark Papers, Box 97, vol. I. The words "or an auditor" are inserted in handwriting on this copy of the rule, undoubtedly by Dean Clark during this colloquy. See Benson, *Reference to Commissioner in Chancery*, 5 VA. L. REG. (n.s.) 497, 497-98 n.3 (1919) ("[T]he ordinary designation in actions at law is . . . 'auditor,' while in proceedings in equity it is . . . 'master.'").

¹⁸¹ Proceedings for Nov. 19, 1935, at 1900, Clark Papers, Box 94, Folder 6. Judge Donworth may have known about *Peterson* because it was cited in a brief note supplied by the Minnesota local committee in support of extension of the equity rules concerning references to masters to law cases. Rule 90, *Suggestions of Local Committees* (Minnesota), Tentative Draft I (Oct. 25, 1935), Clark Papers, Box 97, vol. I.

¹⁸² Rule A-12, Tentative Draft II (Dec. 26, 1935), Clark Papers, Box 98, vol. II. At present, rule 53(a) confirms that master also means auditor.

¹⁸³ The draft rule provided: "except in matters of account, a reference to a master, which in these rules includes a referee, an auditor, or an examiner, shall be the exception, not the rule and shall be made in jury cases only to simplify the issues when such are complicated." Rule A-12, Tentative Draft II (Dec. 26, 1935), Clark Papers, Box 98, vol. II.

¹⁸⁴ Proceedings for Feb. 24, 1936, at 1086, Clark Papers, Box 96, Folder 12.

a few minutes later when Judge Donworth referred to *Peterson* as the leading case in which the Court held that it was proper in a jury case "to have an auditor appointed who really tries the whole case in the first instance, and makes findings which go to the jury as *prima facie* evidence."¹⁸⁵ Referring to the terms of the rule as it stood before them, Judge Donworth asked Dean Clark to examine the opinion and "go as far as *Ex parte Peterson* goes in allowing these findings of the court or auditor to go before the jury as *prima facie* evidence."¹⁸⁶

Chairman Mitchell, Judge Donworth, and Dean Clark then discussed the matter for a few moments. Dean Clark contended that the rule recognized the courts' power to appoint masters or auditors to take *prima facie* evidence in matters of account, while the other two questioned whether the rule was clear enough. Robert Dodge then stated that the rule already fully addressed the scope of the tasks permitted under *Peterson*, because a court would never refer a matter to a master for fact-finding unless the issues were complicated.¹⁸⁷ Other members tried to persuade Judge Donworth that *Peterson's* scope was accounted for in another rule, which would provide that the master's findings would be *prima facie* evidence of those matters and could be read to the jury.¹⁸⁸

This argument did not satisfy Judge Donworth, because he did not think that *Peterson* was limited to matters of account.¹⁸⁹ Although his position did not meet with instant favor,¹⁹⁰ Judge Donworth prevailed when he insisted that the power of the auditor had not been limited previously to simplifying issues as the rule under consideration implied.¹⁹¹ Judge Donworth's victory was reflected in the draft of the rules prepared soon after the meeting.¹⁹²

Although the transcripts contain no further references to *Peterson*, Robert Dodge briefly discussed the case at the ABA institutes. At

¹⁸⁵ *Id.* at 1093-94.

¹⁸⁶ *Id.* at 1094. Chairman Mitchell agreed, saying "that was my suggestion." *Id.*

¹⁸⁷ *Id.* at 1096 (discussing Rule A-12, Tentative Draft II (Dec. 26, 1935), Clark Papers, Box 98, vol. II).

¹⁸⁸ *Id.* at 1097.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (remarks of Mitchell and Dodge).

¹⁹¹ *Id.* (remarks of Morgan, Dodge, and Clark).

¹⁹² Compare Rule A-12, Tentative Draft II (Dec. 26, 1935), Clark Papers, Box 98, vol. II ("shall be made in jury cases only to simplify the issues when such are complicated") with Rule A-13, Tentative Draft III (Mar. 1936), Clark Papers, Box 98, vol. III ("such a reference shall be made only where the issues are complicated"). The new version of the rule also contained, for the first time, a note citing to *Ex parte Peterson*, 253 U.S. 300 (1920). *Id.*

Cleveland, Dodge noted that the Committee had received comments from the bar questioning the right of a court to refer factfindings in jury cases to masters, because it might violate the seventh amendment's jury trial right.¹⁹³ Dodge said that the Committee thought that *Peterson* had conclusively decided that a court had the power to appoint an auditor without violating the right to a jury trial, because the report was only treated as prima facie evidence.¹⁹⁴ Dodge noted that the courts had emphasized that references to an auditor in a jury case should be "sparing and hesitant."¹⁹⁵

In sum, the Advisory Committee relied on *Peterson* only to support a slightly expanded use of auditors in jury cases to include instances in which the matters were complicated and to support the constitutionality of those references. The Committee did not discuss *Peterson* in connection with the viability of inherent power. The Committee believed that the rules provided for all types of masters;¹⁹⁶ it evidently found it unnecessary to consider the existence of further authority outside of the rules. On this point, however, the Clark Papers are silent.¹⁹⁷ It is not possible to determine what the Committee would have done had it considered the problem during its deliberations.

II. THE REMEDIAL SPECIAL MASTER IN INSTITUTIONAL REFORM CASES TODAY

Where does the authority for the appointment of remedial special masters stand now? This Article's historical review reveals that the Advisory Committee contemplated that courts would retain authority to appoint special masters to perform tasks in the remedial phase of law

¹⁹³ ABA, *Cleveland Inst.*, *supra* note 48, at 332. See Report of the Committee on Federal Practice and Procedure of the Federal Bar Association of New York, New Jersey, and Connecticut at 31 (Aug. 25, 1936), Clark Papers, Box 101, vol. XIII; Pennsylvania Bar Association Special Committee Report at 3 (Oct. 13, 1936), Clark Papers, Box 102, vol. XIV.

¹⁹⁴ ABA, *Cleveland Inst.*, *supra* note 48, at 332.

¹⁹⁵ *Id.* at 333. Dodge's remarks at the Washington Institute were substantially similar to those that he made at Cleveland. ABA, *Washington Inst. and New York Symposium*, *supra* note 48, at 171-73. His Washington remarks were then repeated at New York. *Id.* at 290.

¹⁹⁶ See, e.g., *supra* text accompanying notes 92-93.

¹⁹⁷ However, Dean Clark had publicly expressed his personal doubt concerning inherent power in a contemporaneous article. Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 HARV. L. REV. 1303, 1309 n.17 (1936); see also letter from Charles E. Clark to Noel T. Dowling (Dec. 14, 1937), Clark Papers, Box 111, Folder 59 (referring to doubt expressed in the article).

suits of their day. Nothing in the federal rules or in their subsequent history suggests otherwise.¹⁹⁸ How, then, should rules 53 and 70 apply to the appointment of a remedial special master, particularly in the context of institutional reform cases? Although one can draw no bright lines, some patterns do emerge that should provide guidance for future appointments.

A. *Appointments Under Rule 70*

In terms of authority, the comparatively easy case is when the district court is unable to obtain defendant's voluntary compliance with a judgment or decree finding a violation of plaintiff's rights and ordering a change in the conditions causing the violation.¹⁹⁹ When the order has required performance of specific acts, as is typically the case with institutional reform decrees,²⁰⁰ the court would be justified in substituting a third party under rule 70 to perform these acts at the defendant's expense. As discussed previously, there is no reason why this third person could not be a master. The Committee drafted the rules with the desire to provide that a master could do such tasks.²⁰¹

Rule 70's applicability depends on the observance of some important limitations. The judgment must specify a time within which the specific acts must be completed so that the court has a clear standard to decide whether the party has failed to comply.²⁰² Meeting this requirement is trivial; in any event, as judges have realized the difficulty in achieving full implementation of decrees, they have frequently imposed deadlines upon the remedial steps to be taken by defendants.²⁰³ Giving the defen-

¹⁹⁸ Even the latest amendments to rule 53, the most substantial since 1938, are only designed to take account of the creation of federal magistrates. The amendments do not affect the appointment of special masters. See Rule 53, Amendments to the Federal Rules of Civil Procedure, 51 U.S.L.W. 4501, 4504 (May 3, 1983). These amendments were effective as of August 1, 1983.

¹⁹⁹ *E.g.*, Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977). This pattern is considered so common that Professor Resnik included it in her description of a hypothetical institutional reform case that amalgamated facts from several suits involving conditions at prisons and mental hospitals. Resnik, *supra* note 1, at 386, 394.

²⁰⁰ *E.g.*, Wyatt v. Stickney, 344 F. Supp. 387, 395-407 (M.D. Ala. 1972), *rev'd in part, aff'd in part and remanded sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (detailing "minimum constitutional standards for adequate habilitation of the mentally retarded").

²⁰¹ See *supra* text accompanying notes 120-22.

²⁰² FED. R. CIV. P. 70; accord 12 C. WRIGHT & A. MILLER, *supra* note 54, § 3021, at 76.

²⁰³ *E.g.*, Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98, 100-01 (1st Cir. 1978); see also Illinois v. Costle, 12 E.R.C. 1597 (D.D.C. 1979) (promulgation of envi-

dants an opportunity to comply also comports with Supreme Court pronouncements that in litigation challenging the operation of state institutions, the courts should give great deference to the defendants' prerogatives to act.²⁰⁴ The defendants have a defined period of time in which to perform the specific acts pursuant to the judgment; failure to perform within that time justifies court appointment of a substitute under rule 70.²⁰⁵

Rule 70 does not require that a defendant be in contempt before it may be invoked. Rather, the rule provides that the Court may appoint a third person if "the party fails to comply."²⁰⁶ Although contempt is available in proper cases, it is clear from the terms of the rule that it anticipates cases in which a party has failed to comply but is not in contempt.²⁰⁷ As discussed above, the American practice under Equity Rule 8 and rule 70 clearly differs from the English practice, which conditions appointment of a substitute to perform the uncompleted task on the defendant's refusal or neglect. This may have great significance in institutional reform litigation, where it has been observed that parties who are nominally allied with one another as plaintiffs or defendants frequently have different interests and cannot reach a unified collective decision.²⁰⁸ Because of the internal politics, the parties ordered to act may be unable, but not necessarily unwilling, to comply with the court's directive. Furthermore, if the court may appoint a special master as a substitute without making a preliminary finding of contempt or neglect, the appointment may be perceived as less of a punitive measure than would be the case otherwise.²⁰⁹

Finally, there is the issue of the meaning of the rule's term "specific act." It must be recognized that the historic use of Equity Rule 8 and

ronmental regulations).

²⁰⁴ *E.g.*, *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). *See generally* Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 732-57 (1978) (discussing restraints on judicial power).

²⁰⁵ *See* FED. R. CIV. P. 70; *see also* Goldstein, *supra* note 20, at 65-68 (scenario of escalating intrusiveness keyed to defendant's failure to comply).

²⁰⁶ FED. R. CIV. P. 70.

²⁰⁷ *Id.* ("the court may also in proper cases adjudge the party in contempt"); *see also* 12 C. WRIGHT & A. MILLER, *supra* note 54, § 3022, at 77; Dobie, *supra* note 48, at 304-05 (contempt and substituted performances separate remedies under rule 70).

²⁰⁸ *E.g.*, Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 67-75 (1979).

²⁰⁹ *See* Levi, *The Business of the Courts: A Summary and a Sense of Perspective*, 70 F.R.D. 212, 216 (1976). *But cf.* M. HARRIS & D. SPILLER, *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS* 17-20 (1977) (removal of remedial decree usually becomes goal for defendant institution).

of rule 70 usually authorized performance of fairly specific and limited acts. Although not limited to this, especially in the American practice, the paradigm was the signing of a document or deed.²¹⁰ Even the modern use of rule 70 has been generally limited to similar acts.²¹¹ Given this history, federal courts must be reasonably precise in their decrees before they may invoke substitute performance under rule 70 as a remedy for noncompliance. Mere aspirational commands,²¹² which are vague and general, would not be an adequate predicate for the subsequent use of rule 70.

Courts run risks, however, in drafting orders that are too specific. The experiences in some cases suggest that an overly specific order will be met with subtle tools of bureaucratic resistance such as nitpicking, overcompliance, and apparent compliance without any real institutional change.²¹³ In this context, the guide to safe passage between the Scylla of vague aspirational commands and the Charybdis of overly detailed orders may be found in Professor Starr's suggestion that decrees should be specific only about outcomes and not means. His example, suggesting an order requiring that an institution provide meals meeting objective minimal nutrition and health requirements, rather than one compelling the institution to appoint a dietary supervisor with a specified degree,²¹⁴ also would be specific enough to allow substituted performance under rule 70 if the defendants failed to achieve those results.

B. Appointments Under Rule 53

Although resort to rule 70 might be useful in cases in which the rule's threshold requirements have been met,²¹⁵ plaintiffs often seek

²¹⁰ See *supra* text accompanying notes 131-33.

²¹¹ E.g., *Gary W. v. Louisiana*, 622 F.2d 804, 805-06 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981) (directing payment of attorney's fee award); *Gates v. Collier*, 616 F.2d 1268 (5th Cir.), *cert. denied*, 448 U.S. 911 (1980) (same).

²¹² See Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429, 1434-38 (1978).

²¹³ E.g., Mechanic, *Judicial Action and Social Change*, in *THE RIGHT TO TREATMENT FOR MENTAL PATIENTS* 47, 64-65 (1976) (overly detailed reforms can become a "farfical ritual"); Starr, *supra* note 2, at 432-36 (the "hidden costs of direct control").

²¹⁴ Starr, *supra* note 2, at 435-36. For an example of what Professor Starr believes is an overly detailed order, see *Wyatt v. Stickney*, 344 F. Supp. 387, 395-407 (M.D. Ala. 1972), *rev'd in part, aff'd and remanded in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

²¹⁵ For a case in which the requirements of rule 70 appear to have been met, although the rule was not cited, see *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977).

court appointment of a special master much earlier in the process, even before a decree has been issued.²¹⁶ In fact, based on the experience in previous cases, if judges want to maximize the likelihood of successful construction and implementation of a reform decree, they are well advised to appoint masters early in the process of the formulation of the remedial plan.²¹⁷ If the purpose of the appointment is to have the master develop and recommend a decree, there is, of course, not yet a final judgment, and rule 70 would not be applicable.²¹⁸

If judges want to appoint special masters after determining liability but before rendering a written judgment, they must rely on rule 53 for authority. As shown, the Advisory Committee intended to include remedial special masters within the terms of the rule and expressly provided for them by the terms of rule 53(c).²¹⁹ Under rule 53, of course, "a reference to a master shall be the exception and not the rule."²²⁰ It is here that fidelity to the rule counsels greater caution in justifying references to remedial special masters than courts have exercised in the past. Past justifications in some cases are inadequate in light of the Supreme Court's clear pronouncement on the issue.

Typical of the cases in which courts have appointed a special master to assist in the formulation of a decree is *Hart v. Community School Board*,²²¹ a case frequently relied upon by other courts in justifying the appointment of a remedial special master.²²² In *Hart*, Judge Weinstein cited an extensive set of cases to justify the appointment of a special

²¹⁶ *E.g.*, *Amos v. Board of School Directors*, 408 F. Supp. 765, 822-24 (E.D. Wis.), *aff'd sub nom. Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976), *vacated on other grounds and remanded per curiam*, 433 U.S. 672 (1977); *Hart v. Community School Bd.*, 383 F. Supp. 699, 764-69 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

²¹⁷ *See Rebell*, *supra* note 21.

²¹⁸ *See United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372, 1374 (11th Cir. 1981) (rule 70 not applicable without judgment).

²¹⁹ *See supra* text accompanying notes 63-93.

²²⁰ FED. R. CIV. P. 53(b). The rule's additional exceptional condition requirement for actions to be tried without a jury does not apply directly in these cases because the action has already been tried by the court. It is the remedy that is in question, not preservation of the right to a trial by an article III judge. *See Armstrong v. O'Connell*, 416 F. Supp. 1325, 1338 (E.D. Wis. 1976), *vacated and remanded mem.*, 566 F.2d 1175 (7th Cir. 1977).

²²¹ 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

²²² *E.g.*, *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 963 (2d Cir. 1983); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 111 n.33 (3d Cir. 1979); *rev'd on other grounds and remanded*, 451 U.S. 1 (1981), *aff'd en banc*, 673 F.2d 647 (3d Cir. 1982), *rev'd on other grounds and remanded*, 104 S. Ct. 900 (1984); *Armstrong v. O'Connell*, 416 F. Supp. 1325, 1336-37 (E.D. Wis. 1976), *vacated and remanded mem.*, 566 F.2d 1175 (7th Cir. 1977).

master to help determine the appropriate remedy in a school desegregation case.²²³ In the course of his discussion, Judge Weinstein noted that the rule's requirement that the case be exceptional was "more than satisfied when a court is faced with a polycentric problem that cannot easily be resolved through a traditional courtroom-bound adjudicative process."²²⁴ Furthermore, the judge noted, "[a]ny solutions will involve a multitude of choices affecting allocation of educational, housing and other resources, and each choice will affect other choices. Such many-centered problems call for informal consultations and weighing of complex alternatives using a managerial decision-making process."²²⁵

The justification Judge Weinstein offered does not go far enough to meet the exception-not-the-rule requirement in rule 53(b) as interpreted by the Supreme Court in *La Buy v. Howes Leather Co.*²²⁶ In *La Buy*, the Court affirmed the Seventh Circuit's use of a writ of mandamus to reverse the appointment of a special master to hear all the evidence in a trial. The district court's only justifications for the reference were the congestion of its calendar and the complexity of the issues of law and fact in the case, a private antitrust action. Rejecting these justifications, the Court noted that if calendar congestion alone were an adequate reason for the appointment of a special master, the crowded state of many court dockets would make references the rule and not the exception.²²⁷ The Court also observed that most litigation in antitrust was complex, which provided an even more compelling reason for trial before an experienced district judge rather than an ad hoc substitute.²²⁸

Thus, as did the district court in *La Buy*, Judge Weinstein in *Hart* improperly relied on the complexity factor to justify the rule 53 appointment.²²⁹ His analysis would have applied equally well to many

²²³ *Hart*, 383 F. Supp. at 764-67.

²²⁴ *Id.* at 766. Polycentricity is discussed in Fiss, *supra* note 6, at 39-44; Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978).

²²⁵ *Hart*, 383 F. Supp. at 766.

²²⁶ 352 U.S. 249 (1957).

²²⁷ *Id.* at 259. The four dissenters objected to the use of the extraordinary writ of mandamus to reverse the appointment. They did not reach the issue of the adequacy of the district court's reasons for appointing a special master. *Id.* at 260-69 (Brennan, J., dissenting).

²²⁸ *Id.* at 259. A student note written before the Supreme Court issued its opinion in *La Buy* supported the Circuit Court's disapproval of the special master appointment along similar lines. Note, *Reference of the Big Case Under Federal Rule 53(b): A New Meaning for the "Exceptional Condition" Standard*, 65 YALE L.J. 1057 (1956).

²²⁹ Although it might be argued that the *La Buy* restrictions should be applicable only to trial stage references to masters because of the highly sensitive and exclusively judicial nature of the finding of liability, the Supreme Court's opinion is not so limited.

cases and made the appointment of masters the rule rather than the exception. The factors Judge Weinstein relied upon — polycentricity and “multitude of choices”²³⁰ — define in part all public law litigation, including institutional reform litigation, and at best distinguish the entire class of cases from the standard model of adjudication.²³¹ A court should rely on something more when appointing a remedial special master, something that will distinguish the situation in the specific case before it from the remainder of the class of institutional reform cases. According to *La Buy*, it is not enough to use factors that will distinguish an entire class of cases, whether antitrust or institutional reform litigation, from the rest of the federal docket.²³²

The distinguishing factors obviously cannot be compiled in a comprehensive list. Some of the factors, however, that would meet the exception-not-the-rule requirement of rule 53 can be listed. Some factors are analogous to those permitting invocation of rule 70 if a final judgment were in effect, such as when the court is faced with intransigent²³³ or incompetent²³⁴ defendants. In addition, an appointment under rule 53 would be appropriate when expertise in a nonlegal area is required to grant complete relief to the plaintiffs,²³⁵ or when individuals must be

See also Mathews v. Weber, 423 U.S. 261, 274 (1976) (reaffirming that *La Buy* applies to all appointments of special masters under rule 53). Moreover, the sensitivity of the finding of liability is replaced in the typical institutional reform case with the sensitivity and deference that the Supreme Court has consistently mandated as an aspect of federalism when the defendant, as is often the case, is a part of state or local government. *E.g.*, *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (“wide-ranging deference”); *Frug*, *supra* note 204, at 743-57.

²³⁰ *Hart v. Community School Bd.*, 383 F. Supp. 699, 766 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

²³¹ *E.g.*, *Chayes*, *supra* note 1, at 1302 (public law litigation by definition not bipolar). Some writers have contended more broadly that all judicial remedies are to some degree polycentric. *E.g.*, *Kirp & Babcock*, *supra* note 6, at 388. To the extent that this is true, polycentricity would fail even to distinguish either public law or institutional reform litigation as a class from all other litigation.

²³² *Cf. In re South Portland Shipyard & Maine Ry.*, 32 Bankr. 1012 (D. Me. 1983) (local rule providing for automatic blanket referral of bankruptcy matters to bankruptcy judges acting as special masters invalid under rule 53).

²³³ *E.g.*, *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1977); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part, modified in part sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

²³⁴ *See Aspira, Inc. v. Board of Educ.*, 423 F. Supp. 647, 655 (S.D.N.Y. 1976) (“bumbling” defendants).

²³⁵ *E.g.*, *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 314 (E.D. Pa. 1972) (consent decree) (specialist in education appointed special master); *see also Note, Masters and Magistrates in the Federal Courts*, 88 HARV. L.

evaluated professionally on a case-by-case basis.²³⁶ These situations do not violate the exception-not-the-rule requirement, because they are not present in every institutional reform case. In each, the court will need outside help if it is to make its liability determination meaningful.²³⁷

In *Halderman v. Pennhurst State School & Hospital*²³⁸ the appointment of a remedial special master met the exception-not-the-rule requirement under the criteria outlined above.²³⁹ The district court's order provided for the transfer of approximately twelve hundred residents of a mental hospital into facilities and services in the least restrictive community setting.²⁴⁰ The problems of placing so many people in appropriate community facilities that did not necessarily exist and would have to be created, and of implementing what was at the time a com-

REV. 779, 794-96 (1975). *But cf. La Buy*, 352 U.S. at 259 (experienced trial judge, rather than ad hoc and inexperienced special master, should hear complex antitrust matter).

²³⁶ *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Knight v. Board of Educ.*, 48 F.R.D. 115 (E.D.N.Y. 1969).

²³⁷ To avoid a perfunctory decision appointing a remedial special master, a close link should also exist between the qualifications of the person selected and the stated reasons justifying the appointment. If the need for expertise in a particular field is required, the court should appoint a person who has that expert knowledge rather than a legally trained person. A legally trained person might be able to substitute for the judge at evidentiary hearings, but would not necessarily add any of the expertise that the judge purportedly lacks. Thus, in *Gates v. Collier*, 454 F. Supp. 567, 577 (N.D. Miss. 1978), the trial judge rejected the plaintiff's suggestion that one of the district's magistrates be appointed special master in a prison case. The judge's stated rationale was that no magistrate had any expertise in environmental health and safety standards, areas that needed critical attention in the litigation. *Cf. Berger, Away from the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978) (law professor known as housing specialist appointed special master in school desegregation suit (*Hart*) with impact upon housing patterns). By this time, of course, there are people who have built up considerable expertise in a field by virtue of having been special masters. *See, e.g., Ruiz v. Estelle*, 679 F.2d 1115, 1168-69 (5th Cir. 1982) (appendix B) (noting that the law professor appointed special master was an expert because he had served in that capacity in several other prison suits), *cert. denied*, 103 S. Ct. 1438 (1983).

²³⁸ 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd en banc*, 612 F.2d 84 (3d Cir. 1979), *rev'd on other grounds and remanded*, 451 U.S. 1 (1981), *aff'd*, 673 F.2d 647 (3d Cir. 1982), *rev'd on other grounds and remanded*, 104 S. Ct. 900 (1984).

²³⁹ This discussion assumes that the district court was entitled to order any remedy. The Supreme Court, of course, does not agree with this premise. *Pennhurst*, 451 U.S. 1 (1981) (plaintiffs have no substantive rights under federal statute); 104 S. Ct. 900 (1984) (federal court cannot order remedy against state officials under state statute as interpreted by state supreme court).

²⁴⁰ *Pennhurst*, 446 F. Supp. at 1326-27.

pletely novel remedy even for an institutional reform case,²⁴¹ were so extraordinary as to warrant the appointment of a remedial special master with substantive expertise. In addition, the use of a special master was, as the Third Circuit said, "particularly appropriate,"²⁴² because the defendants had been given an opportunity to create and present their own remedies for conditions at the hospital and had failed to do so. By analogy to the criteria of rule 70, the inability of the defendants to develop a remedial plan is yet another factor justifying the appointment of a master under rule 53. .

In cases such as *Pennhurst*, remedial special masters can be appointed while preserving the cautious policies underlying rules 53 and 70. There is little danger of abuse of the power to appoint special masters when the court carefully observes the exception-not-the-rule requirement and uses the appointment power only in a case in which it can articulate factors that make that case distinguishable from others in its class of litigation and that demonstrate that a special master is truly required. The court can demonstrate its deference to state and local government defendants by giving them the opportunity to act first before invoking rule 53 or rule 70. Finally, by keeping within the terms of the rules, the court will not squander the use of a remedy that has proven helpful in an important class of cases that otherwise would be even more difficult to handle satisfactorily.

CONCLUSIONS AND RECOMMENDATIONS

This Article has demonstrated that the original Advisory Committee considered the use of remedial special masters and explicitly decided to include them within the terms of rules 53 and 70. In retrospect, the terms of the rules did not, perhaps, adequately convey this decision.²⁴³ Because the Committee intended all masters, with the exception of discovery masters,²⁴⁴ to be included within the terms of rule 53,²⁴⁵ courts,

²⁴¹ Ferleger & Boyd, *Anti-Institutionalization: The Promise of the Pennhurst Case*, 31 STAN. L. REV. 717 (1979) (analysis by plaintiffs' attorney in *Pennhurst* of the many pathbreaking aspects of lawsuit and trial court's reform decree).

²⁴² *Pennhurst*, 612 F.2d at 112.

²⁴³ This is a good illustration of the truth behind Chairman Mitchell's jest at one of the introductory institutes that "a person who drafted a document was least qualified to interpret it, because he always had in mind what he intended to say rather than what he actually said." ABA, *Cleveland Inst.*, *supra* note 48, at 179.

²⁴⁴ Brazil, *Authority*, *supra* note 4, at 352; Brazil, *Referring*, *supra* note 4, at 170-71.

²⁴⁵ The latest amendments to rule 53 suggest that the current Advisory Committee also believes that all references to special masters come under the rule. Rule 53(f) now

therefore, may rely confidently upon the rule as an adequate source of authority to appoint remedial special masters. However, courts should also more scrupulously observe the requirements of rule 53(b) in appointing remedial special masters than have some courts in the recent past. On the other hand, this Article has also 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. Courts should not purport to rely, however, on inherent power to appoint special masters in circumstances that would make such appointments impermissible under both rule 53 and rule 70.

This research has demonstrated that if the intent of the original Advisory Committee is honored, the rules as drafted grant courts ample power to appoint remedial special masters. However, given the present uncertainty, the adoption of a few minor nonsubstantive amendments to rules 53²⁴⁶ and 70 would authoritatively confirm that this power is available and would show expressly the historic connection between the two rules.²⁴⁷

provides that magistrates are subject to the rule only when the court's order expressly provides that the reference is made under the rule. The published Advisory Committee note explains that the new subdivision responds to confusion flowing from the dual authority of rule 53 and 28 U.S.C. § 636(b)(1)(A), (B) (1982), under which pretrial matters can be referred to magistrates acting as masters. By making this distinction, the new subdivision acknowledges, *sub silentio*, that all references to special masters who are not magistrates fall under rule 53.

²⁴⁶ For different reasons, it has also been suggested elsewhere that rule 53 be amended to clarify the adequacy of the power to appoint remedial special masters. Note, "*Mastering*" *Interventions*, *supra* note 21, at 1091. That Note, however, did not offer any specific amendments to achieve this purpose.

²⁴⁷ First, it would help to clarify the Committee's intent that remedial special masters were contemplated within the terms of rule 53 by amending the first sentence of rule 53(a) as follows:

The court in which any action is pending may appoint a special master therein *at any time*.

(All of the proposed amendments to the existing rules are indicated by italics.)

Second, rule 53(b) should be amended to conform to the proposed change in rule 53(a) as follows:

A reference to a master *at any time in an action* shall be the exception and not the rule.

Third, a minor change should be made to rule 53(c):

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, *as provided in rule 70 or otherwise*, 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.

With these simple changes, the present Advisory Committee and the Supreme Court would confirm the practice that was intended to be carried forward into the new federal rules in 1938. The nonsubstantive changes would clarify the matter and would avoid further confusion surrounding what has become one of the most effective, if controversial, tools of the federal judiciary in enforcing the constitutional or congressionally authorized rights of school children, the mentally ill, the retarded, the disabled, and prisoners, who frequently have no alternative but to rely on the federal courts for protection from institutional abuse.

The italicized change would confirm the original Advisory Committee's intent to permit the continuation of the practice of appointing masters under rule 70 if required when a defendant failed to perform specific acts as ordered in a decree. In conjunction with the proposed changes to rule 53(a) and (b), this amendment would also help confirm that even when no judgment has been entered, the court may appoint a remedial special master under the rule. This has proved helpful in cases when a master has been needed to formulate the remedial plan.

Finally, rule 70 should be amended to clarify that special masters are among the "other person[s]" who may be appointed to act instead of a party. This clarification could be made easily by amending the first sentence of rule 70 as follows:

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person, *including but not limited to a special master*, appointed by the court and the act when so done has like effect as if done by the party.

In deference to Professor Brazil, these proposed amendments were drafted under the assumption that the present Advisory Committee and the Supreme Court will also accept his suggestion and adopt a new rule separately covering the appointment of discovery masters. *See Brazil, Authority, supra* note 4, at 384-88. If that rule is also adopted, appropriate cross-references should be inserted in both rules. Although beyond the scope of this Article, if these proposals are acted upon, the present Advisory Committee should also consider whether magistrates should be named in rule 70. *See* Advisory Committee's Notes to Rule 53 (Aug. 1, 1983 amendments).

