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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
	)	(Special Master Alan Balaran)
GALE NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

INTERIOR DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR RELEASE OF THE REPORT OF THE SPECIAL MASTER REGARDING IT SECURITY AND ANY INFORMATION REPORTED TO THE COURT REGARDING THE SPECIAL MASTER'S INVESTIGATION OR REPORT

In their *Motion and Supporting Memorandum for Release of the Report of the Special Master Regarding IT Security and Any Information Reported to the Court Regarding the Special Master's Investigation or Report*, the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") seek release of the Special Master's report regarding his investigation of Interior's Information Technology systems and provision to the parties of any information the Special Master reported to the Court regarding his investigation or report. Plaintiffs' assertion in their Opposition that Interior Defendants are not entitled to this information requires them to disregard the plain meaning of the Court's February 24, 1999 Order appointing the Special Master and advocate a tortured reading that is inconsistent with other provisions of the Order and with common sense.

Paragraph 8 of the Court's February 24, 1999 Order provides that "[a]ny information reported to the court by the special master shall also be reported to counsel for the parties."[1] Order, Feb. 24, 1999, at ¶ 8. Plaintiffs insist that this provision requires that the parties receive only information the Special Master provides to the Court in the form of a formal "report." Unlike paragraph 8, each of the preceding five paragraphs of the Order expressly refers to "reports" that the Special Master is to "file" or "submit" to the Court. Id. at ¶¶ 3-7. In marked contrast, paragraph 8 of the Order authorizes the Special Master to "call to the [C]ourt's attention any matter that bears upon the defendants' compliance with any order of this [C]ourt or any other applicable discovery rule." Id. at ¶ 8. Paragraph 8 makes no mention of a formal "report" to be "filed" or "submitted." Indeed, if paragraph 8 required a formal report as Plaintiffs suggest, the Special Master presumably would be unable to communicate such information to the Court except through a formal report. The very next sentence in paragraph 8 makes clear that any information communicated to the Court by the Special Master must also be provided to the parties: "*Any information* reported to the court by the special master shall also be reported to counsel for the parties." Id. (emphasis added).

Courts and commentators have recognized the dangers inherent in ex parte communications between special masters and courts. The May 2001 Report of the Civil Rules Advisory Committee, addressing proposed changes to Rule 53, recognized that "[e]x parte communications between a master and the court present troubling questions," and advised that

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[1] Nearly a full page of Plaintiffs' Opposition is devoted to complaining (incorrectly, it turns out) that Interior Defendants' page cite to this provision of the February 24, 1999 Order is wrong. See Pls.' Opposition at 5. Plaintiffs insist that the proper citation to this provision in the Court's three-page Order is "page 4." Id. To avoid further confusing Plaintiffs' counsel, this Reply will cite the Court's Order by paragraph rather than page.

"[o]ften the [appointing] order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings." Advisory Committee on the Federal Rules of Civil Procedure, "Report of the Civil Rules Advisory Committee" at 143 (May 14, 2001, as revised July 31, 2001) (available at www.uscourts.gov/rules/comment2002 (select 8-01CV.pdf from menu)); see also Margaret G. Farrell, The Role of Special Masters in Federal Litigation, SG046 ALI-ABA 1005, 1038 (2002) ("[W]here the purpose of the appointment [of a special master] is to obtain the master's recommended findings of fact, ex parte communication [between the master and the judge] would seem inappropriate to discuss the performance of the master's duties since the judge will review those findings and the record upon which they are based to determine whether they are clearly erroneous. Information outside the record could prejudice that review."); Wayne D. Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?, 53 U. Chi. L. Rev. 394, 413-14 (1986) ("Off-the-record communication between master and judge also risks creating the impression that the master is unduly influencing the court. Parties could justifiably object that such ex parte communication deprives litigants of an opportunity to challenge the information and ideas that might influence the court's subsequent decisions."); cf. 18 U.S.C. § 3626(f)(6)(B) (prohibiting special masters appointed in federal civil actions regarding prison conditions from "mak[ing] any findings or communications ex parte").

The Seventh Circuit addressed similar concerns in Edgar v. K.L., 93 F.3d 256 (7th Cir. 1996) (per curiam). There, the district court appointed a panel of three experts to investigate the mental health care system of Illinois. The district court judge held at least one ex parte meeting with the panel at which the merits of the case were discussed. When the defendants sought to

learn more about the meeting through depositions, the judge quashed subpoenas issued to the participants, invoking "judicial privilege" to shield the substance of the communications. Id. at 258. The Seventh Circuit not only found the private meeting improper, but also found it grounds for disqualifying the district court judge under 28 U.S.C. § 455. Id. at 259. The Court noted that the order appointing the panel (like the Special Master's appointing order in this case) permitted the "Manager," who was appointed to coordinate and facilitate the investigation and reports of the panel, to "report to the Court and the parties," but not to report to the judge in secret. Id. Noting that 28 U.S.C. § 455 is principally concerned with knowledge that is "extrajudicial" in the sense that the judge acquires it outside the courthouse, the Seventh Circuit concluded that "[t]he point of distinguishing between 'personal knowledge' and knowledge gained in a judicial capacity is that information from the latter source enters the record and may be controverted or tested by the tools of the adversary process[;] [k]nowledge received in other ways, which can be neither accurately stated nor fully tested, is 'extrajudicial.'" Id. The court explained:

> Off-the-record briefings in chambers . . . leave no trace in the record – and in this case the judge has forbidden any attempt at reconstruction. What information passed to the judge, and how reliable it may have been, are now unknowable. This is 'personal' knowledge no less than if the judge had decided to take an undercover tour of a mental institution to see how the patients were treated. Instead of going himself, this judge appointed agents, who made a private report of how they investigated and what they had learned. Mandatory disqualification under § 455(b)(1) follows.

Id.

Special masters, of course, are not court-appointed experts. But where, as here, a special master conducts an investigation, he is "functioning like a court-appointed expert (or a continental judge), but without the procedural safeguards that check the reliability of an expert's

reasoning and conclusions," as experts "may be targeted for pretrial discovery, may be deposed, and usually testify at trial, where they are subject to full cross-examination." Brazil, 53 U. Chi. L. Rev. at 418. Furthermore, a court-appointed expert's work enjoys no presumption of correctness, but a special master's findings of fact are reviewed for clear error. Id. Thus, the risks inherent in a court's ex parte communication with a special master are, in some respects, even greater than the risks inherent in communication with court-appointed experts (such as those appointed in Edgar).[2]

Here, such concerns are addressed to some extent by the Court's Order requiring *any* information provided to the Court by the Special Master to be provided to the parties. Order, Feb. 24, 1999, at ¶ 8. Although the Interior Defendants should not be required to file a motion to

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[2] Plaintiffs cite three inapposite cases for the proposition that ex parte communications between a special master and the court are privileged and confidential: Terrazas v. Slagle, 142 F.R.D. 136 (W.D. Tex. 1992), which prohibited depositions of judges' law clerks; a concurring opinion in Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) petition for cert. filed, 71 U.S.L.W. 3154 (U.S. Aug. 9, 2002) (No. 02-241), in which one judge criticized another judge on an appellate panel for publicizing disagreements over the internal workings of the court that did not directly affect the legal principles at issue in the case; and Mumford v. Basinski, 105 F.3d 264 (6th Cir. 1997), in which the court determined that an Ohio domestic relations court referee held an inherently political post that was not safeguarded from political patronage termination in part because he had a confidential relationship with the judges he served. Neither judges' communications with law clerks (as in Terrazas) nor appellate judges' communications with each other (as in Grutter) raise the concerns inherent in a judge's ex parte contacts with a special master. Judicial law clerks are simply staff employees of the court; they are not authorized to conduct investigations, issue reports, or make findings of fact that the court must formally review on the record. Nor are special masters and the judges who appoint them analogous to appellate panels of judges who must deliberate among themselves to reach a decision in a case. A state domestic relations court referee is slightly more analogous to a special master, but the court in Mumford stated that "Ohio law expressly assigns some discretionary adjudicative authority to the referees, permits Ohio judges to delegate other adjudicative powers to the referees, *and provides that the referees shall proffer advice (often in confidence) to the judges concerning the disposition of cases and other legal controversies*." Mumford, 105 F.3d at 273 (emphasis added). Ohio law is not applicable here, and no applicable federal law provides that a special master shall proffer advice in confidence to a district court judge.

receive such information, for the reasons set forth above and in their *Motion and Supporting Memorandum for Release of the Report of the Special Master Regarding IT Security and Any Information Reported to the Court Regarding the Special Master's Investigation or Report*, Interior Defendants respectfully request that the Special Master provide to the parties any information (including any interim report or draft) he has provided to the Court regarding his investigation of Interior's Information Technology systems.

Dated: September 16, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 16, 2002 I served the foregoing *Interior Defendants' Reply in Support of Their Motion for Release of the Report of the Special Master Regarding IT Security and Any Information Reported to the Court Regarding the Special Master's Investigation or Report* by facsimile upon:

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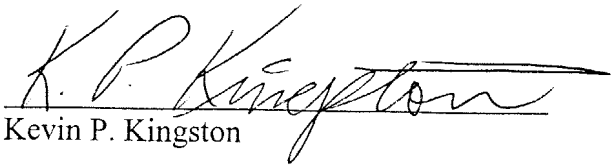

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