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Patricia M. Wald

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“SOME EXCEPTIONAL CONDITION”—THE ANATOMY OF A DECISION UNDER FEDERAL RULE OF CIVIL PROCEDURE 53(b)

PATRICIA M. WALD*

For fifty years the Federal Rules of Civil Procedure have made judges' lives easier by providing clear and reasonably precise standards for procedural decision making. The Rules have withstood the test of time remarkably well, accommodating with only modest revisions new problems, new types of cases, and new conditions in our courts. There remain, however, some rules which by their nature require continual reinterpretation in light of novel or newly emergent legal issues.

This is an account of the way the Court of Appeals for the District of Columbia Circuit recently went about deciding such an issue: specifically, whether mandamus should issue to prevent a district judge from appointing a special master, pursuant to federal rule 53(b), to help sort out an unusual Freedom of Information Act claim. The majority and dissenting opinions issued by the court, which by a 2-1 margin found that appointment of such a master *was* authorized, not only shed light on the nuances of a relatively obscure procedural rule; they also illustrate the ways in which the history of the Federal Rules, judicial precedent, the bare language of the Rules, and even constitutional notions of appropriate article III behavior have helped to shape, and no doubt will continue to shape, the application of the Rules to an evolving and unpredictable jurisprudential scene.

I.

Federal rule 53(b) authorizes the appointment of, and sets terms of compensation for, special masters in civil litigation. The heart of the rule is its second subsection, which, in pertinent part, states:

* Chief Judge, United States Court of Appeals for the District of Columbia Circuit.

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.¹

What is striking about rule 53(b) is its spareness. By itself, the rule tells us next to nothing about what qualifies as an "exceptional condition." One might conclude that a case need only be somehow different from the garden variety—more "complicated" or time-consuming, perhaps. If a "difficult computation of damages" justifies a master, why should not some other difficult feature of the case qualify as an "exceptional condition" as well? Perhaps the condition could lie with the judge herself: a temporarily congested calendar, or an unusually busy year. There is, in short, in rule 53's open-ended terminology "abundant, if not infinite, flexibility and room for interpretation."² As the complexity of federal cases grows, filings increase, and judicial time and resources become ever more precious, almost every "big" or "tough" case could end up with the appointment of a master. This result would surely have its advantages: judges, free to delegate discrete chores to magistrates³ and masters, could manage their own calendars and cases better. Also, since rule 53(a) provides for charging the parties (not the taxpayers) with the costs of the master, it amounts to a currently fashionable users' fee that places the financial burden of litigation on those who benefit directly from the courts' services.

Although such an interpretation of rule 53's broad language

¹ FED. R. CIV. P. 53 (b).

² Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RES. J. 543, 550.

³ United States magistrates are full-time judicial officers of the district court who serve at the government's expense. "A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, *without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure . . .*" 28 U.S.C. § 636(b)(2) (1982) (emphasis added).

In 1983, rule 53 was amended to conform with section 636(b)(2). Rule 53(b) now exempts magistrates, appointed with the parties' consent, from the general requirement "that some exceptional condition" requires the reference. For cases and commentary to the effect that there need not be the same restrictions on the use of magistrates as outside masters, see *CAB v. Carefree Travel, Inc.*, 513 F.2d 375, 379-80 (2d Cir. 1975); McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 373 (1979) ("Many of the inherent defects of the master system . . . are alleviated considerably when a United States magistrate . . . serves as a master in a civil case."); Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1327-29 (1975).

would be reasonable, and perhaps even desirable, it would also be wrong, for as we shall see, there is much more to rule 53 than its bare words. The rule's origins and history, as well as a body of precedent interpreting it and a body of commentary worrying about its overuse, cumulatively inform everyday decisions about its application. The case study of *In re United States Department of Defense*⁴ provides a useful example.

II.

The *Department of Defense* decision arose from a lawsuit filed under the Freedom of Information Act ("FOIA")⁵ by *Washington Post* staff writer R. Scott Armstrong. Armstrong requested that the Department of Defense ("DOD") produce approximately 2,000 documents relating to the United States' attempts in 1980 to rescue its hostages in Iran. The documents comprised approximately 14,000 pages. DOD withheld them, citing FOIA's exemption for classified national security documents.⁶ DOD claimed the information in the withheld documents was highly sensitive.

The trial judge announced that he was considering appointing a special master to review the documents DOD had withheld. Armstrong endorsed the idea, but DOD did not. Instead, it submitted to the trial judge a classified document index, providing descriptions and justifications for withholding each document, and proposed that the trial judge review a random sample of the withheld documents, based upon which he could judge *in camera* the applicability of the claimed exemptions.⁷

The judge, however, adhered to his proposal for a special

⁴ 848 F.2d 232 (D.C. Cir. 1988).

⁵ 5 U.S.C. § 552 (1982 & Supp. IV 1986).

⁶ See *id.* § 552(b)(1).

⁷ *Department of Defense*, 848 F.2d at 233.

According to an affidavit submitted to the district court by the major general in charge of reviewing FOIA requests lodged with DOD on special operations matters, the documents at issue "contain the actual working files for the planning and review of the rescue mission of 24 April 1980, as well as the following intelligence efforts to determine the location of the hostages and monitor the political efforts to obtain their release." The documents include "handwritten notes, intelligence messages, draft option papers, and the military plans for the mission." As such, they contain information that "provides a detailed description of the training, planning, operational concepts, weapons systems, and communications systems employed in the preparation, and execution of the rescue mission."

Id. at 233 n.2 (citation omitted) (quoting Declaration by Maj. Gen. W.H. Rice (Oct. 19, 1985)).

master. In a notice to counsel, he explained that he was dissatisfied with alternative means of initial document review. Obtaining security clearances that would allow the judge's law clerks and other staff to provide assistance in reviewing the mass of documents, he stated, would be difficult and time-consuming. Nor did he consider a government-prepared sample index to be an acceptable solution, citing case authority questioning the impartiality of government-run sampling. Finally, the judge stated, mere random sampling—in which the judge would sift a random sample of the documents—was not “particularly appropriate for the circumstances here.”⁸

The judge's solution was to appoint a security-cleared intelligence expert as master and to charge him with developing a representative sample of the withheld documents and summarizing to the court the arguments that each party had made, or could have made, with respect to the exemptions claimed by DOD. Under this arrangement, the judge wrote:

The Court's Article III role would be preserved, and indeed enhanced beyond that performed by the Court in an *in camera* review: adjudication of the exemptions claimed would be based on the samples selected, an appraisal of the method used by the special master to select the samples, and consideration of the arguments pro and con summarized for the Court by the master together with any additional arguments suggested by the parties. The master will make no recommendation.⁹

Four weeks later, DOD filed a petition in the Court of Appeals for the District of Columbia Circuit, seeking a writ of mandamus to revoke the appointment.

III.

DOD's petition forced the three-judge panel of our circuit to confront a novel question of interpretation arising under rule 53(b). In suggesting that the district judge had so abused his discretion as to warrant the extraordinary remedy of mandamus relief,¹⁰ DOD was arguing that no legal basis existed to support ap-

⁸ *Id.* at 234.

⁹ *Id.*

¹⁰ See *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1143 (1988). “[T]he writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations.” *Id.* The Supreme Court has offered several reasons for limiting the invocation of mandamus to “the exceptional case where there is clear abuse of discretion or ‘usurpation of

pointment of a master—that, in short, no “exceptional condition” existed as was required by rule 53(b). At least three viable trial-management techniques existed which the trial judge had spurned: use of the random selection techniques initially urged by DOD; use of the descriptive index of documents prepared by DOD to select representative documents upon which the judge could assess the applicability of the claimed exemptions; and use of the judge’s law clerks, who, after having received security clearances, could sift the documents in question. Whatever the relative merits of these techniques, DOD argued, the presence of practical, albeit imperfect, alternatives to the appointment of a master meant that no “exceptional condition” existed to justify reference to such an outside party.

DOD’s argument was hardly frivolous. As I have noted, the term “exceptional condition” is less than self-defining. What is intriguing, and illustrative of the rich texture of legal authority that has accreted around the Federal Rules in their bare half-century of existence, are the numerous and different sources of legal authority

judicial power.’” *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957) (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)). First, mandamus actions “have the unfortunate consequence of making the [district court] judge a litigant,” *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976) (quoting *Bankers Life*, 346 U.S. at 384-85); second, “particularly in an era of excessively crowded . . . dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation,” *id.* at 403; third, Congress, since the Judiciary Act of 1789, has signaled its desire that appellate review be postponed until a trial court has rendered a final judgment. Issuing a “writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating” the policies Congress sought to further. *Id.*

Explaining his decision not to request an *en banc* hearing of the *Department of Defense* case, Judge Starr wrote:

Upon reflection . . . I have come to the view that, in its present posture, this matter is less than well suited for *en banc* consideration. The reason is that, as the case comes to us, the Government is seeking a petition for mandamus to prevent the District Court from going forward with its proposed appointment of a special master. The Rule 53 question is therefore presented to us with, as it were, a procedural overlay in the form of the standards which are deemed applicable in a mandamus inquiry. . . .

It is for this procedural reason alone that I forebear from calling on the court to consider this case for *en banc* treatment. And that fact reinforces one stark reality which should not be lost on the bench and bar—the sole result of the panel’s exercise is to deny a petition for a writ of mandamus. Should the Rule 53 question arise hereafter in a proper appeal, the propriety of invoking the procedures under circumstances such as those that obtain here remains, in my view, entirely open and unresolved. In a word, the yellow light is still flashing.

In re United States Dep’t of Defense, No. 84-5044 (D.C. Cir. Aug. 31, 1988) (separate statement of Starr, J.), *denying rehearing to* 848 F.2d 232 (D.C. Cir. 1988).

upon which the panel majority (for which I wrote) and the panel dissent (which my colleague Judge Starr wrote) drew in reaching their contrary results.

The panel majority relied heavily upon the history of rule 53, especially as it had been applied since 1938. Apparent to us at the outset was the "mood" of rule 53, which, while providing authorization for the appointment of masters in some situations, was clearly meant to discourage widespread reliance on them. The rule—especially its language of exceptions and exceptional conditions—has its roots in "equity rule 59," adopted in 1912 as part of a series of reforms designed to dismantle a burdensome and expensive equity system under which it was believed judges had delegated too much of their responsibility to masters.¹¹ Typical of the continuing complaints about reference to masters even after 1912, we learned, was Chancellor Vanderbilt's:

There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all too prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as a referee.¹²

Largely as a result of this lineage, rule 53 is generally viewed as encoding what one commentator terms "a general disinclination to view a non-jury reference with favor."¹³ Such references to masters, it is widely believed, "remove the courts from the arena of litigation, burden the parties with added costs, may unduly delay the outcome, and cause a large duplication of effort inasmuch as the court must, upon objection to the master's report, review the record and his findings before adopting them as its own."¹⁴ The framers of rule 53 were particularly worried about judicial abdication of the core function of running trials, and about the practice in some courts of routinely delegating to masters certain types of unusually difficult cases, such as antitrust and patent litigation.¹⁵

¹¹ See Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 AM. B. FOUND. RES. J. 143, 153; Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 454 n.12 (1958).

¹² A. VANDERBILT, *MODERN PROCEDURE AND JUDICIAL ADMINISTRATION* 1240-41 (1952), quoted in Kaufman, *supra* note 11, at 453 n.7.

¹³ *Id.* at 456.

¹⁴ *Id.*

¹⁵ See Note, *Reference of the Big Case under Federal Rule 53(b): A New Meaning for*

Supreme Court precedent reflects a parallel concern that, unless cautiously used, masters can effectively usurp the judicial function of deciding cases. A long line of precedent, before and especially after the adoption of rule 53, emphasizes that masters exist to assist, but not to supplant, the trial judge.¹⁶ As early as 1889, Justice Field, in *Kimberly v. Arms*,¹⁷ endorsed the use of masters to aid the judge at trial, but cautioned that the judge must never relinquish ultimate decisional powers:

A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar services. The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon or disregard in whole or in part, according to its own judgment as to the weight of the evidence [The court] cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers.¹⁸

In 1920, the Supreme Court repeated its admonition that masters are “to aid judges in the performance of specific judicial du-

the “Exceptional Condition” Standard, 65 YALE L.J. 1057, 1057-58 (1956).

¹⁶ Well before the enactment of rule 53, it was established that federal courts have “an inherent authority to appoint masters as a natural concomitant of their judicial power.” Kaufman, *supra* note 11, at 462. *Ex parte Peterson*, 253 U.S. 300 (1920), is the seminal decision in this regard. The Supreme Court stated in *Peterson* that courts “have . . . 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.” *Id.* at 312 (citation omitted). Federal courts have relied on inherent authority—and, since 1938, on rule 53—to delegate to masters pretrial fact-finding functions; trial-stage matters; and, in recent years, post-trial implementation functions. See Brazil, *supra* note 11, at 176-77. Different questions and concerns are raised depending on the purpose and the timing of the master’s appointment. *Id. passim* (arguing that rule 53 was not designed to permit courts to use masters during the pretrial discovery stage); see Brakel, *supra* note 2, at 562-63 (discussing potential problems with using special masters in institutional—e.g., prison or mental hospital—cases to perform post-decree implementation functions).

¹⁷ 129 U.S. 512 (1889).

¹⁸ *Id.* at 523-24.

ties," and not to displace the court.¹⁹ In so doing, the Court affirmed the inherent power of courts to appoint special masters to perform a variety of "specific judicial duties," but the list of functions it offered by way of example were generally limited ones that left ultimate decisional powers with the trial judge: "To take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence and make finding thereon"²⁰

Finally, in 1957, in the seminal case of *La Buy v. Howes Leather Co.*,²¹ the Supreme Court laid down one clear limitation on the use of rule 53: referring an entire case to a master on the ground that the court was overburdened was inappropriate. Such a referral "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court."²² In *La Buy*, the Supreme Court overturned a district judge's wholesale reference to a master of two full civil antitrust trials. The Court rejected the district judge's arguments that calendar congestion constituted an "exceptional circumstance," and emphasized that the use of masters is "to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause,' and not to displace the court."²³ As for the concern expressed by the trial judge that the issues posed by the cases were complicated, the Court stated that complexity "is an impelling reason for the trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work."²⁴

From this precedent, as well as from the historic concern about judicial abdication underlying rule 53, the panel majority in *Department of Defense* took as its starting point the assumption that the precise nature of the duties delegated to the master is all-important under rule 53. As one commentator has stated, "[w]here the function delegated to the master is basically ministerial there is little if any abdication of the judicial function, and such matters, rather than tying up the court, can in many instances be more

¹⁹ *Peterson*, 253 U.S. at 312.

²⁰ *Id.* at 313.

²¹ 352 U.S. 249 (1957).

²² *Id.* at 256.

²³ *Id.* (citation omitted) (quoting *Ex parte Peterson*, 253 U.S. 300, 312 (1920)).

²⁴ *La Buy*, 352 U.S. at 259.

profitably referred to a master.”²⁵ However, *Department of Defense* did not, at first blush, fit squarely into either the category of cases in which a master has been delegated ultimate decisional duties, or the category of plainly ancillary chores.²⁶ On the one hand, the trial judge had charged the master with duties central to the resolution of the case-in-chief—sorting the FOIA documents and enumerating potential arguments. On the other hand, the judge in calling upon the master to develop a representative sample expressly forbade the master from making any recommendations, and not only retained ultimate decisional power but allowed the parties to challenge the master’s actions.

Nor did the smattering of FOIA cases in our circuit set clear parameters for the appointment of masters. True, fifteen years earlier we had stated in dicta that designating masters in FOIA cases was appropriate. But in that case, *Vaughn v. Rosen*,²⁷ the court had offered little guidance on either the types of FOIA cases in which masters could appropriately be used, or on what types of activities masters could perform. Rather, we wrote simply that where a trial judge determines that dealing with “the raw material of an FOIA lawsuit may still be extremely burdensome . . . it is within the discretion of [the] trial court to designate a special master to examine documents and evaluate an agency’s contention of exemption.”²⁸ The “special master would not act as an advocate” but instead would “assist the adversary process by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge.”²⁹ However, even had *Vaughn* purported to establish binding precedent authorizing

²⁵ Kaufman, *supra* note 11, at 457.

²⁶ Special masters have been used in multifarious contexts. See, e.g., *California v. Texas*, 459 U.S. 963, 963 (1982) (ordering appointment of master to supervise pleadings and issuing of subpoenas); *Mississippi v. Arkansas*, 402 U.S. 926, 926-27 (1971) (special master used to determine facts in a water rights dispute); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 702-03, 708 (1927) (upholding reference of patent infringement cases to master); *In re Hotel Governor Clinton, Inc.*, 107 F.2d 398, 399 (2d Cir. 1939) (upholding use of master in bankruptcy reorganization proceedings); *Biechele v. Norfolk & W. Ry.*, 309 F. Supp. 354, 359 (N.D. Ohio 1969) (various nuisance claims referred to master in plaintiffs’ class action suit for determination of damages); *Kapral v. Jepson*, 271 F. Supp. 74, 84 (D. Conn. 1967) (special master appointed to formulate plan for redistricting); *Heiberg v. Hasler*, 1 F.R.D. 735, 737 (E.D.N.Y. 1941) (determination of foreign law referred to special master to take testimony and report).

²⁷ 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

²⁸ *Id.* at 828.

²⁹ *Id.*

broad invocation of masters, our subsequent decision in *Meeropol v. Meese*³⁰ had qualified our endorsement. *Meeropol* held that a trial court had not erred in deciding *not* to appoint a special master in a FOIA cases, emphasizing the manifest discretion accorded trial judges in making such decisions. *Meeropol*, however, also stated in language pertinent to the issue now confronting us in *Department of Defense* that:

[T]he appointment of a special master will often present more problems than it will solve. If the master makes significant decisions without careful review by the trial judge, judicial authority is effectively delegated to [a non-article III official]; if the trial judge carefully reviews each decision made by the master, it is doubtful that judicial time or resources will have been conserved to any significant degree.³¹

What ultimately persuaded the panel majority that the FOIA appointment in *Department of Defense* was in harmony with the spirit and the historical application of rule 53 were the strict limitations the district judge imposed upon the master's authority. The judge, we wrote, "carefully cabined the master's authority," and he "expressly forbade the master from making any recommendations, charging him instead with the more limited task of developing a representative sample and summarizing each party's arguments or potential arguments."³² The judge also promised the parties that they would have the opportunity to challenge before him the conclusions reached in the master's report. In this respect, *Department of Defense* diverged dramatically from *La Buy*, where ultimate decisional authority in two full cases was delegated to a master, and from the handful of appellate cases either criticizing or overturning the appointments of a master by the lower court. In each of those cases, the flaw in the master's reference was in the grant of final authority—unreviewable by even the judge—over merits issues. These cases involved irretrievable delegations of authority to masters to decide dispositive pretrial motions,³³ to decide an entire land-contract case,³⁴ and to preside over the merits of a complex environmental lawsuit.³⁵ In one case, reference to a

³⁰ 790 F.2d 942 (D.C. Cir. 1986).

³¹ *Id.* at 961.

³² *Department of Defense*, 848 F.2d at 236.

³³ See *In re United States*, 816 F.2d 1083, 1089 (6th Cir. 1987).

³⁴ See *Bennerson v. Joseph*, 583 F.2d 633, 641-42 (3d Cir. 1978).

³⁵ See *In re Armco, Inc.*, 770 F.2d 103, 105 (8th Cir. 1985).

master was criticized where it was shown that the judge had adopted every word of a master's opinion on a summary judgment motion without making *any* changes of his *own*!³⁶

Also striking to the panel was how similar the job assigned to the *Department of Defense* master was to the masters' roles in overseeing complex pretrial discovery regimes in a series of cases in which courts had found the requisite "exceptional condition." We wrote:

The burden of sorting and categorizing sheafs of documents to facilitate testing them for compliance with FOIA's exceptions is a close cousin to the task of overseeing complex document production, an instance of the "unusual discovery" that has been widely recognized as constituting an exceptional condition within the ambit of Rule 53(b).³⁷

Like discovery oversight, the role of FOIA document-sorting oversight seemed infected with none of the problems of excessive delegation or unnecessary cost that animate rule 53's lukewarm attitude towards masters.

The interpretative analysis adopted by the majority for perusing and applying this somewhat elliptical federal rule was, thus, very much a functional one, focusing on the practical needs of the judge and the workings of the master arrangement in this case, and contrasting the limited reference here with the broader evils against which rule 53 was designed to guard. We concluded:

In our view, this case features a very special set of circumstances which meet the "exceptional condition" test of Rule 53. It involves a FOIA claim with respect to which the judge has no access to impartial expert witnesses or other features of the adversary process in order to assist him in making his decision about disclosure. It also involves a massive collection of 14,000 pages which must be sifted through. As Judge Oberdorfer's response to the mandamus petition pointed out, he had only recently used his law clerks for several months to assist him in a "much less technical and sensitive FOIA case," and presumably would have done so again, except for the fact that to do so in this case would have required that they obtain special security clearances, a time-consuming process in itself. The judge also made a judgment based upon several years of experience on the case that random sam-

³⁶ See *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 712-13 (7th Cir.), cert. denied, 469 U.S. 1018 (1984).

³⁷ *Department of Defense*, 848 F.2d at 235 n.5.

pling would not be an appropriate technique in this instance. He therefore resorted to appointment of a master to ensure a prompt, thorough, and independent look at all the documents. Apart from our assumption that Rule 53 itself clearly envisions considerable discretion in the district court in deciding when an "exceptional condition" exists, we find the special combination of circumstances here fits well within that term.³⁸

Thus, the panel majority settled upon an essentially pragmatic, ad hoc standard for deciding when an "exceptional condition" exists: here it was sufficient that the trial judge was confronted with a massive number of documents dealing with sensitive, specialized subject matter and could get no immediate help from his chamber's staff. He needed a security-cleared expert fast, if the trial was to move ahead.

IV.

The dissenting judge, however, drew less upon the animating history and precedential application of rule 53 to determine whether an "exceptional condition" existed. His was instead primarily a linguistic argument, focusing upon one word in rule 53(b): the word "requires." Contending that the exceptional condition must not only warrant or justify the appointment of the special master, it must *require* it, Judge Starr wrote:

It is, in all candor, difficult for me to see how an appointment, however distinguished the proposed master may be, is "required" when other "non-master" routes are so readily available. It is undisputed that the judicially approved method of random sampling is available and as yet unemployed. Likewise available is an *in camera Vaughn* index and affidavit Under these circumstances, it would seem almost by definition that an appointment cannot be "required" if other vehicles or avenues are at hand. To so hold has the obvious and untoward effect of draining Rule 53's language of its natural meaning. That language, lest there be any mistake, sounds not in broad, sweeping terms of judicial discretion. Rather, Rule 53 commands a *showing* that some *exceptional condition requires* the appointment.

Here, it is by no means evident that a master's appointment is "required" by an "exceptional condition" within the meaning of Rule 53, nor are any reasons evident in the record that would

³⁸ *Id.* at 236 (citation omitted); see also FED. R. CIV. P. 53 advisory committee's note ("such masters may prove useful when some special expertise is desired").

warrant such an appointment. The “exceptional conditions” referred to by the trial court include the burden presented by the necessity of *in camera* review of voluminous, highly sensitive documents, particularly in light of the difficulty of obtaining security clearances for judicial clerks and staff. But these factors cannot constitute “exceptional conditions” *requiring* the appointment of a special master unless the court can point to some reason why other, judicially-sanctioned methods of dealing with these common FOIA problems will not suffice. This the District Court, with all respect, has failed to do.³⁹

In sum, our dissenting colleague would require a showing that no other technique besides reference to a master would suffice:

Although it is not for us to direct in minute detail how the trial court should perform what is indisputably its task, we should not be quick to sanction an extraordinary remedy when the District Court has yet to explain why other avenues, which have in the past enabled it adequately to fulfill its task, are unavailing. Surely convenience alone does not suffice as an explanation, for if it did masters would be the rule in all FOIA cases of any size.

The use in rule 53 of the word “require,” we can safely assume, was no accident. To hold that trial judges have no obligation to explain why other courses of action, short of appointing a master, will not suffice thus empties the Rule of any content. At the very least, the trial judge must explain why a master is “required,” *i.e.*, necessary or essential. If Rule 53 really means “desire” rather than “require,” then today’s result follows. But as a matter of logic (and if the Rule means what it says), before a master is *required*, other ordinary courses must *necessarily* be inefficacious. In this case, there were at least two judicially approved alternative courses to follow short of appointing a special master. In my view, the District Judge is obliged to explain *the reasons why* those previously approved methods would not work *under the particular circumstances of this case*. Only then could we truly say that an exceptional condition had *required* the District Judge to appoint a special master.⁴⁰

To the panel majority, this argument misconceived the import of rule 53, which no court had previously held to require the laborious showing the dissent urged.⁴¹ The majority noted that the trial

³⁹ *Department of Defense*, 848 F.2d at 240-41 (Starr, J., dissenting) (footnote omitted).

⁴⁰ *Id.* at 241-42 (Starr, J., dissenting) (citation omitted).

⁴¹ Justice Brandeis’ opinion in *Ex parte Peterson*, 253 U.S. 300 (1920), made clear that for appointment of a master to be appropriate, it is not necessary that the master’s contri-

judge had considered, but rejected, the alternative techniques urged by the government: random selection, for example, or the selection by the government of a "representative" sample. We believed the trial judge's intense familiarity with the case bolstered his authority to make such a choice, and "reaffirm[ed] the broad discretion over trial-management tactics with which a district judge is vested".⁴²

Having found serious flaws in these alternatives, he was well within his discretion to conclude that Rule 53 *required* recourse to a master. In urging deployment of a mandamus writ against Judge Oberdorfer, Judge Starr would have us conclude that the trial judge—after four years' experience on this case, and armed with instructive experience on other FOIA litigation to which he alluded in recounting his decision to appoint the master—abused his discretion in adjudging this trial-management technique more effective than others. Nothing in Rule 53, or in the daunting standards governing mandamus, supports such manifest appellate court interference with Judge Oberdorfer's trial management.⁴³

We accordingly upheld the reference to the master.

CONCLUSION

This brief exercise in the anatomy of one particular judicial application of Federal Rule of Civil Procedure 53(b) illustrates, I hope, that after fifty years the Rules remain living documents. Courts interpreting the Federal Rules are not locked into procedural straitjackets designed solely to prevent the recurrence of antiquated problems. Rather, they can and do look for wisdom and guidance not just in the bare language of the Rules (though as my colleague's dissenting opinion in *Department of Defense* shows, the language of the Rules is often more rich in meaning than immediately meets the eye), but also to the Rules' origins, history, precedential application, and guiding purpose. New problems are

bution be *literally* "necessary" to do justice; rather, the master need only be "necessary" to maximize the efficiency of the litigation process. *See id.* at 312-14. In one commentator's words, Justice Brandeis concluded that the master in *Peterson* was "required" only in the sense that he was necessary "to make the litigation process as expeditious and orderly as possible. And, since it is not possible to determine in advance which procedures or forms of assistance are literally 'necessary' to maximize efficiency, Brandeis' approach converts the meaning of terms like 'necessary' and 'essential' into 'very useful.'" Brazil, *supra* note 11, at 184.

⁴² *Department of Defense*, 848 F.2d at 238.

⁴³ *Id.* at 238-39.

always arising, and the judicial gloss on many of the Rules, while by now a thick one, does not always offer decisive guidance. Yet, in providing the analytic tools with which judges of the present and future can sort out procedural conundrums, without locking jurists into undesired or anachronistic practices or frameworks, the Rules have succeeded mightily in facilitating the development of the law during an extraordinary half-century of change. Let us wish them another fifty years of comparable success.

