

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J TRUMP, et al.,

Defendants.

CASE NO. C17-1297

ORDER APPOINTING SPECIAL
MASTER

This Order follows the Court's Notice of the Appointment of a Special Master. (Dkt. No. 466.) Finding that the Parties' two-year discovery dispute cannot be effectively and timely addressed by the Court or by any available district judge or magistrate judge of the district, and having heard from the Parties (Dkt. Nos. 470, 472, 474, 476, 478), the Court appoints retired United States Magistrate Judge, the Honorable James P. Donohue to serve as Special Master.

In its Notice of Appointment, the Court requested that the Parties propose names of special master candidates (Dkt. No. 466). During the April 2, 2020 Status Conference, the Court discussed Plaintiffs' proposed candidates—Defendants did not submit proposals by the

1 deadline—and asked for feedback on three candidates proposed by the Court. (Dkt. No. 476 at
2 34:10-36:17.) During this discussion, Defendants requested a master “who has substantial
3 experience adjudicating claims of government privilege” and “somebody who has prior federal
4 judicial experience.” (Dkt. No. 35:25-36:5.) Of the candidates proposed by the Parties and the
5 Court, only Judge Donohue holds those qualifications.

6 Judge Donohue was appointed United States Magistrate Judge for the Western District of
7 Washington in 2005, serving for 14 years before his retirement in March 2019. In 2015, he was
8 appointed Chief Magistrate Judge for the District. Prior to his appointment to the bench, Judge
9 Donohue was a shareholder in the Seattle office of Heller Ehrman White & McAuliffe, LLP
10 where his practice was focused on commercial and intellectual property litigation. Judge
11 Donohue also served as the Articles Editor for the Federal Courts Law Review.

12 He received his A.B. from the University of Illinois in 1973, and his J.D. from the
13 University of California, Los Angeles, in 1976, where he was a member of the UCLA Law
14 Review. After his graduation, he served as a VISTA volunteer before going into private practice.
15 Judge Donohue served on the Ninth Circuit *Pro Se* Committee, a committee he chaired from
16 2009-13. He was also on the Ninth Circuit Magistrate Judge Education Committee and was
17 elected to serve on the Board of Directors of the Federal Magistrate Judges Association,
18 representing the Ninth Circuit. He was one of the founding members and first president of the
19 Seattle Intellectual Property Inns of Court. Judge Donohue also served on the Board of Directors
20 of the Special Olympics of Washington.

21 Defendants have objected to the appointment of Judge Donohue, arguing that an article
22 he recently authored demonstrates “at a minimum, an appearance of bias against Defendants.”
23 (Dkt. No. 478 at 2.) The Court has reviewed the article and finds no bias; to the contrary, the
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1 central argument of the article is that judges must remain apolitical and impartial. See James P.
2 Donohue, *I was a Federal Judge. My Former Colleagues Must Stop Attending Federalist Society*
3 *Events*, Slate.com, [https://slate.com/news-and-politics/2019/11/federalist-society-federal-judges-](https://slate.com/news-and-politics/2019/11/federalist-society-federal-judges-unethical.html)
4 [unethical.html](https://slate.com/news-and-politics/2019/11/federalist-society-federal-judges-unethical.html) (last visited April 8, 2020 (“Judges are supposed to be apolitical. The rule of law
5 requires that decisions be based on the laws and Constitution of the United States, and not a
6 judge’s personal views or political preference.”) Further, the article neither mentions the subject
7 matter of this lawsuit nor the named parties. (See id.) And based on his extensive experience
8 and conduct for fourteen years as a federal magistrate judge, the Court has every confidence that
9 Judge Donohue will carry out his duties as Special Master with impartiality.

10 Defendants also expressed concerns about whether the special master’s fees could be split
11 equitably between the Parties and whether such fees would be in line with the Government’s
12 sovereign immunity. (Dkt. No. 476 at 10:18-11:2.) Because Judge Donohue has agreed to act
13 as Special Master, *pro bono*, those concerns are no longer relevant.

14 The Court therefore appoints Judge Donahue Special Master, with the following duties
15 and limitations pursuant to Rule 53 of the Federal Rules of Civil Procedure.

16 **1. Appointment and Scope.** Pursuant to Rule 53(a)(1)(C), the Court appoints
17 Judge Donohue as Special Master to assist the Court in reviewing Defendants’ privilege
18 assertions over documents the Defendants have submitted for *in camera* review.

19 **2. No Grounds for Disqualification.** Pursuant to Rules 53(a)(2) and 53(b)(3), the
20 Court attaches to this Order the Special Master’s declaration identifying any relationship to the
21 Parties, counsel, action, or Court that would require disqualification of a judge under 28 U.S.C.
22 § 455.
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1 3. **Fairness Considerations.** Pursuant to Rule 53(a)(3), the Court will protect
2 against unreasonable delay through communication with the Special Master and the Parties as
3 appropriate.

4 4. **Notice.** Pursuant to Rule 53(b)(1), the Court provided notice to the Parties of its
5 intent to appoint a Special Master and provided an opportunity to be heard on the appointment.
6 (See Dkt. Nos. 466, 470, 472, 474, 476, 478.)

7 5. **Diligence.** Pursuant to Rule 53(b)(2), the Court directs the Special Master to
8 proceed with all reasonable diligence.

9 6. **Special Master's Duties and Scope of Authority.** Pursuant to Rule 53(b)(2)(A),
10 the Special Master shall assist with certain matters, as the Court may determine after notice to
11 the Parties. At this point, the Court limits the scope of the Special Master's authority to the
12 evaluation of Defendants' privilege assertions over documents the Defendants submitted for *in*
13 *camera* review. The Special Master shall identify to the Court those documents over which he
14 believes the Defendants erroneously made privilege assertions. The Court will then review those
15 documents *de novo*. The Special Master may recommend but not issue sanctions, Fed. R. Civ. P.
16 53(c)(2), and may not issue orders, Fed. R. Civ. P. 53(c)-(d), but shall report his findings directly
17 to the Court.

18 7. **Ex Parte Communications.** Pursuant to Rule 53(b)(2)(B), the Special Master
19 may communicate *ex parte* with the Court without restriction. The Special Master shall not
20 communicate *ex parte* with any party.

21 8. **Preservation of Materials.** Pursuant to Rule 53(b)(2)(C), the Special Master
22 shall maintain orderly files consisting of all documents submitted to him by the Parties.
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1 9. **Compensation.** Judge Donohue has agreed to serve as the Special Master, *pro*
2 *bono*.

3 10. **Amendments.** Pursuant to Rule 53(b)(4), the Court may amend this Order at any
4 time after notice to the Parties and an opportunity to be heard.

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6 The clerk is ordered to provide copies of this order to all counsel.

7 Dated April 9, 2020.

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10 Marsha J. Pechman
11 Senior United States District Judge
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 RYAN KARNOSKI, et al.,

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CASE NO. C17-1297

**RULE 53 DECLARATION OF
JAMES DONOHUE**

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16 I declare under penalty of perjury that the following is true and correct:

17 1. Federal Rule of Civil Procedure 53(b)(3) requires that, prior to the entry of an
18 order appointing a master, the master must file (a) "an affidavit disclosing whether there is any
19 ground for disqualification under 28 U.S.C. § 455; and (b) if a ground is disclosed, the parties,
20 with the court's approval, waive the disqualification."

21 2. 28 U.S.C. § 455 provides, in part:

22 (a) Any justice, judge, or magistrate judge of the United States shall disqualify
23 himself in any proceeding in which his impartiality might reasonably be
24 questioned.

(b) He shall also disqualify himself in the following circumstances:

1. Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
2. Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
3. Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
4. He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
5. He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the proceeding;
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

3. I am not aware of any ground under § 455 that would disqualify me from serving as special master in this matter. Since my retirement from the federal bench in March 2019, I have engaged in writing about the propriety of federal judges participating in the Federalist Society, and have worked on and contributed to a presidential campaign effort on behalf of Senator Elizabeth Warren, who is no longer a candidate. Neither my writings nor my involvement with the Warren campaign would disqualify me from performing the expected role

1 as a special reviewing documents claimed as privileged, work which I performed while a United
2 States Magistrate Judge prior to my retirement.

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4 Executed on April 7, 2020 in Seattle, Washington.

5 By 
6 James Donohue
7 James_donohue68@outlook.com
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