UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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NANCY M. MAYER-WHITTINGTON CLERK

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

THE GOVERNMENT'S RESPONSE TO PLAINTIFFS' BILL OF PARTICULARS AND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER TO SHOW CAUSE WHY EDWARD B. COHEN SHOULD NOT BE HELD IN CRIMINAL CONTEMPT

On behalf of Edward B. Cohen, in his official capacity, the United States hereby responds to and moves to dismiss the "Bill of Particulars for Edward B. Cohen in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not Be Held in Criminal Contempt for Destroying E-Mail (3/20/02) and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt " (hereinafter "Supplemental Memorandum"), filed July 22, 2002.[1] Mr. Cohen, who is not a party to this case, is a former Deputy Solicitor of the Department of the Interior. He resigned effective July 31, 2000.

The Supplemental Memorandum purports to be filed "In accordance with this Court's instruction on March 15, 2002," as the "first in a series of civil, and, where appropriate criminal contempt bills of particulars, clarifying and referencing specifications and evidence" against Mr. Cohen and others who are the subject of plaintiffs numerous contempt motions. Supplemental

[1] Mr. Cohen is separately represented in his personal capacity.

Memorandum at 1 n.1. The plaintiffs apparently refer to the hearing held in this matter on March 15, 2002. In that hearing, the Court directed the plaintiffs to state "individual defendant by individual defendant specifications of what the contempt proceedings would be for those 39 people so that they each have an opportunity to address what the evidence is and what you are citing against any of those 39." *Cobell v. Norton*, Civ. Action No. 96-1285(RCL), Transcript of March 15, 2002 Status Hearing, at 21:10-14 ("3/15/02 Tr.").

Taking plaintiffs at their word that the current filing is in response to the March 15, 2002 directive, plaintiffs have abandoned any basis for a contempt order as to Mr. Cohen except the allegations concerning overwriting of backup e-mail tapes which are the subject of the Supplemental Memorandum (as well as of the March 20, 2002 contempt motion), and plaintiffs have abandoned any request that Mr. Cohen be held in civil contempt. That being so, the Supplemental Memorandum, and the request that Mr. Cohen be held in contempt, should be dismissed for several reasons. First, sovereign immunity precludes the imposition of criminal penalties, the only relief sought by plaintiffs, against Mr. Cohen in his official capacity. Second, issues concerning the backup e-mail tapes have been fully briefed, plaintiffs have not sought nor been granted leave to file a supplemental brief on that issue, and the current filing does not set forth any basis for doing so.[2] Third, despite their repeated attempts to do so, plaintiffs have not presented a *prima facie* case of contempt, let alone made the heightened showing necessary to establish criminal contempt.

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[2] The Supplemental Memorandum purports to incorporate by reference the plaintiffs' initial motion filed March 20, 2002 and the reply brief filed April 15, 2002. Supplemental Memorandum at 1 n.1. The United States moved to strike the reply brief. Plaintiffs did not respond to the motion to strike the reply brief, even thought the Court did not rule on their motion to extend indefinitely the July 8, 2002 deadline for their response. Accordingly, the motion to strike the reply brief may be treated as conceded. Local Rule 7.1(b).

ARGUMENT

I. Sovereign Immunity Precludes the Imposition of Criminal Penalties Against Mr. Cohen in His Official Capacity

Plaintiffs request that Mr. Cohen be referred for a prosecution for criminal contempt. Supplemental Memorandum at 1 n.1. Plaintiffs do not request that Mr. Cohen be held in civil contempt. As the government pointed out in "Government's Opposition to Plaintiffs' March 20, 2002 Motion for Orders to Show Cause Why Interior Defendants and their Employees and Counsel Should Not be Held in Contempt" (the "Government's Opposition"), filed April 3, 2002 at 13-16, sovereign immunity bars criminal contempt sanctions against Mr. Cohen in his official capacity.

Since the government has received notice and an opportunity to respond to the contempt claim against Mr. Cohen, the claim against him in his official capacity is to be treated as a claim against the government. *Coleman v. Espy*, 986 F.2d 1184, 1189 (8th Cir.), *cert. denied sub nom. Dye v. Espy*, 510 U.S. 913 (1993), *citing Kentucky v. Graham,* 473 U.S. 159 (1985). *See also Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002), and cases cited therein. The doctrine of sovereign immunity bars the imposition of fines or penalties against the government, except to the extent that the United States has explicitly consented to such sanctions. *United States v. Horn*, 29 F.3d 754, 761 (1st Cir. 1994). A waiver of sovereign immunity must be definitively and unequivocally expressed and must appear in the text of the statute itself. *In re Sealed Case*, 192 F.3d 995, 1000 (D.C. Cir. 1999), *citing Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Horn*, 29 F.3d at 762, *citing United States v. Mitchell*, 445 U.S. 535, 538 (1980), and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

The United States has not waived sovereign immunity from citations for criminal contempt. *Coleman v. Espy,* 986 F.2d at 1191; *United States v. Horn*, 29 F.3d at 763; *see also In re Sealed*

Case, 192 F.3d 995, 999-1000 (D.C. Cir. 1999) ("...it is far from clear that Congress has waived federal sovereign immunity in the context of criminal contempt . . . We know of no statutory provision expressly waiving federal sovereign immunity from criminal contempt proceedings.").[3] Similarly, the court in *In re Newlin*, 29 B.R. 781, 785 (E.D. Pa. 1983), held that a criminal contempt citation by a bankruptcy court against a federal agency violated sovereign immunity because the government had not expressly waived its immunity from citation for criminal contempt. Consequently, to the extent that plaintiffs now are attempting to have Mr. Cohen in his official capacity prosecuted for criminal contempt, the plaintiffs' motion must be denied.

II. Even if Sovereign Immunity Did Not Preclude a Criminal Contempt Referral, a Referral Would Not Be Warranted

A. Legal Standards

Plaintiffs ask that the Court refer Mr. Cohen for prosecution under 18 U.S.C. § 401(3), which permits the court "to punish by fine or imprisonment, at its discretion, such contempt of its authority ... as ... [d]isobedience or resistance to its lawful . . . order." To convict a defendant of criminal contempt under this statute, the Court must find, beyond a reasonable doubt, that Mr. Cohen willfully violated a "clear and reasonably specific" order of the court. *United States v. Roach*, 108 F. 3d 1477, 1481 (D.C. Cir. 1997), *citing United States v. NYNEX Corp.*, 8 F.3d 52, 54 (D.C. Cir.1993), and *United States v. Turner,* 812 F.2d 1552, 1563 (11th Cir.1987). For a violation to be "willful," the defendant must have acted with deliberate or reckless disregard of the obligations created by the court order. *Id., citing In re Holloway,* 995 F.2d 1080, 1082 (D.C.

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[3] *In re Sealed Case*, 192 F.3d 995 (D.C. Cir 1999), was not decided on the issue of whether sovereign immunity precluded criminal contempt against the United States, since the Court determined that a *prima facie* case of criminal contempt had not been alleged. 192 F.3d at 1000.

Cir.1993) *cert. denied*, 511 U.S. 1030 (1994), and *United States v. Greyhound Corp.*, 508 F.2d 529 (7th Cir.1974). Thus, in order to support a referral for criminal contempt, plaintiffs must initially show, by clear and convincing evidence, that (1) a clear and reasonably specific court order was in effect, (2) the order required certain conduct by Mr. Cohen, and (3) that Mr. Cohen willfully violated the court's order.

B. Plaintiffs Have Not Made a *Prima Facie* Showing that Mr. Cohen Willfully Violated any Court Order.

1. Plaintiffs Have Abandoned All Claims Against Mr. Cohen Other than the Allegations in Plaintiffs' March 20, 2002 Motion

Plaintiffs assert that the Supplemental Memorandum has been filed "in accordance with the Court's instruction on March 15, 2002. . . ," Supplemental Memorandum at 1 n.1. There is no question that the Court, in directing the plaintiffs to provide supplemental briefing on their contempt allegations, was referring to the various motions plaintiffs had filed **before** March 15, 2002, and which were pending before the Court at that time. The Court explained the reason for this direction:

> Part of what they [the 39 alleged contemnors] had raised and part of why I had deferred acting on that was they thought there was not enough evidence cited and individual charges made against individuals and I think the time has come for the plaintiffs to lay it out.

3/15/02 Tr. at 21:15-18.

Plaintiffs have not laid out any evidence in support of any of their contempt charges against Mr. Cohen made before the Court's March 15, 2002 hearing. Instead, the Supplemental Memorandum is based entirely on their March 20, 2002 show cause motion. Supplemental Memorandum at 1 n.1. By failing to particularize any of the charges against Mr. Cohen contained

in the motions that were actually pending before the Court on March 15, 2002, plaintiffs have abandoned those charges and motions, and the Court should dismiss them as to Mr. Cohen.[4]

2. Plaintiffs Have Not Shown That Mr. Cohen Violated Any Order Pertaining to Backup E-Mail Tapes

Even if sovereign immunity did not preclude a referral for criminal contempt against Mr. Cohen in his official capacity, plaintiffs have fallen far short of presenting the *prima facie* case justifying such a referral. The Supplemental Memorandum simply rehashes allegations against Mr. Cohen which were contained in the March 20, 2002 motion. As demonstrated by the Government Opposition, as well as the "Opposition of Edward B. Cohen to Plaintiff's Motion for Order to Show Cause" (the "Cohen Response") filed May 3, 2002, that motion failed to meet the lesser standard of presenting a claim for civil contempt against Mr. Cohen or against any of the other respondents. Shorn of irrelevancies and misrepresentations,[5] the Supplemental Memorandum

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[4] These motions include Plaintiffs' Motion for Order to Show Cause Why Defendants and Their Employees and Counsel Should Not Be Held in Contempt and For Sanctions for Violating the Anti-Retaliation Order (filed Aug. 16, 2000); Plaintiffs' Consolidated Reply Brief in Support of Motion to Set a Trial Date for Phase II of this Action and Memorandum in Support of Motion for Order to Show Cause Why Past and Present Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt (filed Aug. 27, 2001); Plaintiffs' Consolidated Motion to Amend Their Motion to Reopen Trial One in this Action to Appoint a Receiver and Memorandum of Points and Authorities in Support Thereof and Motion for Order to Show Cause Why Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court with Trial One (filed Oct. 19, 2001); and plaintiffs' reply briefs as to these motions.

[5] Plaintiffs apparently recognize that the allegedly missing data at issue are solely those copies of Solicitor's Office e-mails that had been transferred to backup tapes which were periodically overwritten, and plaintiffs represent that they will refer to the data as "e-mail backup tapes." Supplemental Memorandum at 2 n.2. Despite this promise, plaintiffs cannot quite resist the temptation to refer misleadingly to the data at issue generally as "e-mails," "trust records," or "records." *See* Supplemental Memorandum at paragraphs 16, 17, 18, 25, 28 (and footnote 5, referenced therein), 29, 30, and 32. Plaintiff also assert, in paragraph 31, that the e-mail backup tapes "are, in fact and as a matter of law, official records of the Department of the Interior." This assertion is clearly wrong, *see* Government's Opposition at 17-18 and Cohen Response at 12-13, and it is difficult to understand how plaintiffs' counsel could believe in good faith that this assertion was factually or legally supportable.

asserts that Mr. Cohen willfully violated this Court's order of November 9, 1998, by writing a memorandum on November 13, 1998, authorizing the computer system personnel of the Department of the Interior to resume the normal practice of recycling computer system backup tapes. Supplemental Memorandum at 12-14.[6] Plaintiffs made the same argument in the March 20, 2002 motion, and the Supplemental Memorandum does not include any additional support for their position. As both the government, Government's Opposition at 9-11, and Mr. Cohen, Cohen Response, at 14-15, pointed out when plaintiffs made this argument in the March 20, 2002 motion, the November 9, 1998 Order did not "clearly and specifically" require the Department of the Interior to maintain new backup tapes, and therefore Mr. Cohen's memorandum did not violate that order, willfully or otherwise.

On the record put forward by the plaintiffs, there simply is no basis for concluding that Mr. Cohen acted "willfully" or in bad faith to disobey a Court order or to deceive the Special Master or the Court regarding the e-mail backup tapes.

C. Plaintiffs Repetitive Filing of Specious Contempt Motions is Improper

1. Plaintiffs Should Not Be Permitted Multiple Bites at the Apple.

Plaintiffs are now on their **third** attempt to seek sanctions from a fully-disclosed event that occurred years ago and as to which plaintiffs have never proven that they suffered any material harm. Due process forbids such multiple and belated efforts to impose criminal sanctions upon an individual.

Plaintiffs sought sanctions based on the e-mail backup tape issue in their September 12, 2000 Motion for Leave and Request for Sanctions in Response to Defendants' Motion for a

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[6] If plaintiffs are attempting to assert any other basis for criminal contempt, the Supplemental Memorandum should be dismissed for lack of specificity.

Protective Order. Plaintiffs did not, however, seek a recommendation for contempt as part of their request for sanctions in this motion. Nor did plaintiffs object within 10 days to the Special Master's July 27, 2001 recommendation regarding sanctions, which was limited to attorney's fees.

On March 20, 2002 – eight months after the Special Master's July 27, 2001 ruling – the plaintiffs filed yet another request for sanctions in connection with the e-mail backup tape issue, this time seeking civil and criminal contempt sanctions as to Mr. Cohen and others. At the time plaintiffs filed their March 20 motion, they were fully aware of the legal and factual standards their motion must meet in order to present a colorable basis for a contempt finding. The legal standards had been fully briefed as part of the second contempt trial, and the Court had clearly stated the evidentiary standards their show cause motions must meet in the March 15, 2002 status call. As shown by the excerpts of the March 15, 2002 hearing transcript quoted above, the Court had directed the plaintiffs to particularize their evidence as to each individual respondent. Yet plaintiffs ignored this directive in filing their March 20, 2002 motion just four days after the hearing. As demonstrated by the Government's Opposition and the oppositions to the March 20 motion filed by the individual respondents, plaintiffs had made no effort to tie any individual respondent to the violation of any "clear and reasonably specific" court order. Indeed, several of the respondents were no longer in Government service at the time some or all of the orders cited by plaintiff as the basis for that motion had been issued, and some of the "orders" themselves did not even qualify as a possible basis for a contempt motion. *See* Government's Opposition at 9-12. Plaintiffs' March 20 motion was inexcusably sloppy and fell so far short of the Court's March 15, 2002 directive that it should never have been filed.

The Supplemental Memorandum is an obvious attempt by plaintiffs to clean up the failings of their March 20 motion. However, the Supplemental Memorandum simply rehashes some of the

allegations made in the March 20 motion and in the September 2000 motion before it. Plaintiffs have now limited their focus to the Court's November 9, 1998 Order.[7] However, the Supplemental Memorandum is based entirely on information that was available to plaintiffs when they filed their March 20 show cause motion and, indeed, even earlier when plaintiffs filed their September 12, 2000 Motion for Leave and Request for Sanctions in Response to Defendants' Motion for a Protective Order and the accompanying "Factual Appendix." Thus, plaintiffs have already had two bites at this apple, and in fairness to Mr. Cohen, they should not be permitted yet another. Further, there is no question that plaintiffs have known for more than **three years** that Solicitor's Office e-mail backup tapes were reused and not saved for a period of several months in late 1998 and early 1999. The Government disclosed this information to the Court, the Special Master, and the plaintiffs in May 1999. The Court has not given plaintiffs a license to file specious allegations of contempt with the promise of unlimited opportunities to repackage and refile the same material multiple times. Such license would be inconsistent with due process because it would subject individuals like Mr. Cohen to continual uncertainty regarding the nature of the charges against them.

2. Plaintiffs Did Not Seek Leave of Court Nor Did They Confer With Any Government Counsel Before Filing This "Supplemental Memorandum"

The Court's March 15, 2002 directive that plaintiffs file supplemental memoranda in support of their contempt charges obviously pertained to the contempt charges **then pending** before the Court. The directive, therefore, did not apply to the March 20 motion. Not only should the plaintiffs have adhered to the clear factual standards set forth by the Court in the March 15

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7 Thus, plaintiffs have dropped their claims that Mr. Cohen was involved in the violation of any of the other five "orders" cited by plaintiffs in their March 20 motion.

status conference (as well as in the substantial body of existing caselaw), but they violated the rules in failing to seek the Court's leave before supplementing their March 20 motion. Likewise, plaintiffs did not confer with counsel for the Government before filing this supplemental brief, in violation of Local Rule 7.1(m). For these reasons, too, the supplemental memorandum should be dismissed.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court enter an order denying plaintiffs motion to refer Edward Cohen for criminal contempt.

Respectfully submitted,

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DATED: August 5, 2002

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on August 5, 2002 I served the foregoing *Government's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edward B. Cohen Should Not Be Held in Criminal Contempt* by hand upon:

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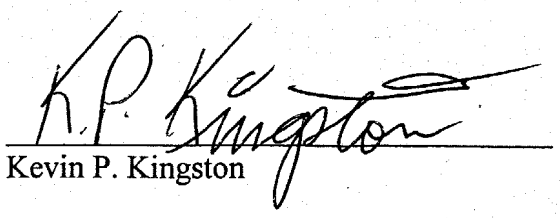

Kevin P. Kingston

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of Plaintiffs' Bill of Particulars for Edward B. Cohen in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not be Held in Criminal Contempt for Destroying E-Mail (3/20/02) and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt, the Government's response in opposition thereto, and the entire record in this case, it is hereby ORDERED that Plaintiffs' motion is DENIED.

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UNITED STATES DISTRICT JUDGE

Date:

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cc:

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