No. 02-5374

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
OR IN THE ALTERNATIVE A PETITION FOR WRIT OF MANDAMUS

BRIEF FOR THE APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. PARTIES AND AMICI

The named plaintiffs in this action are Elouise Pepion Cobell, Earl Old Person, Mildred Cleghorn, Thomas Maulson, and James Louis LaRose. The district court has certified a plaintiff class consisting of present and former beneficiaries of Individual Indian Money ("IIM") accounts, excluding those who had filed their own actions prior to the filing of the complaint in this case.

Defendants are Gale A. Norton, Secretary of the Interior, Neal McCaleb, Assistant Secretary of the Interior for Indian Affairs, and Paul O'Neill, the Secretary of the Treasury.

B. RULINGS UNDER REVIEW

The three rulings on appeal were issued by the Honorable Royce C. Lamberth on September 17, 2002, in Cobell v. Norton, Civ. No. 96-1285. They are a memorandum opinion and order holding the Secretary of the Interior and the Assistant Secretary of the Interior for Indian Affairs in civil contempt and ordering the agency to submit plans for trust reform by January 6, 2003 (Dkts#1476, 1477), reported at __ F. Supp. 2d __, 2002 WL 31060187 (D.D.C. 2002); a memorandum and order denying defendants' Motion To Revoke The Appointment Of Joseph S. Kieffer, III, And To Clarify The Role And Authority Of A Court Monitor (Dkt#1479), reported at __ F. Supp. 2d __, 2002 WL 31060117; and an order appointing Joseph

S. Kieffer, III, to serve as a Special Master-Monitor (Dkt#1478), reported at 2002 WL 31059909.

C. RELATED CASES

This case has previously been before this Court in Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

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TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

GLOSSARY

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

PERTINENT RULES AND REGULATIONS 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 5

A. Initial District Court Proceedings 5

B. This Court's Decision 7

C. Appointment of Court Monitor 9

D. Orders to Show Cause 11

E. The September 17, 2002 Order 12

a. Failure To Initiate Historical Accounting 15

b. Inadequate Disclosure of TAAMS Status 17

c. Misleading Quarterly Reports 18

d. Representations Regarding Computer Security ... 19

SUMMARY OF ARGUMENT 19

STANDARD OF REVIEW 23

ARGUMENT 24

I. THIS COURT HAS JURISDICTION OVER THE DISTRICT COURT'S RULINGS PURSUANT TO 28 U.S.C. § 1292(a), OR, IN THE ALTERNATIVE, UNDER THE ALL WRITS ACT ... 24

II. BY SEIZING CONTROL OF THE PROCESSES FOR CREATING AND IMPLEMENTING PLANS FOR INDIAN TRUST REFORM, THE DISTRICT COURT HAS OVERSTEPPED THE PROPER BOUNDS OF JUDICIAL AUTHORITY 27

A. Under Settled Principles Of Judicial Review Of Agency Action And This Court's Remand Order, The District Court Lacks Authority To Assume Control Of The Operation Of A Federal Program 27

B. The District Court Exceeded Its Authority In Declaring A Cabinet Officer "Unfit" And Assuming Control Of Trust Fund Management ... 31

C. The District Court's Trial Of Contempt Specifications Provides No Basis For Its Assumption Of Authority 37

III. THE DISTRICT COURT COMMITTED CLEAR ERROR IN HOLDING THE SECRETARY AND AN ASSISTANT SECRETARY OF THE INTERIOR IN CONTEMPT 40

A. The Court Could Not Properly Declare Present Officials "Unfit" Based Upon Events Occurring Before They Took Office 40

B. The District Court Committed Clear Error In Its Application Of Principles Of Contempt And Fraud On the Court 41

C. The Record Does Not Support A Conclusion That The Government Violated A Court Order Or Deliberately Misled The Court 47

IV. THE COURT PLAINLY ERRED IN DECLINING TO REVOKE THE COURT MONITOR'S APPOINTMENT AND IN ELEVATING THE MONITOR TO SPECIAL MASTER 52

CONCLUSION 58

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page**

*Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993) 41

Avery v. Secretary of Health and Human Services, 762 F.2d 158 (1st Cir. 1985) 26

*Baltia Air Lines, Inc. v. Transaction Management, Inc., 98 F.3d 640 (D.C. Cir. 1996) 42, 47

In re: Barr Laboratories, Inc., 930 F.2d 72 (D.C. Cir. 1991) 30, 35

Byrd v. Reno, 180 F.3d 298 (D.C. Cir. 1999) 24, 27

*Carson v. American Brands, Inc., 450 U.S. 79 (1981) 24

Chambers v. Nasco, Inc., 501 U.S. 32 (1991) 42

Cobell v. Babbitt, 37 F. Supp. 2d 6 (D.D.C. 1999) 5-6

Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999) ..... passim

*Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) ..... passim

In re Department of Defense, 848 F.2d 232 (D.C. Cir. 1988) 27

Drywall Tapers and Painters of Greater N.Y., Local 1974 v. Local 530 of Operative Plasterers and Cement Masons International Ass'n, 889 F.2d 389(2d Cir. 1989) 41

Dunn v. New York State Dep't of Labor, 47 F.3d 485 (2d Cir. 1995) 26

In re: Edgar, 93 F.3d 256 (7th Cir. 1996) 27, 55, 57

---

* Authorities chiefly rely upon are marked with asterisks.

Federal Power Commission v. Idaho Power Co., 344 U.S. 17 (1952) 29

Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) .. 31

Global Van Lines, Inc. v. FCC, 804 F.2d 1293 (D.C. Cir. 1986) 30

*International Assoc. of Machinists v. Eastern Airlines, Co., 849 F.2d 1481 (D.C. Cir. 1988) 24, 26

International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64 (1967) 41

International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821 (1994) 24

*Jenkins v. Sterlacci, 849 F.2d 627 (D.C. Cir. 1988) ... 52, 55

Koon v. United States, 518 U.S. 81 (1996) 23

Lewis v. Casey, 518 U.S. 343 (1996) 34

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 56

Lincoln v. Vigil, 508 U.S. 182 (1993) 31

Liteky v. United States, 510 U.S. 540 (1994) 56

Missouri v. Jenkins, 515 U.S. 70 (1995) 34

Myers v. United States, 272 U.S. 52 (1926) 32

Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975) . 26

SEC v. Chenery Corp., 332 U.S. 194 (1947) 30

Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978) 49

In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) 32

*Telecommunications Research and Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984) 31, 38

Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457 (2d Cir. 1994) 42

In re: United Mine Workers of America International Union, 190 F.3d 545 (D.C. Cir. 1999) 30

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) 23

United States v. Saskatchewan Minerals, 385 U.S. 94 (1966) 29

Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978) 30

Statutes:

Administrative Procedure Act:

5 U.S.C. 706 31

All Writs Act:

28 U.S.C. § 1651 ..... 2, 26

American Indian Trust Fund Management Reform Act:

Pub L. No. 103-412, 108 Stat. 4239 6
25 U.S.C. § 4042(a) 10
25 U.S.C. § 4043(b) 10

28 U.S.C. § 455(a) 56
28 U.S.C. § 455(b) 55

*28 U.S.C. § 1292(a)(1) 2, 24, 25
28 U.S.C. § 1292(a)(2) 26
28 U.S.C. § 1292(b) 7
28 U.S.C. § 1331 1
28 U.S.C. § 1361 ..... 1, 26

Regulations:

65 Fed. Reg. 17,521 48

Rules:

Fed. R. App. P. 30(c) 1
Fed. R. Civ. P. 53 55
Fed. R. Evid. 407 46

Miscellaneous:

3 Richard J. Pierce, Jr., Administrative Law Treatise
§ 18.1 at 1323 (3d ed. 2001) 49

GLOSSARY

APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs
DOI	Department of the Interior
HLIP	High Level Implementation Plan
IIM Accounts	Individual Indian Money Accounts
TAAMS	Trust Asset and Accounting Management System

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE APPELLANTS

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction, inter alia, under 28 U.S.C. §§ 1331 and 1361. On September 17, 2002, the district court issued a memorandum opinion and order, Dkt#1476 & 1477,[1] concluding that the Department of the Interior had been derelict in the performance of its statutory responsibilities, that the Secretary of the Interior and an Assistant Secretary were "unfit trustee-delegates," that they were in civil contempt, and that the Department would be required to submit trust reform plans by January 6, 2003, to be evaluated in accordance with procedures

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[1] A deferred appendix will be filed pursuant to Fed. R. App. P. 30(c). Record citations are to relevant docket numbers (Dkt#).

described by the court's order. On the same date, the court denied the defendants' motion to revoke the appointment of Joseph S. Kieffer, III, as a "Court Monitor," Dkt#1479, and in a separate order, appointed Mr. Kieffer as "Special Master-Monitor" to function as a judicial officer in the future proceedings, Dkt#1478. The Department filed a timely notice of appeal on November 18, 2002. As discussed in section I below, this Court has jurisdiction under 28 U.S.C. § 1292(a)(1), and, in the alternative, under the All Writs Act, 28 U.S.C. § 1651.

STATEMENT OF THE ISSUES

1. Whether the district court exceeded its authority in concluding that the Secretary of the Interior and an Assistant Secretary of the Interior are "unfit" trustees of Individual Indian Money ("IIM") accounts and in assuming responsibility for all aspects of "trust reform."

2. Whether the district court erred in holding the Secretary of the Interior and an Assistant Secretary in contempt.

3. Whether the district court erred in failing to vacate the appointment of the "Court Monitor" and in elevating him to the position of Special Master-Monitor.

PERTINENT RULES AND REGULATIONS

Pertinent statutory provisions are set forth in the addendum to this brief.

STATEMENT OF THE CASE

The United States holds approximately 10 million acres of land in trust for individual Indians. The Department of the Interior ("DOI") manages revenue-producing activities on those lands, including oil and gas leases, grazing, and timber harvesting. Beneficial ownership is divided among some four million interests and DOI must allocate the revenues accordingly. DOI also handles financial accounts for individual Indians - Individual Indian Money ("IIM") accounts - into which these revenues and other funds flow.

The complexities of trust fund management are extraordinary, and prior proceedings in this case have established that, as a result of conduct over nearly a century, DOI failed to fulfill its duty to provide an accurate accounting to the beneficiaries of the IIM trust accounts who are the plaintiffs in this case. This case concerns DOI's present efforts to provide an accurate accounting of money held in IIM trust accounts.

In Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999), the district court (Lamberth, J.) declared that DOI had breached a duty to retrieve and retain all documents necessary to render an accurate accounting of money held in IIM trust accounts. In Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), this Court affirmed the district court's holding that an accounting of IIM trust funds was required. Noting that the "district court's ordered relief is relatively modest," this Court emphasized that DOI should be

accorded wide discretion in bringing itself into compliance with its statutory obligations, and warned that the district court must be "mindful of the limits of its jurisdiction." Id. at 1109-10.

Since assuming office in 2001, the present Secretary has made performance of an accounting a priority to which she and her management team have devoted extensive time and resources. As discussed below, although much work remains to be done to deal with a century of neglect, the present Administration has made significant progress and is committed to successful completion of the extraordinary task that it has inherited.

The present rulings arise from a trial that required agency officials to show cause why they should not be held in contempt with respect to five discrete "specifications." Many of these specifications involved alleged deficiencies in the detailed quarterly reports filed by the agency pursuant to court order, and much of the conduct at issue took place before present officials took office.

Although the court conducted a trial on the issue of contempt and captioned its order accordingly, neither the court's conclusions nor the relief ordered were limited to a ruling of contempt. Instead, the court modified its earlier judgment, which it made clear was to be treated as a mandatory injunction, declaring that its modification was "not dependent" on its findings of contempt or fraud but was instead based on "the current status

of trust reform." Dkt#1476, at 218. Concluding that Secretary Norton and Assistant Secretary McCaleb are "unfit trustee-delegates," id. at 265, the court stated that it would, itself, oversee the trust reform task, initiating a process in which the Secretary would submit not only a plan for conducting an accurate accounting of IIM funds but also a plan for general trust reform, to be evaluated by the court along with competing plans from plaintiffs, with a view to additional orders of structural relief. Id. at 242-43. The court explained it was necessary to obtain plaintiffs' views in this way because it "will not simply remand the matter back to the agency again as it did in December of 1999." Id. at 249. The court advised the Secretary that she should resign if she believes that she cannot properly discharge her statutory functions under the terms of the court's order. Id. at 215.

STATEMENT OF FACTS

A. Initial District Court Proceedings.

Plaintiffs commenced this suit on June 10, 1996. On February 22, 1999, the court entered its first contempt order against the defendants, who at that time were Interior Secretary Bruce Babbitt, Assistant Interior Secretary Kevin Gover, and Treasury Secretary Robert Rubin. Cobell v. Babbitt, 37 F. Supp. 2d 6 (D.D.C. 1999). Concluding that the defendants had violated a document production schedule and handled the litigation in a manner that was "nothing short of a travesty," id. at 13, the court imposed monetary

sanctions. With defendants' consent, the court appointed Alan L. Balaran as a Special Master to supervise discovery. Id. at 37.

On December 21, 1999, the court issued a declaratory judgment holding that the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act"), requires defendants to provide an accurate accounting of all money in the IIM trust accounts held for the benefit of plaintiffs, without regard to when the funds were deposited. Cobell v. Babbitt, 91 F. Supp. 2d 1, 58 (D.D.C. 1999) ("Phase I Judgment"). The court also held that the defendants had a statutory duty to establish written policies and procedures as follows: for collecting missing information necessary to render an accurate accounting; for the retention of trust documents necessary to render an accurate accounting; for computer systems architecture necessary to render an accurate accounting; and for the staffing of trust management functions necessary to render an accurate accounting. Id. The court specifically declined "to rule on whether an accounting accomplished through statistical sampling would satisfy defendants' statutory duties." Id. at 40 n.32.

Having found the agency in violation of applicable legal obligations, the court remanded the matter to allow DOI the opportunity to come into compliance. Id. at 58. The court also retained jurisdiction over the matter for five years, and required

DOI to file quarterly reports explaining the steps taken to rectify the breaches found. Id. at 58-59.

B. This Court's Decision.

The district court certified its Phase I Judgment for immediate appeal under 28 U.S.C. § 1292(b). In February 2001, this Court held that the district court had "ample evidence to support its finding of ongoing material breaches of [the defendants'] fiduciary obligations," and that the relief ordered was "well within the district court's equitable powers." Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

The Court held that under "common law trust principles" the government's fiduciary obligations predated and extended beyond those imposed by the 1994 Act. Id. at 1103. The Court endorsed the district court's characterization of the defendants' statutory trust duties - specifically, their duty to perform a "complete historical accounting," id. at 1102 - and its finding that those duties were judicially enforceable. Id. at 1104.

At the same time, the Court required the district court to amend its opinion to correct certain mistakes of law. The Court made clear that the agency's legal duty was not to perform specific tasks enumerated by the district court, even if those tasks were clearly related to the ultimate duty to perform an accounting. The Court clarified that "[t]he actual legal breach is the failure to provide an accounting, not [the] failure to take the discrete

individual steps that would facilitate an accounting." Id. at 1106. Although the Court recognized that the government might be unable to cure its breach without doing many of the things ordered by the district court - for example, implementing a computer system, hiring staff, and creating document retention policies - it directed the district court to amend its order to make clear that the defendants were not in fiduciary breach simply for failing to satisfy those specific requirements. Id. The Court explained that "defendants should be afforded sufficient discretion in determining the precise route they take." Id.

Based on its belief that the Phase I Judgment imposed "relatively modest" relief, id. at 1109, the Court found "no need to alter the district court's order, as the bottom line is the same," id. at 1106. Among other things, the Court noted that "[t]he district court explicitly left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate." Id. at 1104. Because "the court does not tell the government what these procedures must entail," the panel found that the district court's ruling was "consonant with the judicial policy of granting agencies that have acted in an unlawful manner 'discretion to determine in the first instance,' how to bring themselves into compliance." Id. at 1109 (citation omitted).

Finally, the Court affirmed the district court's decision to retain jurisdiction over the case for five years and to require periodic progress reports. Id. at 1109. The panel admonished the district court, however, "to be mindful of the limits of its jurisdiction." Id. at 1110.

C. Appointment of Court Monitor.

After this Court's decision, the district court appointed Joseph S. Kieffer, III, as a "Court Monitor" to "monitor and review all of the Interior defendants' trust reform activities and file written reports of his findings with the Court." Dkt#707, at 2 (Apr. 16, 2001). DOI consented to the appointment for a one-year period. The Monitor's reports were to comment not only on the pace of trust reform, but also on "any other matter Mr. Kieffer deems pertinent." Id. The court gave the Monitor access to "any Interior offices or employees to gather information necessary or proper to fulfill his duties," allowed him to engage in ex parte communications, and ordered the defendants to compensate him at a rate of $250/hour.[2] Id. at 2-3.

On April 4, 2002, the district court invited the parties to submit their views on the reappointment of the Monitor for an additional year. Dkt#1242. The government made clear that it

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[2] From April 16, 2001 through November 1, 2002, the Court Monitor had been paid $989,783.75 in fees and $27,539.26 in expenses. See Dkts# 719, 753, 787, 814, 876, 910, 1030, 1077, 1106, 1170, 1241, 1281, 1314, 1368, 1402, 1468, 1550, 1587.

would consent to the reappointment only if the Monitor was limited, among other things, to reporting on steps taken to rectify the breaches of trust declared by the court or steps that would delay an accounting. Dkt#1251. The court rejected this condition, but nevertheless reappointed the Monitor on April 15, 2002. Dkt#1255.

A few days thereafter, on April 19, 2002, the Court Monitor met with DOI officials at their request. The Court Monitor declared that the discussion was "ex parte" and that the DOI officials (most of whom were non-lawyers) were not to take notes or to repeat his comments to anyone. Dkt#1339, at 7. The Monitor then told those present that they were not getting good legal advice, and sharply criticized the Secretary's issuance of a memorandum critical of the Special Trustee.[3] Id. at 7-8. The Monitor issued an ultimatum to the assembled officials requiring them either to comply with his view of the role and authority of the Special Trustee, or to disagree and thereby suffer adverse consequences. Id. at 8. On May 2, 2002, the Monitor issued a lengthy report sharply criticizing the Secretary's supervision of the Special Trustee, ascribing improper motives to various DOI officials, and making policy recommendations concerning DOI's trust reform management. See Dkt#1280.

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[3] The Special Trustee is a DOI employee with general oversight authority over trust reform. He reports to the Secretary of the Interior. 25 U.S.C. §§ 4042(a), 4043(b). The Special Trustee has since resigned, but an Acting Special Trustee is in place.

The agency filed a motion to revoke the Monitor's appointment, describing the Monitor's statements. Dkt#1334. The district court denied that motion on September 17, 2002. Dkt#1479. The court described DOI's allegations as "disingenuous," and found that the motion "fail[ed] of its own mendacity." Id. at 12. The court stated that it was "personally aware of the background of the April 19, 2002 meeting, the conversations at that meeting and at the subsequent meetings between the Deputy Secretary and the Court Monitor." Id. at 10. In another order issued on September 17, 2002, the court elevated Mr. Kieffer to the position of "Special Master-Monitor." See, infra, section IV.

D. Orders to Show Cause.

Pursuant to the district court's December 1999 ruling, DOI began submitting quarterly reports concerning the status of its compliance efforts in March, 2000. Based on these reports, and the Court Monitor's comments on them, plaintiffs filed motions for orders to show cause why the Secretary of the Interior, an Assistant Secretary, and more than three dozen of their employees and counsel, should not be held in contempt.

On November 28, 2001, the court issued a show cause order listing four "specifications" focusing on DOI's alleged failure to initiate an historical accounting and its alleged failures to report properly on the operations of the Trust Assets and

Accounting Management System ("TAAMS")[4] and the Bureau of Indian Affairs Data Cleanup Project. Dkt#1007. On December 6, 2001, the court issued a supplemental order requiring the defendants also to show cause why they should not be held in contempt for "[c]ommitting a fraud on the Court by making false and misleading representations starting in March, 2000, regarding computer security of IIM trust data." Dkt#1035. Although the defendants requested that the contempt trial be postponed until January 7, 2002, so that they could prepare their defense, trial began on December 10, 2001 and lasted 29 days.

E. The September 17, 2002 Order.

1. On September 17, 2002, the district court issued a 265-page memorandum opinion, ordering various forms of relief and holding the Secretary of the Interior and the Assistant Secretary of the Interior for Indian Affairs in civil contempt. The court concluded that the relief previously entered in its earlier declaratory judgment was insufficient, Dkt#1476, at 240-41, making it clear that the declaratory judgment should be treated as having the force of an injunction that "clearly directed" the Department "to perform an accounting of the IIM trust accounts so that the Phase II trial could proceed." Id. at 187-88.

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[4] TAAMS is a computer system designed to allow BIA "to administer trust assets, generate timely bills, identify delinquent payments, track income from trust assets, and distribute proceeds to the appropriate account holders." Id. at 8.

Although the court had conducted a trial solely on the issue of contempt and styled its order accordingly, neither the court's conclusions nor the relief ordered were limited to a ruling of contempt. Indeed, the court emphasized that its modification of its earlier judgment did not depend on the alleged misconduct that was the subject of its trial and which formed the basis for its contempt sanctions:

> [M]uch of the relief granted is not dependent on the Court's conclusion that the defendants committed several frauds on the Court. Rather, the Court has fashioned much of the relief granted today (such as future proceedings and the appointment of a special master) simply because of the current status of trust reform.

Id. at 218 (emphasis added).

Although the named defendants were, as the court recognized, putative contemnors only in their official capacities, and although much of the conduct at issue took place before the present Secretary even took office, the court personalized many of its conclusions. Thus, the court's ultimate conclusion was that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place * * * in the pantheon of unfit trustee-delegates." Id. at 265.

Based on its conclusion that the officials responsible for the accounting program were unfit to perform their duties, the court formalized a broad agenda for trust reform to be supervised by the court in an elaborate sequence of future proceedings. The court directed the Secretary to submit plans to the court to be evaluated

in an ongoing supervisory process that would include "further injunctive relief to make the defendants correct the breaches of trust declared by the Court and stipulated to by the defendants back in 1999." Id. at 239-40.

Under the court's ruling, the Secretary's plans will be evaluated in a "Phase 1.5" trial that will "encompass additional remedies with respect to the fixing the system portion of the case, and approving an approach to conducting a historical accounting of the IIM trust accounts." Id. at 242. The district court ordered DOI "to file with the Court and serve upon the plaintiffs" two plans by January 6, 2003. Id. The first plan is "for conducting a historical accounting of the IIM trust accounts" and the second a general plan "for bringing [the defendants] into compliance with the fiduciary obligations that they owe to the IIM trust beneficiaries." Id. at 243.

In addition, the court offered plaintiffs an opportunity "to file any plan or plans of their own regarding the aforementioned matters," id. at 243, and allowed each party "to file a response to the plan or plans of the other party," id. The court explained that because it "will not simply remand the matter back to the agency again as it did in December of 1999, it is not only appropriate but necessary for the plaintiffs to be heard on these matters at this time." Id. at 249.

The court declared that if DOI officials, "including Secretary Norton, feel that as a result of this Court's rulings they are unable or unwilling to perform their duties to the best of their ability, then they should leave the Department forthwith or at least be reassigned so that they do not work on matters relating to the IIM trust." Id. at 215.

Finally, the court referred plaintiffs' request for an order to show cause against 37 non-party employees and counsel to Special Master Balaran for his report and recommendation, id. at 254, and awarded attorneys' fees and expenses to plaintiffs in an amount to be determined after further proceedings, id. at 249-50.

2. Although much of the relief ordered by the court was not dependent on its findings of contempt and fraud, most of the court's discussion focuses on these issues, which were the only questions litigated at trial. After explaining that its prior declaratory judgment should be treated as a mandatory injunction, id. at 188, the court addressed each of the five "specifications" in the show cause orders. Id. at 31-209.

a. Failure To Initiate Historical Accounting.

Specifications 1 and 2 of the November 28, 2001 order required the defendants to show cause why they should not be held in civil contempt for "[f]ailing to * * * initiate a Historical Accounting Project," and for "[c]ommitting a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting

Project during the period from March 2000, until January 2001." Id. at 16-17. In concluding that DOI had failed to initiate a historical accounting, the court focused heavily on a Federal Register notice, published on April 3, 2000, that sought comment from IIM trust beneficiaries on which of several methodologies the agency should use to perform its historical accounting. The court found that, despite statements made in the Federal Register notice, DOI had already selected the "statistical sampling" methodology. Id. at 191. The court thus concluded that the notice was merely a "sham" intended to deceive both this Court and the district court into believing that the agency was making progress towards fulfilling its fiduciary obligations. Id. at 192-95.[5]

The court further found that, between the time of its December 21, 1999 order and July 10, 2001, DOI failed to analyze different accounting methods or retrieve documents necessary to perform an accounting, id. at 180, and had instead chosen the statistical method without using a legitimate administrative process to make this choice, id. at 189-90.

Despite these findings, the district court declined to issue a contempt sanction with regard to Specification 1. Instead, the court held only that "the defendants unreasonably delayed in initiating the historical accounting project," and that such delay

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[5] In light of these findings, the district court invited this Court to determine whether defendants had "committed a fraud upon the Court of Appeals as well." Id. at 194.

constituted "sanctionable misconduct" that created an "intolerable burden" on the court. Id. at 188. With respect to Specification 2, however, the court held that the defendants were in contempt. By publishing a "sham" Federal Register notice, id. at 180, the court explained, the agency "intentionally misled" the court "into believing that it was undertaking a legitimate administrative process to determine how to perform a historical accounting," when the notice was actually designed "to manipulate the D.C. Circuit into reversing this Court's Phase I trial ruling so that [Interior] would not have to conduct any accounting." Id. at 193.

b. Inadequate Disclosure of TAAMS Status.

Specification 3 required the defendants to show cause why they should not be held in civil contempt for "[c]ommitting a fraud on the Court by failing to disclose the true status of the TAAMS project between September 1999 and December 21, 1999." Id. at 17. In this regard, the court found that DOI had represented, during the Phase I trial, that the TAAMS system would be operational by the end of 2000, and that its implementation would obviate the need for injunctive relief. However, the court found that even at the time of the Phase I trial, the agency's tests of TAAMS had revealed that it required a great deal of further work, and that the schedule presented to the court was unrealistic. The court also found that, both during and after trial, DOI knew it was obliged to

inform the court of its difficulties, but "intentionally failed" to do so. Id. at 84.

Based on these findings, the court concluded that DOI had knowingly and deliberately "infected" the Phase I trial record with inaccurate information about the state of TAAMS implementation. Id. at 196; see also id. at 197 (stating that defendants had made a "conscious and deliberate decision" not to correct inaccuracies after Phase I trial). By concealing its "massive problems" with TAAMS implementation, the court stated, DOI had turned the Phase I trial into "nothing more than a dog and pony show." Id. at 198.

c. Misleading Quarterly Reports.

Specification 4 required the defendants to show cause why they should not be held in civil contempt for "[c]ommitting a fraud on the Court by filing false and misleading quarterly status reports starting in March, 2000, regarding TAAMS and BIA Data Clean-up." Id. at 17. The court considered eight of these reports - filed between March 1, 2000 and January 16, 2002 - and found that, until the winter of 2001, the reports failed to disclose that there were considerable obstacles to implementing TAAMS, and that there was "minimal progress" on the BIA Data Cleanup project. Id. at 200. After that time, the court found that the reports did disclose problems, but held that they did so only in a "superficial, incomplete, and misleading manner." Id. at 100.

d. Representations Regarding Computer Security.

The fifth specification required the defendants to show cause why they should not be held in contempt for "[c]ommitting a fraud on the Court by making false and misleading representations starting in March, 2000, regarding computer security of IIM trust data." Id. at 17. The court found that the defendants repeatedly misled the court on the status of efforts to ensure the security of electronic IIM trust information. Id. at 205-09. Among other things, the court noted that it had relied on representations from agency counsel that the agency was "on the verge" of correcting security problems in denying various requests for injunctive relief. Id. at 205. Relying heavily on a report from the Special Master, the court concluded that many of these representations later proved to be false. Id. at 205-07.

SUMMARY OF ARGUMENT

I. A. This Court has held that the Department of the Interior has a duty to provide an accounting of IIM trust funds. The present Secretary has made that accounting a priority, and, as the trial testimony and DOI's reports indicate, she and other high-level officials have committed their time and resources to resolving the myriad problems that confront them with urgency and expedition. Although the district court discounted many of her achievements because they occurred more than eighteen months after the court's original judgment, even the Court Monitor has

acknowledged that the Office of Historical Trust Accounting, created by the Secretary in July 2001, has "made more progress in [the historical accounting] effort in six months than the past administration did in six years." Dkt#1105, at 18. In a report to Congress in July 2002, the Secretary detailed procedures for record gathering and strategies for addressing gaps in documentation. DOI has engaged several accounting firms, a law firm, and a large bank to assist with performing accountings; has developed an accounting standards manual; and, as of November 1, 2002, has reconciled 14,235 judgment accounts with balances totaling over $40,000,000, and has made substantial progress reconciling 88,779 transactions in per capita accounts, totaling approximately $78,000,000. Dkt#1586 (Eleventh Quarterly Report), at 52-53.

Despite these efforts and accomplishments, we recognize that the task of curing the problems created over a century is far from completion. The question of how best to complete the accounting will depend, in part, on the availability of appropriated funds, and on the choice of means available to the Secretary.

B. The district court did not hold a trial on the "current status of trust reform," which it declared was the basis for much of the relief granted. Dkt#1476, at 218. There is thus no proper factual predicate for the court's decision to assume responsibility for the performance of a historical accounting or the progress of "trust reform." Even if the district court had held a trial that

fairly evaluated whether, despite DOI's progress, agency action was unreasonably delayed since the time of its prior judgment and this Court's decision, the court's actions would far exceed the proper scope of judicial authority over an Executive agency.

A court may, in unusual circumstances, conclude that agency action has been unlawfully withheld. In still rarer circumstances, it may establish a deadline for agency action. But a court may not - consistent with the constitutional allocation of powers - conclude that a Cabinet Officer is "unfit" to perform her duties. Based on this conclusion, which is without foundation in the record, the court has not merely directed that agency action be taken, or that it be taken by a certain date. It has subordinated the agency's performance of its responsibilities to an ongoing system of judicial management that approximates a receivership. The Secretary is required to submit plans for all aspects of trust reform which are to be treated as no more than proposals, to be evaluated together with plans submitted by plaintiffs, to culminate in further judicial directives. As the court has made clear, under no circumstances will it remand the case to the agency. And if the Secretary finds that she cannot properly discharge her statutory functions under the terms of the court's order, she is invited to resign "forthwith." Id. at 215.

In sum, the district court has improperly held a Cabinet officer unfit to perform her duties and formalized a process by

which the court, with the aid of two special masters, will dictate the contours of trust reform.

II. The court's rulings on fraud and contempt cannot support the relief issued and are, in any event, without basis. The court's conclusion that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place * * * in the pantheon of unfit trustee-delegates," Dkt#1476, at 265, cannot properly rest on the conduct at issue which, for the most part, occurred before these officials even took office and which involved no findings regarding Assistant Secretary McCaleb.

More fundamentally, none of the conduct at issue in this case constitutes a clear violation of a specific court order or a scheme to defraud the court tantamount to bribing a judge or falsifying evidence. Stripped of rhetoric, the court's conclusions suggest at most that DOI officials filed a Federal Register notice inviting comments on an issue as to which the agency already had settled views, and that, in the hundreds of pages of quarterly reports filed with the court, DOI was, in places, unduly optimistic about the pace of progress in certain areas, choosing to emphasize its achievements over its setbacks. None of this constitutes an intentional scheme to defraud the court.

III. Finally, the court erred both in re-appointing the Court Monitor and in elevating him to the position of Special Master. As Court Monitor, Mr. Kieffer has engaged in significant ex parte

communications with the parties, has had virtually unfettered access to DOI for well over a year, and has developed strongly-held views in the course of his activities. Given his background of extensive personal knowledge derived from ex parte contacts in this case, he cannot now serve as an impartial and unbiased adjudicator of disputes in his new capacity as Special Master-Monitor.

STANDARD OF REVIEW

Whether the district court exceeded its authority under the APA and separation of powers principles is a question of law subject to de novo review. Although the court's contempt rulings are reviewed for abuse of discretion, and the factual findings supporting those rulings are reviewed for clear error, a court necessarily abuses its discretion when it fails to apply proper legal standards. Koon v. United States, 518 U.S. 81, 100 (1996). Similarly, while the court's decision to retain Mr. Kieffer as Court Monitor and to elevate him to Special Master-Monitor is reviewed for abuse of discretion, the determination whether Mr. Kieffer must be disqualified based on actual or apparent bias is a legal question for this Court. See United States v. Microsoft Corp., 253 F.3d 34, 109-16 (D.C. Cir. 2001).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THE DISTRICT COURT'S RULINGS PURSUANT TO 28 U.S.C. § 1292(a), OR, IN THE ALTERNATIVE, UNDER THE ALL WRITS ACT.

A. Regardless of the manner in which it is styled, an order having the practical effect of an injunction, and threatening serious, perhaps irreparable consequences, is immediately appealable under 28 U.S.C. § 1292(a)(1). See Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981). While an order of civil contempt against a party is not of itself generally appealable, Byrd v. Reno, 180 F.3d 298 (D.C. Cir. 1999), it is equally clear that "an injunction does not cease to be appealable under section 1292(a)(1) merely because it is contained in an order for civil contempt." International Assoc. of Machinists v. Eastern Airlines, Co., 849 F.2d 1481, 1486 (D.C. Cir. 1988).[6]

B. The court's September 17, 2002 ruling is both an injunction and a modification of a declaratory judgment that the court has now held to be indistinguishable from a mandatory injunction. The court made clear that it regarded its prior

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[6] Although the court has imposed civil and not criminal sanctions, the relief in this case is not designed to secure compliance with a specific court order as was the case in Byrd v. Reno. The court's order is based, instead, on a retrospective judgment of past agency conduct. Inasmuch as the government has no "subsequent opportunity to reduce or avoid [monetary sanctions] through compliance," see International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 829 (1994), the rationale for permitting immediate appeals from orders of criminal contempt is equally applicable here.

judgment as inadequate, Dkt#1476, at 240-41, and that it was fashioning new relief that it explicitly declared to be based on a merits determination regarding the "current status of trust reform," that was not dependent on its conclusions regarding fraud and contempt. Id. at 218.

Although the court's ruling contemplates additional future injunctive orders, its present order has the immediate effect of an injunction by both requiring action and implicitly enjoining the Secretary's future exercise of discretion. The injunctive component of the court's order is not limited to the requirement that the Secretary file plans with the court. As discussed below, the court has relegated her to a role as a commenter rather than a decisionmaker. Ultimate decisions on trust fund management will be made by the district court which "will not simply remand the matter back to the agency." Id. at 249. Were the Secretary to attempt to take action independent of the court, its Special Master, the Special Master-Monitor, and plaintiffs' competing plans, the agency would plainly risk new accusations of contempt.

When a district court declares a Cabinet officer unfit, and presents her with the alternative of accepting judicial control of significant Executive functions or resigning "forthwith," id. at 215, that order is properly appealable as an injunction under 28 U.S.C. § 1292(a)(1). Indeed, inasmuch as the court has now held that its 1999 declaratory judgment should be treated as a mandatory

injunction, its order not only has independent injunctive force, but is also appealable as a modification of its earlier injunction. See International Assoc. of Machinists, 849 F.2d at 1486.[7]

Moreover, the order would be appealable even if viewed narrowly as establishing a monitoring scheme. See, e.g., Dunn v. New York State Dep't of Labor, 47 F.3d 485, 488 (2d Cir. 1995); Avery v. Secretary of Health and Human Servs., 762 F.2d 158, 160-61 (1st Cir. 1985); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1199 n.4 (9th Cir. 1975).

C. The court's order elevating the Court Monitor to the judicial role of Special Master would not generally be immediately appealable. In this case, however, the appointment to a judicial role of an individual who has acquired vast ex parte knowledge regarding the case, forms an integral part of the relief the court believed was required. And, to the extent the court has imposed on an executive agency a "Special Master-Monitor" with far-ranging investigative powers, that order plainly has the effect of an injunction.

D. We have, in the alternative, invoked this Court's jurisdiction under the All Writs Act, 28 U.S.C. § 1651. Orders of civil contempt and orders appointing a special master are both properly reviewed under this Court's mandamus jurisdiction. See

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[7] In the alternative, to the extent the court's order established a de facto judicial receivership, it is appealable as of right under 28 U.S.C. § 1292(a)(2).

Byrd v. Reno, 180 F.3d 298, 302-03 (D.C. Cir. 1999); In re Department of Defense, 848 F.2d 232 (D.C. Cir. 1988). When a district court concludes that a sitting Cabinet Secretary is unfit to execute her statutory functions, there can be little doubt that this Court should exercise its supervisory jurisdiction to ensure that this extraordinary conclusion is not erroneous. Similarly, when a court appoints as a judicial officer a person who has had extensive ex parte contacts with both the parties and the district court, this Court should ensure that the mechanisms of justice do not run awry. See In re: Edgar, 93 F.3d 256 (7th Cir. 1996).

Accordingly, if the Court believes that any part of this appeal is more appropriately reviewed pursuant to its mandamus authority, we ask that it review our arguments on that basis.

II. BY SEIZING CONTROL OF THE PROCESSES FOR CREATING AND IMPLEMENTING PLANS FOR INDIAN TRUST REFORM, THE DISTRICT COURT HAS OVERSTEPPED THE PROPER BOUNDS OF JUDICIAL AUTHORITY.

A. Under Settled Principles Of Judicial Review Of Agency Action And This Court's Remand Order, The District Court Lacks Authority To Assume Control Of The Operation Of A Federal Program.

The course on which the district court is embarked is at odds with this Court's prior decision and with basic principles governing judicial review of agency action and the separation of powers concerns that underlie these principles.

1. In its prior decision, this Court held that the government's duties under the American Indian Trust Fund Management

Reform Act were judicially enforceable and that, as a result of failures occurring over a century, agency action had been unlawfully delayed. The relief the district court ordered was general. It required that defendants: (1) serve quarterly status reports upon the plaintiffs and the court; (2) file a revised High Level Implementation Plan for coming into compliance with its statutory duties; and (3) provide additional information as required by the court or requested by plaintiffs. 91 F. Supp. 2d at 56. The order set no timetables and made no provision for specific actions.

In affirming the district court's declaratory judgment, which it believed provided "relatively modest" relief, 240 F.3d at 1109, this Court did not sanction a radical departure from settled principles of judicial review, nor did it authorize a judicial takeover of trust fund management. To the contrary, this Court emphasized that the reviewable agency action was the failure to perform an accounting. While failure to take various subsidiary actions might be evidence of the failure to perform this duty, they were not themselves enforceable obligations, and this Court required the district court to amend its opinion accordingly. Id. at 1105-06 (noting that "defendants should be afforded sufficient discretion in determining the precise route they take").

In remanding this case for further proceedings, this Court emphasized that "we expect the district court to be mindful of the

limits of its jurisdiction." 240 F.3d at 1110. The Court observed that it was possible that DOI might take steps "that are so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting, and the detection of such steps would fit within the court's jurisdiction to monitor the Department's remedying of the delay." Id. The Court stressed that "beyond that, supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction." Id.

2. These admonitions reflect settled law. Although courts have power to review agency action (or inaction) and to declare it unlawful or inadequate pursuant to the standards articulated in the APA, "that authority is not power to exercise an essentially administrative function." Federal Power Commission v. Idaho Power Co., 344 U.S. 17, 21 (1952). The "guiding principle * * * is that the function of a reviewing court ends when an error of law is laid bare." Id. at 20. Thus, after declaring agency action unlawful (or unreasonably delayed), courts may not seek to control the processes by which an agency fulfills its Congressionally-mandated functions on remand. See United States v. Saskatchewan Minerals, 385 U.S. 94, 95 (1966) (invalidating district court order that precluded ICC from reopening evidence on remand). These limitations reflect the respective allocation of powers to the executive and judicial branches.

Nor may a court insert itself into the agency's decision-making process by imposing additional procedural - much less, substantive - requirements on agencies beyond those mandated by statute. As the Supreme Court stressed in Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978), the judiciary may not dictate to agencies the methods and procedures of needed inquiries on remand because "[s]uch a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" Id. at 545 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). These principles apply even where an agency has unquestionably delayed in taking appropriate action. See In re: Barr Laboratories, Inc., 930 F.2d 72, 74 (D.C. Cir. 1991).

Likewise, even in exceptional cases in which an agency has flagrantly disregarded a congressionally-mandated deadline for rulemaking, the appropriate judicial role is to retain jurisdiction over a case and require periodic progress reports until the agency has completed the required action. See, e.g., In re: United Mine Workers of America International Union, 190 F.3d 545, 556 (D.C. Cir. 1999) (retaining jurisdiction and requiring semi-annual progress reports from the Mine Safety and Health Administration until it issued final regulations); see also Global Van Lines, Inc. v. FCC, 804 F.2d 1293, 1305 n.95 (D.C. Cir. 1986) (recognizing agency "discretion to determine in the first instance" how to bring

itself into compliance); Telecommunications Research and Action Ctr. v. FCC, 750 F.2d 70, 81 (D.C. Cir. 1984) (retaining jurisdiction pending FCC's resolution of underlying issues).

These principles harmonize with the rule that judicial review under the APA is limited to the administrative record. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."). Thus, courts generally may not conduct de novo proceedings to test the legitimacy of agency action after the fact, much less order proceedings to determine the initial course of agency action.

The district court apparently believed it could disregard normal APA principles based upon DOI's fiduciary role regarding IIM beneficiaries, Dkt#1476, at 247-49. But even assuming DOI's fiduciary obligations elevate the level of scrutiny applied to agency action after it is completed, they do not authorize judicial intervention in the initial process by which a coordinate branch of the government decides on a plan of action and executes that action. See Lincoln v. Vigil, 508 U.S. 182, 195 (1993).

B. The District Court Exceeded Its Authority In Declaring A Cabinet Officer "Unfit" And Assuming Control Of Trust Fund Management.

The district court's ruling dramatically departs from established limits on review of federal agency action. The court

has not merely required that agency action be taken, or even that it be taken within a specified time frame. Instead, the court has concluded that DOI "continues to be an unfit trustee-delegate for the United States," Dkt#1476, at 264, and that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place alongside former-Secretary Babbitt and former-Assistant Secretary Gover in the pantheon of unfit trustee-delegates." Id. at 265.

It is the exclusive prerogative of the President to determine the fitness of his appointees to perform their duties. See Myers v. United States, 272 U.S. 52, 164 (1926); In re Sealed Case, 121 F.3d 729, 752 (D.C. Cir. 1997) (describing appointment and removal as "a quintessential and nondelegable Presidential power"). A court cannot properly make such a determination. The judiciary's role is limited to reviewing Executive branch actions for compliance with federal law; it does not extend to finding that a Cabinet Secretary is unfit for duty and using that finding as a basis to assume control over Executive functions.

Based on these improper conclusions, the district court deprived the Secretary of independent authority to conduct an accounting of IIM trust funds in the manner she deems most appropriate. The court thus subordinated the Secretary's actions to a judicial process in which the court, not the agency, will direct not only the accounting of IIM trust funds but also all functions related to the performance of an accounting.

Under the newly-created "Phase 1.5" procedures, DOI is required to file with the court, by January 6, 2003, "a plan for conducting a historical accounting of the IIM trust accounts" and "a plan for bringing themselves into compliance with the fiduciary obligations that they owe to the IIM trust beneficiaries." Dkt#1476, at 243. Plaintiffs may then "file any plan or plans of their own," and each party will have an "opportunity to file a response to the plan or plans of the other party." Id.

The critical error is not the requirement of a plan or plans, although that requirement is itself improper. The filing of the plans initiates a process in which the Secretary is reduced to the role of making proposals to the court to be evaluated with plans from plaintiffs and considered in light of further input from the Special Master and the Special Master-Monitor. As the court has made clear, it intends to retain control of all matters related to an accounting and to trust fund management generally and "will not simply remand the matter back to the agency * * *." Id. at 249. And the court has made the extraordinary declaration that if the Secretary and other Interior officials "feel that as a result of this Court's rulings they are unable or unwilling to perform their duties to the best of their ability, then they should leave the Department forthwith or at least be reassigned so that they do not work on matters relating to the IIM trust." Id. at 215.

The district court's actions go far beyond the limits of judicial oversight of Executive branch action. The court purports to take control of how DOI will manage the entire trust fund system - a program with hundreds of employees and a budget in the hundreds of millions of dollars. Indeed, the TAAMS computer system alone affects the land title records program, probate of individual Indian estates, and accounting for revenues from oil, gas, timber and grazing leases. Thus, the court has deeply intruded into programmatic functions that are ill-suited to judicial control.

The court's ruling not only exceeds the bounds of its own competence but dislodges the official who is responsible to the President and the Congress for the conduct of her Department. It is the Secretary, not a court, who must work with Congress to establish the funding for trust reform, and who must calibrate the utility of various options and the availability of resources. A court - which is not politically accountable for its actions - cannot properly step into the Secretary's role. That is the teaching of decisions establishing the limits on judicial control over the actions of coordinate branches of government. See Lewis v. Casey, 518 U.S. 343, 349 (1996) ("[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."); Missouri v. Jenkins, 515 U.S. 70, 132 (1995) (Thomas, J., concurring) ("The separation of powers imposes

additional restraints on the judiciary's exercise of its remedial powers * * * * There simply are certain things that courts, in order to remain courts, cannot and should not do."); Barr Laboratories, 930 F.2d at 74 (recognizing that judicial review is informed by "respect for the autonomy and comparative institutional competence of the executive branch").

The court's error is compounded because it has extended its jurisdiction to the performance of all "fiduciary obligations," separate and apart from its supervision of "a plan for conducting a historical accounting of the IIM trust accounts." Dkt#1476, at 242-43. That ruling is flatly at odds with this Court's holding that the judicially enforceable duty at issue is not "to take the discrete individual steps that would facilitate an accounting," but the provision of the accounting itself. 240 F.3d at 1106.

The district court's ruling is, however, wholly consistent with its management of the case in the period following this Court's decision. The court has not limited itself to monitoring DOI's progress to ensure that an adequate accounting of IIM trust funds is planned and performed. Instead, the court has concluded that all agency functions related to the ultimate duty to perform an accounting could properly be brought within the scope of judicial control. The breadth of topics and the level of detail in which they are covered in the Court Monitor's periodic reports, see, e.g., Dkts#1105, 1280, 1379, underscore the degree to which

the court has strayed from its original mandate to ensure an adequate accounting. As reflected in these reports, and the court's imposition of contempt sanctions for deficiencies in DOI's quarterly reports, the district court means to direct not only the timing and content of a plan for an historical accounting, but all subsidiary and related steps, including the use of resources and the implementation of information technology.

By demanding detailed accountings of all subsidiary agency actions, such as computer support and information technology, the court has intruded, on a day-to-day basis, into precisely those areas that this Court emphasized should be left to the agency's discretion. At no point were DOI's reports thought to be merely informational. They were subject to comparison with findings by the Court Monitor, who was granted unfettered access to the agency, and findings by the Special Master. And failure to report what either the district court, the Special Master, or the Court Monitor believed to be adequate progress opened DOI to severe criticism and the ever-present threat of contempt.

Indeed, while the present order formalizes the subordination of the Secretary's activities to court oversight, the ongoing threat of contempt has had serious consequences even in areas that had nominally been left to the Secretary's discretion. For example, the court stated that the Secretary's endorsement of statistical sampling was "clearly contemptuous." 10/30/01 Status Conf., at 29.

That statement, coupled with the Court Monitor's suggestions that DOI lacks authority to impose any limits on the scope of an accounting, see, e.g., Dkt#1105, at 18 (Fifth Report), chilled the agency's ability to consider a wholly valid approach to completing the accounting, and the Secretary's July 2002 report to Congress contains no reference to a statistical sampling option. In thus responding to the court's views, the Secretary incurred the wrath of the Court Monitor, who excoriated the Secretary for reporting to Congress the estimated $2.4 billion cost of a transaction-by-transaction accounting of all funds (as opposed to a statistical approach) on the grounds that the agency's estimates to Congress were an effort by the agency to avoid its trust obligations. Dkt#1379, at 27, 35 (Eighth Report of the Court Monitor). Thus, in a very real sense, the panoply of reporting requirements, intrusions by the Court Monitor, and the ongoing specter of contempt have already severely restricted DOI's discretion to develop a plan for the completion of an accounting.

C. The District Court's Trial Of Contempt Specifications Provides No Basis For Its Assumption Of Authority.

As we have discussed, the court's orders would constitute clear error even if they had been preceded by a hearing that fairly evaluated the current status of IIM accounting. But the court's conclusions regarding the "status of trust reform" did not emerge from a trial on that question, but rather from proceedings regarding

five specifications of contempt. Much of the evidence at trial had nothing to with the performance of an accounting, but instead focused on matters such as "IT Security" concerns, implementation of the TAAMS computer system, and BIA data back-up capabilities.

Only the first two contempt specifications even addressed the performance of an accounting, and the court's conclusions in that regard were largely directed to failures or asserted deceptions, such as the filing of a Federal Register notice on April 3, 2000, that took place before the present Secretary even took office. The court did not purport to apply the standards for determining unreasonable agency delay set out in Telecommunications Research and Action Ctr., 750 F.2d at 80, but instead reviewed all issues of progress through the prism of contempt.

For example, the Court Monitor acknowledged in his Fifth Report that the Office of Historical Trust Accounting, created by the Secretary in July 2001, had "made more progress in [the historical accounting] effort in six months than the past administration did in six years." Dkt#1105, at 18. However, instead of carefully considering OHTA's recognized successes or possible failures, the district court largely dismissed its relevance on the grounds that it was "too little, too late," because it had been established eighteen months after the court's declaratory judgment, id. at 184, a matter in no way determinative of whether agency action was currently being unreasonably withheld.

While vast work remains to be done, DOI has engaged five public accounting firms, a law firm, and a large bank to assist with performing accountings and has developed an accounting standards manual. Dkt#1586, at 54 (Eleventh Quarterly Report). As of November 1, 2002, the agency had reconciled 14,235 judgment accounts with balances totaling over $40,000,000, and had made substantial progress reconciling 88,779 transactions in per capita accounts, totaling approximately $78,000,000. Id. at 52-53. The contours for the completion of an accounting necessarily depend on the funding available, which the Secretary has made a priority. Her report to Congress in July 2002 details the procedures for record gathering and means for filling gaps in documentation so as to complete accountings for individual accounts.

In short, whatever mistakes may have been made in the process of undertaking the enormous task the Secretary has inherited - a task to which she has committed her efforts and resources - there can be no question that the commitment exists and has resulted in significant achievements. There is absolutely no basis for the court's conclusion, reached on the basis of a proceeding directed to contempt and fraud during specified time frames, that the "defendants are no closer today to discharging their fiduciary responsibilities than they were during the Phase I trial back in the summer of 1999." Dkt#1476, at 240.

In sum, even assuming that the district court's contempt findings had any basis, they could not serve as proper grounds for assuming control of functions committed to a coordinate branch of government. As we demonstrate below, the assumption that the contempt findings have a basis in law or fact is untenable.

III. THE DISTRICT COURT COMMITTED CLEAR ERROR IN HOLDING THE SECRETARY AND AN ASSISTANT SECRETARY OF THE INTERIOR IN CONTEMPT.

A. The Court Could Not Properly Declare Present Officials "Unfit" Based Upon Events Occurring Before They Took Office.

At the outset, it should be stressed that although the contempt sanctions issued by the district court apply to the Secretary and the Assistant Secretary in their official capacities only, the court's ruling personalizes its conclusions in a way that is both inappropriate and unfounded. The court has taken the remarkable step of branding these officials "unfit," and advising the Secretary to resign if she finds the court's rulings unacceptable.

The district court's conclusions are inaccurate and deal for the most part with conduct that took place before the present Secretary and Assistant Secretary took office,[8] and none of the court's findings concern conduct involving Assistant Secretary

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[8] The current Secretary took office in February 2001 and Assistant Secretary McCaleb took office in August 2001. Specifications 2 and 3 are expressly limited to conduct occurring prior to January 2001, Dkt#1476, at 17, and specifications 4 and 5 also largely concern actions taken before the current Secretary took office. Id. (misleading reports starting in March 2000).

McCaleb. The court could not properly declare these officials "unfit" based on their predecessors' conduct.

B. The District Court Committed Clear Error In Its Application Of Principles Of Contempt And Fraud On the Court.

1. The court's analysis uproots the concepts of contempt and fraud on the court from established law and transforms them into a means of exercising control over the ongoing operations of a federal agency.

Neither civil contempt nor fraud on the court is an elastic doctrine that allows courts to impose opprobrium and sanctions when they disagree with the manner in which parties have performed their duties. As the Supreme Court has emphasized, the "potent weapon" of contempt sanctions may not be "founded upon a decree too vague to be understood." International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967). Thus, "civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous" and the violation has been "proved by 'clear and convincing' evidence." Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (internal citations omitted). Put another way, "the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden." Drywall Tapers and Painters of Greater N.Y., Local 1974 v. Local 530 of Operative Plasterers and Cement Masons Int'l Ass'n, 889 F.2d 389, 395 (2d Cir. 1989).

Nor is "fraud on the court" a less stringent doctrine. As this Court has explained, "[f]raud upon the court refers only to very unusual cases involving far more than an injury to a single litigant," such as the bribery of a judge or the knowing participation of an attorney in the presentation of perjured testimony. Baltia Air Lines, Inc. v. Transaction Management, Inc., 98 F.3d 640, 642-43 (D.C. Cir. 1996) (citation omitted). This Court has suggested that "fraud on the court" cannot be found where the alleged misrepresentations have not affected any judicial ruling. Id. at 643 ("It is particularly noteworthy * * * that any misrepresentations to the District Court were not relevant to the court's decision"). See also Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 460 (2d Cir. 1994) (fraud on the court is, inter alia, "a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases presented for adjudication").[9]

2. The district court's dissatisfaction with DOI's performance plainly cannot rise to the level of contempt or fraud on the court.

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[9] Likewise, the catch-all category of "litigation misconduct," which the district court also invoked, Dkt#1476, at 29-31, provides no basis for the drastic remedial sanctions imposed in this case. Although courts have power to protect the integrity of their processes and prevent litigation abuse, the Supreme Court has cautioned that these powers must be exercised "with restraint and discretion," and that a "primary aspect of that discretion" is the selection of an "appropriate sanction" for any asserted abuse. Chambers v. Nasco, Inc., 501 U.S. 32, 44 (1991). This doctrine cannot be extended to justify sanctions based on conduct ranging from filing a Federal Register notice to failing to identify all problems in a computer system.

The court held DOI officials in civil contempt on four principal grounds. First, for publishing a "sham" Federal Register notice designed to mislead the court "into believing that it was undertaking a legitimate administrative process to determine how to perform a historical accounting." Dkt#1476, at 193 (specification 2). Second, for failing to disclose "enormous problems" with the implementation of the TAAMS system. Id. at 198 (specification 3). Third, for filing misleading quarterly status reports that failed adequately to disclose problems with TAAMS implementation and BIA data clean-up. Id. at 199 (specification 4). And fourth, for misrepresenting the status of progress on IT security. Id. at 205 (specification 5).

The defendants' asserted failures do not violate any clear and unambiguous directives in a manner that could conceivably be held contemptuous under governing law. In its initial declaratory judgment ruling, the court issued a series of general directives. Most notably, the court ordered the defendants to file "quarterly status reports setting forth and explaining the steps that defendants have taken to rectify the breaches of trust declared today and to bring themselves into compliance with their statutory trust duties." 91 F. Supp. 2d at 59. The court directed each report to "be limited, to the extent practical, to actions taken since the issuance of the preceding quarterly report," and also directed the defendants to "file with the court and serve upon

plaintiffs the revised or amended High Level Implementation Plan" by no later than March 1, 2000. Id. The court's ruling established no time frame for undertaking an accounting; it established no specifications regarding the appropriate length, methodologies, or performance standards to be used in the quarterly progress reports; and it contained no mandate whatsoever to initiate a rulemaking, much less to consider a particular methodology in that rulemaking or to follow certain procedures in its Federal Register notice. In complying with the court's declaratory judgment ruling, DOI has filed a High Level Implementation Plan, Dkt#437 (First Report), voluminous quarterly reports, see, e.g., Dkt#1586 (Eleventh Report), and has initiated the process of an accounting.

The court's error is underscored because it rests in part on asserted non-compliance with aspects of its prior order that should have been vacated in light of this Court's previous decision. As explained above, although this Court confirmed that DOI was obliged to take steps necessary to perform a proper accounting of IIM trust accounts, it did not agree that the agency was required to perform each of the discrete tasks that the district court believed were necessary to perform an accounting. This Court expressly directed the district court to amend its opinion on remand to account for the fact that the "actual legal breach is the failure to provide an accounting, not [the] failure to take the discrete individual steps that would facilitate an accounting." 240 F.3d at 1106. Instead

of amending its opinion in light of this directive, the district court adopted as the central premise of its contempt ruling the proposition that the Secretary can be held in contempt for failing to satisfy many of the discrete subsidiary requirements designed to facilitate an accounting.

Another erroneous premise of the court's contempt ruling is that the current Secretary may properly be held in contempt for admitting that earlier reports to the court were inaccurate or overly optimistic. For example, in June 2001, at Secretary Norton's direction, DOI contracted with a third-party management consultant, EDS, to perform an assessment of TAAMS and other business and technical issues. The results of the EDS study were reported to the court in DOI's Eighth Quarterly Report, and the court expressly acknowledged "the Eighth Report as much more candid than the previous seven reports." Dkt#1476, at 203. But rather than relying on that report to purge DOI of contempt based on prior actions, the court used the Eighth Report to confirm its belief that earlier reports were inaccurate. Id. at 132, 152-53. Thus, the court noted, "in light of the Department's concessions in the Eighth Report it is abundantly clear that the agency cannot be trusted to provide the Court with timely and complete information regarding trust reform efforts." Id. at 204 n.145.

Contrary to the court's conclusions, what is clear from Secretary Norton's efforts, the resources she committed to the EDS

study, and the acknowledged candor of the Eighth Report, is that the current Secretary is determined to obtain, report, and act upon an accurate picture of the complex trust reform efforts for which she is responsible. And the court's use of the Eighth Report as evidence that the current Secretary is an "unfit" trustee is fundamentally at odds with the principle that subsequent remedial measures should not typically be admissible as evidence of prior negligence, see Fed. R. Evid. 407, a principle that has even greater force in adjudicating culpability in contempt proceedings.

Just as the court's findings cannot support a legal conclusion of contempt, they cannot support its ruling that the defendants committed a fraud on the court. The court doubted the motives of various DOI employees and their counsel in taking certain administrative actions, and believed that various reports failed to state accurately the current extent of reform progress. But none of these alleged failures involved the kind of falsification or obstruction that has been thought to constitute fraud on the court.

There can be no doubt that DOI identified to the court a variety of substantial problems in the TAAMS System and repeatedly disclosed to the court problems regarding IT security. The court's order rests on disagreements about the extent of progress, the magnitude of the problems with TAAMS, the implications those problems posed for ultimate success, and its conclusion that the agency was inappropriately expansive about its successes and insufficiently frank about its failures. See Dkt#1476, at 200

(noting that reports made "this Court (and the plaintiffs) believe that significant headway had been made on these two critical subprojects"); see also id. at 202 (noting that agency attorneys "consistently tempered the language used in the reports"). Retrospective disagreements about certain progress assessments made in hundreds of pages of reports that involved thousands of hours of information-gathering and inevitable exercise of judgment are not the equivalent of bribing a judge or falsifying evidence. Indeed, the reports were not even intended to serve as evidence but were simply issued to comply with court-imposed requirements. That an agency is unduly optimistic or chooses to emphasize its successes rather than its failures at most displays poor judgment. It does not constitute fraud at all, much less one of the "very unusual cases" involving misconduct such as bribing a judge or presenting perjured testimony. See Baltia Air Lines, 98 F.3d at 642-43 (citation omitted). Having established a general requirement to report quarterly on steps taken toward trust reform, without specifying the level of detail required, the court could not properly regard as fraud every failure to report information in sufficient detail that the court would, in retrospect, believe helpful to its supervisory role.

C. The Record Does Not Support A Conclusion That The Government Violated A Court Order Or Deliberately Misled The Court.

As we have shown, the court's application of the doctrines of contempt and fraud on the court is fundamentally flawed and requires

reversal as a matter of law. We now briefly discuss some of the specific errors in the court's rulings on these issues.

1. Among other things, the district court found that the defendants had affirmatively concealed the true status of the Historical Accounting Project. That conclusion stemmed primarily from the court's conclusion that the process by which DOI selected its statistical sampling method was a mere "sham," which was intended to mislead the district court and this Court into believing the agency was making progress towards fulfilling its fiduciary obligations. Nothing in the contempt trial proceedings supports this characterization.

The prior rulings of the district court and this Court make clear that statistical sampling was a legitimate option for consideration. See 91 F. Supp. 2d at 40 n.32; 240 F.3d at 1104. The witnesses at the contempt trial testified that DOI did not commit to any particular accounting approach prior to August 2, 2000. Moreover, DOI never hid its belief that a transaction-by-transaction accounting would be too time-consuming and expensive to be practical. Indeed, the Federal Register notice that the court derided as a "sham" explicitly informed the public that "it is unlikely to expect that the Congress would provide the Department with the staggering appropriations needed to fund such a process." 65 Fed. Reg. 17,521, 17,526.

The idea that DOI acted in bad faith by anticipating the use of some form of statistical sampling is simply inconsistent with the

APA. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 877 (1st Cir. 1978) ("the agency's final decision need not reflect the public input"). In any event, when a court concludes that an agency has "prejudged" a policy decision in such a way as to frustrate public input, the proper remedy is a remand for further proceedings, not contempt sanctions. See 3 Richard J. Pierce, Jr., Administrative Law Treatise § 18.1 at 1323 (3d ed. 2001).

2. The district court's conclusion that the defendants misled the court on the progress of TAAMS implementation between September 1999 and December 21, 1999 is similarly without foundation.

During the Phase One trial, DOI's representations regarding TAAMS were based on information then available to the agency. At the time, some optimism was not unwarranted: there was no proof that TAAMS implementation and data cleanup could not be accomplished according to the plan that then existed. Nevertheless, DOI officials pointed out to the court that the HLIP had been developed on a highly compressed schedule and that the complexities of the task could make TAAMS implementation within the specified time frame difficult. Trial Tr. (7/2/99), at 2963-65 (Thompson Testimony). The agency made a conscious decision to get TAAMS underway despite these plan inadequacies, and it informed the court of that choice.

Agency officials testified during Phase I that the TAAMS rollout schedule was aggressive and that implementation could be delayed by unforeseen problems. See Trial Tr. (6/28/99), at 2280 (Nessi Testimony) (TAAMS deployment schedule is "tentative until we

know that we have a good system that's well tested and ready to move forward"), id. at 2964-65 (Deputy Special Trustee's statement that "[t]here was very little time in [his] mind to finish the work between the time we published the high level plan and when the final action was due * * * that time frame was going to be tough"). That DOI's plans became obsolete because problems later occurred cannot transform representations made in the past into fraud.

The district court also characterized DOI's failure to disclose TAAMS implementation problems after the Phase One trial as "fraud on the court," excoriating the defendants for writing - but not filing – a short report revealing significant setbacks that occurred after the trial. Witnesses agreed that there was a "unanimous" decision to inform the court of the delays, and, aside from positing a "bureaucratic bungle," none could explain why the report was not filed. Trial Tr. (12/19/01), at 1182 (Thompson Testimony). The court's conclusion that the agency had officially and affirmatively decided not to disclose TAAMS implementation difficulties on the basis of the failure to file a report finds no support in the record. Indeed, the court itself readily acknowledged that it "understood at the time of the [1999] trial that TAAMS might not work," Hearing Tr. (11/30/01), at 27, and that the court "understood that Mr. Nessi was painting a very rosy picture that might or might not turn out to be true." Id. at 29. See also Trial Tr. (12/10/01), at 154 (clarifying that Thomas Thompson was "hopeful" but "didn't have any guarantees that this would ever work").

3. The district court similarly erred in ruling that the defendants had defrauded the court by filing "false and misleading" quarterly reports. The court's findings rely heavily on the fact that, in hindsight, the timetables for TAAMS implementation described in DOI's quarterly reports were unrealistic. The agency concedes this much. But DOI always acknowledged that its timetables were aggressive, and that its efforts were based on a calculated risk that quick action might not be as trouble-free as actions taken with greater caution. See, e.g., Dkt#437, at 69-71 (First Report) (admitting that original TAAMS implementation plan "has undergone considerable change since the unveiling of the initial prototype in June 1999," that "data conversion issues interfered with a full test," and that "longer, more intensive training classes than originally considered would be required").

While TAAMS reporting was hampered by overly aggressive deadlines and unanticipated implementation problems, DOI's problems in reporting on the BIA Data Cleanup Project were due to a lack of meaningful metrics to measure progress. The agency never concealed its uncertainty about data cleanup progress. See, e.g., id. at 24 (Revised HLIP) ("it is difficult to estimate a total cost and duration for the entire cleanup effort at this time"). Data cleanup reporting was all the more difficult because of the agency's decentralized approach; each BIA region and office had different data problems, and each required a different solution. Id. at 20-24. Just as in the case of TAAMS reporting, the court's willingness

to infer fraudulent intent from DOI's concededly flawed data cleanup reports reveals a failure to adhere to the appropriate legal standards for contempt and fraud on the court.

4. Finally, the district court erred in finding that the defendants intentionally misrepresented progress on IT security. Even when DOI was explaining its need to transfer IT systems to Reston, it described that transfer as a "first step," and frankly admitted that security was a real problem that could not immediately be solved. See Hearing Tr. (3/29/00), at 25-26 (admission by defendants' counsel that security "is not okay, Judge. I can't represent to you that is about to be okay."). After the move, DOI admitted in a November report that "significant" IT security work remained to be done. Dkt#585, at 6. And, in opposing the Special Master Investigation, DOI again acknowledged that many security measures still needed to be taken. See, e.g., Dkt#716, Exh. 10 (Curran Decl. ¶ 2) (stating that IT security implementation "will likely take three to five years"). Thus, DOI did not represent that the IIM trust data was fully "secure." The court's finding of fraud is contrary to the record and rests on a series of adverse inferences flatly prohibited by the legal standards at issue.

IV. THE COURT PLAINLY ERRED IN DECLINING TO REVOKE THE COURT MONITOR'S APPOINTMENT AND IN ELEVATING THE MONITOR TO SPECIAL MASTER.

A special master is a judicial officer, subject to the same standards of disqualification as a district court judge. Jenkins

v. Sterlacci, 849 F.2d 627, 632 (D.C. Cir. 1988). The district court's appointment of Joseph Kieffer as a special master with significant judicial responsibilities is, under those standards, altogether improper.

A. As outlined above, the district court in April 2001 appointed Mr. Kieffer as Court Monitor to "monitor and review all of [DOI's] trust reform activities" and to file written reports addressing trust reform and "any other matter Mr. Kieffer deems pertinent." Dkt# 707, at 2. The court gave the Monitor access to "any Interior offices or employees to gather information necessary or proper to fulfill his duties," and allowed him "to make and receive ex parte communications * * *." Id. at 2-3.

On April 4, 2002, the district court invited the parties to submit their views on the reappointment of the Monitor for an additional year. The government conditioned its consent on the imposition of terms that were not ultimately accepted by the court.

On April 19, 2002, shortly after his reappointment, the Court Monitor attended a meeting requested by senior DOI officials. After declaring the meeting to be "ex parte," and admonishing the participants that they were not to take notes or to repeat his comments to anyone, Dkt#1339, at 7, the Monitor told the officials that they were not receiving good legal advice. He then took issue in strong terms with the Secretary's issuance of a memorandum critical of the Special Trustee, and told the assembled officials

either to comply with his view of the Special Trustee, or to disagree and suffer adverse consequences. Id. at 7-8.

The defendants then filed a motion to revoke the Monitor's appointment, filing three affidavits describing the course of the meeting. Dkt#1339. In denying the motion, the court explained that it was "personally aware of the background of the April 19, 2002 meeting, the conversations at that meeting and at the subsequent meetings between the Deputy Secretary and the Court Monitor." Dkt#1479, at 10.

Instead of removing Mr. Kieffer, the court elevated him to the role of a "Special Master-Monitor." Dkt#1478. The Special Master-Monitor is to "monitor the current status of trust reform and the Department's trust reform efforts"; "advise the Court and the parties of his findings by periodically filing reports with the Court"; and "oversee the discovery process and administer document production, except on matters related to IT security, document retention and preservation, and the Department of the Treasury [which] shall still be handled by Special Master Balaran." Dkt#1476, at 260.

B. The court's actions with respect to the monitor constitute clear and significant legal error. As this Court has made clear, with respect to matters of disqualification a "special master must hold himself to the same high standards applicable to the conduct of judges." Jenkins, 849 F.2d at 632. As the Court has observed, a special master's factual findings are reviewed by the district

court only for clear error under Fed. R. Civ. P. 53. "Thus, even though a special master's findings may go against what the district court and this court believe to be the weight of the evidence, those findings may nonetheless be upheld. In this respect, the special master occupies a position functionally indistinguishable from that of a trial judge." Jenkins, 849 F.2d at 631.

Under 28 U.S.C. § 455(b), a judicial officer, including a master, is disqualified if he has "personal knowledge of disputed evidentiary facts concerning the proceeding." Id. A judicial officer has improper personal knowledge of the facts when he obtains information ex parte. As the Seventh Circuit explained in In re: Edgar, 93 F.3d 256 (7th Cir. 1996), with regard to a judge's conversations with an expert panel, "personal knowledge" means information derived outside the record and not subject to adversarial testing. The court emphasized 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." Id. at 259. "Knowledge received in other ways, which can be neither accurately stated nor fully tested, is 'extrajudicial.'" Id. (holding recusal required where a district judge engaged in ex parte discussions with a panel of experts charged with investigating an allegedly defective state mental health system).

It is undisputed that the monitor in this case has had wide-ranging ex parte contacts with DOI employees, including both oral discussions and the receipt of documents. Based on the information he has received, the monitor has issued a series of reports that have been highly critical of DOI. The fact that the monitor has formed a view of this case, and has done so on the basis of substantial ex parte information, disables him from serving in a judicial capacity in the same litigation.

The fact that the Special Master-Monitor shall "oversee the discovery process and administer document production" further underscores the problem. Discovery and document production issues, including issues of privilege, have been contentious. In his role as monitor, Mr. Kieffer has issued his own discovery requests. Mr. Kieffer cannot now be made an impartial judicial officer responsible for ruling on these issues subject only to clear-error review by the district judge.

Indeed, these circumstances preclude the monitor's elevation to a position of special master not only because of his personal knowledge, but also because of his appearance of partiality. Under 28 U.S.C. § 455(a), a judicial officer "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Id. This provision imposes an objective standard which turns on the appearance of bias or prejudice. See Liteky v. United States, 510 U.S. 540, 548 (1994); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 (1988). From any objective

standpoint, this monitor cannot be seen as a disinterested participant in this litigation. As detailed above, he has threatened Interior officials with adverse consequences if they refuse to go along with his view of the issues, and has repeatedly and harshly castigated the Secretary and other Interior officials in his reports to the court. This course of conduct is inconsistent with a neutral, judicial role.

Even if the court had not elevated Mr. Kieffer, he would be precluded from continuing as Court Monitor. Absent the government's consent, the district court has no authority to require an agency to accept a "Monitor" with far-ranging investigative powers and to require it to pay for his services. As DOI made unequivocally clear in district court, it did not consent to the monitor's reappointment on the terms imposed by the court. Dkt#1251.

Moreover, in denying DOI's motion to vacate the Court Monitor's appointment, the court emphasized that it was "personally aware of the background of the April 19, 2002 meeting, the conversations at that meeting and at the subsequent meetings between the Deputy Secretary and the Court Monitor." Dkt#1479, at 10. To the extent that the court relied on information that did not enter the record and "can be neither accurately stated nor fully tested," Edgar, 93 F.3d at 259, its ruling is without basis.

CONCLUSION

For the foregoing reasons, the district court's September 17, 2002 orders holding the Secretary of the Interior and an Assistant Secretary in civil contempt and ordering the agency to submit trust reform plans by January 6, 2003, denying the defendants' motion to revoke the appointment of Joseph Kieffer as Court Monitor, and elevating Mr. Kieffer to the position of Special Master-Monitor should be vacated, and this case should be remanded to the agency for further proceedings consistent with this Court's decision.

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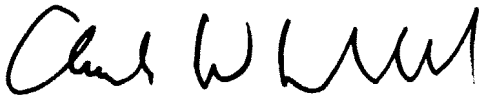
CERTIFICATE OF COMPLIANCE

Counsel for the Appellants hereby certifies that the foregoing brief satisfies the requirements of Fed. R. App. P. 32(a)(7) and D.C. Cir. Rule 32(a) as follows: the brief was prepared in 12-point Courier New font and the Corel Wordperfect 9.0 computer word count is 13,634.



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