

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, : Civil Action 96-1285  
et al. :  
Plaintiffs :  
 :  
V. : Washington, D.C.  
 : Monday, June 2, 2008  
DIRK KEMPTHORNE, Secretary :  
of the Interior, et al. :  
 :  
Defendants : 2:00 p.m.

*TRANSCRIPT OF PRETRIAL CONFERENCE  
BEFORE THE HONORABLE JAMES ROBERTSON  
UNITED STATES DISTRICT JUDGE*

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Proceedings reported by machine shorthand, transcript produced  
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1 going to be called are frankly not very high. As far as I'm  
2 concerned, the limiting factor here is not who is going to  
3 poison my mind, but how long is it going to take.

4 And I think this thing will take -- I'm just guessing,  
5 because it's going to take as long as it needs to take, and if  
6 we need to take a break and come back and continue it, we will  
7 do that, but in my mind, I have two, three weeks as the duration  
8 of this trial. You have given me a lot more witnesses than I  
9 will hear in two or three weeks, but it seems to me -- but a lot  
10 of them are may calls, a much smaller number are will calls.

11 Let me just talk for a minute about the issues that are  
12 presented by the defendants' motion in limine, and I will be  
13 happy to hear from you-all on these same subjects. I haven't  
14 really decided them.

15 The government asserts that there are four general  
16 kinds of testimony that the plaintiffs plan to elicit that is  
17 irrelevant, trust management issues, information technology  
18 security, expert legal opinion, and expert opinion on the  
19 plaintiffs' old revenue model.

20 Trust management qua trust management is not what this  
21 trial is about, nor indeed what this case is about. Or at least  
22 not this phase of the case. I don't know if anybody is ever  
23 contemplating a Phase III, but trust management, in my mind it  
24 occupies a different lobe than the issues we're dealing with  
25 here. And so my inclination is to agree in general with the

1 government's argument that asset management is outside the scope  
2 of this trial.

3           Now, where I see it probably coming in, because I don't  
4 think Mr. Gingold is going to be denied on this - he's been  
5 talking about this subject since day one - has to do with  
6 investment and interest rates and what might have, should have  
7 been done with the money that hasn't been distributed. And I  
8 suppose that inevitably I'm going to hear some of that, but I  
9 cannot imagine listening to eight witnesses on the subject. And  
10 so I would hope that this afternoon we can narrow that subject  
11 to something more manageable.

12           On IT security, the plaintiffs are still grinding that  
13 ax, and even though I have issued an order permitting the  
14 reconnection of the computer systems at the department, the  
15 plaintiffs' argument is that there are limits on the  
16 admissibility of electronically stored evidence, and that in  
17 order to render them admissible, the party sponsoring an exhibit  
18 is responsible for demonstrating the integrity of the IT system  
19 that generated it, something like that. I'm making up the  
20 words, but that's the generality of the plaintiffs' proposition.

21           I think it is very unlikely that I will exclude any  
22 evidence in this case on the grounds of the unreliability of the  
23 computer system, period, full stop. If the plaintiffs have some  
24 point to make about egregious problems with some computer system  
25 that isn't repetitive of what I've heard before, I will hear it.

1 But the objection will go, I think, to weight rather than to  
2 admissibility.

3 Third, expert legal opinion on the law of remedies and  
4 equitable disgorgement. The government's point is that neither  
5 of the two Dougs has any factual knowledge of the case, and I  
6 haven't given any indication that I was interested in purely  
7 legal testimony. And I think both of those propositions are  
8 true, although experts testify all the time that don't have any  
9 factual knowledge of cases.

10 And there is merit to the plaintiffs' position that the  
11 government opened that door with the Langbein testimony, and I  
12 don't want to hear a seminar and I don't want to hear a lecture,  
13 but if there are experts who have something to offer in this  
14 field, I'm going to listen to it.

15 The fourth is the expert opinion on the old revenue  
16 model, which the government says these people, Fasold, Gabriel,  
17 McQuillan, Stinnett, and Wright, don't know anything about  
18 anything but the revenue model that the plaintiffs used during  
19 the 1.5 trial, and they've abandoned it. The plaintiffs say,  
20 no, no, no, we haven't abandoned it, and that Fasold's  
21 calculation of trust funds may help to shed light on both the  
22 fact and the amount of the government's benefit.

23 Well, how much light can be shed, I don't know. How  
24 repetitious and redundant it is, I don't know. And I don't know  
25 that I can resolve that one in advance. I think I'm going to

1 have to listen to it, or listen to some of it, and take  
2 objections to it on the spot. But remember, in some cases it's  
3 easier to let it ride than to fill up the record with  
4 objections, because, as I said, I am presumed -- the presumption  
5 may be rebuttable, but I am presumed to be able to sort out what  
6 I should hear from what I shouldn't hear.

7 So I think I've said my peace. I'm looking at a two or  
8 three-week trial, I've given my kind of high level view of the  
9 government's motion in limine, and I will hear from anybody who  
10 wants to speak at this point. Mr. Kirschman?

11 MR. KIRSCHMAN: Thank you, Your Honor. A significant  
12 issue here isn't so much your ability to sift through evidence  
13 or testimony that's not relevant, and your ability to discern  
14 the relevance of testimony, and we don't question in any way  
15 your ability to do that. But a major issue here is the  
16 prejudice to us, the defendants, as we prepare for a trial of a  
17 relatively limited duration that has been generally fast tracked  
18 anyway, where we have, I believe it's 29 may calls.

19 So the question is whether this information is  
20 relevant. The purpose of a motion in limine is to manage the  
21 trial beforehand into something manageable, and not to be left  
22 to speculation as to how many may calls may or may not appear  
23 and what they will or will not testify about.

24 When the issue is the mismanagement of trust assets,  
25 and that's what the definition is, and it is well established in

1 this case, both by prior opinions of this Court and as noted by  
2 yourself, Your Honor, we should not be left in the dark as to  
3 what is actually going to be tried.

4 As you said, it is well established in this case that  
5 asset mismanagement is not part of the case, and yet that's the  
6 description we're left with. If that is what they intend to  
7 present, if that's what plaintiffs intend to present through the  
8 eight witnesses, then that should not be part of the case.  
9 Because not only are they presenting a case, we're preparing to  
10 defend a case.

11 On the issue of asset management, we suggest, as we  
12 stated in our motion, that you have to look to the purpose of  
13 the trial. And the Court, in its May 2nd order, set out a well  
14 defined goal for the trial, scope of the trial, and that was to  
15 determine the dollar amount of the funds that were received in  
16 the IIM Trust that do not appear to have been disbursed to  
17 beneficiaries and are not explained by the government's  
18 accounting efforts. And then you also mention the second issue  
19 related to what benefit, if any, was reaped by the government  
20 from the use of those funds.

21 Now, the issue is not here whether a certain security  
22 could have received a more favorable interest rate, whether a  
23 different bond should have been used. The should haves aren't  
24 part of this trial as set out in your May 2nd order. And we  
25 certainly understood that to be the case.

1           Plaintiffs, you're right --

2           THE COURT: How do you expect the plaintiffs to  
3 establish -- or what kind of a proof would you suggest they use  
4 to establish the benefit-to-the-government theory? I mean,  
5 their position is that X dollars were not distributed, were  
6 received but not distributed over Y period of time. What is the  
7 benefit, just that number of dollars?

8           Now, I understand -- let's not get lost here. I do  
9 understand that there is an argument, and I think a significant  
10 argument, on whether any interest will be payable at all.  
11 That's a jurisdictional argument. But the plaintiffs are going  
12 to want to prove that if the number is a billion dollars, then  
13 they're owed three billion dollars or something, and they've got  
14 to prove that by some method.

15           Now, how would you prove it if you were the plaintiffs?

16           MR. KIRSCHMAN: I don't know how I would prove  
17 plaintiffs' case, and point in fact, we don't think they can  
18 prove it. But what they would look to --

19           THE COURT: It's like "Meet the Press." I ask the  
20 question, you -- I didn't expect an answer to that question.

21           MR. KIRSCHMAN: No, but the point is, plaintiffs have  
22 set out what they intend to prove, and that's whether money was  
23 wrongfully withheld. And if there's evidence of money  
24 wrongfully withheld, and we don't believe there is, they can  
25 present that. And if that somehow led to a benefit to the

1 government, as opposed to being paid to a third party so that  
2 the government didn't have the use of the funds, or it was lost  
3 so the government didn't have use of the funds, that's the type  
4 of evidence that we anticipate they will present.

5           They said it, and they said it in their briefs and they  
6 said it at the last pretrial conference, that their burden is to  
7 show money not only wrongfully withheld, but that then was used  
8 for the benefit of the government. And challenging whether  
9 bonds have been mismanaged, or whether, as they state in their  
10 opposition, that cash investments, securities, and bonds have  
11 been mismanaged, isn't relevant to that inquiry.

12           They also make the very general statement that cash,  
13 investments, securities, and bonds are unaccounted for. Well,  
14 that's a very broad statement. If it's an accounting issue, it  
15 doesn't belong here, and it certainly doesn't show that any  
16 money was used for the benefit of the government. So I don't  
17 know.

18           But those are the issues, and they've set them forth in  
19 their brief, and it's not a matter of general asset  
20 mismanagement. And for us to find out, well, we didn't really  
21 mean asset mismanagement, here's what we meant, and we find out  
22 on day two of the trial, that is prejudicial.

23           To the extent they gave us their descriptions of what  
24 their witnesses are going to testify about, and they are  
25 general, they should be bound to them, and they shouldn't be put

1 in a position where they're allowed to tell us all, including  
2 Your Honor, for the first time, what they really meant the  
3 witness was going to testify during the course of the trial.

4 On the second point, the IT security issue, again, Your  
5 Honor, not only have you heard this type of testimony before,  
6 and in fact you heard from Ms. Infield in October regarding  
7 records managements issues and keeping of the records, she just  
8 testified in October to Your Honor. So we have been there.

9 Not only that, there was a 59-day hearing in 2005 where  
10 this was all addressed, and the Court of Appeals came away with  
11 a clear ruling that the plaintiffs hadn't established any harm  
12 or immediate harm related to the accounting effort based on  
13 IT security.

14 Again, we certainly understand that the Court can cut  
15 short any testimony that it finds outside the scope of the  
16 May 2nd order, but it's prejudicial for us to try to prepare an  
17 IT security case in the midst of what we thought was a trial  
18 related to the limited issue of any potential remedy. We should  
19 not be subjected to that. And not only is it a matter of  
20 prejudice, but that's not what the May 2nd order addressed.

21 This Court has obviously identified this as a  
22 collateral issue, and we agree with you, and it's one that's  
23 been tried repeatedly. We thought we were moving ahead. We  
24 don't necessarily agree with the manner in which we're moving  
25 ahead, but we understood we were moving ahead to a new issue.

1           Plaintiffs' recent notice to the Court asking the Court  
2 to take notice of an IT report card only demonstrates our point.  
3 If they're going to be introducing evidence like that, and we're  
4 expected to prepare for such a trial, one, it's not appropriate  
5 at this stage given the history of the case, and two, it's  
6 prejudicial for us now to go scrambling for IT security  
7 witnesses.

8           Your Honor, that's especially true related -- we  
9 identified two witnesses, Mona Infield, who's already testified,  
10 and Joan Tyler. And perhaps most importantly, plaintiffs have  
11 identified three 30(b)(6) witnesses, and the third addresses the  
12 issue of the security of electronic data; that is, IT security.

13           There is simply no reason for the Court to hear from  
14 any 30(b)(6) witness as identified by plaintiffs. And I would  
15 like to address this. This is a long-standing issue that's been  
16 raised off and on with the Court over the years and never really  
17 resolved, and that is plaintiffs' use of the NARA regulations to  
18 imply that there's some type of evidentiary bar created by the  
19 NARA regulations. That simply is not true, and Your Honor has  
20 already expressed the fact that you're inclined not to exclude  
21 any evidence, and that is certainly correct.

22           Plaintiffs rely specifically on the NARA reg at 26 CFR  
23 1234.26. Your Honor, do you have that in front of you?

24           THE COURT: No.

25           MR. KIRSCHMAN: If you prefer, I have copies I could

1 distribute.

2 THE COURT: Well, for a guy who is arguing that this is  
3 a collateral issue, you're making it a main part of this hearing  
4 this afternoon. I don't think you need to argue this point.  
5 Frankly, I think you're kicking in an open door.

6 MR. KIRSCHMAN: Well, here's why I ask: We had talked  
7 in a telephone conference regarding 30(b)(6) witnesses --

8 THE COURT: I know. Let's talk about 30(b)(6). My  
9 general response to your prejudice point is that we can -- in a  
10 bench trial we can easily build in a failsafe mechanism here  
11 that works something like this: If a witness testifies to  
12 something that you thought and do think is outside the subject  
13 matter of this trial, and I do not exclude it, the easiest  
14 approach to that is for you to say, we're not prepared to  
15 respond to this, we want to come back and respond to it later,  
16 which we'll bring the witness back for cross-examination later.  
17 We can solve those kinds of problems.

18 What I cannot solve with that simple device is the  
19 requirement put on you to prepare and present a 30(b)(6) witness  
20 if the plaintiffs have demanded a 30(b)(6) witness. And that,  
21 it seems to me, is something we need to deal with today,  
22 because -- and I don't know how many of these witnesses are  
23 government witnesses that are being called as adverse witnesses,  
24 and the same thing applies to them, I think. If government  
25 witnesses are being called as adverse witnesses and you need to

1 prepare them before they testify, well, that gets prejudicial,  
2 particularly if they're going to testify to things that you  
3 think are beyond the pale.

4 So I forget who Mona Infield works for, for example.

5 MR. KIRSCHMAN: She works for the Department of the  
6 Interior, although she's been in frequent contact with  
7 plaintiffs' counsel.

8 THE COURT: I'll read between those lines.

9 MR. KIRSCHMAN: I don't know the exact number, and I  
10 wish I had them here. There are approximately a dozen, and  
11 there may be more, witnesses that are either government  
12 employees, government former employees, or government contract  
13 personnel. And I think of plaintiffs' 34 identified witnesses,  
14 it's probably more like 15, almost half. Again, I'm sorry, I  
15 don't have the exact number.

16 But we have to prepare, and Your Honor has raised a  
17 good point. For each of those witnesses, we have not only to  
18 find their availability, which we have been working with counsel  
19 in doing, but then to the extent they're all may call, we have  
20 to prepare each of them because we don't know when they're going  
21 to be called.

22 We are still discussing a possible notification between  
23 the parties as to the order of witnesses. Plaintiffs asked that  
24 we provided them with witness' availability before they could  
25 address the order of their witnesses, and we've been

1 accommodating, or accommodating them as quickly as we could on  
2 the availability of witnesses. But even a notice of two  
3 business days, three business days doesn't give us enough time  
4 to prepare all the government employees, former employees, and  
5 contractors that are listed in plaintiffs' list.

6 On the 30(b)(6) --

7 THE COURT: Well, let me look at your motion in limine.  
8 On the trust management issues, which of these people are  
9 government employees, former employees, or government  
10 contractors, Ed Angel?

11 MR. KIRSCHMAN: He is a government contractor.

12 THE COURT: Carolyn Haase?

13 MR. KIRSCHMAN: She's a former government contractor.

14 THE COURT: Paul Homan?

15 MR. KIRSCHMAN: Plaintiffs' witness.

16 THE COURT: Don Pallais.

17 MR. KIRSCHMAN: Plaintiffs' expert witness.

18 THE COURT: Sharon Redthunder.

19 MR. KIRSCHMAN: She is a government employee. You may  
20 recall, Your Honor, she testified in October on behalf of the  
21 plaintiffs as plaintiffs' witness. But she's a government  
22 employee.

23 THE COURT: Is she the administrative judge?

24 MR. KIRSCHMAN: No. I'm sorry, I forget her title.

25 THE COURT: Jeff Steinhoff?

1 MR. KIRSCHMAN: Former government employee.

2 THE COURT: Ed Street?

3 MR. KIRSCHMAN: Mr. Street is -- I believe he works or  
4 worked for BIA.

5 MR. GINGOLD: Mr. Street I believe worked for  
6 Arthur Andersen.

7 THE COURT: A former contractor?

8 MR. KIRSCHMAN: Mr. Gingold is correct. I'm sorry, I'm  
9 looking at old notes.

10 THE COURT: Ray Ziler?

11 MR. KIRSCHMAN: Actually, I had Mr. Ziler as a former  
12 manager of Arthur Andersen.

13 MR. GINGOLD: Partner.

14 THE COURT: All right. Is Ed Angel a may call or will  
15 call?

16 MR. KIRSCHMAN: He is a will call, Your Honor.

17 MR. GINGOLD: No, that's not true.

18 MR. KIRSCHMAN: I'm sorry, are you talking about -- I'm  
19 sorry, he's a may call for plaintiffs. We have identified him  
20 as a will call.

21 THE COURT: So I'm not worried about Angel.  
22 Carolyn Haase?

23 MR. KIRSCHMAN: A may call for plaintiffs.

24 THE COURT: Sharon Redthunder?

25 MR. KIRSCHMAN: May call for plaintiffs.

1 THE COURT: Jeff Steinhoff?

2 MR. KIRSCHMAN: May call for plaintiffs.

3 THE COURT: Ed Street?

4 MR. GINGOLD: Excuse me, Your Honor. Bob, you  
5 identified Ms. Haase a 30(b)(6) for you.

6 MR. KIRSCHMAN: That's true. Related to the...

7 MR. GINGOLD: Correct.

8 MR. KIRSCHMAN: She's identified both as a may call for  
9 plaintiffs - she's witness number 13 - and we have informed  
10 plaintiffs that regarding a part of one of their 30(b)(6)  
11 designations, number 33, related to the NORC meta-analysis, she  
12 would also be able to address a portion of that.

13 So she's listed both as a may call on plaintiffs' list,  
14 and we have identified her as someone who could address a  
15 portion of number 33 as a 30(b)(6) witness.

16 And Mr. Street and Mr. Ziler are both may calls.

17 THE COURT: The NORC meta-analysis? I guess we're  
18 going to go through the NORC meta-analysis again, are we not?

19 MR. KIRSCHMAN: We may, Your Honor. It was raised  
20 briefly in our April filing.

21 THE COURT: Well, this is getting very complicated very  
22 quickly. I'm not worried about Ed Angel, I'm not worried about  
23 Paul Homan, I'm not worried about Dan Pallais, but all the rest  
24 of them, all the rest of the trust management issue witnesses it  
25 seems to me -- well, they're all may calls. Right? Ziler and

1 Street are may calls?

2 MR. KIRSCHMAN: Yes, Your Honor.

3 MR. GINGOLD: That's correct.

4 THE COURT: Well, I guess it's time we got down to the  
5 issue of what a may call really means. May call if what?

6 MR. GINGOLD: Your Honor, we put may calls on our list  
7 in part depending upon what the government was going to provide  
8 with regard to witnesses. Because we filed our witness list two  
9 weeks before the government did, so some of our may calls were  
10 dependent on what we anticipated the government was going to do  
11 so we didn't have to supplement the list.

12 Also, depending on what the government did do, some of  
13 our may calls have become will calls in our own mind. But we  
14 had to do this, because we had no --

15 THE COURT: Yeah, I know. Okay. So of these may  
16 calls, are they still may calls or have you taken them off the  
17 list? Have they been elevated to will calls?

18 MR. GINGOLD: Mr. Ziler -- Your Honor, we've only  
19 removed one witness from the list, Mr. Steinhoff. And Mr. Ziler  
20 has been changed to a will call. But the others -- well, we  
21 have an issue that we're still dealing with, because one of the  
22 witnesses for the government is very ill so some of the issues  
23 we were thinking about dealing with we have to deal with in the  
24 alternative.

25 But Mr. Ziler is a will call, Steinhoff has been

1 removed from the list, the others are what we may call. And  
2 depending on how we think we're dealing with a particular  
3 witness issue, some may be called, some may not be called.  
4 We're still trying to deal with that particular issue.

5 THE COURT: Where is Tim Russert when I need him?

6 MR. KIRSCHMAN: Resting from yesterday, I imagine.

7 On that, plaintiffs will be going first, Your Honor. I  
8 understand that they may have to wait to see what the government  
9 puts on in our responsive portion of the case, but certainly  
10 plaintiffs should have an idea regarding what they intend to put  
11 on, as they are going first.

12 And as far as the witness, and while I'm thinking of  
13 it, and Mr. Gingold agrees, we would like at some point a brief  
14 side-bar regarding that witness, just so we could bring the  
15 Court up to date.

16 THE COURT: Brief side-bar about what?

17 MR. KIRSCHMAN: There is a witness who is ill, who has  
18 been undergoing treatments and has undergone surgery, and if the  
19 Court would like any details on that so you know what to expect  
20 or not expect from that witness, I would like to address that  
21 side-bar. Just because it involves the individual's private  
22 medical history.

23 THE COURT: All right. What I distill from all of this  
24 is that Paul Homan, Don Pallais, and Ray Ziler are will calls on  
25 the trust management issue. Any prejudice there?

1           MR. GINGOLD: Your Honor, they're not all will calls,  
2 Your Honor. Mr. Homan is not a will call. He's still a may  
3 call.

4           THE COURT: Okay. So the will calls are Pallais and  
5 Ziler?

6           MR. GINGOLD: Yes, Your Honor.

7           THE COURT: That's getting down to something  
8 manageable. You agree with that, Mr. Kirschman? You can deal  
9 with those two witnesses as will calls.

10          MR. KIRSCHMAN: Yes, Your Honor. Knowing that they're  
11 will calls, we can address them and prepare for them.

12          THE COURT: All right. Now let me try another just  
13 kind of homespun solution here. There are a lot of names here  
14 that are will calls. Suppose we leave it this way: Mr. Gingold  
15 says whether the may calls are called depends on how you deal  
16 with things. They're still thinking about it. He doesn't want  
17 to be bound by it today.

18                 Let's proceed with Pallais and Ziler, and then if the  
19 plaintiffs want to put any of the may calls on, they will do it  
20 in a rebuttal phase of the case, even though they may not be  
21 bound by the formal idea of rebuttal. That is, if it turns out  
22 after hearing your case that they wish they had called these may  
23 calls, I will let them do it in the rebuttal phase of the case,  
24 even though it might be not strictly speaking rebuttal. Gives  
25 you time, gives them time, let's everybody sort things out as we

1 go along. Acceptable?

2 MR. KIRSCHMAN: Well, from my understanding of what  
3 you've said, what that means is we essentially during the course  
4 of the trial not only have to prepare for the possibility that  
5 all of those witnesses will testify, including some after our  
6 case is over, so even while we're putting on our case, a portion  
7 of our team will also be preparing for potential rebuttal  
8 witnesses.

9 THE COURT: Well, let me add another amendment, then.  
10 And your whole team doesn't have to do that, because if I'm  
11 going to let them testify after you're finished with the case,  
12 you'll have some time to prepare before they are heard.

13 MR. KIRSCHMAN: Well, that would certainly assist us,  
14 Your Honor.

15 THE COURT: Okay. Everybody happy with that?

16 MR. KIRSCHMAN: Yes.

17 MR. GINGOLD: Yes, Your Honor.

18 THE COURT: Good. Let's move on to information  
19 technology.

20 MR. KIRSCHMAN: Would you like to review the witnesses,  
21 Your Honor? I had addressed the points regarding that. The  
22 witnesses are Mona Infield and Joan Tyler, and then there's a  
23 30(b)(6) witness. You suggested that we address the 30(b)(6).

24 THE COURT: Yeah, let's talk about 30(b)(6). I am the  
25 guy, I think, who first suggested that it would be okay to do

1 30(b)(6) witnesses at trial, but when I did that, I did not  
2 anticipate that there would be 30(b)(6) witnesses summoned to  
3 talk about issues that were of disputed relevance.

4 I do think that it would be prejudicial for the  
5 government to have to prepare and present 30(b)(6) witnesses on  
6 issues that I subsequently found I didn't want to hear. I mean,  
7 that's a total waste of time and effort, and time and effort  
8 that nobody has in their budget.

9 So trustworthiness of defendants' electronic records  
10 and record-keeping systems is the 30(b)(6) subject, is it not?

11 MR. KIRSCHMAN: Yes, Your Honor.

12 THE COURT: Much too broad.

13 MR. KIRSCHMAN: Yes, Your Honor.

14 THE COURT: Who's the sponsor of this idea for the  
15 plaintiffs, Mr. Gingold? I've already given you a pretty clear  
16 indication of how I feel about this issue at this trial.

17 MR. GINGOLD: Yes, you have.

18 THE COURT: So where do we go from here?

19 MR. GINGOLD: Your Honor, as we said in our brief,  
20 we're not interested in reassessing whether or not the system  
21 should be reconnected. The decision has been made. The issue  
22 of admissibility and the weight of the evidence, however, is  
23 related to the trustworthiness of the systems that house the  
24 data, and the reliability of the data housed in those systems.

25 Whether we're dealing with a trust case or any other

1 case, the reliability of the evidence and how this Court decides  
2 to weigh that evidence is very important. It is particularly  
3 important here, since we are relying almost exclusively on the  
4 government data.

5 Therefore, Your Honor, in addition -- this is  
6 important. The IT security dealt only with the external  
7 security related to interconnection to the Internet, it did not  
8 deal or address the issues with regard to the serious security  
9 problems that were internal, that are not addressed by  
10 disconnection, that were raised during various proceedings we've  
11 had in this litigation, that go directly to the reliability of  
12 the data that is used and relied upon by defendants in meeting  
13 their duty, or their burden, based on our understanding of this  
14 Court's pretrial order.

15 So we believe, Your Honor, it is directly relevant to  
16 the extent to which this Court determines the government has  
17 been able to reduce properly and prove the amount of money that  
18 has been disbursed from the trust. Part of that goes to the  
19 trust management systems themselves, the data that the  
20 government itself has presented, including, Your Honor, in the  
21 900-plus meta-analysis documents that were alluded to in  
22 defendants' April filing.

23 These are issues that defendants themselves have put on  
24 the table, these are issues that are wholly related to meeting  
25 burdens of proof as this Court, not in this litigation, but this

1 Court has historically determined with regard to burdens of  
2 proof on a party that was required to do an accounting, a  
3 fiduciary required to do an accounting.

4 One of the things we didn't do, and since we're  
5 starting at the last issue, Your Honor, not the first issue you  
6 raised, is we took to heart this Court's instruction not to file  
7 additional briefing materials. We haven't done so, except a  
8 brief response to the government's motion in limine.

9 Following the Court's pretrial order, we read with care  
10 what was concluded in that order, and there are a number of  
11 items related to the witnesses we purport to call, or we ask to  
12 call, that are directly related to how this Court wrote the  
13 pretrial order, what it said, what cases were identified, the  
14 concerns that are either expressly identified or implicit in the  
15 cases that are cited.

16 We went to great pains to look at all that, and in part  
17 that's how the witnesses were selected, not just on how the  
18 Justice Department would like to frame the case, but how this  
19 Court, as we understand it, framed the proceeding. Evidentiary  
20 issues are relevant to every trial, whether it's this trial or  
21 the trials we've had before. The weight of the evidence, as we  
22 have said repeatedly, is within this Court's discretion. We  
23 don't say otherwise.

24 But in order to have a fully informed opinion on how to  
25 weigh the evidence, the reliability is critical, especially

1 since the government itself again has raised that very issue  
2 with respect to NORC as a statistician determining the  
3 appropriateness of disbursements prior to 1972; relying in part,  
4 for example, on meta-analysis documents that the government put  
5 together. We've gone through those documents, the 900 documents  
6 in whatever condition they're in - because many of them are not  
7 complete - we've identified what they're talking about,  
8 including how the trust management issues relate to the  
9 conclusions that systems and data are sufficiently reliable or  
10 similar to post-1972-data, that extrapolations and regressions  
11 can be made to come up with estimates, as they have stated in  
12 their revised AR-171, as to what disbursements have been made or  
13 collections have been made vis-a-vis the IIM Trust.

14 So Your Honor, we went with care to identify this  
15 Court's pretrial order, we went with care and cases that are  
16 relevant that have not been cited to this Court yet. As a  
17 matter of fact, what we have is, for your information, just the  
18 cases and authorities - it's not much - that are relevant to  
19 exactly what this Court said in its pretrial order, including,  
20 with regard to burdens, as set forth by the U.S. District Court  
21 for the District of Columbia, 1945, in the *Cafritz* case, with  
22 respect to how the fiduciary must meet its burden in a  
23 proceeding before this Court when it has failed to do an  
24 accounting. So it's just a case. We have no commentary with  
25 regard to it.

1           With regard to the interest issue that this Court  
2 raised and has raised explicitly in a pretrial order in the  
3 context of the *Library of Congress* case, Your Honor, we  
4 identified cases that are relevant to that, we identified why  
5 the *Library of Congress* case is, as a matter of fact, based on  
6 another case or series of cases that actually state that here,  
7 in fact in accordance with *Library of Congress*, if we were  
8 seeking interest, or if unjust enrichment is considered to be  
9 interest, it is not only permissible for this Court to make that  
10 determination, it is expressly authorized. We cite the  
11 statute -- we provide the statutes, we provide the cases, we  
12 provide no commentary in that regard.

13           For example, Your Honor, in 1926, the United States  
14 Supreme Court --

15           THE COURT: You're way afield of where you started  
16 here.

17           MR. GINGOLD: Okay. But Your Honor --

18           THE COURT: We're talking about trustworthiness of  
19 defendants' electronic records and record-keeping systems.

20           MR. GINGOLD: That goes right to the issue of meeting  
21 burdens of proof, as this Court determined those burdens are to  
22 be addressed by the parties in the pretrial order. The burdens  
23 are specific to each party. How those burdens are satisfied in  
24 many respects are determined by law, including law set forth in  
25 this district. The reliability of the information, the

1 particular nature of the information, the specifics are all  
2 important, Your Honor.

3 THE COURT: Let's just talk 30(b)(6) now. Okay?  
4 30(b)(6), of course, as we all know, is a discovery rule and not  
5 a trial rule, so its adaptation to a trial is unusual, to say  
6 the least. And maybe I need to back way off that and just say  
7 forget 30(b)(6) for trial.

8 But even in the discovery context, what you need to do  
9 to designate a 30(b)(6) witness is to define with specificity  
10 the areas in which the person is expected to testify, and then  
11 the respondent identifies a person or persons who are willing  
12 and able to testify about that, and have some obligation to  
13 prepare the person.

14 Now, as I understand it, your 30(b)(6) designation is  
15 for trustworthiness of defendants' electronic records and  
16 record-keeping systems. In other words, what? Who would that  
17 be, the Chief Information Officer of the United States  
18 government?

19 MR. GINGOLD: No, Your Honor. Each agency --

20 THE COURT: Who would that be, or what 15 people would  
21 that be?

22 MR. GINGOLD: First of all, we don't know how many  
23 systems have trust data that the experts designated by the  
24 government are relying on to meet the government's burden of  
25 proof in reducing the reasonable approximation, or the

1 approximation that plaintiffs have asserted is reasonable in the  
2 amount of money that was collected from the Individual Indian  
3 Trust lands.

4 The important aspect of that, Your Honor, is that's not  
5 in our control, that's in the trustee's control. And the  
6 government knows who the people are. These are all government  
7 employees, Your Honor. If they wanted to talk to Mona Infield  
8 or Joan Tyler with regard to what they know or don't know, they  
9 certainly have the ability to do so.

10 If they want to talk to the people who are responsible  
11 for ensuring the accuracy of the trust data, which is, Your  
12 Honor, at least a trust duty that exists, and with respect to  
13 Cobell XIX, the Court explicitly pointed out that the government  
14 didn't challenge the findings of this Court. So whatever  
15 findings this Court has made remain unchallenged with regard to  
16 that issue.

17 But we were looking at slightly different issues in  
18 that lengthy proceeding, and it dealt with the interconnectivity  
19 issue. And what we're dealing with now is a narrow subset  
20 dealing solely with the admissibility of electronic records and  
21 data housed in systems that the government is using to meet its  
22 burden of proof.

23 And Your Honor, we have identified with more  
24 specificity than what has been discussed by Mr. Kirschman under  
25 34(A) and (B) of our witness list. Every federal agency is

1 supposed to identify who's responsible for these particular  
2 records and elements. We don't designate them, the agency is  
3 supposed to. And it's not just under 1234.10 or 26, Your Honor,  
4 as we specified here. This is the obligation of the agency.

5 And Your Honor, in our case we're not looking at the  
6 broad programmatic issue, we're looking at the trust issue. And  
7 there's also a 1925 case that says if the government is acting  
8 other than as a sovereign, but, for example, as an insurer, it  
9 is treated like the insurer, and in Court it is also handled  
10 like an insurer and not like a sovereign.

11 These are the type of things we will hand up before we  
12 leave, because there's no need to discuss them further. But  
13 these identify specifically why witnesses were identified, how  
14 they were identified, in accordance with law that has been  
15 established both by statute and through rulings of the Supreme  
16 Court that have never been changed.

17 So that's all we were trying to do with these, Your  
18 Honor, meet your standards as set forth in the scheduling order,  
19 or in the pretrial order, comply with the law that is settled  
20 and exists with regard to this type of proceeding, both in this  
21 circuit, in this District Court, and with regard to all the  
22 other issues.

23 THE COURT: You have a way of moving from the specific  
24 to the general very quickly, Mr. Gingold, and you're getting too  
25 general for me. What I'm going to do with this 30(b)(6) witness

1 on trustworthiness of defendant's electronic records and  
2 record-keeping system is to sustain the government's motion in  
3 limine and not require the government to prepare or produce any  
4 witness on that subject for you to call in your case-in-chief.

5 If you've got some other -- I don't know what  
6 cross-examination Infield and Tyler will be subjected to on that  
7 subject, but to require the government to produce -- to find and  
8 produce a witness on the trustworthiness of electronic records  
9 and record-keeping systems is much too broad and burdensome, and  
10 I'm not going to require them to do it.

11 Now, that's not to say that the government won't be  
12 required to come up with something on this subject. I don't  
13 know at this point, because I don't know -- frankly, I still  
14 don't know exactly what the content of your claim or your case  
15 is here. I've already told you that I don't expect to be  
16 excluding documents or numbers from evidence in this case, but  
17 you will have questions about the validity or the accuracy of  
18 some of those numbers. And until I get closer to the  
19 granularity of what those issues are, I'm not going to require  
20 the government to identify a 30(b)(6) witness.

21 MR. GINGOLD: Your Honor, with all due respect, and it  
22 is due respect, Your Honor, significant respect, the government  
23 knows who these people --

24 THE COURT: I'm glad to hear that, Mr. Gingold.

25 MR. GINGOLD: The government knows who these people

1 are. We've been in trial on similar issues where these same  
2 people have been put forward. It's not a burden.

3 THE COURT: It isn't the people, Mr. Gingold, it's the  
4 breadth of the issue. The issue is just beyond -- it's kind of  
5 a universal theory that you have about this case, and we've --  
6 we saw the numbers in the first trial, we know what the numbers  
7 are; I expect we're going to hear slightly different numbers in  
8 the second trial. But trustworthiness of defendants' electronic  
9 records and record-keeping systems, I'm sorry, it doesn't cut  
10 it. Let's move on.

11 MR. GINGOLD: Your Honor, it's not just a theory. This  
12 Court has made findings in that regard.

13 Your Honor, we also have never had any Treasury  
14 witnesses, any Treasury witnesses testify with respect to the  
15 data or the systems. There is no record in this 12 years of  
16 litigation where those issues have been identified and  
17 presented. The same concern about the reliability of the data  
18 and the weight of evidence that is given to that data is  
19 important, and there's nothing in 12 years of these proceedings  
20 that goes to that issue.

21 So we are going into a situation where we have -- they  
22 are co-trustee delegates, the Treasury and the Department of  
23 Interior; they're equally responsible for the information.  
24 They've been defendants in this case for 12 years, and there's  
25 no issue here that has been hidden from the government in that

1 regard.

2 I would just like to point out that Ms. Infield can't  
3 testify with regard to Treasury, Ms. Joan Tyler can't testify  
4 with regard to Treasury. There's nothing that we can do in that  
5 regard, particularly since it's the government that opposed all  
6 discovery in this case.

7 So to the extent that the government would be  
8 surprised, Your Honor, we're dealing on the same level playing  
9 field that they are in that regard. But I would just like to  
10 point out, we don't know anything because there's been no  
11 Treasury witness ever presented in that regard.

12 One last note, however. Would this Court like just the  
13 authorities that I referenced with regard to the issues other  
14 than the IT security?

15 THE COURT: Sure.

16 MR. GINGOLD: I'm not going to say very much, because  
17 these are just authorities that we've identified that we believe  
18 are relevant after reading the pretrial order, going through all  
19 the issues that were identified in the pretrial order. And we  
20 have the *Henkels vs. Sutherland*, which deals with specifically  
21 the unjust enrichment issue, where the government holds funds in  
22 trust, and how unjust enrichment is outside the scope and not  
23 barred by the no interest rule. And that is a unanimous  
24 decision of the Supreme Court.

25 We have a 1932 Comptroller General opinion that

1 references that and restates it, and distinguishes the funds  
2 held in trust from other things where the no interest rule  
3 applies.

4 We also have specific statutes which identify that  
5 interest is to be paid and meet what this Court raised in the --  
6 we believe in citing the *Library of Congress* case with regard to  
7 express consent of interest to Individual Indian Trust  
8 beneficiaries, in items three, four.

9 In item five, it's an 1841 statute that applies to all  
10 funds held in trust by the United States government that has  
11 never been repealed. And further, Your Honor, it has been used  
12 and referenced in item six and item seven. The current version  
13 of the statute is identified in item eight. Item nine, Your  
14 Honor, identifies the obligations of the fiduciary in meeting  
15 its burdens when accounting hasn't been presented, and there is  
16 a court proceeding.

17 And the last case, which is *Standard Oil vs.*  
18 *New Jersey*, it states specifically that again the no interest  
19 rule doesn't apply, and interest is available when the  
20 United States government in that case was acting as an insurer.  
21 And the statement was made by the unanimous court and  
22 Justice Holmes that where the government is not acting as the  
23 government or the administrator, and it's acting in a commercial  
24 or other capacity, the no interest rules don't apply.

25 I would also like to point out that in *Henkels*, the

1 reason that unjust enrichment was determined to be outside the  
2 scope of the no interest rule was because it would raise serious  
3 constitutional questions otherwise.

4 THE COURT: Okay. Mr. Kirschman?

5 MR. KIRSCHMAN: Your Honor, just having received that  
6 little stack of documents, we certainly would like a chance to  
7 respond to those cases.

8 THE COURT: This is a non-brief. This is not a brief.

9 MR. KIRSCHMAN: Well, if it walks like a duck and  
10 quacks like a duck, it's often a duck. So to the extent it may  
11 be considered a brief, once we have a chance to review it, we  
12 may like an opportunity to respond to those cases. Again,  
13 obviously I haven't looked at those yet.

14 I want to point out two things on 30(b)(6) before we  
15 leave that topic, Your Honor. There are two other witnesses  
16 about which plaintiffs use the 30(b)(6) mechanism, and those  
17 were 32 and 33. Number 32 related to the CP&R data that was  
18 part of a trial exhibit back in October, and the other, again,  
19 related to the meta-analysis.

20 We have identified witnesses to plaintiffs for those  
21 two 30(b)(6) categories. I did want to make -- I wanted to  
22 offer clarification --

23 THE COURT: See, those two things strike me as being  
24 much more in the 30(b)(6) ballpark, because they're about  
25 specific data, specific documents. And you're not objecting to

1 those, are you?

2 MR. KIRSCHMAN: No, Your Honor. But I do want to  
3 qualify what we believe we have agreed to on that front.  
4 Because they are more narrow. We have identified witnesses who  
5 can testify regarding those topics; however, as the Court knows,  
6 under Rule 30(b)(6) as a discovery tool, there is more to just  
7 identifying a witness under 30(b)(6), and one of those is to  
8 prepare the witness to speak on behalf of the entire department  
9 and to do more than testify to his or her personal knowledge,  
10 but to accumulate the knowledge that can be reasonably be  
11 assembled from the entire institution.

12 In this case we're talking to the Department of the  
13 Treasury when it comes to the CP&R data, and also we're talking  
14 about when it comes to number 33, a specific document. So it's  
15 not as much of an issue.

16 But I wanted to be clear when we had our phone  
17 conversation with the Court what we thought we were agreeing to,  
18 and that was solely the identification of witnesses who could  
19 testify to these topics. To the extent that in the normal  
20 course 30(b)(6) is interpreted to bind the government or the  
21 witnesses speaking on behalf of the entire institution, we did  
22 not intend to suggest - and to the extent that the Court assumed  
23 otherwise, I apologize - that we were going to present one  
24 witness who we were going to prepare to speak for the entire  
25 institution.

1 THE COURT: Well, let me hear what the plaintiffs have  
2 to say about that. I frankly didn't -- I don't know that I was  
3 thinking about that when we talked about 30(b)(6), but you raise  
4 an interesting and I think fair point.

5 MR. KIRSCHMAN: I must confess, Your Honor, when we  
6 spoke, I was not thinking about it. It's only once we later  
7 went back and looked at the rule that we realized we should  
8 clarify with the Court what we were discussing, what the  
9 government -- what I was discussing at the time.

10 MR. DORRIS: Good afternoon, Your Honor. Bill Dorris  
11 for the plaintiffs.

12 THE COURT: Mr. Dorris.

13 MR. DORRIS: These two requests, 32 and 33, are very  
14 narrow. The first deals simply with one -- it's not all the  
15 CP&R data, it's one report that was an exhibit, and it's being  
16 asked questions as to how that was prepared, what was relied on.  
17 The second is a known quantity, what they call the meta-analysis  
18 documents that you're familiar with from the October hearing.

19 So we think it's appropriate, given how narrow those  
20 two requests are, that whoever they designate - and they have  
21 designated one person with respect to the CP&R report,  
22 Mr. Cymbor, and they've designated two with respect to the  
23 meta-analysis documents, Mr. Scheuren and Ms. Haase - we think  
24 it's appropriate for them to speak on behalf of the respective  
25 departments that are designating them, and for them to be

1 prepared to address those questions and those topics.

2 THE COURT: Well, I think we have all agreed that  
3 witnesses will be designated, that they will be prepared to talk  
4 about those topics, that the topics are appropriately narrow for  
5 a 30(b)(6). The only dispute hanging in the air is whether the  
6 testimony of a witness brought on by the government to respond  
7 to your questions will bind the whole government on those  
8 subjects.

9 And I think at this point both sides can and should  
10 take a save on that question. We're just going to have to see  
11 how it develops. As a practical matter, a government witness  
12 testifying on that will be deemed to have made something like  
13 admissions when he or she testifies, and so it might be sort of  
14 an academic question as to whether the answer binds the  
15 government.

16 But the cross fertilization of 30(b)(6) in a trial is  
17 new to all of us, I think, and we're just going to have to play  
18 that out in the context of the trial. I have no ruling to make  
19 on that subject right now, and frankly my guess is that it will  
20 become a moot point by the time we finish the testimony of those  
21 two witnesses.

22 MR. DORRIS: Great. Thank you, Your Honor.

23 MR. KIRSCHMAN: Your Honor, before I move on to the  
24 third category, the legal opinion testimony.

25 THE COURT: Yes, sir.

1 MR. KIRSCHMAN: If I could cite two cases on the issue  
2 of Rule 30(b)(6) and use at a trial. The few legal cites that  
3 address it have ruled that it should not be a part of it. I  
4 raise that only with respect to the extent it clearly could  
5 affect the binding nature of any testimony.

6 THE COURT: Right.

7 MR. KIRSCHMAN: That is *Donoghue v. Orange County*,  
8 848 F.2d 926 at 931, that was a Ninth Circuit 1987 decision.  
9 And a District Court has also addressed this in an unpublished  
10 decision, and that's at *Hill v. National Railroad Passenger*  
11 *Corp.*, Number Civ. A 88-5277, 1989 WL 87621. And that's in the  
12 Eastern District of Louisiana, 1989.

13 In the same vein is a *Law Review* article. I'm sorry,  
14 it's not a *Law Review* article, but it is a treatise on  
15 depositions. And that's Victoria Brieant, B-R-I-E-A-N-T, from  
16 the American Law Institute, "Depositions At Home and Abroad,"  
17 14, Number 5, practice litigator 7 at nine, and it's  
18 September 2003.

19 That's the law we could find on this subject, and to  
20 the extent it becomes one -- if it becomes an issue at trial,  
21 that's likely the testimony -- I'm sorry, likely the authorities  
22 we would be referring to.

23 THE COURT: Okay.

24 MR. KIRSCHMAN: The third category relates to the  
25 offering of legal opinions, and I would like to make just a few

1 points on that, Your Honor. And again, in filing a motion in  
2 limine, we looked to the Court's May 2nd order. And I think  
3 here, what's significant is the Court's express statements that  
4 what he didn't want to hear, what Your Honor did not want to  
5 hear about is more legal argument on, for example,  
6 jurisdictional issues.

7 In their opposition brief, plaintiffs specifically cite  
8 two reasons to allow the legal testimony of the two professors  
9 they have cited, one of which, Your Honor, who is a will call,  
10 and plaintiffs have indicated he's expected to testify  
11 four hours. I understand that's just plaintiffs' best  
12 estimation at this time, so I'm certainly not suggesting that  
13 they will actually elicit four hours of testimony. But still,  
14 Professor Laycock is a will call, one of only five.

15 And in their opposition, plaintiffs state that the  
16 experts on restitution should be heard for two principal  
17 reasons, and this is at page four. One is they state that the  
18 government repeatedly has mischaracterized as damages the  
19 trustee's unjust enrichment. Well, that was certainly a  
20 jurisdictional argument we made, and still reserve, but you've  
21 made it clear in your May 2nd order that jurisdictional issues  
22 such as whether these remedies should be cast as damages or as  
23 restitution should not be part of this case.

24 Also, plaintiffs set a second issue out, and that is  
25 that the issue remains as to whether these are benefits or

1 prejudgment interest. And as the Court will recall from our  
2 last conversation at the last pretrial conference, there is law  
3 on this, there's a lot of law on this, and while this issue is  
4 still pending before the Court, there is certainly no reason  
5 that one professor's view of this issue really should hold any  
6 sway, when the law is out there for the parties to brief and the  
7 Court to consider.

8           A third point relates to Professor Langbein.  
9 Professor Langbein testified in 2003 at the Phase 1.5 trial in  
10 response to two trust experts that plaintiffs put on, Mr. Homan  
11 and Mr. Fitzgerald. He was not presented as a legal expert per  
12 se, but he addressed trust issues that were raised by  
13 plaintiffs' witnesses.

14           And certainly here plaintiffs in their brief talk about  
15 the curative admissibility doctrine. Professor Langbein was not  
16 talking about the law of restitution, and certainly not about  
17 these issues that plaintiffs have raised in their opposition, so  
18 the curative admissibility doctrine really does not have any  
19 application here.

20           What we appear to possibly be hearing relates to the  
21 law on restitution, and to the extent there's law on it, it  
22 could be briefed, if the Court chooses to do that post trial,  
23 but there's certainly no reason that one professor's viewpoint  
24 should hold the day or take up approximately four hours of the  
25 trial time.

1           Would you like to hear from plaintiffs on that before I  
2 move on?

3           THE COURT: No, move on.

4           MR. KIRSCHMAN: And finally, Your Honor, regarding the  
5 motion in limine, Mr. Fasold's model, this again is a case where  
6 there are five witnesses identified related to this model, his  
7 model. Contrary to what we know -- contrary to what plaintiffs  
8 represent, and based on what we've already learned both in  
9 October and previously, his model does not calculate trust funds  
10 held in Treasury. He took the figure \$13 billion from the  
11 report to Congress in 2002, applied his own revenue estimations  
12 to that, and then plugged in the difference to come up again  
13 with a total of 13 billion.

14           That testimony and the foundational testimony of those  
15 experts who worked with him in 2003 are not relevant, and while  
16 they will require us to do a lot of possible preparation, we  
17 don't see that any case has been made for his testimony to be  
18 used in this context.

19           Plaintiffs might suggest he's done new work or he has  
20 new figures to rely on, or a new method, but we certainly have  
21 heard nothing about that. And because their witness list does  
22 not describe that, there's no basis for this Court to take its  
23 time during this trial, and for us to utilize our time to  
24 prepare for the potential that these five gentlemen may appear  
25 as a result of this trial.

1 THE COURT: Well, maybe I just need to hear more from  
2 the plaintiffs about what the Fasold calculation is and how you  
3 expect these witnesses to testify and what each of them has to  
4 say. Who's going to tell me about that?

5 MR. GINGOLD: Your Honor, should I address  
6 Professor Laycock first?

7 THE COURT: No. Look --

8 MR. GINGOLD: May I correct the record, then?

9 THE COURT: You don't even need to correct the record.  
10 I'm going to hear your experts. Yes, it could be briefed, yes,  
11 it could be written direct. I kind of like to listen to law  
12 professors. I try not to look too befuddled when I listen to  
13 them, but I like to listen to law professors and I'll hear these  
14 two.

15 MR. GINGOLD: I'll go on, but one note.  
16 Professor Langbein has been publicly quoted as saying  
17 that Professor Laycock is one of the two living American experts  
18 on the law of restitution.

19 THE COURT: Langbein being the other?

20 MR. GINGOLD: No, he's not. That's the reason for his  
21 question, might be what condition is he in.

22 But independent of that, with respect to Mr. Fasold,  
23 this Court may recall the extensive testimony by Mr. Gambrell  
24 with respect to the use of PI/Dwight's data that the government  
25 uses other than with regard to trust funds to try and verify the

1 accuracy of the collection information, whether it's MMS or  
2 whether it's BLM or other parts. And they use the same  
3 information with regard to the oil and gas data that Mr. Fasold  
4 used in his model and used as a basis of structuring his model  
5 that Mr. Wright, among other things, who is a petroleum engineer  
6 and geologist, was analyzing and viewed from the PI/Dwight's  
7 database.

8 The information that Mr. Gambrell testified to in that  
9 regard was specifically the fact that there was so much concern  
10 about the accuracy and completeness of information with regard  
11 to the government's own production information and payments,  
12 that it used the independent industry databases to be able to  
13 confirm whether or not the payments were complete.

14 There is relevance in that regard. Whether or not it's  
15 going to be relevant in this proceeding as we go forward, Your  
16 Honor, we don't know. And if the issue comes up, it may be  
17 helpful to try and deal with more precision if that's necessary.  
18 We have him listed as a may call because we honestly don't know  
19 if we're going to use him. But is there relevance? Yes.

20 Mr. Gambrell, the head of the FEMO office in Farmington, spent  
21 quite a bit of time explaining why that information is important  
22 in determining accuracy and precision, Your Honor.

23 But Your Honor, at this point in time we don't know.  
24 We're not playing games, we're not trying to hide the ball. We  
25 don't know whether or not that type of information will be

1 necessary as we go forward in the trial. But is it relevant?  
2 We believe it clearly is.

3 THE COURT: Well, let's see. Fasold, Gabriel...

4 MR. GINGOLD: Mr. Gabriel was involved in the GIS  
5 aspect of this, Your Honor, which went to how to allocations  
6 were being made. Because we were using GIS modeling techniques  
7 early out, before it became popular with GPS systems, to try and  
8 determine the production within the reservation boundaries.

9 So these are all related to each other. It's a linked  
10 relationship, which is why each one was identified. Whether or  
11 not Mr. Fasold or Mr. Wright or any of them would be necessary,  
12 we don't know. But the probativeness and the relevance is  
13 there, and if this Court chooses to conclude that if we do  
14 proffer them as witnesses, that their information is redundant,  
15 we have observed this Court being very clear in saying that, and  
16 the testimony is concluded. There's no harm to the government.  
17 They know what these people have done. They know the  
18 analysis --

19 THE COURT: Look, let's leave this as we left some of  
20 the earlier issues, the trust management issues. I'm not going  
21 to rule on the motion in limine as to these witnesses on the  
22 plaintiffs' old revenue model. They're all listed in the  
23 revised plaintiffs' witness list as may call witnesses, it may  
24 be mooted by the trial. If they do testify and if the  
25 government asserts prejudice or surprise and needs more time to

1 prepare to call them back for cross-examination, they'll have  
2 it. Let's just leave it that way. I don't see that we need to  
3 bite that particular bullet today, because we can adjust as we  
4 go along to be fair to both sides, and of course that's my  
5 intent.

6 MR. GINGOLD: Thank you, Your Honor.

7 MR. KIRSCHMAN: One second, Your Honor.

8 Your Honor, regarding Mr. Fasold, it would help the  
9 government if we knew, for instance, if what we could anticipate  
10 as may call is testimony on the previous model or whether  
11 there's something new.

12 THE COURT: Anything new, Mr. Gingold?

13 MR. GINGOLD: Your Honor, if they testify, it would be  
14 broader than their previous testimony, but it's based on exactly  
15 the same information and the same methodology that was employed  
16 in the model and then described.

17 THE COURT: Broader but the same?

18 MR. GINGOLD: The subject matter is the same, but the  
19 testimony would be broader, subject to this Court's patience, of  
20 course.

21 MR. KIRSCHMAN: Well, I guess we will have to wait to  
22 see, then, what we hear if we hear it.

23 Your Honor, I have some other issues outside of the  
24 motion in limine I would like to quickly bring to the Court's  
25 attention.

1 THE COURT: Yes, sir.

2 MR. KIRSCHMAN: And this was not in our motion in  
3 limine, but I want to bring it to the Court's attention. There  
4 are two issues that are tangential to a motion in limine, and  
5 one involves the testimony of one of plaintiffs' may call  
6 witnesses, and that's Mr. Gene Dodaro, who is listed as a  
7 plaintiffs' may call.

8 Mr. Dodaro is now the acting Comptroller General; in  
9 other words, he's the head of GAO. We have been informed just  
10 recently before the hearing that Mr. Dodaro will not be  
11 available on the week of June 9th because he's in travel and has  
12 commitments that he can't change.

13 But at this time, if plaintiffs make a proffer that  
14 they do intend to call him, we would like to reserve the right  
15 to move to exclude his testimony, given his position and  
16 certainly his very limited involvement in the issue in this case  
17 that may relate to the hearing, relate to the trial, and that is  
18 the settlement packages prepared by GAO up until 1951.

19 I'm not making that motion now. Plaintiffs have him as  
20 a may call. We found out he's not available the first week in  
21 June. If the Court would like a motion pretrial, I can -- we  
22 can certainly prepare one biased on his present position and the  
23 limited necessity for his testimony.

24 THE COURT: You have reserved your rights.

25 MR. KIRSCHMAN: Also, too, we did not make this point

1 in our motion in limine, but as the Court noted, there are often  
2 several witnesses in plaintiffs' witness list where it appears  
3 at least that testimony could be cumulative because the broad  
4 subject matter has been used as a label for several witnesses.  
5 This is true related to Treasury witnesses and the benefit  
6 conferred issue. This is an issue, the cumulative nature of  
7 testimony, that we may raise during the course of the trial,  
8 depending on who plaintiffs identify as witnesses to call.

9 And again, I am not making argument here, but I did  
10 want to alert the Court to the fact that the government may  
11 raise objection to cumulative testimony as it relates both to  
12 the issue we already addressed, asset mismanagement, but also  
13 benefit to the government as it relates particularly to the  
14 Treasury witnesses.

15 There's a --

16 THE COURT: Let me just interject here. On this  
17 question of asset mismanagement or asset management, in case  
18 there's any question about that, the only relevance that I think  
19 asset management could have in this trial is as it relates to  
20 the quantum of benefit to the government. That's -- it's the  
21 same issue, in my mind.

22 MR. KIRSCHMAN: That's what we understood the Court to  
23 say earlier in this proceeding, Your Honor.

24 THE COURT: Okay.

25 MR. KIRSCHMAN: Also, too, Mr. Gingold mentioned that

1 on Friday afternoon -- well, early evening we provided to  
2 plaintiffs the revised document AR-171. It will not be referred  
3 to as AR-171 because there's no administrative record in this  
4 trial, but that document was provided to plaintiffs as you  
5 requested.

6 We note that in their brief filed earlier this year,  
7 plaintiffs included an Attachment A that was similar but  
8 expanded upon AR-171. The Court has mentioned that we are  
9 sometimes ships passing in the night, and that should be  
10 avoided. We would ask plaintiffs if they have a revised  
11 Attachment A, that that similarly be provided to us prior to the  
12 start of the trial so we know that we're preparing for a revised  
13 document. That should hopefully prevent any break in  
14 cross-examination, because we know the document that's being  
15 used, if it's being used.

16 THE COURT: Let me get a response to that right now.  
17 Mr. Gingold, is there an Attachment A?

18 MR. GINGOLD: Your Honor, we received it on Friday  
19 night. We're still working on it. But one of the issues we're  
20 dealing with are footnotes in the revised AR-171 that say NORC  
21 has done some analysis that hasn't been produced, and numbers  
22 may change.

23 So we are working in a dynamic environment, so to  
24 speak, Your Honor. But we didn't even get it until Friday  
25 night. We've been digesting the information in there, we've

1       been trying to understand the footnotes, which explain that  
2       analysis has been done and will continue to be done that has not  
3       been produced. And we don't know what new data has been relied  
4       on, because it also suggests that's been done as well.

5               THE COURT: All right. I take it you don't resist  
6       Mr. Kirschman's proposition that if you have a revised  
7       Attachment A, you should give it to him as soon as you have it.

8               MR. GINGOLD: Yes. And if we have the revised  
9       information that is being used to support the data in a revised  
10       171, we would hope that we have the same accommodation, Your  
11       Honor.

12              MR. KIRSCHMAN: I'm not clear on that last point.

13              THE COURT: He says there are footnotes in your revised  
14       AR-171 that refer to data that you don't have.

15              MR. GINGOLD: Or analysis that has been done that we  
16       don't have that's been done by NORC or others.

17              MR. KIRSCHMAN: Well, certainly since the October  
18       trial, as we told the Court, work has continued to address the  
19       Court's issue regarding collections and disbursements. That's  
20       certainly true. And as you intimated would be the case, it is  
21       in fact the case. The AR-171 has been revised with new numbers  
22       based on that additional work.

23              THE COURT: Well, yes, we all understand that. But  
24       Mr. Gingold's point is that there are footnotes relating to  
25       material that supports those numbers, and that he hasn't

1 received the material that supports those numbers.

2 MR. KIRSCHMAN: In some cases that is true, because  
3 additional documents have been found and additional work has  
4 been done.

5 THE COURT: Are you going to give him the documents or  
6 make him guess?

7 MR. KIRSCHMAN: We were not anticipating, in all  
8 honesty, giving him the documents, no.

9 THE COURT: Well, how is he going to challenge or  
10 examine those data if he doesn't have the bases for the new  
11 data?

12 MR. KIRSCHMAN: He would examine those documents at the  
13 time they were introduced in similar fashion that we discussed  
14 here. If they determine they need more time during the course  
15 of the trial, we anticipated they would ask for what time they  
16 need.

17 But we were not anticipating providing to the  
18 plaintiffs every new document or all the work that was done  
19 since October. Honestly, I thought we had addressed that with  
20 the Court, and there was no discovery.

21 THE COURT: Well, that's true. We said there wasn't  
22 going to be any more discovery, but I guess -- I mean, you've  
23 asked for their new Attachment A, you're giving them a new  
24 AR-171, but they don't know how you got to the new numbers, do  
25 they? Is there any way for them to figure out how you got to

1 the new numbers?

2 MR. KIRSCHMAN: There are general explanations in  
3 footnotes that are now included, but there's more information  
4 beyond those footnotes.

5 THE COURT: And is it going to be explained at the  
6 trial?

7 MR. KIRSCHMAN: Yes, certainly, Your Honor, in detail.  
8 And we anticipated that upon that explanation and the  
9 presentation of whatever documents we would show underlying the  
10 revised AR-171, plaintiffs would base their cross-examination on  
11 that. Just as we, when we are faced with a witness on June 9th  
12 that we know nothing about, will have to decide whether we can  
13 cross examine that witness based on what we just heard, or  
14 whether we will need new time because that witness, Dr. Cornell,  
15 is presenting a new analysis as to benefit.

16 THE COURT: Let me ask you this, Mr. Kirschman: Are  
17 there any new reports or analyses or calculations that support  
18 the new numbers in AR-171 that could be collected and given to  
19 the plaintiffs if I directed it to be done, or are you talking  
20 about going back and pulling out thousands of documents?

21 MR. KIRSCHMAN: Your Honor, there are certainly  
22 documents that could be presented to plaintiffs within the time  
23 before June 9th. I don't know if it's all of the background  
24 materials, but certainly there are documents that would further  
25 explain the revised AR-171.

1           THE COURT: Well, I mean, what's happening is that the  
2 weakness in my generous offer to take your time and come back  
3 and cross examine if you're prejudiced by something at the trial  
4 is beginning to become apparent. This is a trial that could  
5 have a couple of days and then skip a couple of weeks, and then  
6 have a couple of more days and come back for a couple more  
7 weeks. We could be at this until St. Swithin's Day, and I don't  
8 want that to happen.

9           It's only a week until trial, and I understand the  
10 limitations on everybody's time and energy between now and next  
11 Monday, but I'm going to direct, Mr. Kirschman, that you collect  
12 and turn over to the plaintiffs what in good faith you can find  
13 that will explain what's in those footnotes and what the new  
14 numbers are in AR-171.

15           Frankly, it's in your own interest. If you put  
16 somebody on with a whole lot of new information, Mr. Gingold is  
17 going to say, I need three weeks to respond to that. And what  
18 am I going to do? I don't expect to adjourn this case at the  
19 drop of a hat. There will be some occasion -- I think it's  
20 clear there will be some adjournments, but they're not going to  
21 be profound or long ones.

22           So collect what you've got and give it to them. I  
23 mean, I guess I think that it would be an unfair surprise for  
24 you to uncork a whole new AR-171 with all kinds of new studies  
25 that have been done that he's never seen before.

1           MR. KIRSCHMAN: Your Honor, on that point, you may  
2 remember at the last pretrial conference, or it might have been  
3 in our telephone conversation, plaintiffs indicated that they  
4 weren't even relying on AR-171 at all. And the Court expressed  
5 the statement -- you made the statement, then you'll be getting  
6 more than you thought you'd be getting. Counsel said, that's  
7 right, because we're not relying on AR-171.

8           In this case plaintiffs are proceeding first, and we  
9 don't have one shred of information regarding what their will  
10 call experts - four of the five are experts, Mona Infield is  
11 not - come June 9th, we don't have one shred of information  
12 concerning what their experts are basing their testimony on.

13           Mr. Gingold, I believe, was the one who represented  
14 both at the status conference and in our telephone conversation  
15 that AR-171 was not the basis for their claim. Now we have a  
16 lot of work to do to provide this information, and our work is  
17 ongoing, our expert's work is ongoing, our fact witness' work is  
18 ongoing regarding this information, but now we're being asked to  
19 provide information regarding AR-171 that we were told wasn't  
20 being used by plaintiffs. And we don't have anything regarding  
21 the reports of Dr. Cornell, of Mr. Pallais, of -- I don't have  
22 the list here. James C. Miller, III, all identified as experts  
23 who will begin testifying on June 9th.

24           At the least, if the Court orders it, we will make a  
25 good faith effort to provide what information we can. But

1 what's good for the goose is good for the gander, especially  
2 when we'll be cross examining a witness first on June 9th.

3 THE COURT: Mr. Gander?

4 MR. GINGOLD: With all due respect, Your Honor, I  
5 disagree with Mr. Goose. We provided 420 pages of support in  
6 our opening brief, Your Honor, that was requested with respect  
7 to how we're going forward in this proceeding. We identified  
8 with specificity what we anticipated doing, what we were going  
9 to be relying on, and how we were going to do it. 171 has been  
10 a particular focal point, as this Court knows, not only in the  
11 October trial but what's going on now, which is precisely why  
12 it's been revised.

13 Your Honor, I find it difficult to believe that someone  
14 can revise statistics, statistical data and results, without  
15 having the information to support it readily available. I've  
16 never seen --

17 THE COURT: No, what I'm asking you to respond to is  
18 what have you given to the government about the testimony of  
19 Cornell, Pallais, and Miller?

20 MR. GINGOLD: We have told them exactly what they're  
21 going to be testifying about. With regard to Mister -- each one  
22 of our witnesses are relying on the government data, Your Honor.  
23 That's what it is. On the government data. Not industry data,  
24 not other data, the government data. That's aside from  
25 Mr. Fasold, et al., and that group.

1           So it's the government data. Whatever they've  
2 produced, whatever they've provided to us, that's what we're  
3 going to be using. There's a lot of government data. They've  
4 produced it.

5           What we're talking about with regard to Mister -- by  
6 the way, Your Honor, with regard to Dr. Cornell, Dr. Cornell is  
7 going to be testifying exactly what we identified in the witness  
8 list he's going to be testifying to. He's going to be  
9 testifying to with X dollars that are in the system, how does it  
10 benefit the government based on an economic analysis. And the  
11 economic analysis is not a damage model, it's a restitutionary  
12 model. We've said that.

13           Mr. Miller is going to confirm that as a former  
14 director of the Office of Management and Budget in the Reagan  
15 Administration, the information that has been testified to in  
16 this proceeding is accurate, that in fact the government relies  
17 and uses the funds that are held in the Treasury that are not  
18 disbursed, and they directly benefit. We have stated this time  
19 and time again.

20           With regard to Mr. Pallais, in our opposition to the  
21 government's motion in limine, we provided the basic information  
22 from the government's documents, principally if not exclusively,  
23 Your Honor, excerpts from the 900 or so meta-analysis documents  
24 that the government produced in incomplete form. It's their  
25 information. This is what he's testifying to with regard to it.

1 Every bit of information our experts are talking about is with  
2 regard to the data from the government, how the government  
3 operates. The OMB director has an understanding of how the  
4 government operates, and some people think --

5 THE COURT: So, Mr. Gingold, your statement is -- your  
6 submission is that in good faith you have provided all of the  
7 information the government needs effectively to cross examine  
8 these witnesses when it's their turn?

9 MR. GINGOLD: Your Honor, quite frankly, I don't know  
10 of anything else they're going to be basing their testimony on  
11 other than what we've already told this Court or what has been  
12 produced in this litigation.

13 That's the difference between what we're talking about  
14 with regard to 171. They say new information has been either  
15 created, developed, discovered, and it's a basis of numbers that  
16 they provide in a revised document that is relevant. How useful  
17 it is, we don't know yet, because we haven't been able to parse  
18 it out.

19 THE COURT: Okay.

20 MR. KIRSCHMAN: Your Honor, if I could respond to that,  
21 please.

22 THE COURT: Yes.

23 MR. KIRSCHMAN: Because with all due respect, that was  
24 a non-answer. I can tell you our revised AR-171 relies on  
25 government data also. If that's the extent of the answer you're

1 looking for, I can tell you that now.

2 For Mr. Gingold to say their witnesses are relying on  
3 government data tells us nothing, tells defendants nothing,  
4 tells the Court nothing. And this is what plaintiffs said in  
5 their witness list regarding Bradford Cornell: "He will address  
6 the calculation of benefits conferred on the government, impact  
7 of disgorgement of calculated benefits conferred in  
8 decision-making process." That's it. No more, no less. That's  
9 not helpful. And to say he relied on government data, that  
10 assists us not at all.

11 Regarding Mr. Miller, here's how plaintiffs described  
12 his four hours of expected expert testimony.

13 THE COURT: I just read it.

14 MR. KIRSCHMAN: Yeah, that helps us not at all. And to  
15 say he relied on government data --

16 THE COURT: All right, all right, all right. Look, I  
17 don't know whether this tempest is a teapot or a teapot dome,  
18 and I won't know until we hear the testimony at trial. Just  
19 bring your witnesses and we'll see what happens.

20 MR. GINGOLD: With respect to Mr. Dodaro, may I speak  
21 to that? Because we would like Mr. Dodaro and as well as  
22 Mr. Gamboa, both of whom signed letters that were very specific  
23 to the settlements issue that the government is raising again.

24 They specifically said in both letters, and that was  
25 Mr. Dodaro when he was not acting as Comptroller General, that

1 the GAO did not, never has settled the accounts of individual  
2 Indians. I'm not going to go into the details of the issues,  
3 Your Honor, because that dealt with the sanctions and other  
4 proceedings that this Court is well aware of. We don't have to  
5 do that again. Summary judgment has been rendered by this Court  
6 in that regard.

7 But Mr. Dodaro literally signed one of the letters  
8 that's directly relevant to the admissibility and the weight of  
9 the evidence, of information defendants have said they want to  
10 again try and get in front of this Court.

11 THE COURT: What office did you say Mr. Dodaro holds?

12 MR. KIRSCHMAN: He's the acting head of the GAO, the  
13 Comptroller General.

14 THE COURT: Well, his signature on the letter is his  
15 signature on the letter. Why do you need him on the witness  
16 stand?

17 MR. GINGOLD: Your Honor, if in fact we have -- it is  
18 settled that the issue is as explained by Mr. Dodaro and  
19 Mr. Gamboa, there's no reason to have these witnesses, as long  
20 as we're not challenged later by the fact that we didn't have  
21 the individuals testify in this proceeding.

22 THE COURT: Well, I do not intend in this proceeding  
23 this afternoon to get into the weeds of why you need the  
24 testimony of the Comptroller General of the United States, but I  
25 am very reluctant to require somebody like that to come and

1 testify unless it's necessary. And until or unless I understand  
2 why it's necessary, I'm going to assume that it won't be  
3 necessary.

4 But you may have to file your motion. We'll just see  
5 how it plays.

6 MR. GINGOLD: Your Honor, there is a summary judgment  
7 decision this Court has made with regard to this. The effort,  
8 at least as we understand the government's goal right now, is to  
9 actually use its information broader than was the original  
10 subject matter of the summary judgment motion that the  
11 government lost, and was also part of the sanctions imposed by  
12 this Court for its understanding of the credibility of the  
13 information, Your Honor.

14 So it is directly probative to information that they  
15 now say they want to use that has been characterized harshly by  
16 this Court, and it has serious credibility issues. And  
17 Mr. Dodaro --

18 THE COURT: You're talking about a letter. Right?

19 MR. GINGOLD: That's correct.

20 THE COURT: Where is the letter? Show me the letter.

21 MR. GINGOLD: It's introduced in evidence, Your Honor,  
22 in this proceeding.

23 THE COURT: But has anybody got a copy of it now?

24 MR. KIRSCHMAN: No, sir, we do not.

25 MR. GINGOLD: No.

1 THE COURT: What does the letter say?

2 MR. GINGOLD: It says that notwithstanding what the  
3 government has represented, that at no time has the General  
4 Accounting Office ever settled the accounts of Individual Indian  
5 Trust beneficiaries.

6 THE COURT: And?

7 MR. GINGOLD: What they're presenting are settlement  
8 packages purporting to represent these packages as settling  
9 accounts of Individual Indian Trust beneficiaries.

10 THE COURT: And exactly how does that impact on the  
11 question that we're dealing with in this trial?

12 MR. GINGOLD: Well, if they're trying to use those as  
13 evidence of deductions or payments to the beneficiaries, we  
14 think there's ample findings by this Court, letters from  
15 Messrs. Gamboa and Dodaro and other analysis from this Court,  
16 that that is not a proper use of that information. There's a  
17 serious question about it.

18 THE COURT: Is the authenticity of the letter signed by  
19 Mr. Dodaro objected to?

20 MR. KIRSCHMAN: No, Your Honor.

21 THE COURT: I mean, to what extent is the settlement of  
22 Indian Trust accounts a major deduction from the amount of money  
23 that you think might be at stake here?

24 MR. KIRSCHMAN: These documents will not be used to  
25 deduct from the possible remedy figure, Your Honor,

1 specifically. And we are not using them to show, as was  
2 suggested here, that Individual Indian Money accounts had an  
3 accounting performed.

4 But they do contain relevant evidence regarding the  
5 scope and consistency of review by the government related to  
6 Individual Indian Monies, and the information is contained  
7 within those packages. You may recall that Dr. Angel introduced  
8 several of those in October, and he testified there regarding  
9 what they demonstrated within the settlement packages  
10 themselves, that they showed a consistent review by Treasury and  
11 GAO.

12 We're not making assertions that the IIM accounts have  
13 received an accounting, and we're certainly not stating anything  
14 broader than that for purposes of the trial commencing on  
15 June 9th.

16 THE COURT: So the purpose of even referring to the  
17 settlement packages is to talk about the consistency of data?

18 MR. KIRSCHMAN: The process of review. The process of  
19 review that this data was subject to 1951 back in time, first by  
20 Treasury and then GAO.

21 And what we hope to do -- and by the way, the witnesses  
22 related to this are identified as may call, but if we should use  
23 them, the evidence will be used to show the Court relevant  
24 information related to IIM and the process of review that was  
25 taken in inspecting this information.

1           One of the issues here is whether money was  
2 systematically wrongfully withheld to the tune of \$4.5 billion.  
3 And we think, depending on the case plaintiffs put on or not,  
4 the fact that there was for decades a pattern of review by a  
5 third agency outside of Interior goes to the weight of their  
6 argument. And for that reason, this testimony may be presented,  
7 and will likely be addressed, I should say, by Dr. Angel to some  
8 extent, and he is a will call witness, but he has already  
9 testified to that general point in October.

10           MR. GINGOLD: Your Honor, Mr. Dodaro -- I'll keep this  
11 short because I know this Court would like to adjourn. But  
12 260 Fed. Supp 2d 110, DDC 2003 addresses the issues in detail,  
13 and Mr. Dodaro and Mr. Gamboa, both from GAO, both said there  
14 was no regular review. So contrary to what is being  
15 represented, that was the case. And that was part of the  
16 summary judgment decision of this Court and also the subsequent  
17 proceedings that related to it.

18           That is relevant, and we believe that's important with  
19 regard to getting the testimony from Mr. Gamboa, if in fact the  
20 testimony is -- the information is allowed to go forward.

21           The defendants themselves have identified in their  
22 witness list a Mr. Banda, Frank Banda, of the Reznick Group, who  
23 purports to be testifying with regards to the nature of the  
24 examination work performed by GAO and Treasury, certifications  
25 provided by GAO and Treasury, and the relevance of the

1 examinations and conclusions to the IIM system. That is  
2 directly relevant to what Mr. Gamboa and Mr. Dodaro have spoken  
3 to and said is materially different from what is being  
4 represented by the government. And this Court has addressed  
5 those issues in the past and dealt with it.

6 To the extent the government wants to use that  
7 information, we believe it would be extremely helpful to have  
8 the individuals who have the direct knowledge, and not based on  
9 either plaintiffs' or defendants' characterization of what  
10 they've said. We think it would be enormously helpful to this  
11 Court.

12 THE COURT: What was Mr. Dodaro's position at the time  
13 he signed that letter, and when did he sign it?

14 MR. GINGOLD: He was Principal Assistant Comptroller  
15 General, Your Honor. So he was apparently the number two  
16 person.

17 THE COURT: When? Date of letter?

18 MR. GINGOLD: It is August 27th, 1999, and it deals  
19 directly with the issues we're talking about now, both  
20 Mr. Kirschman and myself.

21 THE COURT: Where were you on August 27th, 1999?  
22 Actually, you may know.

23 MR. GINGOLD: I do know, Your Honor.

24 THE COURT: You may know.

25 MR. GINGOLD: I do know.

1 THE COURT: You have that talent that most of us lack.  
2 I think the likelihood that Mr. Dodaro will be called  
3 to testify in this case is somewhere between slim and none, but  
4 I will reserve ruling on that until I hear the testimony and  
5 hear what the letter is actually all about.

6 MR. GINGOLD: If we could respectfully request this  
7 Court to review the summary judgment decision.

8 THE COURT: Well, I'll review it when, as, or if I need  
9 to review it. I'm not going to review it tonight.

10 MR. KIRSCHMAN: Your Honor, if we could have  
11 clarification. You said just recently that the parties should  
12 just bring their witnesses and we'll move forward.

13 THE COURT: That's what I said.

14 MR. KIRSCHMAN: To be clear, that means we are not  
15 presenting backup documentation now?

16 THE COURT: That's what it means. Are we done?

17 MR. GINGOLD: Footnotes in 171 don't have to be  
18 documented?

19 THE COURT: That's right. Are we done? We're done.

20 Oh, wait, wait, wait, wait, wait. In the last trial, I  
21 rather, I think, unwisely, as it turned out, said we would not  
22 sit on Fridays. So we skipped a Friday, and the next Monday we  
23 were done. We could have done the whole thing in a week.

24 But it's summertime now, and we have different rhythms  
25 here. I will hear from counsel as to how they feel about

1 Fridays. Do you want to continue through Friday or not?

2 MR. KIRSCHMAN: We have no problem with continuing  
3 through Fridays, Your Honor. And Your Honor, I forgot to ask, a  
4 starting time for Monday, June 9th?

5 THE COURT: 9:30.

6 MR. KIRSCHMAN: And Your Honor, another administrative  
7 matter, if we could have access to the courtroom on the Friday  
8 before, the 6th, I believe, so that we can again work with the  
9 systems.

10 THE COURT: That's fine with me. Talk to Ms. Catina  
11 Porter, who is my new courtroom deputy - you may have noticed  
12 that this is not Al Richburg - and Ms. Porter will make whatever  
13 arrangements need to be arranged.

14 MR. GINGOLD: Your Honor, with regard to Fridays off,  
15 plaintiffs' counsel appreciated Fridays off. This Court moved  
16 everything along very quickly, and we think Fridays off is  
17 helpful, given the intense and compressed environment that we're  
18 trying to get this resolved in.

19 THE COURT: Intense and compressed. I like that. All  
20 right. We'll take Fridays off.

21 MR. KIRSCHMAN: And Your Honor, I'm sorry, one final  
22 question. Plaintiffs identified one more will call witness, I  
23 believe it was Mr. Ziler. Was that the lone additional will  
24 call for their entire witness list, or was that just on that one  
25 topic? I wasn't clear.

1           MR. GINGOLD: That was with regard to the one topic  
2 that you asked us about, Your Honor. We're looking at the  
3 issues now and we're going to make those determinations.

4           THE COURT: If you have any more will call issues, I  
5 want rolling disclosures going both ways on will call witnesses.

6           MR. GINGOLD: How about two calendar days with regard  
7 to those?

8           THE COURT: I mean, when you decide, that's when you  
9 call and tell them.

10          MR. GINGOLD: Both ways?

11          THE COURT: Both ways.

12          MR. KIRSCHMAN: Thank you, Your Honor.

13                 (Proceedings adjourned at 4:00 p.m.)

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**CERTIFICATE OF OFFICIAL COURT REPORTER**

I, Rebecca Stonestreet, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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**SIGNATURE OF COURT REPORTER**

**DATE**