IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	Special Master Alan Balaran
	)	
Defendants.	)	
	)	

GOVERNMENT'S RESPONSE TO SPECIAL MASTER'S PROPOSED PROTOCOL FOR PROCEEDINGS REGARDING PLAINTIFFS' MARCH 20, 2002 MOTION FOR ORDER TO SHOW CAUSE

By order dated September 17, 2002, the Court referred to the Special Master the *Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel, Should Not Be Held in Contempt for Destroying E-Mail* (filed Mar. 20, 2002) ("*Plaintiffs' March 20, 2002 Motion*"). In that motion, plaintiffs sought the issuance of show cause orders for both civil and criminal contempt sanctions against Secretary Gale Norton and Assistant Secretary Neal McCaleb in their official capacities and against seven non-party respondents in their official and personal capacities. The undersigned Department of Justice attorneys represent these respondents (collectively, the "Named Individuals") in their official capacities.[1]

On October 7, 2002, the Special Master issued a proposed protocol and schedule for addressing *Plaintiffs' March 20, 2002 Motion*. Having reviewed the schedule and consulted with

[1]Each of the Named Individuals is separately represented in his or her personal capacity. Not all representatives of the Named Individuals agree with all of the positions taken by the Government herein, and some may elect to file separate responses.

counsel representing the Named Individuals in their personal capacity, the Government now responds to the Master's proposed protocol and schedule.

As an initial matter, the Government observes that because plaintiffs seek criminal contempt sanctions against the Named Individuals, as well as civil contempt sanctions, the rules applicable to criminal proceedings should be respected in this proceeding in order to assure that the Named Individuals are afforded the full measure of due process to which they are entitled by the Constitution. Pretrial discovery is far more limited in criminal proceedings than in civil actions, and the Federal Rules of Criminal Procedure do not routinely permit depositions.[2] Consequently, the Government proposes that the Special Master implement a procedure that would first clarify whether plaintiffs have met their *prima facie* burden of showing contempt through briefing before permitting discovery.[3] This proposed procedure would have the likely additional benefit of narrowing the issues so that any discovery the Master may eventually allow

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[2]Fed. R. Crim. P. 15 allows for pretrial depositions only in "exceptional circumstances" when "it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial. . . ." The Advisory Committee Notes state that "a party may only move to take the deposition of one of its own witnesses, not one of the adversary party's witnesses" (Advisory Committee Notes on "1975 Enactment"), and confirm that "[t]he principal objective [of Rule 15(a)] is the preservation of evidence for use at trial. It is not to provide a method of pretrial discovery nor primarily for the purpose of obtaining a basis for later cross-examination of an adverse witness. Discovery is a matter dealt with in Rule 16." (Advisory Committee Notes on "1974 Amendment"). Fed. R. Crim. P. 16(b) addresses the disclosures required of a defendant in a criminal proceeding and limits those disclosures to documents, tangible objects, reports of examinations and tests, and summaries of expert opinion testimony that the defendant intends to rely upon at trial.

[3]The Government anticipates addressing such issues as the proper standard for reviewing the bills of particulars in its responsive brief, but notes for the record here that it does not agree that Rule 12(b)(6) supplies the correct standard, nor does the Government agree that the issue before the Master is "fraud on the court," since *Plaintiffs' March 20, 2002 Motion* clearly argues that show cause orders are warranted solely by the alleged violation of specified orders or directives.

would be more focused. Further, the Government believes it would be inconsistent with the due process rights of the Named Individuals to permit plaintiffs multiple opportunities to restate their allegations. Accordingly, the Government proposes the following schedule:

December 2, 2002:	Plaintiffs file bills of particulars as to Secretary Norton, Assistant Secretary McCaleb, Phillip Brooks, Charles Findlay, Willa Perlmutter, Lois Schiffer and James Simon.[4]
January 17, 2002:	Secretary Norton, Assistant Secretary McCaleb, Phillip Brooks, Charles Findlay, Willa Perlmutter, Lois Schiffer and James Simon (in their official and personal capacities) file responses to plaintiffs' bills of particulars.[5]
January 31, 2002:	Plaintiffs file their replies to the January 17, 2002 responses.

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[4]Plaintiffs have already filed bills of particulars as to Edward Cohen (*see "Bill of Particulars" in support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Criminal Contempt for Destroying E-Mail (3/20/02) and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt* (dated July 22, 2002)) and Edith Blackwell (*see "Bill of Particulars" for Edith Blackwell in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Destroying E-Mail (3/20/02) and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt* (dated July 29, 2002)).

[5]Both Government counsel and individual counsel have filed responses on behalf of Edward Cohen and Edith Blackwell to plaintiffs' bills of particulars, and these responses should also be accepted for review by the Master. *See The Government's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edward B. Cohen Should Not Be Held in Criminal Contempt* (filed Aug. 5, 2002); *Memorandum of Edward B. Cohen in Opposition to Plaintiffs' "Bill of Particulars" and Supplemental Memoranda in Support of Plaintiffs' Motion for an Order to Show Cause Why Edward B. Cohen Should Not Be Held in Criminal Contempt* (dated Sept. 10, 2002); *The Government's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edith Blackwell Should Not Be Held in Contempt in Connection with the Overwriting of Backup Tapes* (filed Aug. 12, 2002); *Supplemental Opposition of Edith R. Blackwell to Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not Be Held in Contempt for Destroying E-Mail* (dated Aug. 30, 2002).

February 28, 2003:	Oral argument
Following oral argument:	Special Master's Report and Recommendation to the Court regarding *Plaintiff's March 20, 2002 Motion* as to each of the Named Individuals.

Consistent with Fed. R. Civ. P. 53(e)(2), the parties and Named Individuals should have the opportunity to file with the Court any objections they may have to the Master's Report and Recommendation. There should be no determination as to whether discovery can take place, or what the scope of any discovery should be, until the Court has ruled upon the Master's Report and Recommendation, determined whether or not plaintiffs have met their burdens, and clarified the nature and scope of further proceedings, if any, on the subject motions.

The Government further proposes that the Master set a date before the end of this month for a case management conference to be attended by counsel for the parties and for the Named Individuals. The Government proposes October 30, 2002 beginning at 10:00 am, if the Master's schedule allows. The Government will obtain a location and court reporter for the conference, if the Master so directs.

On other matters of protocol, the Government believes that all portions of the record of these proceedings should remain public and not be sealed.

Respectfully submitted,

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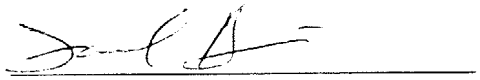
DATED: October 15, 2002

CERTIFICATE OF SERVICE

I certify that on October 15, 2002 I served the foregoing *Government's Response to Special Master's Proposed Protocol for Proceedings Regarding Plaintiffs' March 20, 2002 Motion for Order to Show Cause* in the manner stated upon the persons listed on the attached service list.



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