UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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No. 05-5269

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

ELOUISE PEPION COBELL, et al.,
Plaintiffs-Appellees,
v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

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ON APPEAL FROM THE UNITED STATES
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REPLY BRIEF FOR THE APPELLANTS

INTRODUCTION AND SUMMARY

I. The July 12 order requires that Interior, in all communications made in the "ordinary course of business," warn trust beneficiaries of the unreliability of all "information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets," and specifically warn them to keep that unreliability in mind in making any decisions affecting their assets. Cobell v. Norton, 229 F.R.D. 5, 16, 24 (D.D.C. 2005). In purpose and effect, the order is a merits-based injunction designed to preserve the "status quo" by deterring as many land sales as possible pending completion of the "accounting" previously ordered by the court. Id. at 16 & n.8. As the court declared, the order "represents a significant victory for the plaintiffs," by making Indian beneficiaries aware of "the danger involved in

placing any further confidence in the Department of the Interior." Id. at 23.

The order comports with none of the requirements for equitable relief. The court conducted no evidentiary hearing. Plaintiffs demonstrated neither imminent irreparable harm nor any of the other prerequisites for an injunction, and the court made no reference to the criteria that govern the exercise of its equitable authority.

Plaintiffs' selective and often highly misleading citation to items from the preceding nine years of litigation does not advance their argument. It is not merely that the materials cited are often six or ten years old and that the court could not issue a new injunction based on such stale submissions. It is also the case, as plaintiffs do not dispute, that the district court at no point conducted a trial to determine the reliability of all "information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets," and adjudicated no "specific claim[] that Interior breached particular statutory trust duties, understood in light of the common law of trusts," with respect to land appraisals. Cobell v. Norton, 392 F.3d 461, 477 (D.C. Cir. 2004).

Plaintiffs' primary endeavor is to avoid appellate review by insisting that the order is simply an exercise of the authority to issue procedural orders under Rule 23(d). Inasmuch as plaintiffs also defend the order as a merits-based injunction, their argument is plagued by significant inconsistencies. In any

event, the July 12 ruling is plainly not a procedural order designed to convey neutral information and cannot be insulated from this Court's scrutiny.

II. Plaintiffs do not dispute that the July 12 decision sets out a comprehensive moral and ethical indictment of the Department of the Interior and its officers and employees, including the charge that Interior officials are morally oblivious villains who perpetuate a history of racism because they themselves do not regard Indians as equal citizens.

Plaintiffs deal with the opinion by ignoring most of its language. This relieves them of the obligation to explain the record basis for the court's scathing attack. It likewise allows them to avoid the impossible task of explaining how any litigant could properly be subjected to ongoing supervision by a judge who has condemned it in this manner, or how such ongoing supervision would preserve the appearance of justice.

Plaintiffs' tactic, instead, is to defend isolated segments of an expurgated opinion. They fail even in this attempt. Moreover, even apart from the court's unprecedented moral indictment, plaintiffs cannot show why assignment to another judge would be an inappropriate response to a series of rulings, reversed by this Court, that have only impeded progress in achieving the ostensible goals of this litigation.

ARGUMENT

I. THE JULY 12 ORDER SHOULD BE VACATED.

A. The Order Comports With None Of The Requirements For Equitable Relief.

1. The purpose and effect of the July 12 injunction is to sow mistrust among individual beneficiaries of the Indian trusts. It requires that all communications made in the "ordinary course of business" warn trust beneficiaries of the unreliability of all "information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets," and specifically warn them to keep that unreliability in mind in making any decisions affecting their assets. 229 F.R.D. at 16, 24. The notice must accompany routine communications having nothing to do with the IIM accounts at issue here, such as information regarding health, education, and other welfare programs.

The stated purpose of this relief is to ensure that "the trust beneficiaries should retain all or most of their trust assets in as unaltered a state as is practicable, until Interior completes the required accounting[.]" Id. at 14 (quotation marks omitted); see also id. at 16 & n.8. The court reasoned that an individual's decisions regarding land sales and other assets might be affected by information generated by its previously-ordered structural injunction, which would have required review of trust assets well beyond funds in IIM accounts, including the re-creation of all land transactions since 1887. Cobell v. Norton, 283 F. Supp. 2d 66, 175-77 (D.D.C. 2003). The court could not explain, however, precisely what information generated

even by that sweeping injunction would be likely to affect decisions regarding disposition of land and other assets. The court confessed that "it is difficult to envision the ways in which information about this litigation and the historical accounting that Interior has been ordered to produce would affect the decision of any given trust beneficiary on whether or not to sell trust land[.]" 229 F.R.D. at 14-15 (quotation marks omitted). Nonetheless, the court concluded that its relief was appropriate because "it is impossible to imagine that such information would have no effect at all." Id. at 15 (quotation marks omitted). Agreeing, plaintiffs declare that "[t]he order serves to protect pendente lite Plaintiff-Beneficiaries' interest in the trust accounts[.]" Br. 10 n.10.

The July 12 order provides far-reaching equitable relief pending further action by the court, but it comports with none of the requirements for such relief. The order was issued in response to plaintiffs' "Motion to Require Defendants to Give their Beneficiaries Notice of their Continuing Inability or Refusal to Discharge their Fiduciary Duties," JA __, which, as plaintiffs stress, invoked both the court's equitable powers and its authority under Rule 23(d). Br. 29. Although the motion remained pending for more than eight months, the court conducted no evidentiary proceeding to consider whether plaintiffs could carry their burden of proof with respect to the elements of the injunction. The resulting opinion considered no new evidence and

no new claim, and made no finding that an injunction was required to prevent imminent irreparable harm.

As noted, even the court could not foresee how the information produced by its structural injunction would affect decisions to sell lands. An injunction may not issue based on the speculation that "it is impossible to imagine that such information would have no effect at all." 229 F.R.D. at 15 (quotation marks omitted). Such reasoning inverts the standards for equitable relief.

Moreover, the premise of even that attenuated speculation was removed when this Court vacated the accounting injunction for a second time. As discussed in our opening brief, Interior's plan for historical accounting activities - unlike the "accounting" twice ordered by the district court - calls for an accounting of funds in IIM accounts, and does not include the review of land transactions. See Cobell, 392 F.3d at 464 ("funds have quite a different legal status from the allotment land itself"); Cobell v. Norton, 240 F.3d 1081, 1102 (D.C. Cir. 2001) (requirement to account for "'[a]ll funds' means all funds, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)").

Plaintiffs nevertheless urge that the July 12 injunction is appropriate because "if beneficiaries sell trust assets because of unreliable valuations or appraisals, they will both be deprived of fair value for those assets and receive no benefit from the 'fixing-the-system' remedy in this suit." Pl. Br. 20.

But they do not explain how an accounting of funds in IIM accounts would provide any information likely to have any bearing on sales of land or other assets.

2. Even if plaintiffs' selective record citations offered a cogent story, they could not justify an injunction that, as we have shown, fails to meet basic equitable standards. Plaintiffs' reliance on such excerpts is flawed for two additional reasons.

First, the court could not properly premise assessments of the present accuracy of trust information on its perusal "of the accumulated detritus of nine years spent examining Interior's odious performance as Trustee-Delegate for the Indian trust[.]" 229 F.R.D. at 16. The decision to issue a new injunction based on stale evidence replicates the error stressed by this Court in vacating the reissued structural injunction. As this Court declared, "even if the prior findings had been fully valid and had supported issuance of the injunction in September 2003, they would not necessarily have supported its reissuance 17 months later in February 2005." Cobell v. Norton, 428 F.3d 1070, 1076 (D.C. Cir. 2005).

Second, the court at no point held a trial to determine whether all information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets is unreliable. There has never been a trial to determine the reliability of land valuations or appraisals. Nor has there been an adjudication that Interior has breached any actionable duty in that regard. See 392 F.3d at 477 ("The court's authority is limited to considering specific claims that Interior breached particular statutory trust duties,

understood in light of the common law of trusts, and to ordering specific relief for those breaches."). It is symptomatic of the conduct of this litigation that the court nevertheless believed it had authority to regulate voluntary sales of trust lands by individual Indian beneficiaries.

The 1999 trial, now seven years distant, concerned only an accounting for funds in IIM accounts, and did not concern land appraisals or trust assets generally. Moreover, even with respect to funds in IIM accounts, the purpose of that trial was not to determine the accuracy of any or all account balances, but to determine whether Interior had failed to provide the required accounting. In contrast, the warning required by the July 12 order indicates that the court has determined that a level of inaccuracy exists that would cause a reasonably prudent person to postpone trust transactions. Indeed, as the court's opinion makes clear, it believes that unreliability to be so deep and pervasive that its warning is necessary to advise beneficiaries of "the danger involved in placing any further confidence in the Department of the Interior." 229 F.R.D. at 23.

The 2002 contempt trial likewise did not purport to determine the accuracy of trust information, and the contempt ruling was, in any event, vacated by this Court. The 2003 Phase 1.5 trial addressed the contours of structural relief to be issued on the basis of the contempt trial and did not purport to determine whether Interior had failed to comply with any duties regarding the accuracy of information. The structural injunction that followed was twice vacated by this Court.

Plaintiffs do not dispute this account, limiting themselves to the footnote suggestion that each of the trials since this Court's initial 2001 decision "addressed the reliability of trust data," with the additional observation that "much of the 44-day Phase 1.5 Trial concerned that issue." Br. 3 n.3. This unexplained statement apparently refers to plaintiffs' attempt at the Phase 1.5 trial to demonstrate that "a proper accounting is impossible" and that the court should, in lieu of ordering accounting activities, adopt plaintiffs' model for estimating the revenues generated by trust assets. See 283 F. Supp. 2d at 207. The court did not adopt plaintiffs' model and did not accept plaintiffs' contention that "the extant [trust] records cannot be presumed to be reliable." Ibid.

3. As discussed, plaintiffs' attempt to justify the July 12 order on the basis of items introduced over many years and for various purposes would fail even if their account were accurate and compelling. It is neither.

As an initial matter, plaintiffs' suggestion that time has stood still since 1999 does not survive even cursory scrutiny. As of March 2005, Interior had committed more than $100 million to historical accounting activities. 2005 Cason Decl. 3. As of June 2005, Interior had accounted for 43,764 judgment accounts with balances totaling over $56 million, and 8,401 per capita accounts with balances totaling over $28 million. Status Report to the Court Number Twenty-Two at 19-24 (Aug. 2005). Interior has mailed out 12,122 historical account statements, id. at 25, and its request to send out an additional 28,107 statements has

been pending with the district court since March 2005. Docket #2914. Plaintiffs have no comment on this progress other than to declare - inexplicably - that "not a single accounting has ever been rendered to any beneficiary[.]" Br. 3.[1]

Plaintiffs' attempt to demonstrate the unreliability of all trust data depends almost entirely on their attempt to derive non-existent concessions from sentence fragments. Plaintiffs insist that the government "urged the district court to accept as undisputed fact that 'Indian trust data is wholly unreliable and utterly useless as an accurate measurement of anything, except to confirm the manifest neglect and malfeasance inherent in Indian trust management.'" Br. 16 (quoting Docket #1781, ¶36). Unsurprisingly, that was not the government's position. The cited discussion occurs in a pleading regarding the applicability of a statute of limitations. In the passage cited by plaintiffs, the government quoted plaintiffs' characterization of a 1928 report. The government did not endorse the correctness of

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[1] Plaintiffs likewise ignore the evidence accumulated in the course of historical accounting activities that suggests that Interior's trust information is more accurate and more comprehensive than was believed before these activities were commenced. For example, a study performed by Ernst & Young examined the accounts of the named plaintiffs and their agreed-upon predecessors, analyzing 12,617 transactions in the period from 1914 to 2000. (The study was performed at a cost of $20 million pursuant to a special congressional authorization.) Its 2003 report found contemporaneous evidence of 86% of the transactions representing 93% of the total dollar amount. Phase 1.5 Tr., Def. Ex. 156 at 2. With a single exception, Ernst & Young found "no evidence of transactions that were not recorded in the available IIM account ledgers." Id. at 2. The one exception was a credit of $60.94 that was incorrectly credited to an account with a similar account number. Ibid.

that assessment, much less advocate the proposition that trust data is at present unreliable. Instead, the government quoted plaintiffs' characterization to show that trust violations had been "[a]lleged" prior to 1984. Docket #1781 at 19.

Plaintiffs' quotations from Interior's 2003 Fiduciary Obligations Compliance Plan alter key language and omit relevant context. For example, they assert that the plan conceded that Interior cannot "'accurately provide ... data regarding allotment ownership to individual Indian beneficiaries.'" Br. 24 (citing Docket #1707 at 27) (plaintiffs' emphasis). What the plan actually said was: "An evaluation of the complexity and limitations of current trust management systems, both automated and manual, suggests that Interior cannot timely provide for the entire trust * * * data regarding allotment ownership to individual Indian beneficiaries on a routine basis." Docket #1707 at 27 (emphases added). Plaintiffs thus substitute the word "accurately" for "timely" and omit the relevant context.

Similarly, plaintiffs insist that the plan "concede[d] that 'Interior cannot ensure an accurate accounting on a going forward basis,' and that there is no 'assurance that all current account balances are reliable.'" Br. 23 (quoting Docket #1707 at 2). The cited discussion in fact explained that the historical accounting of IIM accounts would provide the information needed to assess the accuracy of current IIM account balances, echoing the point made in this Court's 2001 decision, that the purpose of historical accounting activities is to assess the accuracy of current account balances. 240 F.3d at 1102. The plan did not

purport to prejudge the outcome of those accounting activities (and, in any event, concerned only IIM funds and not land appraisals or trust assets generally).

Plaintiffs make the same mistake in purporting to find concessions in the testimony of various government officials. For example, plaintiffs assert that Assistant Secretary Gover, "when asked '[I]sn't it true that there is no way to tell whether the account balances are accurate?' answered, 'Yes.'" Br. 22 (quoting Phase 1 Tr. 1101). In fact, the question posed to Assistant Secretary Gover in his 1999 cross-examination was: "Since they have never done an accounting, isn't it true that there is no way to tell whether the account balances are accurate?" Phase 1 Tr. 1101 (emphasis added). By omitting half the question, plaintiffs misstate the point of the answer. Mr. Gover's 1999 statement that he could not testify about the accuracy of account statements prior to an accounting did not predict the outcome of future accounting activities. Moreover, Mr. Gover, like other witnesses in the 1999 trial, was addressing IIM accounts, not trust lands or trust assets generally.

Plaintiffs' attempt to invoke evidence from the 59-day trial on Interior's computer security, Br. 24-26, is no more successful. That trial concluded on July 29, 2005, and the July 12 decision did not purport to rely on evidence from the ongoing trial. Moreover, the opinion that issued at the conclusion of the IT trial did not find that trust data had been the subject of unauthorized hacking, Cobell v. Norton, 394 F.

Supp. 2d 164 (D.D.C. 2005), and the order of relief has been stayed by this Court. Cobell v. Norton, No. 05-5388.

4. Plaintiffs are equally wide of the mark when they attempt to justify the July 12 order as an appropriate equitable response to a deliberate, systemic propagation of misinformation, declaring that the "Trustee-Delegate's willful communication of unreliable information is an egregious breach of trust." Br. 29. This assertion epitomizes plaintiffs' belief that baseless factual allegations accompanied by vague legal conclusions are sufficient to sustain virtually any order of relief. The "evidence" for their contention consists primarily of an earlier dispute regarding Interior's attempt to send account statements to beneficiaries. Br. 27-28 (citing Cobell v. Norton, 212 F.R.D. 14 (D.D.C. 2002)). For present purposes, it is sufficient to note that the dispute did not involve the accuracy of the data contained in those statements and that no inaccuracy in that data has ever been identified. Moreover, the district court at the time issued the relief that it (wrongly) believed appropriate.

Plaintiffs also cite a finding that a 2000 Federal Register notice "'was a sham .... [and] a farce,'" but incorrectly attribute the finding to this Court. Br. 28 n.28. In fact, the quoted language appeared in the contempt decision that was vacated by this Court. See Cobell v. Norton, 226 F. Supp. 2d 1, 34 n.30 (D.D.C. 2002). Equally baseless is plaintiffs' claim that the government "transmitt[ed] materially misleading information to beneficiaries" in connection with an auction of lands in Oklahoma in 2004. Br. 28 n.28. The cited passages

merely described plaintiffs' allegations, which the district court expressly declined to address. See Cobell v. Norton, 225 F.R.D. 41, 46 & n.1, 52-53 (D.D.C. 2004).

B. Invocation of Rule 23(d) Cannot Insulate The Order From Review.

Plaintiffs insist at length that the July 12 order is a proper exercise of authority under Rule 23(d). Their principal goal is to avoid appellate review of the order, a result that they believe would follow automatically if they can affix the Rule 23(d) label.

Plaintiffs' argument is in considerable tension with their insistence that the order is an appropriate exercise of the court's equitable jurisdiction to maintain the status quo "pendente lite." Br. 10 n.10; see also Br. 29 (invoking "the district court's inherent injunctive power" as an alternative basis for the July 12 order). And, as plaintiffs do not dispute, the Rule 23(d) label placed on the order does not determine its appealability. See, e.g., Avery v. Secretary of Health and Human Servs., 762 F.2d 158, 161 (1st Cir. 1985) (Breyer, J.).

Rule 23(d) orders are not generally appealable because they provide a means for addressing only "procedural matters" in the conduct of class action litigation. Fed. R. Civ. P. 23(d)(5). The notices in the cases cited by plaintiffs (Br. 17-20) bear no resemblance to the notice required here. The case that plaintiffs deem "[m]ost analogous," Br. 19 - In re School Asbestos Litigation, 842 F.2d 671, 684 (3d Cir. 1988) - held that an association could be required, in its communications with

class members, to disclose the existence of the litigation and its affiliation with the defendant asbestos manufacturers. The fact of the affiliation was not in dispute. See id. at 674. Plaintiffs' other authorities are even farther afield. The notice approved in Barahona-Gomez v. Reno, 167 F.3d 1228, 1236-37 (9th Cir. 1999), informed class members of the pendency of the litigation and the fact that a preliminary injunction had been entered. Similarly, the notice in In re Synthroid Marketing Litig., 197 F.R.D. 607, 610 (N.D. Ill. 2000), informed class members of the procedures they would have to follow in order to participate in, object to, or opt out of a settlement. By contrast, Great Rivers Cooperative v. Farmland Industries, 59 F.3d 764 (8th Cir. 1995), vacated an order compelling the defendant to print in its newsletter an article written by the class plaintiffs, stressing that such forced speech is "rarely, if ever, appropriate." Id. at 766. Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), vacated an order barring class counsel from communicating with prospective class members, id. at 103-04, even though the order had exempted communications made in the ordinary course of business, id. at 95.

The decisions that plaintiffs cite from this Circuit have nothing to do with class notices or class communications. See Br. 18-19 (citing Eubanks v. Billington, 110 F.3d 87 (D.C. Cir. 1997), and Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998)). Both cases held that a district court may permit class members to opt-out of a class certified under Rule 23(b)(1) and (b)(2), even though those provisions do not expressly authorize opt-outs.

This Court reasoned that the authority to allow opt-outs falls within the Rule 23(d)(5) authority "to make 'appropriate orders' to govern 'procedural matters' in a class action." Thomas, 139 F.3d at 234 (citing Eubanks, 110 F.3d at 93, 94). The decisions did not, as plaintiffs suggest, treat Rule 23(d) as authority to award substantive relief.

Plaintiffs once more seek to resolve their difficulties by inventing a concession, urging that the government "waived" its Rule 23(d) objection. Br. 15. In reality, the government opposed plaintiffs' attempt to obtain "substantive relief in the case in the guise of a notice to the class members." Docket #2759 at 4. The government objected to a notice requirement in any form, but explained that if some form of notice were required, it "should only inform class members of the existence of this litigation, of their potential class membership, and of their right to consult with class counsel." Id. at 7 (quotation marks omitted).

As we explained in our opening brief, the July 12 order is analogous to a requirement that a manufacturer sued in products liability litigation place warning labels on its products pending final judgment. Plaintiffs do not and could not contend that the July 12 order is different in any meaningful respect. In each case, the interim measure is nothing more or less than a merits-based injunction. And as we have shown, the July 12 injunction is without basis in law or fact.

II. THE CASE SHOULD BE ASSIGNED TO A DIFFERENT DISTRICT COURT JUDGE.

A. Plaintiffs Ignore The District Court's Statements That Are Irreconcilable with The Appearance of Justice.

Plaintiffs blandly observe that the fact that the district court's "decisions are, at times, adverse to the government - or, heated in tone - does not translate into partiality or the appearance of injustice." Br. 41 (footnote omitted).

As an abstract statement of principle, there is no doubt that heated language and adverse rulings generally do not require reassignment, and the government did not previously seek reassignment even in the face of some very "heated" condemnations.

But plaintiffs do not explain how the pronouncements in the July 12 opinion can be dismissed as "heated in tone." It is only by ignoring the district court's actual assertions that plaintiffs can proceed as if the court's statements fall within the customary bounds of judicial rhetoric.

As discussed at length in our opening brief, the district court announced its view that present officials and employees of the Department of the Interior are morally oblivious racists. The court invoked past racism not as the evil itself, but for the purpose of condemning present officials for failing to break with that history. Thus, after observing that the trust relationship was created in 1887 "at a time when the government was engaged in an 'effort to eradicate Indian culture,'" the court declared that "one would expect, or at least hope, that the modern Interior

department and its modern administrators would manage it in a way that reflects our modern understandings of how the government should treat people." 229 F.R.D. at 7 (citation omitted). However, "our 'modern' Interior department has time and again demonstrated that it is a dinosaur – the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind." Ibid.

Thus, the court declared, this case serves as a cautionary tale "[f]or those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history." Ibid. Indeed, the court proclaimed, this case "serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few" and "reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people." Ibid. The court thus felt it appropriate to speculate as to whether Interior's "past and present leaders" are "evil people" or "apathetic people" or "cowardly people." Id. at 22 (emphases added).

To the district court, Interior's "degenerate tenure as Trustee-Delegate for the Indian trust" is an undifferentiated outrage, featuring "scandals, deception, dirty tricks and outright villainy - the end of which is nowhere in sight." Id. at 11 (emphasis added). "After all these years," the court concluded, "our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal." Id. at 7.

Plaintiffs at no point suggest that our brief misunderstood these statements, and it is difficult to see how any such contention would be possible. It is only by ignoring these statements that plaintiffs can even attempt to argue that the record supports the court's determinations.

From the material quoted above, plaintiffs cull a single sentence fragment. They assert: "[E]ven the court's harshest language (e.g., 'hand-me-down of a disgracefully racist and imperialist government') is fully supported by evidence of record, including explicit admissions of government witnesses." Br. 32. For this point, plaintiffs quote the testimony of Dr. Angel, a government expert witness who agreed with the assertion of plaintiffs' counsel that Commissioner of Indian Affairs Sells, who held office in the early part of the last century, believed that white people were superior to Indians. Id. at 32 n.30. Dr. Angel also stated his understanding that such a viewpoint drove policies of that commissioner as well as his predecessors and successors. Ibid.

Even plaintiffs do not contend that Dr. Angel, a historian, thereby condemned all successors including the present Secretary. Instead, they implicitly seek to recast the reference to "hand-me-down of a disgracefully racist and imperialist government," to suggest that the court branded only past officials, such as Commissioner Sells, as racist or immoral. As the foregoing passages demonstrate, that is clearly not the case. Indeed, that much is clear even from the full sentence from which plaintiffs isolate their "hand-me-down" fragment.

By ignoring the court's statements, plaintiffs are relieved of the impossible burden of explaining how the appearance of justice can be preserved by requiring a litigant to proceed under the supervision of a judge who has delivered himself of such an indictment. Plaintiffs' citation to cases in which reassignment requests were denied (Br. 31-32) only underscores the extraordinary nature of this proceeding.[2] Indeed, even cases in which courts have ordered reassignment pale in comparison to this litigation. See Haines v. Liggett Group, Inc., 975 F.2d 81, 87-88, 97-98 (3d Cir. 1992); United States v. Torkington, 874 F.2d

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[2] See Mendes-Silva v. United States, 980 F.2d 1482, 1489 (D.C. Cir. 1993) ("Although we conclude that the district court erred in granting the government's motion for summary judgment," the "district judge did not inappropriately prejudge the issues nor otherwise indicate an inability to dispose fairly of this matter on remand."); Bembenista v. United States, 866 F.2d 493, 499 (D.C. Cir. 1989) (district court had relied on a Supreme Court decision that was superseded after issuance of its opinion); Koller v. Richardson-Merrell Inc., 737 F.2d 1038, 1064 (D.C. Cir. 1984) (declining to reassign but indicating confidence that the district judge would do so herself if she felt that she could not continue to act with complete impartiality), vacated on other grounds, 472 U.S. 424 (1985).

1441, 1447 (11th Cir. 1989) (reassignment after two reversals and comment that prosecution was "silly" and a "vendetta"); Mitchell v. Maynard, 80 F.3d 1433, 1450 (10th Cir. 1996) (reassignment in light of "[t]he history of the case, combined with evidence of [the trial judge's] expressions of his disapproval toward [the plaintiff], his attorney and his claims").

Plaintiffs do not discuss Torkington or Mitchell, and mistakenly seek to distinguish Haines on the theory that the reassignment was required because the court had consulted extra-record material. Br. 32-33. Plaintiffs conflate two different parts of the Third Circuit's opinion. In one holding, the court reversed rulings on attorney-client privilege because the district court had considered materials not considered by the magistrate judge, which was inconsistent with the requirement that it review the magistrate's ruling under a "clearly erroneous standard." Haines, 975 F.2d at 92-93.

The question of reassignment was addressed separately, and was not connected to the district court's evidentiary ruling or its review of materials not reviewed by the magistrate. Reassignment was required because the trial judge had issued a rhetorical indictment that described the tobacco defendants as the "king[s] of concealment and disinformation" and declared that they "secretly decide[d] to put the buying public at risk solely for the purpose of making profits." Id. at 97. The court of appeals explained that "it is impossible for us to vindicate the requirement of 'appearance of impartiality' in view of the statements made in the district court's prologue to its opinion.

* * * [W]e conclude that the appearance of impartiality will be served only if an assignment to another judge is made, and we will, pursuant to our supervisory power, so direct." Id. at 98.

As Haines and other cases cited in our briefs reflect, a decision to assign a case to a different judge need not involve extra-judicial contacts. See also Conley v. United States, 323 F.3d 7, 15 (1st Cir. 2003) (en banc); Mackler Prods., Inc. v. Cohen, 225 F.3d 136, 146-47 (2d Cir. 2000); Torkington; Mitchell. Although issues of assignment and recusal may overlap, they involve distinct questions. Where bias is based on extra-judicial sources, recusal is mandatory. Assignment decisions, in contrast, involve the exercise of discretion and a consideration of the factors set out in United States v. Wolff, 127 F.3d 84, 88 (D.C. Cir. 1997).[3]

B. Plaintiffs Find No Support Even For Their Expurgated Version Of The Court's Statements.

Ignoring the brunt of the district court's attack, plaintiffs isolate a handful of the court's accusations and then attempt to establish that those statements, at least, are based on the record. Br. 34-38. That approach is inherently fruitless. Moreover, plaintiffs cannot defend even their expurgated version of the opinion.

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[3] Perhaps because assignment decisions often involve the exercise of appellate discretion in a way that differs from recusal decisions under 28 U.S.C. § 455, a court of appeals may reassign a matter sua sponte and reassignment motions need not be filed with district court in the first instance. See, e.g., United States v. Microsoft Corp., 56 F.3d 1448, 1463-65 (D.C. Cir. 1995); Wolff, 127 F.3d at 88.

Although we cannot address each of plaintiffs' claims, some instances are illustrative. For example, citing reports issued by the Special Master between 1999 and 2002, plaintiffs assert that the government "never disputed the accuracy of the Special Master's findings regarding their systemic failure to preserve irreplaceable trust records" and "confessed below that 'the Special Master's findings are generally beyond dispute' and 'are irrefutable.'" Br. 35. As with plaintiffs' other imagined concessions, the government never agreed implicitly or explicitly that it was involved in a "systemic failure to preserve irreplaceable trust records." In the first of the two government filings cited by plaintiffs, the government agreed that deficiencies existed in areas such as "inventorying - including inconsistent practices, the use of vague and misspelled words, and the mistaken identification of trust records as temporary." Docket #1273 at 2. In the second, the government agreed that "training materials do not use the word 'trust' in connection with the term 'records management' in many instances" and do not "attempt to exhaustively list all types of trust records, even if possible." Docket #1269, Exh. 2 at 1.

Similarly, while plaintiffs contend that there was "irrefutable evidence that critical 'trust documents [] had been shredded,'" Br. 35 (quoting 229 F.R.D. at 9), what the Special Master actually found was a 1998 interest calculation report that apparently had been printed out in the course of developing computer programs and shredded out of Privacy Act concerns. Docket #716. And while plaintiffs charge "spoliation" in 2004,

Br. 35-36, the incident actually involved a roof leak in which 62 of the more than 100,000 boxes of trust records that Interior maintains got wet. Docket #2696 at 5-6.

Plaintiffs cite various sanctions orders as evidence of dishonesty and misconduct, Br. 36, and they doubtless have had more success in obtaining sanctions than any other known litigant. The district court has held three cabinet secretaries and two under secretaries in contempt. Contempt proceedings against 37 Interior and Justice Department officials have been pending since 2002. As plaintiffs note, the district court has repeatedly imposed sanctions on the government and its counsel for, among other things, seeking protective orders and raising privilege objections to deposition questioning. Br. 36-37. Because such sanctions are not immediately appealable, little practical recourse exists in this litigation of apparently indefinite duration. To the extent that this Court has considered the district court's reasoning, it has rejected it. See Cobell v. Norton, 334 F.3d 1128, 1145-50 (D.C. Cir. 2003) (vacating contempt citations against Secretary Norton and Assistant Secretary McCaleb). Other sanctions orders are, on their face, incompatible with this Court's rulings. Compare, e.g., Cobell v. Norton, 213 F.R.D. 48, 57, 61-62 (D.D.C. 2003) (imposing personal monetary sanctions on government counsel for a motion urging that Special Master-Monitor Kieffer had "become a 'de facto litigant' in this case"); with 334 F.3d at 1140-45 (vacating Mr. Kieffer's appointments and observing that he "became something like a party himself," having been "charged

with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system").

C. Plaintiffs Cannot Show That The District Court Can Set Aside Its Stated Views Or That The Need to Preserve the Appearance of Justice Is Outweighed By Inefficiencies Resulting From Reassignment.

It is unclear how a court that has formed such deep-seated and passionate views regarding the moral character of a litigant can be expected to set them aside. In any event, whether or not a court might successfully do so is not the issue. As the Third Circuit stressed, the appearance of justice and impartiality may require reassignment even if a court of appeals believes that a district court might be able to put its stated views behind:

> On the basis of our collective experience, we would not agree that he is incapable of discharging judicial duties free from bias or prejudice. Unfortunately, that is not the test. It is not our subjective impressions of his impartiality gleaned after reviewing his decisions these many years; rather, the polestar is "[i]mpartiality and the appearance of impartiality."

Haines, 975 F.2d at 98; see also Torkington, 874 F.2d at 1447.

Plaintiffs' assertion that reassignment would waste resources is difficult to credit. In the period since this Court's initial decision in January 2001, this Court has issued five published decisions reversing or vacating the district court's decisions in whole or in significant part. Compare Conley, 323 F.3d at 15 (reassignment after three reversals); Mackler Prods., 225 F.3d at 146-47 (reassignment after two appeals on sanctions issues). Although statistical sampling forms a crucial part of any historical accounting, and although this Court repeatedly stated that use of this essential tool is a

matter for the agency's discretion, the district court repeatedly barred its use. See 428 F.3d at 1078; 392 F.3d at 473; 240 F.3d at 1104. The court thereby significantly impeded the pace of progress, imposing multi-billion dollar "accounting" requirements entirely outside the contemplation of Congress. Indeed, the court reissued its injunction - sua sponte - even after Congress had intervened to halt the wasteful expenditure of billions of dollars which "'would not provide a single dollar to the plaintiffs, and would without question displace funds available for education, health care and other services.'" H.R. Conf. Rep. 108-330, at 117 (2003). Plaintiffs, far from defending this conduct, observe that "they have long agreed that spending billions on an inadequate accounting is unreasonable." Br. 47 n.43.[4] The court's willingness to twice require performance of an accounting that both parties and Congress believe wholly misguided confirms that reassignment is in the public interest.

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[4] Without apparent irony, plaintiffs nevertheless suggest that the government should be sanctioned because its reassignment motion stated

> that "this Court vacated a $12 billion injunction that was deemed by Congress to be 'nuts.'" (Mot. 3) (emphasis added). That is a bald misstatement. Cobell XIII makes clear that it was not Congress but "one senator" that called spending that much money on a futile accounting "nuts."

Br. 47 (citing 392 F.3d at 466).

III. PLAINTIFFS' REQUEST FOR SANCTIONS IS BASELESS.

Pursuing the tactic that has served them so well in district court, plaintiffs renew the motion for sanctions they filed earlier in response to the government's reassignment motion. Br. 43-48. Plaintiffs declare that the government's "scandalous" reassignment request threatens "potentially serious consequences for the Judge, his reputation, these proceedings, and the very integrity of the judicial process." Id. at 44.

Plaintiffs appear unaware of the irony of their assertion. The district court's vitriolic assault on present Interior officials is dismissed as "strong language." Br. 30. The government's motion, by contrast, is declared "hysterical," id. at 44, and replete with "deliberate lies," id. at 48.

Plaintiffs' motion reflects tellingly on the way in which this litigation has evolved. As the cases that plaintiffs cite make clear (Br. 43-44), sanctions are reserved for frivolous filings. Yet in this litigation, a motion that is clearly filed in good faith and with evident justification is decried as "scandalous" and "hysterical," id. at 44, as if charges of moral depravity and ongoing racism by a district court that has repeatedly issued massive structural relief against a cabinet Department should not be considered in determining whether assignment to another judge is advisable.

In any event, plaintiffs' account of alleged "distortions, mischaracterizations, and deliberate lies" (Br. 48) is no more accurate than their account of government "concessions" regarding

virtually every issue of law or fact. The "distortions" and "deliberate lies" are simply matters as to which plaintiffs disagree. They urge, for example, that the government should be sanctioned for having suggested that the district court "regards the APA as inapplicable." Br. 45. But the applicability of APA principles has been fiercely contested by plaintiffs, see Plaintiffs' Brief (No. 05-5068) at 18 (heading 5) ("The historical accounting raises issues of trust law and is not governed by the APA"), and this Court's reversal of two structural injunctions was based in part on the district court's failure to comply with principles of review emphasized by the Supreme Court in Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004). See 428 F.3d at 1076; 392 F.3d at 472-73. Although plaintiffs may believe that Brown v. Board of Education, 349 U.S. 294 (1955), rather than Southern Utah provides the relevant legal framework, a disagreement over the meaning of a "see also" cite to Brown (240 F.3d at 1108) could not constitute a basis for sanctions.

As we have shown, plaintiffs' own presentation contains material inaccuracies and omissions and fails to discuss the district court's crucial language. Those failings have not prompted a motion for sanctions, a weapon that litigants should be most reluctant to add to their appellate arsenal.

CONCLUSION

For the foregoing reasons and for the reasons stated in our opening brief, this Court should vacate the order of July 12, 2005, and direct that the case be assigned to a different district court judge.

Respectfully submitted,

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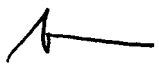
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(c) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the foregoing brief contains 6,950 words, according to the count of Corel WordPerfect 12.



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