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.	No. 04-5084 [Civil Action No. 96-1285 (D.D.C.)]

REPLY IN SUPPORT OF GOVERNMENT'S MOTION FOR STAY PENDING APPEAL AND OPPOSITION TO PLAINTIFFS' MOTION TO VACATE ADMINISTRATIVE STAY

Pursuant to this Court's temporary stay, the Department of the Interior has resumed electronic communications with the rest of the world. Databases relied on by the public and by regulators have been restored, critical procurement functions have proceeded, distribution of royalty payments to Indian tribes continues unimpeded, and educational services are once more being provided to tens of thousands of Indian children. Norton Decl., pp. 1-2; Tipton Decl., pp. 1-9.

The termination of the stay would stop these and many other operations in their tracks. Plaintiffs do not suggest otherwise.

1. Without addressing the immediate and extraordinary injury to the government and the public that will occur in the absence of a stay, plaintiffs assert that the stay would impair the integrity of IITD. The district court cited no evidence of such harm in issuing its injunctions and plaintiffs do no better.

Instead, plaintiffs cite various statements made in 2001, at the time when the Special Master first "hacked" into an Interior computer system and the district court issued a TRO severing Interior's electronic links to the world. There is neither room nor need here to address plaintiffs' account of what happened in 2001. As plaintiffs do not dispute, to avert an indefinite shutdown, Interior agreed to a Consent Order, entered on December 17, 2001, which established a procedure for restoring internet connections. The Consent Order provided that offices would be restored to the internet upon

agreement by the Special Master that the systems were adequately secure or that they neither housed nor provided access to IITD. The computer systems at issue here are those that were restored to the internet pursuant to the Consent Order. They are thus the very systems that the court recognized were adequately secure or did not house or provide access to IITD.

In issuing its July 2003 preliminary injunction, the court cited no evidence that the restoration of these systems was mistaken or that their restoration had resulted in any threat whatsoever to IITD. To the contrary, the court declared that "plaintiffs have not demonstrated to the satisfaction of the Court that the reconnected systems are not presently secure from unauthorized Internet access." Exh. 2, at 30. That recognition alone should have been dispositive: it would, of course, be plaintiffs' burden to establish entitlement to injunctive relief, not Interior's burden to demonstrate that its communications should remain unsevered. Moreover, the voluminous certifications and supporting documents filed with the court pursuant to its July 28, 2003 order detail the comprehensive measures taken to enhance computer security in the systems at issue. See, e.g., Certification of Robert E. Brown, Acting Director, Minerals Management Service at 31 (listing security measures to prevent unauthorized access including firewall and router protections, regular updates with security patches, mandatory IT security training, and mandatory password changes every 60 days) (filed Aug. 11, 2003). The court here has thus ordered agency-wide disconnection with no evidence of a security problem and without reviewing the massive investment in security since 2001. The magnitude of its error is extraordinary.

2. Plaintiffs' effort to construct a legal basis for the injunction underscores the extent to which the court's exercise of its continuing jurisdiction has paid no heed to the nature of the claim at issue, settled limitations on judicial review of agency action, and this Court's mandate. It proceeds from the same mistaken misconception of the court's role in this case as the sweeping structural injunction also on appeal to this Court. (The government's appeal from the structural injunction, No. 03-5314, is proceeding on the same expedited briefing schedule as the appeal from the July 2003 preliminary injunction, No. 03-5262. Because the March 15, 2004 injunction purports to "supersede" and "replace" the July 2003 injunction, we have asked that the appeals from those

two orders be consolidated so that the appeals from all related orders can be heard expeditiously.)

As this Court emphasized in its first decision in this case, a court cannot, consistent with the separation of powers, order "wholesale improvement of [a] program by court decree, rather than in the offices of the Department [of the Interior] or the halls of Congress, where programmatic improvements are normally made." Cobell v. Norton, 240 F.3d 1081, 1108-09 (D.C. Cir. 2001) (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990)). Thus, as this Court declared, the only actionable breach of duty at issue in this APA action was the unreasonable delay in the performance of an accounting, id. at 1106. The Court thus approved only limited continuing jurisdiction, cautioning the district court "to be mindful of the limits of its jurisdiction," id. at 1110, and explaining that its jurisdiction was confined to determining whether future steps taken by Interior were so defective that they would "necessarily delay rather than accelerate the ultimate provision of an adequate accounting," ibid.

In its March 15 order, as in its structural injunction, the district court has paid no heed to this directive or the settled principles that it reflects. Instead, the court has sought to assert authority over the structure and day-to-day operations of the Department of the Interior without even a nominal anchor in any statutory command. As plaintiffs do not dispute, the 1994 Act, the only statute at issue in this case, contains no reference to computer security. It provides no measure for determining what level of security is adequate, and does not authorize a court to respond to security problems by disconnecting communications networks. Nor was there a basis for concluding, even in 2001, that the Special Master's ability to "hack" into a computer system had significant relation to the performance of an accounting. And under no circumstances could the statute be construed to authorize injunctions that disconnect agency communications.

In the view of plaintiffs and the district court, the March 15 injunction, like the structural injunction, is justified as the "long-overdue institutional reform of the troubled Trust." Opposition at 1. But, as discussed, this is not and could not be an action to achieve wholesale improvement of the trust by court decree. Plaintiffs' efforts to avoid the impact of Pub. L. 108-108 reflect the same

mistaken reasoning.[1] That statute addresses the only claim in this case – the performance of an accounting – and provides that nothing in the 1994 Act "or in any other statute, and no principle of common law shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities * * *." Plaintiffs insist that the legislation is inapplicable because it "simply does not extend to ongoing trust management and prospective trust reform." Opposition at 17. In other words, plaintiffs frankly acknowledge that the injunction at issue is not premised even on the broadest understanding of "accounting activities." The injunction is thus without a legal basis in this suit.

Moreover, the district court's willingness to order relief unrelated to the sole legal claim at issue does not defeat the application of the legislation. In enacting Pub. L. 108-108, Congress would presumably have been aware of the fact that the district court dismissed plaintiffs' common law claims at the time that it issued its 1999 declaratory judgment, and that this Court had left no doubt that the only actionable duty at issue is the performance of an accounting. The magnitude of the district court's error cannot be transformed into a basis for frustrating an Act of Congress.

3. Plaintiffs re-assert constitutional arguments previously advanced in their unsuccessful opposition to a stay of the structural injunction. Plaintiffs do not dispute that Congress has authority to amend the substantive law that provides the basis for a forward-looking injunction. See, e.g., Miller v. French, 530 U.S. 327, 344 (2000); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 232 (1995); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 432-35, 441 (1992). Instead, they argue that the temporary nature of Pub. L. 108-108 (specifically, the inclusion of a December 31, 2004

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[1]Plaintiffs colorfully refer to the legislation as the "Midnight Rider" provision and suggest that the measure is somehow suspect because it was introduced by the Conference Committee. They neglect to mention that the House and Senate submitted their versions of the Interior appropriations bill before the district court issued its structural injunction on September 25, 2003. See 149 Cong. Rec. S12004 (Senate version passed on September 23, 2003); 149 Cong. Rec. H7104-05 (House version passed on July 17, 2003). After the Conference Committee introduced the amendment on October 27, 2003, the House debated the measure for three days, see 149 Cong. Rec. H9970-71, H9992-95, H10197-203, and ultimately approved it on October 30. Id. at H10205. The Senate followed suit on November 3. 149 Cong. Rec. S13785-90.

expiration date) suggests that the provision "cannot sensibly be regarded as a substantive amendment of the law." Opposition at 18.

The limited duration of Pub. L. 108-108 does not make it an unconstitutional usurpation of judicial authority. Many statutes contain "sunset" provisions and most appropriations measures last only for the period of appropriations, whether or not an expiration date is explicitly stated in the statute itself. Indeed, in Robertson, the appropriations provision at issue "expired automatically on September 30, 1990." 502 U.S. at 433.

Plaintiffs alternatively suggest that Pub. L. 108-108 deprives them "of their vested property interests without due process of law." Opposition at 19. But plaintiffs have no "vested right" to either an accounting or to the "prospective trust reform" they claim to be seeking. Opposition at 17. Even a cause of action for damages does not vest until it has been reduced to an unreviewable final judgment. See, e.g., Lyon v. Agusta SPA, 252 F.3d 1078, 1086 (9th Cir. 2001) ("although a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained") (quotation marks and citation omitted). And as this Court has observed, the legal basis for prospective relief may be revised by Congress at any point. See, e.g., National Coalition To Save Our Mall v. Norton, 269 F.3d 1092, 1097 (D.C. Cir. 2001) ("although an injunction may be a final judgment for purposes of appeal, it is not the 'last word of the judicial department' because any provision of prospective relief 'is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law'") (quoting Miller, 530 U.S. at 347).

4. As they did in opposing the stay of the structural injunction, plaintiffs argue that this Court has no authority to issue a stay until the district court rules on the motion pending before it. See Opposition at 15. Rule 8 of the Federal Rules of Appellate Procedure requires that a stay motion be filed in district court. It does not make a ruling on the motion a predicate for appellate jurisdiction. Plaintiffs do not contest that the government filed a stay motion first in the district court, and only subsequently sought relief from this Court. The district court's injunction warranted emergency

relief, and an appellate court is authorized to provide such relief as long as a stay motion is filed in district court.

5. Plaintiffs seek to defend the district court's refusal even to consider the 12 certifications and hundreds of pages of supporting documents, detailing in comprehensive fashion the steps taken to date regarding the security of IITD. Plaintiffs make no attempt to reconcile the court's ruling with the express language of 28 U.S.C. 1746 and LCvR 5.1(h), which provide no support for the court's ruling. Moreover, as discussed in our motion, the July 28, 2003 order required that the certifications comply with Fed. R. Civ. P. 11. Plaintiffs do not argue that the certifications failed to comport with Rule 11's certification standards; indeed, plaintiffs disregard Rule 11 entirely. In any event, as we also discussed in our motion, even if the court believed that a procedural error existed, the appropriate course would have been to allow the agency to correct that error. Under no circumstances could the court properly seize on a purported error of this kind to sever an agency's electronic communications.

While defending the district court's refusal to look at the relevant information that it had required, plaintiffs invoke various reports issued in late 2003 that reflect no light on the matter at issue here. See Opposition at 6-7. As we explained in our motion, these reports do not focus on improper access to data by unauthorized persons through the internet, and they address no threat to IITD in particular. See Stay Motion at 14-15. The congressional subcommittee gave a grade of "F" in overall computer security to Interior and the Departments of Justice, State, Energy, Homeland Security, Health and Human Services, Agriculture, and Housing and Urban Development. The subcommittee's scorecard did not address the question of unauthorized access to data via the internet. It was, instead, concerned with many broad issues encompassed under the rubric of "computer security." No one disputes that these broad issues present significant challenges. They also afford absolutely no basis for the relief ordered here.

CONCLUSION

The district court's March 15, 2004, injunction should be stayed pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2004, I caused copies of the foregoing reply to be sent to the Court and to the following by hand delivery:

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