UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	Civil Action No. 96-CV-1285 (RCL)
v.	
GALE A. NORTON, et al.,	
Defendants.	

GOVERNMENT'S OPPOSITION TO PLAINTIFFS' MARCH 20, 2002 MOTION FOR ORDERS TO SHOW CAUSE WHY INTERIOR DEFENDANTS AND THEIR EMPLOYEES AND COUNSEL SHOULD NOT BE HELD IN CONTEMPT

This brief is submitted on behalf of defendants Gale Norton and Neal McCaleb and the seven non-party respondents named in plaintiffs' motion in their official capacities.[1] The present contempt motion asks the Court to hold nine current or former Department of the Interior ("Interior") and Department of Justice ("DOJ") officials and employees in contempt of court, requests monetary sanctions and, for the individual respondents, even suggests incarceration for failure by the Interior Office of Solicitor to preserve all backup e-mail tapes. *See* Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not Be Held in Contempt for Destroying E-Mail ("Plaintiffs' Motion"), at 9, 12, 21. In addition to the show cause order, plaintiffs ask the Court to impose an adverse inference that would result in conclusive evidentiary presumptions against the defendants on any topic that might have been the

[1]The individual respondents are separately represented in their personal capacity.

subject of e-mail communication.[2] The government acknowledges – as it did some three years ago before the Special Master and in open Court – that some e-mail backup tapes were overwritten. However, Plaintiffs' Motion does not establish an adequate basis for the extreme measures they propose.

Plaintiffs submitted with their motion a 104-paragraph "Factual Appendix " and 81 exhibits. Certain significant assertions in the "Factual Appendix" are not supported by plaintiffs' exhibits, which themselves are too often misleading snippets of larger documents.[3] Viewed as a whole, Plaintiffs' Motion falls short of setting forth a *prima facie* case showing, by clear and convincing evidence, that the government or any of the individual respondents have violated a definite and specific court order so as to justify holding the government or the individuals in contempt. Further, civil contempt is not appropriate because neither the government nor the individual respondents can restore the overwritten backup data, and civil money damages and criminal penalties are barred by sovereign immunity.

The facts as stated by the plaintiffs, as described by the Special Master in his July 27, 2001 Opinion, and as established by the record preclude a finding of contempt. There is no evidence that the recycling of the backup e-mail tapes was anything more than a mistake. or that

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[2]Plaintiffs' Motion is not directed at defendant Department of the Treasury ("Treasury") or at any Treasury official or employee. Accordingly, there is no basis for the Court to consider any sanctions as to Treasury.

[3]On March 26, 2002, the government filed a motion to enlarge the time to respond to Plaintiffs' Motion from April 3, 2002 to May 3, 2002, and also filed a motion for expedited review of the motion to enlarge. The Court has not yet acted on those motions, and accordingly, the government has had insufficient time to conduct a thorough review of all the facts and circumstances raised in the Plaintiffs' Motion or to adduce rebuttal evidence. This opposition therefore addresses only the sufficiency of the allegations and the supporting materials contained within Plaintiffs' Motion and does not constitute acceptance by the government of plaintiffs' factual or legal assertions.

any of the named respondents meant to destroy "evidence." Interior had in place a paper recordkeeping system for retaining e-mail communications during all periods in which the recycling occurred. Accordingly, plaintiffs have not established a basis for any of the relief they seek, nor have they shown any actual prejudice to their case as a result of any overwriting.

The Special Master's July 27, 2001 Opinion

Plaintiffs' Motion is premised upon the Special Master's Opinion of July 27, 2001 ("the July 27, 2001 Opinion") (appended as Government Exhibit 1), which the Court affirmed on March 29, 2002.[4] In the July 27, 2001 Opinion, the Special Master declined to impose a protective order concerning Interior's duty to produce records derived from e-mail backup tapes in response to plaintiffs' Third Formal Request for the Production of Documents ("Third Document Request"). The Third Document Request included a request to produce "'all documents prepared or signed by past or present attorneys in the Solicitor's Office and relating to the administration of the [Individual Indian Money] Trust which express legal advice, conclusions, opinions, assessments, instructions or directions.'" July 27, 2001 Opinion at 2, 3. The Third Document Request defined "documents" as including e-mails. In the course of motion practice over the Third Document Request, defendants contended that it was not necessary to produce both paper printouts and taped backup copies of e-mails responsive to the Third Document Request, arguing that the same information is depicted in the two media and that requiring defendants to review the increasing masses of backup tapes to find responsive copies

[4]Although plaintiffs assert that their motion covers conduct subsequent to that addressed by the Special Master in the July 27, 2001 Opinion, plaintiffs' discussion of the "material facts . . . [that] conclusively support this show cause motion and the remedies requested by plaintiffs" includes events only up to December 5, 2000. Plaintiffs' Motion at 5-9. All of those "material facts" were before the Special Master when he rendered the July 27, 2001 Opinion.

was unduly burdensome and expensive. *See* July 27, 2001 Opinion at 3, 9. The Special Master found that software systems at the Solicitor's Office's headquarters office and 18 regional and field offices are backed up on a daily and weekly basis on tape media used to recover lost data in the event of a system crash. *Id.* at 4. Normally, the daily and weekly backup tapes generated by those offices are kept for two and four weeks respectively, before they are recycled by overwriting. *Id.*

To ascertain whether information on the hard copy on an e-mail is materially identical to that contained on the backup tape copy of the e-mail, the Special Master on November 20, 2000 directed Interior to produce examples of backup tapes from each Solicitor's office. Of these, four tapes from two offices were then analyzed by a contractor specializing in the restoration and recovery of electronic data. July 27, 2001 Opinion at 10, 11; *see also* Plaintiffs' Exhibit 63. The contractor identified six categories of information that "will be present on the electronic version of the mail files that can differ from the paper copies": the bcc field, deleted mail messages, the modification date, conversation topic information, internet or gateway information, and attachments. *Id.* at 11.

The Special Master denied defendants' motion for a protective order and recommended sanctions, finding that the motion was not substantially justified.[5] The Special Master also determined that ". . . the Office of the Solicitor engaged in a pattern of overwriting (and thus destroying the data embedded in) e-mail backup tapes generated at: (1) the main headquarters in

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[5] Plaintiffs' suggestion (Plaintiffs' Motion at 1) that the Special Master recommended sanctions for "spoliation" is incorrect. Plaintiffs in fact did not seek such sanctions, nor did the Special Master make any recommendation regarding such sanctions. Plaintiffs do not explain why they have waited for eight months to file this motion seeking additional relief on the same matters addressed by the Special Master in the July 27, 2001 Opinion.

Washington, D.C. as well as in its 18 field and regional offices between June 1998 and November 1998; (2) 17 field and regional offices between November 1998 and May 1999; and (3) 11 field and regional offices between May 1999 and November 20, 2000." *Id.* at 17. The Special Master also noted three other instances after May 1999 in which backup data from a particular office had been overwritten or lost for periods up to seven months and a fourth instance in which 12 tapes from a particular office had been lost in the mail. *Id.*

There are certain discrepancies in the Special Master's statement of the periods and locations in which the overwriting of some e-mail backup tapes occurred.[6] It is important that the Court have a clear record for purposes of putting the overwriting into the context of the various orders on which the plaintiffs rely. However, these discrepancies do not alter the proper disposition of the motion. Further, for each of the time periods and locations identified by the Special Master's opinion as lacking e-mail backup data, it may be that some e-mail backup data does in fact still exist and was not overwritten. *See* Plaintiff's Exhibit 55.

ARGUMENT

I. Civil Contempt is Not Warranted

A. Legal Standards

Standards for civil contempt have been set forth in the initial contempt hearing in this case, *Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999) ("*Cobell I*"), and other cases in this

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[6] The Special Master's identification of the first period of overwriting (June to November 1998) conflicts with an earlier finding in the opinion that the Solicitor's Office had begun saving backup e-mail tapes between February and November 1998 as a result of the Independent Counsel investigation. *Id.* at 4, citing Nov. 20, 1998 Declaration of Glenn Schumaker, ¶ 4. During the second time period set forth in the Special Master's opinion (November 1998 to May 1999), the Solicitor's headquarters office had resumed the previous practice of recycling backup e-mail tapes. May 20, 1999 Declaration of Glenn Schumaker, ¶ 4 (included in Government Exhibit 2).

circuit. The court's power to find a party in civil contempt for violation of discovery orders may be based either on Federal Rule of Civil Procedure 37(b)(2) or the court's inherent power to protect its integrity and prevent abuses of the judicial process. *Cobell I*, 37 F. Supp. 2d at 9. However, remedies drawn upon under the court's inherent power should be exercised only when the rules do not provide the court with sufficient authority to protect its integrity and prevent abuse of the judicial process; therefore, when a discovery order has been violated, the court should turn to its inherent powers only as a secondary measure. *Id.* at 11.

A party seeking a finding of contempt must initially show, by clear and convincing evidence, that (1) a court order was in effect, (2) the order required certain conduct by the respondents, and (3) the respondents failed to comply with the court's order. *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 16 (D.D.C. 2000); *Petties v. District of Columbia*, 897 F. Supp. 626, 629 (D.D.C. 1995). Once the movant has made a *prima facie* showing that the respondent did not comply with the court's orders, the burden shifts to respondent to produce evidence justifying the noncompliance. *Bilzerian*, 112 F. Supp. 2d at 16.

As this Court has noted, "the 'extraordinary nature' of the remedy of civil contempt leads courts to 'impose it with caution.'" *SEC v. Life Partners, Inc.*, 912 F. Supp. 4, 11 (D.D.C. 1996), *quoting Joshi v. Professional Health Services, Inc.*, 817 F.2d 877, 879 n.2 (D.C. Cir. 1987). Further, in light of the severity of the contempt sanction, it should not be resorted to "if there are any grounds for doubt as to the wrongfulness of the defendants' conduct." *Life Partners*, 912 F. Supp. at 11, *citing MAC Corp. v. Williams Patent Crusher & Pulverizer Co.*, 767 F.2d 882, 885 (Fed. Cir. 1985).

A civil contempt action is "a remedial sanction used to obtain compliance with a court order or to compensate for damages sustained as a result of noncompliance." *Food Lion, Inc. v.*

United Food & Commercial Workers Int'l Union, 103 F.3d 1007, 1016 (D.C. Cir. 1997), *quoting National Labor Relations Board v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981). The goal of a civil contempt order is not to punish, but to exert only so much of the court's authority as is required to assure compliance. *Petties*, 897 F. Supp. at 629. Finally, a party found to be in contempt should be given an opportunity to purge itself of the contempt prior to the imposition of any penalties. *Bilzerian*, 112 F. Supp. 2d at 16. This requirement stems from the remedial nature of civil contempt. *See Food Lion*, 103 F.3d at 1016 (a civil contempt action is "a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance"), *quoting Blevins Popcorn*, 659 F.2d at 1184. Thus, a contempt order should be imposed, if at all, only at the conclusion of a three-stage proceeding involving:

> (1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding the recalcitrant party in contempt and threatening to impose a specified penalty unless the recalcitrant party purges itself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled.

Blevins Popcorn, 659 F.2d at 1184, *citing Oil, Chemical & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 575, 581 (D.C. Cir. 1977); *Bilzerian*, 112 F.Supp.2d at 16.

B. Plaintiffs Have Not Made a *Prima Facie* Showing that the Respondents Did Not Comply with Court Orders.

As discussed above, plaintiffs must make a threshold showing, by clear and convincing evidence, that a "definite and specific" court order was in effect, that the order required certain conduct by the respondents, and that the respondents failed to comply with the court's order. *See Life Partners, Inc.*, 912 F. Supp.at 11. Plaintiffs hardly attempt to address these threshold

requirements. The motion fails to identify specific acts or omissions by specific respondents that violated specific requirements of specific orders. Instead, Plaintiffs present in the motion, without explanation, a list of non-party respondents against whom they seek a contempt order, and set forth in the Factual Appendix numerous allegations, many of which have nothing to do with the non-party respondents, but never attempt to explain what conduct of the non-party respondents violates any specific court order.

An individual accused of actions that might constitute contempt has a due process right to know precisely the nature of the charges against him or her. *See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. Co.*, 380 F.2d 570, 581 (D.C. Cir. 1967) ("Like any civil litigant, a civil contemnor is . . . clearly entitled to those due process rights, applicable to every judicial proceeding, of proper notice and an impartial hearing with an opportunity to present a defense."). At a minimum, this due process must include a specific articulation of the order the person is alleged to have violated and the proof that he or she has violated it. *Wyatt By and Through Rawlins v. Rogers*, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996) ("Precedent dictates that a plaintiff seeking to obtain the defendant's compliance with the provisions of an injunctive order move the court to issue an order requiring the defendant to show cause . . . . In his motion, the plaintiff cites the provision(s) of the injunction he wishes to be enforced, alleges that the defendant has not complied with such provision(s) and asks the court, . . . to order the defendant to show cause."). Thus, in order to initiate a contempt proceeding, the movant must set forth specific and detailed factual allegations that would constitute contempt of a court order if proven. *See, e.g., id.* (court should examine moving party's allegations to determine whether a case is sufficiently made out for an order to show cause).

The government acknowledged on May 20, 1999 — nearly three years ago — that the recycling of Solicitor's Office e-mail backup tapes had mistakenly resumed as of November 23, 1998. Specifically, the government told the Special Master:

> We acknowledge that it was a mistake not to have either provided explicit instructions to MIS to continue the practice of preserving all newly created backup tapes after the release of the Office of the Independent Counsel, or to have petitioned the Court to allow Interior to resume normal overwriting practices.

Motion for Establishment of Time Frame for Production of Certain Electronic Records and Notice to the Court Regarding Retention of Such Records, filed May 20, 1999, at 5 (Government Exhibit 2) (relevant portion also included in Plaintiffs' Exhibit 39).

The government stands by its acknowledgment that newly-created backup tapes of Solicitor's Office e-mails should have been retained. However, the government's failure to do so did not violate any specific directive of the Court. The matter raised in the government's motion for protective order regarding the Third Document Request was limited to the question of whether defendants were required to search the stock of backup tapes that had been retained (rather than recycled as normal) in connection with the Independent Counsel investigation. Defendants' Consolidated Reply in Support of Defendants' Motion for Enlargement of Time, and Memorandum in Support of Defendants' Motion for Protective Order Regarding Third Formal Requests for Production, filed July 22, 1998, at 7, and July 22, 1998 Declaration of Edith Blackwell, ¶¶ 5-7 (included in Government Exhibit 3); *see also* Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Protective Order Regarding Third Formal Requests for Production, filed Aug. 11, 1998, at 5-7 (Government Exhibit 4). The Court's November 9, 1998 Order denying the government's motion for a protective order was silent on the question whether,

on a going-forward basis, the Solicitor's Office had to continue to accumulate newly created backup tapes and search through those for responsive e-mails.

On February 12, 1999, the government noted in a pleading that newly created tapes were being retained. United States' Consolidated Response in Opposition to Plaintiffs' Motion to Compel Production of Documents Responsive to Plaintiffs' Second, Third, Fourth, and Fifth Formal Requests for Production of Documents, filed Feb. 12, 1999, at 1 n.2 (Government Exhibit 5). This statement was, of course, in error. However, plaintiffs have offered no evidence that the attorneys who filed the February 12, 1999 opposition actually knew that backup tape recycling had resumed until a May 12, 1999 meeting with agency personnel to discuss the Special Master's May 11, 1999 ruling. *See* Government Exhibit 2 and declarations included therein.

As plaintiffs concede (Plaintiffs' Motion at 13), the overwriting of the backup e-mail tapes can be the basis for civil contempt only if the failure to maintain the backup tapes violated a clear and unambiguous court order. Plaintiffs identify six orders (listed chronologically) that they contend the government and the individual respondents have violated: (1) the Court's November 9, 1998 Order; (2) the Special Master's May 11, 1999 Order denying defendants' motion for reconsideration; (3) the Court's August 12, 1999 Order Regarding Interior Department IIM Records Retention; (4) the Court's December 21, 1999 Trial Opinion and Order; (5) the October 27, 2000 oral order of the Special Master regarding e-mail backup tapes; and (6) the Special Master's November 20, 2000 letter Order directing defendants to retain e-mail backup tapes at all Solicitor's Offices. *See* Plaintiffs' Motion at 12.

Two of these orders do not appear to cover Solicitor's Office e-mail records in any form. The provision of this Court's December 21, 1999 Trial Opinion and Order that plaintiffs assert is

applicable (Plaintiffs' Motion at 15)[7] is in fact a provision of the Declaratory Judgment, *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999), and, as such, cannot be the basis of a contempt order on a discovery matter. *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (holding that noncompliance with a declaratory judgment is not contempt and vacating a contempt order based in part of failure to comply with the declaratory judgment).

The August 12, 1999 Order Regarding Interior Department IIM Records Retention required that the Interior Department distribute appended memoranda "regarding retention of all documents and data relating to Individual Money Trust funds and Individual Indian trust assets as identified in Attachment A to the second memorandum ("IIM Records"). . . ." Documents and data maintained by the Solicitor's Office are not listed among the categories identified in Attachment A to the second memorandum, and therefore the overwriting of the backup e-mail tapes did not violate this order either.

The four other orders concern the Third Production Request, which sought documents from the Solicitor's Office. Neither the Court's November 9, 1998 Order nor the transcript of the November 6, 1998 hearing before the Court "definite[ly] and specific[ally]" required the government to retain newly created tapes. *See Life Partners*, 912 F. Supp. at 11. The Special Master's oral order of October 27, 2000 required retention of backup e-mail tapes for the Solicitor's offices that generated responsive e-mails. The Special Master's letter order of November 20, 2000 expressly required retention of e-mail backup tapes for **all** Solicitor's offices, regardless of whether they performed IIM work or not. Thus, plaintiffs have not shown that the

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[7] "Further, the systemic destruction of e-mail is in clear violation of the December 21, 1999 Order in which the Court ordered "defendants to retrieve and retain all information concerning the IIM trust that is necessary to render an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs." Plaintiffs' Motion at 15.

government has not substantially complied with these orders, which after all could only be obeyed after they were issued.

The government acknowledges that the May 11, 1999 Order required defendants to produce copies of e-mails on backup tapes that are responsive to the Third Production Request. However, the Special Master's order did not address whether offices that performed no IIM work needed to retain their backup e-mail tapes, too, as well as continuing to print out hard copies of their e-mails consistent with Interior's recordkeeping system. In any case, plaintiffs' loose charges that defendants have destroyed "documents" and "e-mails" are unsubstantiated and are not supported by the July 27, 2001 Opinion. The Special Master found only that **e-mail backup tapes** had been erased, not that e-mails generally had not been printed out. Accordingly, the loss is limited to backup copies of printed e-mails that are potentially responsive to the Third Production Request.

C. Even If Plaintiffs Could Show a Violation of a "Definite and Specific" Order, Imposing Coercive Civil Contempt Sanctions for Failure to Retain E-Mail Backup Tapes Would Be Inappropriate Because None of the Respondents Could Comply with Such an Order.

Civil contempt sanctions are used either to obtain compliance with a court order or to compensate for damages sustained as a result of noncompliance. *Food Lion, Inc.* 103 F.3d 1016. Coercive contempt sanctions are intended to force the offending party to comply with the court's order. *Coleman v. Espy*, 986 F.2d 1184, 1190 (8th Cir.), *cert. denied sub nom. Dye v. Espy*, 510 U.S. 913 (1993). Compensatory contempt sanctions compensate the plaintiff for damages that the offending party has caused by its contempt. *Id.* Plaintiffs seek both coercive and compensatory sanctions against the government and the individual respondents. Plaintiffs' Motion at 21. Neither form of sanctions is appropriate against any of the respondents here.

Plainly, coercive sanctions could not force the government or any of the individual respondents to produce e-mail backup data that was overwritten more than three years ago. Accordingly, the remedial purpose of a contempt order cannot be served where, as here, the allegedly violative act cannot be corrected. *See In re Sealed Case*, 250 F.3d 764, 770 (D.C. Cir. 2001) ("Because the Government could not undo the July 18 disclosure [of grand jury material], holding the Government in civil contempt would serve no useful purpose. . . .").

Moreover, the non-party individual respondents either no longer work for the government (respondents Schiffer, Simon, Cohen and Perlmutter) or have been recused from working on the case since last year (respondents Brooks, Findlay and Blackwell). Accordingly, these individuals no longer have any ability to implement any corrective action in regard to this matter.

Further, Secretary Norton, although named only in her official capacity, cannot properly be held in contempt for matters that occurred months and even years before she even assumed office, and which she therefore never had an opportunity to prevent **or** cure. *See* Defendant's Proposed Conclusions of Law Following Contempt Trial, filed Feb. 28, 2002, at ¶¶ 57-67 (Government Exhibit 6). Likewise, Administrator McCaleb should not be held in contempt both because the alleged violations predated his tenure and because he has no authority over the Solicitor's Office in any event.

D. Sovereign Immunity Precludes the Imposition of Criminal Penalties or Compensatory Sanctions for Civil Contempt Against the Government or the Individual Respondents in Their Official Capacity.

Plaintiffs suggest both criminal and civil penalties against the government and the individual respondents. *See* Plaintiffs' Motion at 9, 12, 21. Because of sovereign immunity,

these forms of sanctions are not available against the government or against the individual respondents in their official capacity.[8]

The doctrine of sovereign immunity bars the imposition of fines, penalties or monetary damages against the government, except to the extent that the United States has explicitly consented to such sanctions. "The doctrine of sovereign immunity stands as an obstacle to virtually all direct assaults against the public fisc, save only those incursions from time to time authorized by Congress." *United States v. Horn*, 29 F.3d 754, 761 (1st Cir. 1994). A waiver of sovereign immunity must be definitively and unequivocally expressed and must appear in the text of the statute itself. *Id.*, at 762, *citing United States v. Mitchell*, 445 U.S. 535, 538 (1980), and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

The United States has not waived sovereign immunity from citation for criminal contempt, nor for court-imposed fines for criminal contempt. *Coleman v. Espy*, 986 F.2d 1184, 1191 (8th Cir.), *cert. denied sub nom. Dye v. Espy*, 510 U.S. 913 (1993); *United States v. Horn*, 29 F.3d at 763; *see also In re Sealed Case*, 192 F.3d 995, 999-1000 (D.C. Cir. 1999) ("...it is far from clear that Congress has waived federal sovereign immunity in the context of criminal contempt . . . We know of no statutory provision expressly waiving federal sovereign immunity from criminal contempt proceedings.").[9] Similarly, the court in *In re Newlin*, 29 B.R. 781, 785

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[8]"As long as the government entity receives notice and an opportunity to respond, a suit against a government employee in his official capacity is to be treated as a suit against the entity." *Coleman*, 986 F.2d at 1189, *citing Kentucky v. Graham*, 473 U.S. 159 (1985). *See also, Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002), and cases cited therein.

[9]The issue has not been decided by the Court of Appeals in this Circuit. The District Court in *United States v. Waksberg*, 881 F.Supp. 36, 41 (D.D.C. 1995), *vacated and remanded*, 112 F.3d 1225 (D.C. Cir. 1997), held that sovereign immunity barred recovery of damages as compensation for the government's violation of an injunctive order. The Court of Appeals

(continued...)

(E.D. Pa. 1983), held that a criminal contempt citation by a bankruptcy court against a federal agency violated sovereign immunity because the government had not expressly waived its immunity from citation for criminal contempt.

Plaintiffs' claims for compensatory damages are undefined. Their motion identifies no out-of-pocket expenses that they claim to have suffered except, presumably, their attorneys' fees and costs in filing the motion. To the extent that plaintiffs are seeking money damages other than attorneys' fees and costs, their claims are barred because the United States has not waived its immunity to the imposition of compensatory monetary damages based on contempt. *Coleman v. Espy*, 986 F.2d at 1191; *United States v. Horn*, 29 F.3d at 763; *McBride v. Coleman*, 955 F.2d 571, 577-78 (8th Cir.), *cert. denied sub nom. McBride v. Madigan*, 506 U.S. 819 (1992); *Barry v. Bowen*, 884 F.2d 442, 444 (9th Cir. 1989).

The determinations in this case that sovereign immunity does not bar either plaintiffs' claim for prospective action or their claim for retrospective relief in the form of an accounting[10] have no bearing on the separate issue of whether the government has waived sovereign immunity for money damages for civil contempt arising from violations of discovery obligations. A waiver of sovereign immunity as to one available remedy does not, by implication, waive sovereign immunity as to other remedies. *See Brown v. Secretary of the Army*, 918 F. 2d 214 (D.C. Cir.

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[9](...continued)
vacated and remanded with directions to withhold a ruling on the sovereign immunity issue pending a determination on whether Waksberg had incurred damages. 112 F.3d at 1228.

[10]*See Cobell v. Babbitt*, 30 F. Supp. 2d. 24, 31-33, 38-42 (D.D.C. 1998) (denying defendants' motion for judgment on the pleadings); *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 21 (D.D.C. 1999) (denying defendants' motion for summary judgment); *see also Cobell v.Norton*, 240 F.3d 1081, 1094-95 (D.C. Cir. 2001) (agreeing that plaintiffs' action was not barred by sovereign immunity).

1990) (waiver of sovereign immunity as to back pay awards for discriminatory denial of promotion did not waive sovereign immunity for prejudgment interest on such back pay awards), *cert. denied,* 502 U.S. 810 (1991). Moreover, the holdings that sovereign immunity did not bar plaintiffs' claims were based explicitly on the finding that plaintiffs were not seeking money damages. *See Cobell*, 52 F. Supp. at 21 ("defendants' sovereign immunity in the context of this case is simply not an issue as long as plaintiffs do not seek money damages.").

Although this Court did not expressly address the issue of sovereign immunity in its ruling in *Cobell I*, its Order did not impose monetary penalties against the government officials whom the Court had cited for civil contempt. Under the law of sovereign immunity, plaintiffs likewise cannot obtain monetary penalties through the present motion against the government or any of the individual respondents in their official capacity.

E. Plaintiffs Have Not Demonstrated "Willfulness", "Deceit" or "Cover Up" by the Government or the Individual Respondents in Connection with the Backup E-mail Tapes.

To the extent that plaintiffs are suggesting that there has been some fraud upon the Court, they have not demonstrated any intentional misrepresentations by the government or by any individual respondent. Government Exhibit 6, at ¶¶ 17-24. While the government has acknowledged that it was a mistake not to retain newly created backup tapes for Solicitor's offices engaged in IIM work between November 23, 1998 and May 12, 1999, the plaintiffs have offered no evidence that this recycling was the product of bad faith. More specifically, plaintiffs have not shown that any of the individual respondents intentionally withheld information or intentionally misinformed the Special Master or the Court about the e-mail backup tape retention issues. The Special Master found that the defendants' August 2, 2000 motion was repetitive and therefore warranted sanctions, and the defendants chose not to contest that finding. The Special

Master did not find "willfulness" or deceit, as plaintiffs suggest. Moreover, plaintiffs have not even attempted to establish their accusations of "rampant, pervasive, long-standing and total destruction of defendants' and their counsel's e-mail over a period of five and one half years." *See* Plaintiffs' Motion at 20. The Special Master's opinion pertains solely to the **backup** e-mail tapes and says nothing about the adequacy of the defendants' paper e-mail production.

In this context, it is significant that one of defendants' main arguments against searching and producing from e-mail backup tapes was Interior's paper recordkeeping system for e-mail, which required employees to print out hard copies of e-mail records. Def. Department of the Interior's Motion for Protective Order Clarifying Duty to Produce E-Mail Records, filed August. 2, 2000, at 6-12 and exhibits referenced therein. Defendants observed that Interior's e-mail recordkeeping system comported with the regulations established by the National Archives and Records Administration ("NARA") pursuant to its authority under the Federal Records Act, 44 U.S.C. §§ 3101-24 to set standards for records preservation and disposal for all agencies. *Id.* at 9-11. Defendants also noted that NARA's regulations "specifically direct that 'backup tapes should not be used for recordkeeping purposes' because they do not have storage and retrieval capabilities." *Id.* at 10, citing 36 C.F.R. § 1234.24(c). The regulations also authorize deletion of the on-screen version of an e-mail record once the e-mail has been printed out, if the agency is employing a paper recordkeeping system. 36 C.F.R. §§ 1234.24(d), 1234.32(d)(1).

NARA's regulations concerning the proper manner for maintaining e-mail records were directly addressed — and upheld — by the Court of Appeals in *Public Citizen v. Carlin*, 184 F.3d 900, 337 U.S. App. 320 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000). As the Court of Appeals concluded in *Carlin*:

> All agencies by now, we presume, use personal computers to generate electronic mail and word processing documents, but not all have taken the next step of establishing electronic recordkeeping systems in which to preserve those records. It may well be time for them to do so, but that is a question for Congress or the Executive, not the Judiciary, to decide.
>
> In sum, we do not think the Archivist must, under the RDA [Records Disposal Act], require agencies to establish electronic recordkeeping systems.

Id., 184 F.3d at 910, 337 U.S. App. at 330. The Special Master ultimately concluded in his July 27, 2001 opinion that *Public Citizen v. Carlin* was inapplicable to the e-mail backup tapes at issue in Plaintiffs' Motion. July 27, 2001 Opinion at 11. For purposes of this opposition, the government does not take issue with that holding, although it does respectfully note that the issue has been preserved for appeal. Notwithstanding the Special Master's treatment of *Public Citizen v. Carlin*, there can be no question that that ruling confirmed the **reasonableness** of respondents' reliance upon Interior's paper recordkeeping system as the single source for producing responsive e-mails to the plaintiffs until the Special Master, in May 1999, required the Solicitor's Office to produce from backup tapes as well. Plaintiffs do not explain how government employees following a duly promulgated recordkeeping regulation, in the absence of any court requirement to the contrary, can be cited for contempt.

Plaintiffs' Motion asserts a "cover-up" by "defendants and their counsel" because the recycling of e-mail backup tapes was not disclosed to the Court or Special Master at various hearings and in various pleadings filed between November 23, 1998 and May 13, 1999. *See* Plaintiffs' Motion at 6-7. The government acknowledges that backup tape recycling resumed on November 23, 1998 following the issuance of a November 13, 1998 memorandum by then-

Deputy Solicitor Edward Cohen. *See* Plaintiffs' Exhibit 20.[11] But the Plaintiffs' Motion cites no evidence that any of the respondents who appeared before the Court or the Special Master or who filed a declaration in this matter between November 20, 1998 and May 13, 1999 actually knew about the Cohen memorandum or that e-mail backup tape recycling had in fact resumed.[12] On February 12, 1999, the government did erroneously state, in a pleading signed by respondent Phillip Brooks, that the government was continuing to retain newly-created backup tapes. As explained above, however, plaintiffs have offered no evidence that Mr. Brooks' knew about the recycling before May 12, 1999. Instead, the record shows that when Mr. Brooks learned about the recycling, he promptly disclosed and corrected the erroneous statement before both the Special Master and the Court. *See* Government Exhibit 2. These circumstances plainly do not justify the imposition of any sanctions, much less establish a "cover-up."

Likewise, the motion presents no basis for concluding that any of the respondents "concealed" from the Special Master or the Court that until May 1999, e-mail backup tapes in the Solicitor's regional and field offices were continuing to be recycled and thus overwritten in accordance with the offices' usual practices. The July 22, 1998 declaration of Edith Blackwell,

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[11]Plaintiffs mischaracterize the November 13, 1998 Cohen memorandum as an instruction to "destroy e-mail." Plaintiffs' Motion at 6. The memorandum, in fact, pertains only to e-mail backup tapes. Plaintiffs' Exhibit 20. Plaintiffs' own Factual Appendix contradicts their attack on Mr. Cohen and correctly quotes a November 10, 1998 memorandum by Mr. Cohen directing collection of all Solicitor's Office e-mails, among other documents. Factual Appendix ¶ 27.

[12]Plaintiffs' Motion claims that defendants' April 12, 1999 pleading falsely informed the Court that they had taken "reasonable steps to ensure that documents relevant to this litigation are preserved," including "routine backup of electronic files." Plaintiffs' Motion at 7 and Factual App. ¶ 44 and Plaintiffs' Exhibit 37. It is plain, however, from the excerpt of the pleading relied upon by plaintiffs that the subject of that document was actual Trust records, and did not include backup tapes of Solicitor's Office e-mail. Similarly, the August 12, 1999 Document Preservation Order, which plaintiffs rely upon as a basis for seeking a show cause order (Plaintiffs' Motion at 12, 14), says nothing about the Solicitor's Office e-mail backup tapes.

to which plaintiffs make frequent reference, simply noted that the Solicitor's Office had retained a stock of backup tapes in connection with the Independent Counsel investigation. July 22, 1998 Declaration of Edith Blackwell, ¶¶ 5-8 (included in Government Exhibit 3). The declaration acknowledged that certain of the tapes had e-mail records, but made no representations as to the particular Solicitor's offices covered by the tapes, nor as to whether backup e-mail tapes were being retained by the Solicitor's office other than in connection with the Independent Counsel investigation. *Id.* Accordingly, it is difficult to comprehend how this declaration can be viewed as a "misrepresentation" regarding the Solicitor's Office's backup e-mail tape practices in the regional and field offices.

Plaintiffs also make much of Ms. Blackwell's survey of the regional and field offices following the Special Master's early November 2000 request for defendant's reasons for limiting the search of the e-mail backup tapes to the headquarters and seven regional and field offices. Contrary to plaintiffs' assertions, however, the Special Master's oral October 27, 2000 order did **not** direct the Solicitor's Office to "preserve all Solicitor's Office e-mail wherever, whenever or however it may be maintained." Plaintiffs' Motion at 12. In fact, the Special Master's October 27, 2000 directive was explicitly a "stopgap measure until the issue that's before me is decided." Government Exhibit 7, at 48:19-21. The Special Master's order was as follows:

> [By DOJ attorney Findlay]: I understood — as you've explained your order to me earlier, I've understood it to mean that it requires the saving of backup tapes in Solicitor's Office.
>
> [By the Special Master]: That a Solicitor's Office generated **that may be related to IIM information.**

Government Exhibit 7 and Plaintiffs' Exhibit 58, at 55:1-5 (emphasis added).[13] The Special Master requested an immediate letter from government counsel "clarifying or explaining what the responsibilities you're about to undertake are. . . . [J]ust so there is no mistake, and we don't go two weeks down the road with a misapprehension." *Id.* at 58:24-59:1-4. On October 30, 2000, Mr. Findlay provided the requested explanation, stating "you ordered that Interior save backup tapes from the components of the Solicitor's Office likely to have documents responsive to the discovery" and identifying those eight offices. Plaintiffs' Exhibit 59. Nothing in the Plaintiffs' Motion demonstrates that the Special Master ordered retention of backup tapes at all Solicitor's Offices, regardless of whether they performed IIM-related work, until November 20, 2000. Plaintiffs' Exhibit 63.

The plaintiffs' claims of a "cover-up" are undermined by the very documents they include in their motion. These documents do not show any "cover-up" of lost e-mail backup data. Rather, plaintiffs' exhibits show that the defendants took steps to retain responsive Solicitor's Office e-mail backup tapes, and that they informed the Special Master of lost e-mail backup data — whether the loss was large or small, and whether due to human or technical error. *See* Plaintiffs' Exhibits 39, 43, 50-54, 57, 71, 73, 75, 77- 79.[14]

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[13]The Special Master clarified that his order applied only to backup tapes for the servers containing e-mails **generated** by the Solicitor's Office and that he was not concerned about backup tapes for servers containing e-mails **received** from the Solicitor's Office. Government Exhibit 7 and Plaintiffs' Exhibit 58, at 56:18-57:6.

[14]Plaintiffs make an unfounded assertion that DOJ attorney Charles Findlay "notified the Master formally that the Solicitor's Office would not be preserving electronic records. . . ." Plaintiffs' Motion at 8 and Factual App. ¶ 68 (referencing Plaintiffs' Exhibit 54). In fact, Plaintiffs' Exhibit 54 shows just the opposite. There, Mr. Findlay stated that "the Solicitor's Office has instructed its regional and field offices to save backup tapes. . . ." Plaintiffs' Exhibit 54, at 2. The specific offices saving backup tapes were listed on an inventory sent with the letter.

(continued...)

On the record put forward by the plaintiffs, there simply is no basis for concluding that the government or any of the individual respondents acted "willfully" or in bad faith to deceive the Special Master or the Court or to "cover-up" the retention issues regarding the e-mail backup tapes.

* * *

In sum, whether or not plaintiffs have made a prima facie showing that the government violated a court order in regard to the overwriting of backup tapes, civil contempt is not an appropriate remedy and criminal contempt is not an available remedy.

II. THE SANCTIONS PROPOSED BY PLAINTIFFS ARE GROSSLY DISPROPORTIONATE.

A. Sanctions for Overwriting the Tapes Must be Proportionate to the Harm Resulting to Plaintiffs.

Parties have an obligation to preserve documents and other physical materials they know or reasonably should know are relevant to litigation. *Shepherd v. American Broadcasting Companies*, 151 F.R.D. 159, 198 (D.D.C. 1992), *rev'd on other grounds,* 62 F.3d 1469 (D.C. Cir. 1995). The Special Master determined that plaintiffs' filing of the Third Document Request on June 11, 1998 triggered an obligation by defendants to maintain the backup tapes of the Solicitor's Office, because defendants then had actual and constructive notice that the Solicitor's Office backup tapes were relevant to this action. July 27, 2001 Opinion at 5.[15] Any sanction for

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[14](...continued)
Plaintiffs' Exhibits 54 and 55. As noted below, there was no extant direction from the Special Master or the Court at the time of this letter (June 27, 2000) that Solicitor's Offices that did not generate e-mail responsive to plaintiffs' Third Document Request needed to retain their backup tapes.

[15] The Special Master stated that *Linnen v. Robins Co. Inc.*, 1999 WL 462015 (Mass. (continued...)

failure to maintain backup tapes, either under Rule 37 or the inherent power of the court, must be just and proportionate to the seriousness of the violation. *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996).

In particular, sanctions for failure to preserve the backup tapes in the form of a default judgment, or sanctions which are the functional equivalent of default judgment, as plaintiffs' proposed adverse inference appears to be, are permitted only in two instances: (1) if the destroyed documents are dispositive of the case, so that a lesser sanction, such as an issue related sanction, effectively disposes of the merits anyway, or (2) the guilty party has engaged in such wholesale destruction of primary evidence regarding a number of issues that the court cannot fashion an effective issue-related sanction. *Webb v. District of Columbia*, 146 F.3d 964, 972 (D.D.C. 1998); *Shepherd v. American Broadcasting Companies,* 62 F.3d 1469, 1479 (D.C. Cir. 1995). Because the system of justice strongly favors disposition of cases on the merits, litigation-ending sanctions are a last resort to be applied only after less dire alternatives have been explored without success or would obviously prove futile. *Bonds*, 93 F.3d at 809. Moreover, sanctions that are fundamentally penal – such as default judgment, contempt orders, awards of fees or fines – must be grounded on clear and convincing evidence of the predicate misconduct. *Shepherd*, 62 F. 3d at 1478.

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[15](...continued)
Super.), was "of compelling application to the instant issue," July 27 2001 Opinion at 18 n.16. That case did involve overwritten backup tapes of e-mails. However, in *Linnen*, the plaintiffs explained why the overwritten material could have been pivotal to their case. *Id.* In this case, plaintiffs have not attempted to show any prejudice from the overwriting.

B. The Sanctions Sought by Plaintiffs are Grossly Excessive and Disproportionate to any Harm Suffered.

As sanctions for overwriting backup e-mail tapes, plaintiffs have suggested fines, imprisonment and a vaguely drafted adverse inference which apparently would assume that any evidence offered by the government is contradicted by an undiscovered e-mail (including, apparently, evidence about events occurring generations before e-mails existed). The proposed sanctions are totally at odds with the applicable standards concerning failure to preserve evidence and are plainly excessive for the violations found by the Special Master. As discussed above, there is no basis for plaintiffs' repeated claims that the government willfully or intentionally destroyed evidence, and, absent evidence of bad faith or willfulness, even a carefully drawn evidentiary inference is inappropriate. *See Johnson v. Washington Metropolitan Area Transit Authority*, 764 F. Supp. 1568, 1579-80 (D.D.C. 1991) ("Normally such inferences are not drawn unless there is evidence of 'evil intent, bad faith or willfulness.'") (citing *Vick v. Texas Employment Comm'n* , 514 F. 2d 734, 737 (5th Cir. 1975), and *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 587 F. Supp. 180, 208 (D.D.C. 1984)). Plaintiffs' allegations of violations are wildly exaggerated, and their showing of any resulting prejudice is essentially rhetorical. The government suggests a more dispassionate examination of the matter.

The Third Production Request did not seek the overwritten backup tapes themselves. They are relevant to this case only to the extent that they may contain some e-mail records responsive to the Third Document Request. The Solicitor's Office maintains e-mails, including e-mail messages responsive to the Third Production Request, in paper form. The Special Master has not found, and plaintiffs have not attempted to show, that defendants have not met their obligation to produce the substance of e-mail messages responsive to the Third Production

Request in paper form. The Special Master's consultant found that the paper copies of the e-mails differed from the copies on backup tapes in that the backup tapes **could** (not that they did or would) contain six fields of information which might not be on the paper copy: the bcc field in the case of a non-bcc'd recipient, deleted mail messages, the modification date, conversation topic information, internet or gateway information, and attachments. While one could theorize instances in which one of these fields could conceivably be relevant to some contested factual issue in some case, plaintiffs have not articulated any issue in this case to which the information might be relevant.

Plaintiffs' actions belie any claim that information lost by the overwriting prejudices their case. The backup tapes of the Solicitor's Officer were not among the categories of documents that defendants were required to maintain under the terms of the Court's August 12, 1999 Order Regarding Interior Department IIM Records Retention. As plaintiffs acknowledge (Plaintiffs' Motion at 14), that order was a consent order resulting from negotiations between the parties concerning the categories of documents defendants were required to retain.[16] Neither plaintiffs nor defendants considered information exclusively on the Solicitor's Office backup tapes relevant then, and plaintiffs have not shown why that information is relevant now.

Since the plaintiffs have not demonstrated how the overwriting of the backup tapes prejudices their case, any evidentiary-related sanctions are premature. It would be more appropriate for the court to consider evidentiary consequences for the overwriting, if any are

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[16] The August 12, 1999 Order was negotiated more than a year after plaintiffs had been informed that the backups for the computer system in the Solicitor's Office deleted e-mails after ninety days, and that, except for a backup tape partially covering April 1995, the available tapes did not include e-mails prior to December 31, 1997. *See* Plaintiffs' Exhibit 14 (July 22, 1998 Declaration of Edith Blackwell, ¶ 6) (also included in Government Exhibit 3).

warranted, at trial, in the context of specific facts. For example, if plaintiffs establish at trial that information overwritten on backup tapes is relevant to a contested factual matter, such as whether a particular person received a bcc of a particular e-mail, and that information is not otherwise available, the court could consider whether an inference is appropriate on that specific issue. On the current state of the record, however, plaintiffs have not established an entitlement to any adverse evidentiary inference or other issue-related sanction.

CONCLUSION

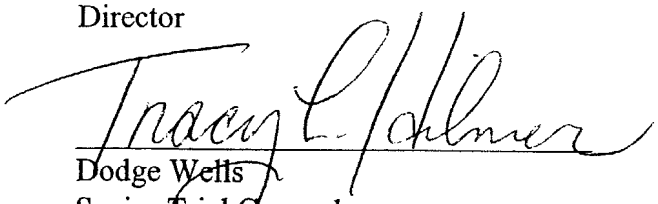
For the foregoing reasons, the government respectfully requests that the Court enter an order denying plaintiffs' motion.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
Director



Dodge Wells
Senior Trial Counsel
D.C. Bar No. 425194
Tracy L. Hilmer
D.C. Bar No. 421219
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044
(202) 307-0474

OF COUNSEL:

Sabrina A. McCarthy
Department of the Interior
Office of the Solicitor

DATED: April 3, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of Plaintiffs' March 20, 2002 Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Destroying E-mail, the government's opposition thereto, and the entire record in this case, it is hereby ORDERED that Plaintiffs' motion is DENIED.

UNITED STATES DISTRICT JUDGE

Date:

cc:

Sandra P. Spooner
John T. Stemplewicz
Cynthia L. Alexander
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Fax (202) 514-9163

Dodge Wells
Tracy L. Hilmer
Commercial Litigation Branch
Civil Division
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044
Fax (202) 616-3085

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
Fax (202) 318-2372

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
Fax (202) 822-0068

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530