

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT
3

4 -----
5 ELOUISE PEPION COBELL, ET AL.,

6 Plaintiffs/
7 Appellees,

8 v.

No. 05-5388

9 GALE A. NORTON, SECRETARY OF
10 THE INTERIOR, ET AL.,

11 Defendants/
12 Appellants.

13 Tuesday, April 11, 2006

14 Washington, D.C.

15 The above-entitled matter came on for oral
16 argument pursuant to notice.

17 BEFORE:

18 CIRCUIT JUDGES TATEL AND BROWN AND SENIOR CIRCUIT
19 JUDGE SILBERMAN

20 APPEARANCES:

21 ON BEHALF OF THE APPELLANTS:

22 MARK B. STERN, ESQ.

23 ON BEHALF OF THE APPELLEES:

24 DENNIS M. GINGOLD, ESQ.
25

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, MD 20852
Tel: (301) 881-3344 Fax: (301) 881-3338
info@DepositionServices.com www.DepositionServices.com

C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Mark B. Stern, Esq.
On Behalf of the Appellants

3; 58

Dennis M. Gingold, Esq.
On Behalf of the Appellees

29

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE CLERK: Case number 05-5388, Elouise Pepion Cobell, et al. v. Gale A. Norton, Secretary of the Interior, et al. Mr. Stern for the appellants, Mr. Gingold for the appellees.

ORAL ARGUMENT OF MARK B. STERN, ESQ.

ON BEHALF OF THE APPELLANTS

THE COURT: Good morning, Mr. Stern.

MR. STERN: Good morning, Your Honors. May it please the Court, in this appeal, the Court considers an injunction that requires the Department of the Interior to disconnect major communications systems from the internet, keep them from reconnecting other systems, requires Interior to disconnect computer systems between its components, and that requires it to disconnect communications within the Department.

THE COURT: Excuse me, counsel, I'm having a little difficulty hearing you.

MR. STERN: I'm sorry, Your Honor. Is that --

THE COURT: Is that mic working?

MR. STERN: Is that better?

THE COURT: Much better.

MR. STERN: It requires -- disconnect communications among computers within a department. Now, it's not clear what legal plan or what record would justify an injunction of this

1 kind, but the one thing that is clear is that we do not have
2 those circumstances in this case. First, what is the
3 irreparable harm --

4 THE COURT: If you don't know what circumstances
5 would justify an order like this, how do you know that this
6 doesn't meet the standard?

7 MR. STERN: Well, Your Honor, when I say that I
8 don't know, I find it difficult to imagine that there are any.
9 So, perhaps that's --

10 THE COURT: You find it difficult to imagine what?

11 MR. STERN: That there are any circumstances that
12 could justify a judicial order requiring a cabinet agency to
13 disconnect major computer systems from the internet. I'm just
14 leaving open in theory the possibility that some circumstances
15 that I cannot imagine --

16 THE COURT: Well, suppose there was rampant evidence
17 of computer security problems and people hacking into the
18 computers and actually jeopardizing trust information? Trust
19 data?

20 MR. STERN: Your Honor, if that were the case, that
21 -- we're many stages away from that, but even assuming that
22 were the case, it should be clear what this order does. I
23 mean, there has to be a balancing of whatever interests are
24 arguably protected by an injunction and what the real and
25 obvious impact of that injunction is. And, again, as was said

1 in our briefs, the Court can imagine what the effect would be
2 if the Court were told to disconnect all of its computers from
3 communicating with each other and the outside world.

4 Now, that problem for the Department of --

5 THE COURT: Actually, for some of us who don't like
6 the computer business anyway, that would be very pleasant.

7 MR. STERN: But, well let me say that for -- you
8 know, me as a lawyer, I could actually disconnect my computer.
9 It would be a problem. People would get angry with me if I
10 didn't respond on e-mails. Yeah, I could do it. A cabinet
11 agency cannot do that for all the reasons that are spelled out
12 in the declarations and the testimony of this case.

13 THE COURT: Counsel, counsel I don't think you're
14 really focused on Judge Tatel's question. Suppose -- put
15 aside the scope of the injunction. Suppose there was evidence
16 that persons internal to the Department of Interior had used
17 the computer -- the insecure computer situation to steal money
18 away from the beneficiaries by somehow purloining money out of
19 accounts. Suppose that was true.

20 MR. STERN: Well, it wouldn't justify this
21 injunction. And, again, the question --

22 THE COURT: It would certainly justify an
23 injunction, would it not?

24 MR. STERN: Well, I'm not sure, Your Honor, because
25 the injunction would --

1 THE COURT: You mean if somebody was stealing money
2 away from the Indians, that wouldn't justify an injunction?

3 MR. STERN: Let me be clear, Your Honor. What I
4 mean by that is that it would have -- if an injunction was
5 necessary to deal with irreparable harm, so that for example
6 people are always having problems with -- you know, with
7 financial institutions where there are data being obtained by
8 third parties, all sorts of things happen to them, they
9 generally don't then go in and get an injunction against
10 Citibank to require a disconnect from the internet, and what
11 happens is they're made whole by Citibank --

12 THE COURT: Wait a minute. That goes to the scope
13 of the injunction. But if there were evidence in this case
14 that money were being taken away from the accounts in some
15 fashion by people internal or externally, that would certainly
16 justify an injunction of some kind, would it not? No?

17 MR. STERN: No, the reason I'm -- Your Honor, I'm
18 not trying to be difficult. My only point is that an
19 injunction has to be premised on the idea that an injunction
20 is necessary because there is irreparable harm, so that if, in
21 fact --

22 THE COURT: Oh, in other words there wouldn't be
23 irreparable harm because they could get their money damages,
24 is that your theory?

25 MR. STERN: No, not just money damages, but would

1 have to be, look --

2 THE COURT: I thought the government -- Interior
3 Department was a trustee.

4 MR. STERN: Of course it's a trustee --

5 THE COURT: You don't need to show irreparable
6 injury to -- I wasn't aware of the fact that you needed
7 irreparable injury to enjoin a trustee from violating the
8 trustee's trust obligations.

9 MR. STERN: Of course you are, Your Honor. There's
10 no -- these -- the rules of -- the rules of equity are not
11 suspended for a trustee. What this Court has said is that a
12 court will -- duties are rooted in statutes, but that a
13 court's equitable powers can be --

14 THE COURT: Suppose I had a -- supposed I had a
15 trust -- personal trust. Which I don't. But suppose I did.
16 And suppose the trustee, instead of keeping the trust assets
17 in a bank, kept it in a box in front of his house. Are you
18 suggesting that if I went to court and sought an injunction to
19 protect my trust assets, I would lose because I hadn't shown
20 that anybody had tried to take the money out of the box?

21 MR. STERN: But, I mean, your credit -- you would
22 have shown imminent irreparable harm, I assume is the
23 predicate of --

24 THE COURT: Nobody's tried to get into the box at
25 all. It's been there for two years. Everybody's just walking

1 past --

2 MR. STERN: That's right. If you could demonstrate
3 that no reasonable -- that a reasonable trustee would not keep
4 trust assets in a box in his home, which I assume would be an
5 easy showing to make, that would be --

6 THE COURT: Well, but isn't the question here
7 whether or not keeping trust assets in a box in front of the
8 house is the same as keeping them in an unsecured computer
9 system?

10 MR. STERN: Well, Your Honor --

11 THE COURT: Isn't that true? That's the question.
12 Isn't it?

13 MR. STERN: The -- there are similarities -- in the
14 sense there are similarities and it's --

15 THE COURT: (Indiscernible) degree and it's also a
16 question of fact, correct?

17 MR. STERN: There are questions of fact --

18 THE COURT: And we have a District Court finding
19 here of imminent risk to an unsecured computer system.

20 MR. STERN: Your Honor, what we do not have -- we
21 have a statement of that. That is not tied to anything. And
22 we have to -- look, we don't have --

23 THE COURT: Excuse me --

24 MR. STERN: -- there is a class here --

25 THE COURT: -- the Court cited -- excuse me, the

1 District Court cited evidence in the record of security
2 breaches.

3 MR. STERN: Your Honor, security breaches -- what
4 we're talking about here are a situation in which you have
5 endless numbers of things to do under the FISMA Scheme. And
6 anybody in any agency can go through and say, oh you didn't do
7 this, there's a problem over here, and so forth. Here's what
8 we do not have. Just as in this Court's IT opinion where the
9 Court said there is no evidence at that time that anyone other
10 than the special master had ever hacked into a computer system
11 -- ITD today after a 59-year trial, after 10 years of
12 litigation --

13 THE COURT: There's no evidence in my hypothetical
14 that anyone tried to break into the box and steal my trust
15 assets.

16 MR. STERN: Well, Your Honor, there's no evidence
17 that any private trustee would have breached any duty to
18 maintain trust records by keeping trust data in this kind of a
19 computer system.

20 THE COURT: Counsel, it seems to me you're making an
21 argument that's far in excess of anything unique in this case,
22 and I'm sort of mystified. Maybe part of the problem with all
23 this litigation is there's such extreme arguments presented by
24 both sides and extreme language; particularly in the
25 plaintiff's briefs. But I am troubled by your -- it sounds to

1 me that you're taking the position now that it was
2 inappropriate for the District Judge to even consider a
3 security problem with respect to the trust accounts.

4 MR. STERN: No, Your Honor. That's not our position
5 at all.

6 THE COURT: So, then if it was legitimate fraud, I'm
7 sure that it would not be very wise to take that position
8 since it would be directly counter to an opinion of this
9 Court, but assuming that's true, then it's certainly possible
10 that some breaches of security could affect the possibility of
11 giving the plaintiffs relief in this case and could affect the
12 trust duty of the government, couldn't it -- isn't that true?

13 MR. STERN: Yes, Your Honor.

14 THE COURT: So, why were you fussing with Judge
15 Tatel's hypothetical and suggesting that, gee, there's nothing
16 that could happen here that would justify any kind of an
17 injunction?

18 MR. STERN: Your Honor, if I -- if I said that, I
19 did not mean to say that. That was not the position we took
20 in the briefs, it's not the position that I mean to take here
21 this morning. Our position is, indeed, much simpler and it
22 really does -- and it really isn't a very far-reaching
23 position as Your Honor suggests because I don't think that we
24 need to go very far.

25 THE COURT: Now, let me ask you another question

1 about the federal legislation. What is it --

2 MR. STERN: FISMA?

3 THE COURT: FISMA. It's not clear to me reading
4 your briefs that I understand your view as to the relationship
5 between FISMA and your fiduciary obligations. Is it your
6 argument that your fiduciary obligations are limited to
7 compliance with FISMA?

8 MR. STERN: I think that certainly one can't examine
9 the fiduciary duties without reference to FISMA, but again the
10 -- here it's really --

11 THE COURT: There's a simple yes or no answer to
12 that question.

13 MR. STERN: Well --

14 THE COURT: You can then explain it.

15 THE COURT: You do argue -- the government does
16 argue in its brief that FISMA controls -- the FISMA standard
17 controls the case.

18 MR. STERN: Well --

19 THE COURT: It's not quite clear that you argue
20 that, Judge Tatel. They sort of suggest it, but they don't
21 argue it.

22 MR. STERN: Well, what we think is this, is that
23 what this Court has said is that the duties are fiduciary in
24 the government context that was rooted in the statute, but
25 they can be filled out by common law duties.

1 Now, whether or not -- we're leaving open the possibility
2 -- the plaintiff's theory is you have -- the only duty that
3 they cite is the common law duty, and they talk about it on
4 page 26 of their brief. They say you've got a common law duty
5 to maintain the trust records, which we don't find.

6 Let's take that on its terms. You come in, you have a
7 lawsuit. You don't show that in any respect what's happening
8 with these records breaches a standard of care that would have
9 given rise to an action against the --

10 THE COURT: Would you like to answer my question
11 now, counsel? Would you like me to repeat it now? Is it your
12 view that compliance with FISMA exhausts any fiduciary duty
13 you owe to the beneficiaries of this trust, and if you're in
14 compliance with FISMA, whatever that means, that's the end of
15 the game?

16 MR. STERN: I think that at bottom that is the
17 answer, Your Honor, however the assumption -- and the reason
18 that --

19 THE COURT: Or, you could have a situation where
20 somebody was stealing money out of the trust and still be in
21 compliance with FISMA, couldn't you?

22 MR. STERN: I mean, and that's why --

23 THE COURT: That's why it's a little difficult to
24 make the argument you're making. But you're making it anyway.

25 MR. STERN: Your Honor, what we say is this, that

1 the kind of relief that would have to be ordered -- and it's
2 very difficult to talk about this in the abstract because we
3 really wouldn't have --

4 THE COURT: Yeah, that's like hypotheticals, right?

5 THE COURT: You know, I also don't understand how
6 your response to Judge Silverman is consistent with *Cobell VI*.
7 In *Cobell VI* the Treasury Department argued that the
8 destruction of certain records complied with the Archived
9 Document Destruction Act. And we rejected that. We said the
10 obligation to destroy check records more than six years old,
11 "cannot excuse Treasury from its fiduciary obligation." Isn't
12 it exactly the same issue?

13 MR. STERN: Your Honor, it is not a crucial part of
14 our argument in this case --

15 THE COURT: But you just -- the only reason I ask
16 you that question is when you answered Judge Silverman's
17 question, you said, "at bottom that is our position".

18 MR. STERN: I think that --

19 THE COURT: That FISMA is ultimately controlling.

20 MR. STERN: I think -- I really took the --

21 THE COURT: At bottom -- the drain just went out of
22 the bottom?

23 MR. STERN: Look, we --

24 THE COURT: I don't mean to tease you too much, but
25 the truth of the matter is that can't possibly be your

1 position, is it?

2 MR. STERN: Our position, Your Honor, is -- you're
3 probably right, but our position is that if plaintiffs had
4 come in and had demonstrated a problem -- a real problem that
5 some form of injunctive relief might have been appropriate,
6 that it would have to be based on a real problem, a violation
7 of a real -- relief would have had --

8 THE COURT: But FISMA has nothing to do with --

9 MR. STERN: Excuse me, Your Honor.

10 THE COURT: This statute really has nothing to do
11 with the case then, does it?

12 MR. STERN: Your Honor, I think the statute is
13 relevant because what it does show -- and I'll tell -- I mean,
14 I'll tell you why I think that it's relevant. First of all,
15 it's the statute that the plaintiff's like relied on initially
16 when they brought their TRO and PI, but the -- but we think
17 the statute is relevant because what it does is it puts into
18 context the kinds of problems that agencies face, it
19 emphasizes the need to prioritize risks, to look at -- to
20 conduct matters on a system-wide basis, and to make cost
21 effective decisions, and a lot of this trial -- in fact most
22 of the trial was not -- has nothing to do with dangers to IITD
23 in particular at all. It was just lots of discussion about
24 what's going on under the FISMA. And that's one of the
25 reasons we talk about the FISMA is to explain that, look, that

1 can't be the basis for plaintiff's claim --

2 THE COURT: Mr. Stern, let me ask you this. If I --
3 if we -- if I didn't accept your argument about the FISMA --
4 assume I just don't accept that as a foundation for the
5 defendant's trust duties here, then also assume for a minute
6 that I don't accept your argument that the absence of evidence
7 of a break-in is dispositive, okay? Then to me the case comes
8 down to the District Court's finding of imminent risk. That's
9 what the District Court has done; he's held a 60-day hearing.
10 He's, on the basis of the record, concluded that there's an
11 imminent risk and he's ordered a remedy based on that. And I
12 don't see anywhere in your brief beyond your argument about
13 FISMA and the argument that a break-in is required that his
14 imminent risk finding is clearly erroneous.

15 MR. STERN: I don't think that that's right, Your
16 Honor. I mean --

17 THE COURT: In fact, I couldn't find the words
18 clearly erroneous in your brief.

19 MR. STERN: No, we are -- I mean, we're not arguing
20 that --

21 THE COURT: You see the reason I'm asking you the
22 question. If you're wrong about FISMA and if you're wrong
23 about the dispositive effect of there not having been evidence
24 of a non-Interior Department break-in -- that is, someone who
25 wasn't the IG -- if you're wrong about both of those, then

1 what we're left with as an appellate court is a district court
2 finding of imminent risk. And you haven't challenged it as
3 clearly erroneous.

4 MR. STERN: Your Honor, what we do cite are
5 statements like if -- look, even imagine that somebody
6 actually for the first time not only got in the front door,
7 which is what these contractors did -- let's assume that they
8 were then able to sort of open interior doors, so to speak,
9 and get further in, okay, what hasn't happened. Then let's
10 suppose that they actually do something. Now, at the point
11 that they would actually do something, there is no showing
12 that anything would be irreparable. I mean, what Diann Sandy,
13 plaintiff's witness, said --

14 THE COURT: Then if there's no evidence that
15 anything would be -- so, your argument is that -- see, now
16 you're back to where you were at the beginning, I think, that
17 there's no basis for injunctive relief at all because even if
18 the money was stolen, the Court could order it repaid. Right?

19 MR. STERN: Your Honor, no, that's not --

20 THE COURT: That's what you just said.

21 MR. STERN: Your Honor --

22 THE COURT: You said, "There's no evidence of
23 irreparable harm." That's what you just said.

24 MR. STERN: Yes, Your Honor. There is no evidence
25 of irreparable harm.

1 THE COURT: But there is evidence in the record of
2 internal computer fraud --

3 MR. STERN: Excuse me, Your Honor?

4 THE COURT: Internal computer fraud.

5 MR. STERN: Fraud?

6 THE COURT: Yes. There's evidence -- there's record
7 evidence of it. The District Court pointed to several
8 examples of employees of the Department committing internal
9 computer fraud.

10 MR. STERN: I have to just -- I'm not sure what that
11 is, Your Honor. And there are certainly --

12 THE COURT: All right, here I'll --

13 MR. STERN: I mean, again, that doesn't have to do
14 -- look, if you had -- let's assume that you had five
15 criminals in the Department who did something, you know, and
16 they were caught. That doesn't mean that you have sever --
17 you know, I've got a good idea; let's sever your computer
18 communications.

19 THE COURT: Why don't you take a look at your -- do
20 you have a joint appendix in front of you?

21 MR. STERN: Excuse me, Your Honor?

22 THE COURT: Do you have the joint appendix in front
23 of you?

24 MR. STERN: All of it?

25 THE COURT: Well, do you have page 445. It's the

1 District Court's decision. He points to -- he points to two
2 instances in '04 of computer fraud by employees that resulted
3 in substantial losses to the government. (Indiscernible) --

4 THE COURT: (Indiscernible) involve Indian trust
5 accounts?

6 MR. STERN: No. I mean, all this --

7 THE COURT: Is that your answer?

8 MR. STERN: Well, Your Honor, this says that they
9 have explained in his personal familiarity with the two
10 incidents of computer fraud --

11 THE COURT: Right.

12 MR. STERN: -- by career employees which resulted in
13 some --

14 THE COURT: Substantial loss. Well, there is
15 evidence --

16 MR. STERN: He -- there's no claim by a single one
17 of the \$500,000 class -- \$500,000 class members --

18 THE COURT: So, I -- so, there has to be evidence
19 not just that the Interior's computer system is vulnerable,
20 but that there is specific evidence that these trust funds
21 have been accessed, right, that's your position?

22 MR. STERN: Yes. Of course. I mean, you can't look
23 -- let's imagine --

24 THE COURT: Well, let me go back -- can I go back to
25 my hypothetical? Of my trust funds being kept in a box on the

1 street?

2 MR. STERN: Yes.

3 THE COURT: I mean, are you seriously telling me
4 that if there is evidence that the computer system in which a
5 trustee is keeping -- let's drop my hypothetical. If there's
6 evidence that the computer system in which a trustee is
7 keeping trust resources, trust assets, has been broken into,
8 is vulnerable, that people have committed computer fraud, that
9 the Court could not enter injunctive relief because there
10 isn't evidence that the particular trust account wasn't broken
11 into?

12 MR. STERN: Yes, Your Honor --

13 THE COURT: That's your position?

14 MR. STERN: Your Honor, there is not an invulnerable
15 computer system in this country --

16 THE COURT: Let me be sure; that's the government's
17 position. It's not the -- before the trustee -- before the
18 Court can grant injunctive relief in a trust situation, there
19 has to be actual evidence that the trust account at issue was
20 threatened --

21 MR. STERN: Or, subject to imminent risk of harm;
22 yes.

23 THE COURT: Well, that's what the District Court has
24 found --

25 MR. STERN: Your Honor --

1 THE COURT: -- and you haven't made a challenge --
2 clearly erroneous challenge --

3 MR. STERN: Your Honor, that -- that conclusion does
4 not connect to any actual subsidiary real findings for --

5 THE COURT: Well, had you made this argument in your
6 brief, you might have a case, but I don't see it.

7 MR. STERN: Your Honor, we tried to make that point
8 in our brief -- many points, including the statements about
9 what would happen if somebody managed to get it out. There's
10 endless testimony about the various security systems that are
11 in there, about -- it has to be understood there's penetration
12 testing, which is the basis of all this, but the contractors
13 themselves they use say, look, there's not a system in the
14 world, Mahach says, that could withstand this. In fact,
15 there's --

16 THE COURT: What's the government's objection to the
17 District Court's request that it look into segregating these
18 accounts?

19 MR. STERN: Your Honor, the reason -- it's not that
20 the government hasn't looked into segregating it. The
21 government has looked into segregating it. What Mr. Brown --
22 when the Court says why haven't you segregating Minerals
23 Management Service? (Indiscernible), Your Honor, that would
24 cost \$40 million to do --

25 THE COURT: I agree about the Mineral Management.

1 What about other agencies? Couldn't it be done in other
2 agencies?

3 MR. STERN: Your Honor, it's unclear -- what
4 Interior has done at various points, as it says in its
5 testimony, it's tried to segment in various ways by giving
6 extra protection to trust data. What the testimony is is that
7 -- is that Interior has given trust data priorities well
8 beyond what the actual risk to it is because of this
9 litigation --

10 THE COURT: Is that the same as segregating it?

11 MR. STERN: No, Your Honor. And the problem --
12 look, segregating -- you can make things increasingly safe by
13 segregating them out until you just have an unplugged computer
14 and that's the last --

15 THE COURT: No, but isn't -- but doesn't this avoid
16 the unplugged computer problem.

17 MR. STERN: No, but, Your Honor, the point is
18 segregating, you --

19 THE COURT: If it's segregated --

20 MR. STERN: -- every time you can like --

21 THE COURT: Just explain to me why -- just explain
22 to me in a simple sentence or two. Why is it that segregating
23 the accounts doesn't solve your problem?

24 MR. STERN: Because, look, Mr. Brown does testify
25 about that and we cite that in the brief, and he explains,

1 look, as long as you're going to still have things being
2 online, you're still going to have exposure. The only way you
3 get out of these problems really is -- I mean, and this is
4 another thing that the FISMA sort of gets at, is the goal is
5 not to sort of maximize security against risks that don't
6 exist with out regard to functionality. The other hand is to
7 make the best use of the data you have and if you're going to
8 expand the uses of the data, of course you also increase
9 vulnerabilities and you've got to make an adjustment is the
10 actual risk to this data such that it justifies --

11 THE COURT: Counsel, let me --

12 MR. STERN: -- restricting the --

13 THE COURT: -- if I may ask a couple of questions.

14 If I understand your position, your first position is there is
15 no justification for this injunction because there's no
16 showing of a imminent threat to these trust accounts because
17 there's no showing that anybody penetrated the computer system
18 directed towards the trust accounts. Is that correct?

19 MR. STERN: That's part --

20 THE COURT: Wait, wait, let me -- that's one of your
21 arguments. Now, I'm puzzled. I thought you did clearly
22 contend that the injunction was improper for that reason, but
23 Judge Tatel says, well, it's a finding of fact and you never
24 said it was clearly erroneous. I'm not sure that -- I'm not
25 sure I understand your answer to that. I'm not sure you have

1 to say it's a finding that's clearly erroneous in an equitable
2 situation, but what is your response to that? Because I
3 understood your argument to be --

4 MR. STERN: We --

5 THE COURT: -- that there's no need for an
6 injunction because -- there's no premise for an injunction
7 because there's no showing of a potential penetration of the
8 trust accounts.

9 MR. STERN: No, that's right. I mean, look, we --

10 THE COURT: Well, all right. What do you say to
11 Judge Tatel saying, well, you didn't really challenge the --

12 MR. STERN: No, we --

13 THE COURT: -- finding of fact. No?

14 MR. STERN: Excuse me, Your Honor. Let me correct.
15 The brief -- and the brief speaks for itself obviously --

16 THE COURT: Oh, I wish that were true.

17 MR. STERN: The -- what we have -- we have stressed
18 throughout the brief that there is no showing of imminent
19 irreparable harm. We say that over and over again and we
20 explain why we think that. I mean --

21 THE COURT: Did you use the term "clearly
22 erroneous"?

23 MR. STERN: No, I don't think we used the term
24 "clearly erroneous".

25 THE COURT: But your argument is that there's no

1 showing of imminent harm because there's no evidence of a
2 break in.

3 MR. STERN: Excuse me, Your Honor?

4 THE COURT: There's no evidence of a break in
5 because the test.

6 MR. STERN: That's not the only reason that we think
7 that there is no evidence of irreparable harm.

8 THE COURT: That's my question. What's the other
9 reason? That was my question.

10 MR. STERN: The -- the -- that's part of it, but
11 also there is the whole system of secondary checks that would
12 come into play. There's the absence of any showing that if
13 somebody -- that if you got much further in than any person
14 has ever gotten, that you would be able to do something that
15 would result in irreparable harm as opposed to creating
16 problems. Mr. Brass, the IG contractor, says, look, it's one
17 thing for me to maintain sort of -- he talks about flying
18 under the radar and keeping a low profile. He says as long as
19 I'm just looking at things, but if I were to try and delete
20 accounts or try to get money out, he says, now that's
21 different.

22 That's what he -- that's the IG contractor --

23 THE COURT: If I may review what I understand to be
24 your case. Number one, there's no showing of the irreparable
25 harm for the grounds that you've just described. Number two,

1 even if there was, the injunction is much too broad.

2 MR. STERN: Yes, Your Honor.

3 THE COURT: All right. I think those are your basic
4 two arguments. Although it's sometimes difficult to penetrate
5 your brief to find those two arguments.

6 Now, I want to ask you a question concerning petitioners'
7 point in which I think you slough in your brief. Petitioners
8 argue that there is tension between the cases on this Court of
9 Appeals; particularly -- if I can remember my numbers
10 correctly, *Cobell VI* and is it *XI* or *XII* --

11 THE COURT: Twelve --

12 THE COURT: -- as compared to *XVII* and the one I sat
13 in in the --

14 THE COURT: (Indiscernible).

15 THE COURT: Right. Now -- and that is relevant to
16 our FISMA discussion, too, because the government has
17 traditionally argued that this is an APA case. Plaintiffs
18 have argued this traditionally is a trust case. Our opinions
19 have tried to straddle to a certain extent, although it is
20 fair to say that in 13 we sort of dismissed APA, and then we
21 brought it back a couple of times.

22 Now, petitioners argue this is tension in our cases. You
23 say no tension at all; Court of Appeals acts with one voice,
24 everybody knows that. Well, don't petitioners have a point?
25 Aren't -- isn't there some tension in our cases?

1 MR. STERN: No, Your Honor. I really don't --

2 THE COURT: Oh, come on. We said in -- was it 13 we
3 said APA is irrelevant and the last two cases in the
4 structural injunction we said APA is relevant --

5 MR. STERN: This is an argument that petitioners
6 made, plaintiffs made to the second structural injunction
7 panel that there was tension and that the structural
8 injunction in that panel, if it persisted in the bad ways that
9 the previous structural injunction panel would continue to
10 fall in into a trap. And this Court didn't accept it then and
11 it shouldn't accept it now, and the reason for that, I
12 think --

13 THE COURT: Well, whether we accept it is a separate
14 question. As a lawyer, don't you see certain tension in our
15 cases? It may be dicta in one case as opposed to a holding in
16 another, but isn't there some tension?

17 MR. STERN: I think that Judge Williams' opinions in
18 the two second structural injunction opinions go back and
19 discuss the 240 F.3d, the first case in considerable detail --

20 THE COURT: What about Judge Rogers opinion with, I
21 think Judge Ginsburg and Judge Randolph on it in which they
22 say specifically APA doesn't apply.

23 MR. STERN: That's right. Well --

24 THE COURT: Is that consistent with the structural
25 injunction?

1 MR. STERN: What the Court said there is you don't
2 get *Chevron* deference. And this Court --

3 THE COURT: They said APA doesn't apply. Didn't we
4 say that?

5 MR. STERN: I don't remember if --

6 THE COURT: I thought we did.

7 MR. STERN: -- but that wouldn't have been
8 consistent with the first of this Court's opinions --

9 THE COURT: Oh, 6 actually doesn't say APA doesn't
10 apply. It's more in --

11 MR. STERN: Well, the Court specifically based -- it
12 says how am I looking at this, what case do I have in front of
13 me, and it says it's a 7061, and that's how it --

14 THE COURT: But it seems to me petitioners are
15 right, is there's some tension. Now --

16 MR. STERN: Even if there's some tension, Your
17 Honor, I mean what we're saying is this. The one thing that
18 we know about this Court's last IT opinion -- we know a couple
19 of things. First of all, they vacated the actual injunction
20 in front of them and that's what they were doing so they
21 didn't have to consider all the other ramifications of the
22 injunction.

23 We also know that it --

24 THE COURT: So, you're suggesting the APA line was
25 just dicta.

1 MR. STERN: Whether or not --

2 THE COURT: It's a legitimate point.

3 MR. STERN: I think that it is dicta, but let's also
4 be clear at that point there had never been a trial on
5 information technology security, so the Court was looking at
6 sort of statements going back to 2001 and it's saying, look,
7 in 2001 you guys admitted that there was a problem and now
8 you're complaining that the District Court is continuing to be
9 involved with IT security, you know even though the special
10 master regime is over, and what the Court said is, no, the
11 Court can stay involved in that and the government is wrong in
12 thinking that the case is purely about an accounting.

13 And a week later in 392 F.3d this Court said exactly the
14 same thing, and I know because I was arguing that point in
15 both cases, I lost that point in both cases. But what the
16 Court said in both is, no, it's not just about an accounting.
17 They said that twice.

18 THE COURT: If you look through our opinions, I thin
19 you can come to the conclusion that there's a trust obligation
20 which is in some respects greater than the government's
21 obligation under APA, yet APA is relevant with respect to the
22 means in which the government conducts its trust obligation,
23 which for me would be one way of trying to pull them together,
24 but I don't think the government ever makes any effort in its
25 brief to try to pull them together.

1 MR. STERN: Well, what we say is this. If you take
2 plaintiffs common law claim here at face value -- they don't
3 do very much to explain what their common law claim is, and
4 the one thing that can't be is you can't just go over this --
5 what the District Court essentially says is --

6 THE COURT: Do me a favor. Would you go back for
7 rebuttal time and think about how we should conceptually
8 relate the APA with the trust obligation. Think about it. I
9 don't think the government has done a very good job of
10 suggesting how those two concepts relate together. You simply
11 argued APA, plaintiffs simply argue trust, and it's like ships
12 passing in the night. But I ask you to consider that.

13 MR. STERN: I accept that, Your Honor, and I guess
14 the only point that I'd make is just taking the common law --

15 THE COURT: I take it you can --

16 MR. STERN: -- doesn't work.

17 THE COURT: I think the presiding judge would let
18 you sit down at this point. You can think about that for
19 rebuttal.

20 THE COURT: Take the hint.

21 MR. STERN: Thank you.

22 ORAL ARGUMENT BY DENNIS M. GINGOLD, ESQ.

23 ON BEHALF OF THE APPELLEES

24 MR. GINGOLD: May it please the Court, my name is
25 Dennis Gingold representing the plaintiffs in this litigation,

1 and Your Honor we are the appellees, we are not the
2 petitioners.

3 This --

4 THE COURT: I'm sorry, did I use the term
5 petitioner?

6 MR. GINGOLD: Yes, you did, Your Honor.

7 THE COURT: You mean suggesting, therefore, an APA
8 relationship and you wish to make that clear from the start
9 there's no APA relationship; this is a trust matter? Forgive
10 me, my use of the term "petitioner" comes out of habit, not
11 out of malice.

12 MR. GINGOLD: That's right, Your Honor, and
13 traditionally Indians lose, so usually they are the
14 petitioners.

15 THE COURT: I beg your pardon?

16 MR. GINGOLD: Usually Indians lose in the trial
17 court, which is why they are the petitioners in this circuit.
18 Your Honor, we --

19 THE COURT: Usually Indians lose in the trial court?
20 Are you -- what kind of argument is that, counsel?

21 MR. GINGOLD: Your Honor, historically this is an
22 important case. Historically --

23 THE COURT: And we're to take your argument
24 seriously now that the problem in this case is Indians usually
25 lose in the trial court?

1 MR. GINGOLD: No, I was explaining why Indians are
2 usually referred to as petitioners.

3 THE COURT: Petitioners is not a pejorative.

4 MR. GINGOLD: No, I didn't think it was. I was just
5 correcting the --

6 THE COURT: Well, I take your correction in the
7 spirit in which it was offered.

8 MR. GINGOLD: Thank you very much, Your Honor. It
9 was intended just as a correction. But, thank you.

10 Your Honor has identified the tension between *Cobell VI*
11 and *Cobell XII*, *Cobell XIII* to a certain extent and, indeed,
12 *Cobell XVII*. And that is a tension that the appellees have
13 identified in their briefs. It is a tension that has existed
14 from the beginning of this case, although we felt it was
15 settled in *Cobell VI*. We felt *Cobell VI* accurately described
16 the duties of the Secretary as a trustee delegate as fiduciary
17 duties and as fiduciary duties, they are to be measured with
18 more scrutiny and subject to the more stringent standards of a
19 fiduciary. Not merely as a secretary discharging her duties
20 as an administrator or as the Court in *Cobell VI* explained,
21 donning the mantle of an administrator, but to contend that
22 the secretary is entitled to deference and expertise --

23 THE COURT: Your position is *Cobell XIII* and *Cobell*
24 *XVII* were inconsistent with prior cases, is that correct?

25 MR. GINGOLD: *Cobell XVII*, in our opinion, is in

1 conflict with *Cobell VI* and *Cobell XII*. We believe *Cobell*
2 *XIII* can be read consistently, although there are some
3 inconsistencies in *Cobell* --

4 THE COURT: So then why didn't you file a petition
5 for rehearing? A suggestion en banc --

6 MR. GINGOLD: Your Honor --

7 THE COURT: Because, as the government points out,
8 you let that go by.

9 MR. GINGOLD: Your Honor, our understanding of the
10 first in time rule in this circuit, and in every other circuit
11 but the Eighth Circuit, is that the first in time rulings
12 prevail and it's the subsequent rulings that are questionable
13 with regard to their validity if they are not reconcilable
14 with the earlier rulings. Therefore, it would be incumbent
15 upon the government, not the trust beneficiaries, to seek en
16 banc review and they did not do so.

17 THE COURT: Well, you're talking about 12 and 13
18 being inconsistent --

19 MR. GINGOLD: No --

20 THE COURT: -- essentially.

21 MR. GINGOLD: No, Your Honor. We believe 12 is
22 entirely consistent with *Cobell VI* and --

23 THE COURT: No, no, no -- *XIII* is inconsistent with
24 *XII*.

25 MR. GINGOLD: No, we believe the holding in 13 is

1 not inconsistent because --

2 THE COURT: Well, the language is.

3 MR. GINGOLD: There is some language that is
4 inconsistent.

5 THE COURT: I thought you were --

6 THE COURT: When you say -- you know, actually when
7 you talk about first in time, *XII* and *XIII* were issued exactly
8 the same time, exactly the same month.

9 MR. GINGOLD: Your Honor, if I may? *Cobell XII* was
10 issued on December 3rd and *Cobell XIII* was issued on December
11 10th.

12 THE COURT: You're making a distinction between the
13 seven days?

14 MR. GINGOLD: Well, we have not seen in any of the
15 cases we reviewed on first in time whether the distinction is
16 one day or one year, first in time prevails. We have not seen
17 that --

18 THE COURT: Well, we were issuing them at the same
19 time. They were circulating so the judges must have thought
20 they were consistent.

21 MR. GINGOLD: Your Honor, I do not speak to what the
22 judges were thinking --

23 THE COURT: Yes, I noticed.

24 THE COURT: Let me ask you this about your argument
25 about -- maybe the reason why -- maybe the reason why *17* is

1 different from *Cobell VI* and *XII* is they dealt with different
2 things. *Cobell VI* and *XII* dealt with the Interior
3 Department's trust responsibility; something on which the
4 courts don't defer, whereas *Cobell XVII* dealt with a remedial
5 issue on which we do defer. So, maybe there isn't really
6 anything inconsistent about them at all; just that they were
7 dealing with different things.

8 MR. GINGOLD: Your Honor --

9 THE COURT: What do you think of that?

10 MR. GINGOLD: I think it's an interesting argument,
11 Your Honor, but that's not what --

12 THE COURT: I wasn't making an argument. I was
13 asking you whether maybe these decisions aren't as
14 inconsistent as you think they are --

15 MR. GINGOLD: Your Honor --

16 THE COURT: -- because *XVII* is dealing with a
17 different kind of animal that *VI* and *XII*. That's all.

18 MR. GINGOLD: Your Honor, the accounting duty --

19 THE COURT: Huh?

20 MR. GINGOLD: The accounting duty is a fundamental
21 trust duty.

22 THE COURT: It is a duty, but the question in 17 was
23 the remedy or the duty. The remedy for the violation.

24 MR. GINGOLD: That's correct.

25 THE COURT: Okay. So, you acknowledge, don't you,

1 that our deference would be dramatically different in those
2 two situations?

3 MR. GINGOLD: Your Honor, I think the case in 17
4 turned on the details that were dictated to the secretary in
5 order for her to achieve compliance with the clear trust duty,
6 and those details were included in the structural injunction.
7 No such details were included in the October 20, 2005
8 injunction. Indeed, in accordance with the remand
9 instructions of the *Cobell* Court -- of the *Cobell XII* Court,
10 the judge was careful not to detail either the standards or
11 the methods the secretary should achieve compliance, whereas
12 in *XVII* that's exactly what the judge did and this Court found
13 problems with.

14 I think --

15 THE COURT: Let me go back to the basic arguments
16 the government makes; the first of which is that there is no
17 showing in this entire massive proceeding in the District
18 Court -- the government I think implicitly takes the position
19 this is a sideshow anyway. Then this massive proceeding down
20 in the District Court to look into the security of the
21 computer systems. There is no showing that anyone ever
22 penetrated the trust accounts -- individual trust accounts
23 either internally or externally in such a fashion as to cause
24 any harm. True?

25 MR. GINGOLD: No, that's false, Your Honor.

1 THE COURT: False.

2 MR. GINGOLD: That's correct.

3 THE COURT: Who did?

4 MR. GINGOLD: Let me explain. Plaintiff's 246 is
5 found at JA-9358. That is a -- an e-mail and attached to it
6 is a draft affidavit that is dated August 8th, 2003. It is
7 from Mary Kendall Adler, who is the general counsel of the
8 Office of Inspector General and she is also the Deputy
9 Inspector General.

10 THE COURT: And she was stealing money out of the
11 trust account?

12 MR. GINGOLD: No, she specifically identified in the
13 attached draft affidavit that was -- that section, among
14 others, were redlined prior to its finalization. But in this
15 exhibit, which is 246, she specifically said that there were
16 numerous instances of fraud and mishandling of trust funds and
17 over the previous two years, there were nine alone that had
18 been discovered.

19 THE COURT: I'm sorry?

20 MR. GINGOLD: Over the previous two years, that's
21 from 2001 to 2003, there were nine that were being
22 investigated.

23 THE COURT: And did the District Judge rely on that?

24 MR. GINGOLD: It's -- the District Judge did not
25 rely on that in his findings, but it is part of the record

1 below --

2 THE COURT: Well, wait a minute. If he doesn't rely
3 on it in his findings, it's not before us.

4 MR. GINGOLD: Your Honor --

5 THE COURT: That's why I didn't know anything about
6 it.

7 MR. GINGOLD: Your Honor, there are several others,
8 if I may?

9 THE COURT: Yes, well the question is did the
10 District Judge make any finding that anybody had penetrated
11 the trust accounts and diverted money or did other -- created
12 any other harm?

13 MR. GINGOLD: The District Judge's findings, based
14 on my understanding of his decision, Your Honor, is that the
15 funds and the data are in imminent risk of harm. He did not
16 spec --

17 THE COURT: No, that's not my -- there may be a
18 difference in view as to whether there is a risk. Certainly
19 Judge Tatel's hypothetical of a shoebox is an interesting and
20 troubling one. But, the government's basic argument, as I
21 understand it, is that, look, there was no showing that
22 anybody penetrated and caused any difficulty and, therefore,
23 this draconian injunction is wholly inappropriate.

24 MR. GINGOLD: Your Honor, if I may, I don't think
25 that's what they said. I think they said there's no evidence

1 in the record. I think that's what they said.

2 THE COURT: Well, look, we're reviewing the District
3 Court's opinion.

4 MR. GINGOLD: Your Honor, the District Court --

5 THE COURT: We don't find facts on our own. So, if
6 the District Judge did not find as a fact that any -- there
7 had been any penetration of these accounts by any malign
8 agent.

9 MR. GINGOLD: The District Court did not make that
10 specific finding, Your Honor; I agree.

11 THE COURT: Well, why then should there be an
12 injunction?

13 MR. GINGOLD: Your Honor --

14 THE COURT: Let alone this injunction which is quite
15 extraordinary.

16 MR. GINGOLD: Your Honor, if, in fact, all the trust
17 data has been corrupted and compromised --

18 THE COURT: What is corrupted?

19 MR. GINGOLD: Corrupted means altered, modified,
20 deleted, or otherwise --

21 THE COURT: Do you have any evidence of that?

22 MR. GINGOLD: Evidence of what, Your Honor?

23 THE COURT: That anybody corrupted the trust data by
24 penetrating the computers?

25 MR. GINGOLD: Yes, as a matter of fact in --

1 THE COURT: No, no, has the District Judge ever
2 found that? I shouldn't have asked that question. Once
3 again --

4 MR. GINGOLD: The District Court did not make that
5 specific finding, but it is evidence of record, Your Honor.

6 THE COURT: Well, without that finding, I find that
7 injunction quite extraordinary.

8 MR. GINGOLD: No, Your Honor I was also not finished
9 answering the question.

10 THE COURT: Go ahead, counsel.

11 MR. GINGOLD: Thank you very much.

12 THE COURT: It's my pleasure.

13 MR. GINGOLD: If, in fact, the data was corrupted or
14 compromised or otherwise altered or modified by an
15 unauthorized person, and there was no audit trail or ability
16 to determine what has been done, who did it, when it was done,
17 which the Judge has found, Your Honor, because of the absence
18 of audit controls and other devices that are necessary to
19 insure that can be done, then any change in the data will be
20 irreparable harm to the trust beneficiaries.

21 It is important to understand this particular point. If,
22 in fact, all the data has been compromised, you don't need an
23 injunction, Your Honor. It's the bulldozer on the front lawn.
24 If the bulldozer already takes the house down, you don't need
25 an injunction because you're not going to order anyone to put

1 the house back up. It's not going to work. The house has
2 been destroyed.

3 Same thing if the bulldozer is on the front lawn of this
4 courthouse. We have a situation for years, Your Honor. Since
5 1984 these systems have been open systems. The Judge -- the
6 District Court Judge carefully considered the impact of these
7 problems and did state explicitly that this is an open IT
8 architecture. The open IT architecture exposes critical trust
9 data and critical trust funds to the risks that we've
10 discussed. The Inspector General himself testified that he
11 had major concerns about the trust funds, in addition to the
12 record that has existed that the Chief of the Appellate
13 Section of the U.S. Attorney's Office, in another exhibit via
14 a memorandum that's included in the record -- it's Plaintiff's
15 247 -- specifically referenced testimony of a government
16 expert who testified under oath on June 11th, 2001 that there
17 was unauthorized access, open access to trust information,
18 files disappeared, changes were made, nobody would be able to
19 be able to identify what was done or when it was done. That
20 goes back, Your Honor, four year -- five years.

21 This problem with regard to the data has been a serious
22 problem in this litigation --

23 THE COURT: But what impact does the most recent
24 opinion authorizing sampling have on this matter?

25 MR. GINGOLD: I beg your pardon? Could you please

1 explain that question? The sampling?

2 THE COURT: Yes. In other words, it's not going to
3 be necessary in order to give an appropriate accounting, which
4 is after all what this lawsuit started out as. It's not going
5 to be necessary to insure every account is perfectly correct,
6 is it, if we're going to rely on sampling?

7 MR. GINGOLD: Your Honor, my reading of *Cobell XVII*
8 says that the Judge cannot rule out the possibility of using
9 statistical sampling to be able to discharge the duty that was
10 declared in *Cobell VI*. And the duty that was declared in
11 *Cobell VI* was an accounting of all funds and all items of the
12 trust. *Cobell XIII* and *Cobell XVII* in fact even discussed the
13 fact that plaintiffs would not be harmed by the absence of the
14 structural injunction because in the end, each trust
15 beneficiary needs to be paid whatever he is owed, including
16 imputed income and interest. Your Honor, if it is possible,
17 and that's all I believe *Cobell XVII* said -- if it is possible
18 to use statistical sampling to be able to identify all funds
19 and all items of the trust for each trust beneficiary, there's
20 no reason not to use statistical sampling. I believe that's
21 what *Cobell XVII* and *XIII* said.

22 The realities, Your Honor, that remains to be seen.

23 THE COURT: When we were faced in this litigation
24 constantly with a question of whether or not the methodology
25 of accounting, which was requested or ordered by the District

1 Judge, far exceeded the cost -- far exceeded in cost the trust
2 corpus, which struck this Court as, to put it bluntly,
3 foolish.

4 MR. GINGOLD: May I respond, Your Honor?

5 THE COURT: Yes, please.

6 MR. GINGOLD: Your Honor, it does not even come
7 close to approaching the trust corpus, even if it's \$13
8 billion. Your Honor, the trust corpus -- let me explain.
9 Thank you.

10 The trust corpus involves 11 million acres of land today.
11 It originally was 54 million acres of land. It involves all
12 the subsurface natural resources. That's oil, gas, timber.
13 We're dealing with aggregates. We're dealing with precious
14 metals. This is the trust corpus, Your Honor.

15 What you are talking about, I believe, is the annual
16 revenue that is reported coming from the trust corpus. The
17 question here, though, goes back to what Cobell VI said. And
18 Cobell VI said there must be an accounting for all items of
19 the trust and all funds. And the Court -- this Court
20 underscored all. It italicized all funds. The Cobell XVII
21 and Cobell XIII Courts said for each trust beneficiary. Not
22 for some. Not for those that are living today and not for
23 those who died 15 or 20 years ago, and not for those whose
24 accounts were only open on October 25th, 1994, which is what
25 the government argued. It's for all trust beneficiaries --

1 THE COURT: Well, we did react to the \$13 billion
2 for the accounting.

3 MR. GINGOLD: Your Honor, we reacted that way, too,
4 if you'll recall.

5 THE COURT: Yes, I know. You came up and said that
6 injunction, we didn't even ask for.

7 MR. GINGOLD: That's correct.

8 THE COURT: Yes, which was sort of extraordinary.

9 MR. GINGOLD: Well, Your Honor, we have no desire to
10 see the United States Government waste \$13 billion on an
11 accounting. Our position is that whether you're using the
12 narrow regulations, whether you're using Clear Column Federal
13 Computer Act, whether you're using the Federal Records Act or
14 any other statutory scheme independent of the Trust Reform
15 Act, the obligation is to insure the integrity of the data and
16 the assets held by the United States Government in its
17 systems. That's what every statutory scheme has said since
18 1987 to the present. That's what the regulatory schemes say
19 from 1987 to the present, including OMB Circular A-130,
20 Appendix 3, and Your Honors, Appendix 3 deals with
21 interconnectivity specifically.

22 THE COURT: Can I ask you another conceptual
23 question which I put to counsel for the government? Our cases
24 are somewhat intentioned with respect to APA opinions like
25 *Luhan* and *Utah*. You've always argued those cases are

1 irrelevant; this is a straight trust case. Although we have
2 also held that even in a straight trust case, it wouldn't make
3 sense to have some of the costs that the District Judge
4 imposed. You've pointed out there really is quite a
5 difference between the typical trust cast in which the
6 trustees will never expend funds to the detriment of the
7 beneficiaries, but here the funds spent by the government come
8 out of the general taxpayers revenue, whereas the
9 beneficiaries are a separate subclass, so that presents a
10 slight difference in some respects, and some have called it
11 distortion.

12 But, in any event, my point is we have cases which rely
13 on *Utah* and *Luhan* -- APA cases. We've said now three or four
14 times that APA is relevant. We've also said it's irrelevant.
15 You've pretty much argued all along it's irrelevant, but our
16 cases have said it's relevant. How do you square the circle?
17 How would you put them together?

18 MR. GINGOLD: Let me clarify if we have not been
19 clear enough, Your Honor. We believe there is a relevance to
20 the Administrative Procedure Act. We believe the relevancy
21 does not trump the fiduciary duties and the standards that are
22 applied as a trustee. We believe that's what *Cobell VI* and
23 *Cobell XII* --

24 THE COURT: Yes, but how do you put them together?

25 MR. GINGOLD: Your Honor, I think you actually

1 articulated very effectively during the government counsel's
2 argument. The Court has the authority to order the trust --
3 the secretary acting as a trustee, acting as a trustee
4 delegate to discharge the trust duties and the Court has the
5 authority to determine whether or not the secretary has
6 accomplished that.

7 The Court doesn't have the authority based on what this
8 Court has said to dictate in detail what steps must be taken
9 for the secretary to bring herself into compliance. There is
10 tension. That tension can be reconciled if done properly.

11 One of the other major factors that is important in this
12 regard is what *Cobell VI* stated with regard to undue delay.
13 If there is undue delay, the Court can even go further. Undue
14 delay means justice denied. Consequently this Court, quite
15 intelligently and quite carefully in *Cobell VI* and *XII*
16 described the tension between the Administrative Procedure Act
17 and described the trust duty of the United States Government
18 which dates back with respect to individual Indians. This is
19 an important point. There's a difference between the
20 individual Indian trust and the tribal trust. But with
21 respect to individual Indians that dates back to 1887, because
22 in accordance with *Mitchell II* and with regard to *White*
23 *Mountain Apache*, the United States Government has exercised
24 control over the trust lands since that period of time and
25 with that exercise of control are the traditional trust duties

1 and obligations unless Congress unequivocally stated to the
2 contrary. And, Your Honor, that hasn't been the case.

3 Indeed, in the Trust Reform Act of 1994 this Court
4 interpreted that literally to mean what Congress said. This
5 reaffirms the trust duty of the United States. It reaffirms
6 some of the obligations, including the need to be able to
7 reconcile balances, daily and annually. In order to do that,
8 you need accurate records. In order to do that, you need
9 adequate systems. In order to do that, you need adequate
10 staff --

11 THE COURT: Let me ask you -- let me stop for
12 another point. The government points out that its
13 recordkeeping, its computer systems really are not -- compared
14 actually in recent terms, compare favorably with various other
15 government agencies, including the Defense Department. You
16 recognize you're not dealing with Chase Manhattan Bank --
17 although it's no longer Chase Manhattan Bank -- whatever --

18 MR. GINGOLD: Morgan, Your Honor.

19 THE COURT: Morgan, that's right with the latest
20 merger. You're dealing with the United States Government
21 which has, as you know, not the best record in the world
22 across the board on its ability to handle computers and,
23 indeed, any newspaper reader noticed that the FBI has had a
24 devilish time in the last 10 years trying to get its computer
25 system to operate appropriately, and indeed even to have the

1 correct security for it. It's also true of the Defense
2 Department. You can't make a silk purse out of a sow's ear.
3 Isn't that fair? I mean, how can you ask -- you're basically
4 asking for the Interior Department's computer system to be
5 equivalent to Chase Bank, whereas what you want for Interior
6 something much better than the government provides even in the
7 areas of national defense.

8 MR. GINGOLD: Your Honor, what I'd like to say is as
9 follows. Trust duty is not dependent on the inability or the
10 incompetence of the trustee. The government is the trustee,
11 not the Department of Interior, and not the Department of the
12 Treasury. The entire United States Government, each branches
13 delegates include the Secretary of the Interior and the
14 Secretary of the Treasury. The trust is established and
15 rooted in statute and treaty. It is defined by common law and
16 trust law and trust principles --

17 THE COURT: So, in other words it's your view that
18 the District Judge is perfectly entitled to ask for a much
19 better computer system than the Defense Department, the CIA,
20 and the FBI have?

21 MR. GINGOLD: Your Honor --

22 THE COURT: Because there's this trust obligation --

23 MR. GINGOLD: Yes. The answer is yes. The FBI is
24 not a fiduciary to individual Indian trust beneficiaries. The
25 property - this is real property. These are property rights

1 that are protected by due process in this country. The FBI
2 doesn't have that property and the Defense Department --

3 THE COURT: Well, they only have the obligation to
4 protect the United States against terrorist attacks and in
5 your view, that's much less important than the trust
6 obligation here?

7 MR. GINGOLD: No, Your Honor. If the United States
8 Government believes that's sufficient security for those
9 systems, the government has made that decision. The United
10 States Government hasn't made a decision with regard to the
11 trustee - trust beneficiaries here, that the trust
12 beneficiaries are entitled to the protections that any other
13 trust beneficiary is entitled to in this country. They have
14 not unequivocally stated that Indian trust beneficiaries are
15 not entitled to have their property rights protected like
16 anyone else does, and, Your Honor, the Indians didn't ask for
17 their property to be put in trust. It is in trust and that's
18 what we're dealing with.

19 Once you take someone's property in trust, you have an
20 obligation to protect it. There is 800 years of trust law,
21 including 200 years of trust law in this country that define
22 those standards in common law --

23 THE COURT: When you refer to you, you're not
24 referring to me, are you?

25 MR. GINGOLD: No, Your Honor.

1 THE COURT: Thank you.

2 THE COURT: Let me --

3 THE COURT: Go ahead.

4 THE COURT: I want to pursue a couple of different
5 issues. Well, they're related to Judge Silverman's first line
6 of questioning. Would you agree that in fashioning the
7 injunction here the District Court had an obligation to
8 balance the harm he found to the Indian's interests against
9 the effect of the remedy on the Interior Department?

10 MR. GINGOLD: Yes, I would, Your Honor.

11 THE COURT: You agree with that.

12 MR. GINGOLD: Yes, sir.

13 THE COURT: Where in this opinion would I find him
14 doing that?

15 MR. GINGOLD: I think throughout the opinion,
16 including the Judge's decision to exclude from the scope of
17 the order any system that affects the health, welfare,
18 property of anyone in this country or the national security of
19 this country -- and, by the way, the Court explicitly
20 discussed the fire suppression responsibilities of the
21 Interior Department. The Court explicitly excluded those
22 systems.

23 THE COURT: Okay, anything beyond that?

24 MR. GINGOLD: Yes, Your Honor. The Court did a
25 balancing and talked about the fact that there is irreparable

1 harm to the trust beneficiaries as he's found it based on the
2 59-day record of proceeding --

3 THE COURT: Right.

4 MR. GINGOLD: -- and he -- he was left with a
5 problem, Your Honor, because the government put on no evidence
6 during the 59-day trial of harm of consequences as a result of
7 a disconnection. This was an important point, and you may
8 recall it was raised in the briefs that the government filed
9 with regard to the stay that has been imposed by this Court on
10 the injunction.

11 What we have here is a situation where the government is
12 now stating in a declaration what was not stated during the
13 59-day proceeding that a variety of different problems and
14 harms would result, and there is some strong language that
15 described this. The reality is, Your Honor, that was not put
16 forth by the government during the proceeding.

17 The government initially argued that they were caught by
18 surprise that plaintiffs were seeking a disconnection. They
19 thought they were dealing solely with --

20 THE COURT: Your point then is that -- are you now
21 saying to me that the government before the District Court
22 never argued that a disconnect injunction would adversely
23 affect the Interior Department?

24 MR. GINGOLD: They did argue that, Your Honor --

25 THE COURT: Okay.

1 MR. GINGOLD: -- but they did not say it would cause
2 irreparable harm or a catastrophic situation.

3 THE COURT: For example -- I mean, the District
4 Court found -- the District Court didn't condemn all of the
5 Interior's computer systems. It found, for example, that some
6 of the bureaus like MMS and DIA had fairly good protection
7 from intrusion, right? So, why were they in -- why were they
8 disconnected?

9 MR. GINGOLD: I couldn't hear that last part, Your
10 Honor?

11 THE COURT: Why were those two agencies
12 disconnected?

13 MR. GINGOLD: Those two agencies were disconnected
14 originally on December 5th, 2001 and then they continued
15 disconnected --

16 THE COURT: I know, but I'm not asking you whether
17 they -- I know they were, but the District Court found that
18 they had fairly good protection against intrusion.

19 MR. GINGOLD: They had extremely good connection
20 against intrusion from the internet because they had
21 disconnected. That's what the Court said.

22 And, Your Honor, with respect to the irreparable -- the
23 balance of harms the Court did specifically discuss the
24 balance of harms beginning at page 274 of the opinion where he
25 starts in category (iii), balance of harms, and he went

1 through a fairly detailed analysis, including describing the
2 public interests that could be affected by what your concerns
3 are. So, the Court did, Your Honor --

4 THE COURT: Let me ask you a question then about the
5 definition of IITD.

6 MR. GINGOLD: Yes, sir.

7 THE COURT: Is it your understanding that this
8 definition is limited to confidential information? Is it
9 supposed to be?

10 MR. GINGOLD: Your Honor, it's -- is it limited to
11 confidential information?

12 THE COURT: Yeah, confidential trust information.

13 MR. GINGOLD: Your Honor, I believe it is limited to
14 confidential trust information because I believe what the
15 Court says in the defined term, it is based on the information
16 that the government relies on in discharging its trust duties.
17 That's what the -- that's also part of the definition of
18 individual Indian trust data in the injunction. And this
19 definition of trust data actually was --

20 THE COURT: Do you have the definition in front of
21 you there?

22 MR. GINGOLD: I do not have the definition --

23 THE COURT: Well, it says -- it says anything that
24 refers to directly -- anything that refers to directly or
25 indirectly and generally or specifically a federal record --

1 affects the existence of individual Indian trust assets. And
2 then under 5(a) it says which was created for or by Interior
3 in connection with management of Indian -- individual Indian
4 trust information.

5 So, there's nothing in there that refers to -- in fact,
6 that language could cover the government's brief in this case.

7 MR. GINGOLD: I beg your pardon?

8 THE COURT: I said that language could cover the
9 government's brief in this case.

10 MR. GINGOLD: Your Honor, this is the language that
11 the -- that is almost identical to the language used by the
12 government in the December 17, 2001 consent order. This
13 carries over from that period of time.

14 THE COURT: The government argues that this
15 injunction is too broad, and I'm asking you whether this
16 definition standard is to confidential information, because as
17 I read it, it's much broader.

18 MR. GINGOLD: No. It's related, as I understand it,
19 to the information necessary and relied on by the United
20 States Government to discharge its trust duties to individual
21 Indian trust beneficiaries. If, Your Honor, some of that
22 information happens to be public, notwithstanding the Privacy
23 Act issues, then, in fact, it's covered. If, in fact, there
24 are not Privacy Act issues, then that information could be
25 public.

1 If you're dealing with confidential financial
2 information, you're dealing with property of individuals and
3 -- even of those properties, Your Honor that should be
4 confidential information. I'm not sure what information that
5 the United States Government relies on to discharge the trust
6 duties of the United -- that the Interior relies on to
7 discharge the trust duties of the United States --

8 THE COURT: So (indiscernible) -- individual data?

9 MR. GINGOLD: Your Honor, if you read on with regard
10 to 5(a) --

11 THE COURT: -- 5(a) --

12 MR. GINGOLD: That's right.

13 THE COURT: -- (indiscernible) in connection with
14 the management of individual Indian trust assets.

15 MR. GINGOLD: That's correct --

16 THE COURT: That's the government's brief.

17 MR. GINGOLD: That's the standard. Whatever is --

18 THE COURT: But that would cover the government's
19 brief.

20 MR. GINGOLD: Your Honor --

21 THE COURT: There's nothing in this thing that says
22 it's limited to confidential information.

23 MR. GINGOLD: Your Honor, we're not aware of trust
24 information which is -- involves the -- which is financial and
25 which involves the property rights of individual which is not

1 confidential information and we haven't -- and nothing was
2 presented during the 59-day hearing which indicated that any
3 of the information that the government was relying on is not
4 confidential. Indeed, that's why so many of the -- of
5 documents and so much of the transcript testimony is under
6 seal.

7 THE COURT: If -- one last question. If we
8 disagreed with your view about the adequacy of the District
9 Court's findings here and thought this injunction was too
10 broad, what -- what elements of it are most important to
11 preserve with respect to your interests?

12 MR. GINGOLD: It's a difficult question. I'll try
13 and give you an intelligent answer. The -- because of the --

14 THE COURT: In other words, my hypothetical -- my
15 question is we can't have an Interior-wide injunction. Assume
16 that we -- let's say that's what we do think. I'm just asking
17 you hypothetically. Assume we think it's too broad. What
18 elements of this are critical protecting your clients'
19 interests?

20 MR. GINGOLD: I think the BIA and OST disconnected.
21 Bureau of Indian Affairs and Office of Special Trustee
22 disconnections are critical to be included.

23 THE COURT: Is that because that's where most of the
24 trust data is?

25 MR. GINGOLD: No, unfortunately that's not where

1 most of it is, Your Honor. As the government has recently
2 disclosed, it's suffused throughout the department.

3 THE COURT: So, why did you pick those two agencies?

4 MR. GINGOLD: Well, I'm starting with those two
5 agencies, if I may --

6 THE COURT: Okay.

7 MR. GINGOLD: -- because as far as I know, that's
8 all they have. I don't think they have any other data or
9 information other than trust information, so I'm trying to
10 start with the low-lying fruit, if I may?

11 THE COURT: Mm-hmm.

12 MR. GINGOLD: Second, I would say that MMS
13 contractors, such as Excenture and USI Network, which house
14 all the oil and gas royalty information generated for MMS,
15 that must be included, unless the contractors -- OMB -- 3130,
16 Appendix 3, that FISMA, that NARA, that -- identifies are also
17 disconnected, then there will never be any possibility of
18 protection for the trust beneficiaries because there has never
19 even been an analysis independently performed by the
20 government. Notwithstanding a 2000 opinion from the
21 solicitor, notwithstanding a 2004 opinion from the assistant
22 general counsel -- or, associate general counsel of the Office
23 of Inspector General, notwithstanding admonitions from OMB,
24 they have never been addressed.

25 That also includes the tribes, Your Honor. Indian tribes

1 -- there are approximately 100 tribes by compact, contract, or
2 cooperative agreement that with the Department of Interior
3 that administer trust assets on behalf of the United States
4 Government. There are -- organization that is required to
5 protect the data the same way any contractor and the United
6 States Government is to protect the data. The response to
7 Hord Tipton, the CIO, in an e-mail as to why they did not --
8 and this is part of the record of these proceedings as well --
9 did not protect the data in the tribal systems is because if
10 they had to discharge that responsibility would be a nightmare
11 for the Department of Interior.

12 This is not a delegable function. The trust duty of the
13 United States is a government duty to the trust beneficiaries.
14 It cannot be delegated and diminished through a compact
15 contractor (indiscernible).

16 Your Honor, as far as we know the only data that's held
17 by the tribes in the administration of the individual Indian
18 trust pursuant to contract, compact, and cooperative agreement
19 is individual Indian trust data. They, too, should be
20 disconnected in accordance with statute, regulation and this
21 Court's orders with regard to the protection of trust data
22 wherever it is. These are government records. This is
23 individual Indian trust data. These are assets of the trust.
24 Under *White Mountain Apache*, the United States Government may
25 not allow the trust assets to fall into ruin on the watch of

1 any particular Interior Secretary. That was the 2003 opinion
2 of the Supreme Court.

3 THE COURT: Thank you. Your time is way over.

4 MR. GINGOLD: Thank you.

5 THE COURT: Mr. Stern, your time is up, but you can
6 take two minutes, including to answer Judge -- question.

7 THE COURT: It seems there are two questions you
8 should answer in two minutes. One is my conceptual question
9 and secondly, you should focus hard on Judge Tatel's concern
10 that you have not challenged as any finding of fact to the
11 effect that there's irreparable -- that there is a danger of
12 irreparable harm -- a risk of irreparable harm.

13 ORAL ARGUMENT OF MARK B. STERN, ESQ.

14 ON BEHALF OF THE APPELLANTS

15 MR. STERN: Well, let me sort of try to make a
16 couple points which I think respond to these. Let me say that
17 the government doesn't dispute the existence of a duty to
18 preserve trust records. However, what would follow from that
19 is, if plaintiff wanted to proceed on that point, they would
20 need to show that either there was harm or imminent harm, or
21 that the government was failing to comply with standards that
22 would apply to a tribal trustee or some kind of trustee.
23 There's no showing of that at all, much less that this form of
24 injunctive relief would issue in any similar way --

25 THE COURT: Is it really true that it's a finding of

1 fact?

2 MR. STERN: Your Honor, our entire brief is the
3 motive to showing --

4 THE COURT: No, no counsel. Should you assume the
5 correctness of my esteemed colleague's statement that the
6 question of whether there is a risk of irreparable harm is a
7 finding of fact?

8 MR. STERN: Your Honor, I don't think that the
9 overall conclusion, you know, is a finding of fact. I think
10 that when there are subsidiary findings of fact that -- and
11 those subsidiary facts don't add up to the conclusion, but if
12 the conclusion were thought to be a finding contrary to our
13 view, that it would be clearly erroneous. We haven't used the
14 word clearly erroneous, but it would be under any standard it
15 doesn't -- this record does not support that conclusion.

16 And there's discussion about the role of the APA and sort
17 of remediation and so forth. Leaving aside sort of, you know,
18 our view that there's been no demonstration of entitlement to
19 an injunction, no showing of a failure to comply with the duty
20 that would be visited on a private trustee in any
21 circumstance --

22 THE COURT: Well, where did that come from? Excuse
23 me, where did that -- I haven't heard that argument before.
24 So --

25 MR. STERN: It's in our brief.

1 THE COURT: So, going back to my hypothetical again
2 with my box on the street. I'd have to have evidence that
3 other trustees didn't do that?

4 MR. STERN: Well, Your Honor, here the showing would
5 be --

6 THE COURT: Isn't it simply a question of imminent
7 risk?

8 MR. STERN: Well, first of all there is no showing
9 of imminent risk. But look --

10 THE COURT: The District Court has found that --

11 THE COURT: Is that a finding of fact?

12 THE COURT: The District Court has made -- the
13 District Court has made that finding.

14 MR. STERN: Your Honor --

15 THE COURT: It hasn't?

16 MR. STERN: Your Honor, as I just said, if that is a
17 finding, it is clearly erroneous. We think it's a conclusion
18 and the subsidiary findings do not support it. But under any
19 standard, it is wrong. We would -- there is an other ground
20 you could say, look it doesn't matter -- and this is going
21 back to your first question which I understood to be your
22 hypothetical about the box which says, look, if we were doing
23 something that any private trustee would know, whether or not
24 there would actually be an irreparable harm or an imminent
25 threat, you can just know no private trustee is allowed to do

1 this.

2 THE COURT: Why isn't it enough to say private
3 trustees don't keep trust data on unsecured computers?

4 MR. STERN: Because there is no showing that the
5 computers are not secured. Everybody acknowledges that the
6 computers are secure in the sense that we've got --

7 THE COURT: Isn't there a question of the extent to
8 which they're secure --

9 MR. STERN: That's right, and there is no argument
10 -- I mean, Judge Silverman says, well, you can't expect the
11 government to do what, you know, sort of Morgan Stanley or
12 whoever might do. There's no showing that what you would get
13 with Morgan Stanley would be better. I mean, this is --
14 there's nothing like that in here.

15 Yeah, plaintiffs come in and they go, look, there are
16 various problems. Now, of course the District Court says have
17 you made progress? Absolutely substantial progress. Laudable
18 progress. The IG reports say monumental change. Both the
19 2003 and the 2004 reports, which are the only ones that were
20 in there in that trial say that. There's no doubt, \$100
21 million spent on that in three years. The testimony from the
22 IG contractors about the defenses that were -- and the double
23 and triple layers of security are quite remarkable so to refer
24 to these as an unsecure system, there's no way -- there's
25 nothing in this record that would suggest --

1 THE COURT: I just want to get that one -- want you
2 to focus on the conceptual issue; the interrelationship
3 between the trust duty and APA and how we should look at that
4 going forward given the tension in our cases?

5 MR. STERN: Well, I think that the question -- I
6 think what Your Honor said before is really key that the role
7 of the Court --

8 THE COURT: You both have said that. I wish I
9 understood what I said.

10 MR. STERN: Well, what I understood this Court to be
11 saying is -- again, we don't dispute the duty to maintain a
12 trust record and let's just suppose, you know, for, you know,
13 argument sake, obviously from my point of view that there was
14 some showing of a violation of a duty here. At that point,
15 you would then have sort of the logic of the last --
16 injunction opinion which you had a finding that the government
17 needed to do an accounting. That was the premise.

18 And what the Court said is, look, just because it
19 involves fiduciary duties, the Court can't come in and treat
20 this as its domain and displace the agency as the principle
21 person for working out compliance with a broad statutory
22 mandate. And let's understand that what's been done here --
23 first of all, there are huge numbers of systems that would
24 come offline and the way they come back online is that you
25 have to write plans not based on any particular standard --

1 not a FISMA standard, not an Interior standard, but some new
2 standard, which then is subject each and every one of these is
3 subject to discovery, further litigation proceedings, and then
4 the Court could decide whether it likes part of the plan, all
5 of the plan, and all the further relief. That's all in the
6 order. This is not my imagination. This is the way this is
7 really supposed to work.

8 THE COURT: Thank you, Mr. Stern.

9 MR. STERN: Thank you.

10 THE COURT: Your time is up. Let's move on to the
11 next.

12 (Recess.)

13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Judith A. Downey

Date

DEPOSITION SERVICES, INC.