TRANSCRIPT OF PROCEEDINGS

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

IN RE: GALE A. NORTON,
SECRETARY OF THE INTERIOR IN
HER OFFICIAL CAPACITY,

Petitioner.

No. 03-5288

Pages 1 through 52

Washington, D.C.
Date: October 14, 2005

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SECRETARY OF THE INTERIOR IN
HER OFFICIAL CAPACITY,

Petitioner.

No. 03-5288

Friday, October 14, 2005

Washington, D.C.

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

BEFORE:

CHIEF JUDGE GINSBURG AND CIRCUIT JUDGES HENDERSON AND RANDOLPH

APPEARANCES:

ON BEHALF OF THE PETITIONER:

THOMAS M. BONDY, ESQ.

ON BEHALF OF THE RESPONDENT:

MARK I. LEVY, ESQ.

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C O N T E N T S

ORAL ARGUMENT OF: PAGE

Thomas M. Bondy, Esq.
On Behalf of the Petitioner 3; 47

Mark I. Levy, Esq.
On Behalf of the Respondent 18

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1 P R O C E E D I N G S

2 THE CLERK: Case No. 03-5288, In Re: Gale A.
3 Norton, Secretary of the Interior in her Official Capacity,
4 Petitioner. Mr. Bondy for the petitioner; Mr. Levy for the
5 respondent.

6 ORAL ARGUMENT OF THOMAS M. BONDY, ESQ.
7 ON BEHALF OF THE PETITIONER

8 MR. BONDY: May it please the Court, my name is
9 Thomas Bondy. I represent the petitioner, the Secretary of
10 the Interior.

11 In April 2003 Special Master Alan Balaran engaged in
12 conduct requiring his disqualification as a federal judicial
13 officer in this case. He remained in office and continued to
14 issue reports. Pending the disqualification motion filed by
15 the government in District Court and pending this mandamus
16 petition filed in this Court --

17 JUDGE GINSBURG: And those are the reports that are
18 the subject of your current petition?

19 MR. BONDY: That's right, Your Honor.

20 JUDGE GINSBURG: And what -- how many reports?

21 MR. BONDY: Three.

22 JUDGE GINSBURG: And one deals with the NAID
23 situation. What are the other two?

24 MR. BONDY: The critical one is the NAID one issued
25 in April 2003. The other two, both of which are contained in

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1 the Joint Appendix, were issued in August and September of
2 2003.
3 JUDGE GINSBURG: Those are the site visit reports?
4 MR. BONDY: Yes. Both of them are site visit
5 reports.
6 JUDGE RANDOLPH: Did they have anything --
7 JUDGE GINSBURG: And are your objections the same?
8 JUDGE RANDOLPH: -- yeah.
9 MR. BONDY: I'm sorry, Your Honor?
10 JUDGE RANDOLPH: Go ahead.
11 JUDGE GINSBURG: Are you objections to the three
12 exactly the same?
13 MR. BONDY: Well ultimately; yes, but if I can
14 explain, Your Honor. Obviously, the core report about which
15 we are concerned, because it embodies the improper judicial
16 conduct in this case, is the NAID report issued in April 2003.
17 JUDGE GINSBURG: Well, what's wrong with the other
18 two?
19 MR. BONDY: Well, what's wrong with the other two is
20 not what's wrong with them on their own terms. It's that at
21 that point, the Special Master was irretrievably and fatally
22 tainted because of the bias that revealed itself in April
23 2003. At that point, the Special Master was disqualified from
24 playing any role as a judicial officer in this case because he
25 had demonstrated that he was biased. So, going forward from

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1 that case, he could play no role and issue no reports.

2 JUDGE GINSBURG: So, those two reports -- what's the

3 sequence -- timing again?

4 MR. BONDY: The NAID report, which is the first one,

5 was issued in April 2003. The two site visit reports were

6 issued respectively in August and September of 2003. All

7 three of those reports are in the Joint Appendix.

8 JUDGE HENDERSON: Did Smith have anything to do with

9 the last two?

10 MR. BONDY: No. No, Your Honor. And if I can go

11 back to the first report, Your Honors, it's important to

12 understand the nature of the conduct that led to why we are

13 here today.

14 In -- the Special Master, Alan Balaran, was tasked by the

15 District Court with looking into allegations by a computer

16 consulting firm, NAID, that the Department of the Interior and

17 a third party, a competing contractor, EDS, had essentially

18 conspired to provide false information to the District Court

19 in its required quarterly reports about the status of the

20 TAAMS computer system.

21 In carrying out the task of looking into the merits of

22 those allegations, what Mr. Balaran did, totally off the

23 record, is collaborate with and actively participate with

24 NAID's vice president, the accusing party, to gather,

25 evaluate, and analyze the evidence. That process resulted in

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1 a report; the NAID report that we're talking about, which
2 found, not surprisingly, that NAID was the bearer of truth in
3 this controversy and that EDS and Interior, indeed, had
4 conspired both to deprive NAID of contractual opportunities
5 and to provide false information or misleading information to
6 the Court.
7 JUDGE RANDOLPH: These sites visits; what was the
8 subject matter of the report?
9 MR. BONDY: That's a little bit difficult to answer,
10 but let me try. And the reason it's difficult is because of
11 the way Mr. Balaran -- the breadth with which he viewed his
12 mandate. The third one, for example, the Dallas site visit,
13 what happened there is unannounced ex parte Mr. Balaran
14 visited a Dallas, Texas MMS site -- Mineral Management Service
15 -- and he had done this many times before. This time he did
16 it ex parte, no Department of Justice counsel were present,
17 and Mr. Balaran felt that it was appropriate for him to show
18 up at a Department of Interior installation unannounced, talk
19 to whoever he wanted, and literally sort of roam the hallways
20 talking to people and see what he said -- see what he saw.
21 And in this instance, after a couple of hours -- he spent
22 about two hours there -- he was ordered to leave the building
23 by the government.
24 And he issued a report -- and just to answer your
25 question as one illustration, he said that in the two hours he

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1 spent in the building, he saw -- in his words -- the
2 unexplained presence of a shredder. He saw a shredder in the
3 building and he said that was unexplained. That had to be
4 explained and was cause for further investigation. That's
5 what he said in his report.
6 JUDGE RANDOLPH: And what has happened to these two
7 reports? Has the Court adopted them?
8 MR. BONDY: The Court has not formally adopted them,
9 but it's also not the case that nothing has happened. For
10 example, on the basis of both of those reports -- and we're
11 talking about Reports No. 2 and 3 now, the site visit reports
12 - plaintiffs have sought and obtained further discovery in the
13 case. Also, plaintiffs continue to cite these reports; in
14 particular the NAID report --
15 JUDGE RANDOLPH: What do you mean on the basis of
16 those reports plaintiffs have sought and obtained further
17 discovery? Tell me what that means.
18 MR. BONDY: Plaintiffs made discovery requests, the
19 basis for which was those reports. Said because of what the
20 Special Master said in those reports, we need to seek further
21 discovery.
22 JUDGE RANDOLPH: Right, have you complied -- has the
23 government complied with those discovery requests?
24 MR. BONDY: At least one deposition, yes, actually
25 took place as a result.

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1 JUDGE RANDOLPH: Is there any pending discovery
2 requests on the basis of these reports?
3 MR. BONDY: I'm not quite sure how to answer that.
4 There were pending discovery requests that were granted in
5 part and nothing -- some of those nothing has ever happened as
6 a result. But, also, further things have happened as a result
7 of the discovery. So, the deposition I was referring to led
8 to further motions by the plaintiffs.
9 And the point, if I can step back Your Honor, to I think
10 a higher level of generality, notwithstanding the fact that
11 the District Court has not formally adopted these reports, he
12 has allowed them to be filed into the record and expressly
13 ruled that there was nothing improper about their issuance in
14 the first place and as a result, plaintiff's have effectively
15 and successfully made these reports part of the fabric of the
16 ongoing District Court proceedings. They cite them, they use
17 them, our witnesses have been cross-examined at trial
18 proceedings based on some of these reports. As we've
19 discussed, discovery has been sought and obtained. And even
20 in this Court in their brief before you today plaintiffs cite
21 these reports - and, again, especially the NAID one, but all
22 of them in general for the truth --
23 JUDGE RANDOLPH: Well, the reports are in the Joint
24 Appendix.
25 MR. BONDY: Yes, they are.

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1 JUDGE RANDOLPH: And the relief you request is
2 vacate?
3 MR. BONDY: Yes.
4 JUDGE RANDOLPH: How do we vacate a report?
5 MR. BONDY: I'm not sure how to answer that, Your
6 Honor --
7 JUDGE RANDOLPH: I don't even know what that means.
8 MR. BONDY: Well, to hold that they should never
9 have been issued because the judicial officer who authored
10 them was irretrievably biased --
11 JUDGE RANDOLPH: But even if we did that, the
12 reports are circulating. How many copies of this? I have no
13 idea --
14 MR. BONDY: But it's not just --
15 JUDGE RANDOLPH: What rule of law would there be to
16 prevent, so long as you have a copy and its relevant, the
17 plaintiff's counsel from asking question on the basis of the
18 material --
19 MR. BONDY: Well, but the point is now, the status
20 quo in the District Court based on what the District Court has
21 done is that these reports properly count for something. And
22 the point is they should count for nothing. They should never
23 have been issued for the most fundamental of reasons; the
24 judicial officer who wrote them was fatally tainted for bias
25 before he ever wrote them. They should never have been issued

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1 and vacater is required.

2 And I want to make clear, we think we just have a clear
3 legal entitlement to that, like any other litigant. The
4 United States has the right to have its litigation decided by
5 a neutral, unbiased judicial officer, which this person was
6 not. He was required to go, and he's gone and his reports --

7 JUDGE RANDOLPH: I'm still having trouble
8 understanding what vacating a report -- if the Supreme Court
9 vacates a decision of this Court, they don't erase the opinion
10 off of -- out of F.3d. And people can still talk about it and
11 ask questions about it and do whatever they want with it. It
12 has no precedential effect, but that's about all.

13 Now, the -- here the Judge hasn't adopted this report, so
14 there's nothing -- there's no judicial order to vacate. So,
15 I'm not sure what you mean by that. You want a declaration
16 from the Court that Balaran was in violation of his ethical
17 responsibilities and, therefore, the report is tainted. What
18 more?

19 MR. BONDY: Well, that is what we want, and that the
20 report should be vacated. And --

21 JUDGE RANDOLPH: But what does that mean?

22 MR. BONDY: But it does -- one of what the -- again,
23 let me step back. The Special Master here at the eleventh
24 hour, before this Court has originally scheduled this oral
25 argument, of course submitted his resignation and charged in

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1 his resignation letter, of course, that the recusal efforts
2 were, themselves, a sham, reflecting not just malfeasance, but
3 corruption by United States Government officials. And the
4 real question before you today, and this is what plaintiffs
5 are telling you, is that by doing that, the sole sequence of
6 events leading to this eleventh hour resignation takes the
7 conduct of the Special Master out of the purview of this
8 Court. And that's not right. That can't be right.
9 This is a judicial officer who did something
10 fundamentally improper, contrary to all norms of how judicial
11 officers should behave. I don't think that's reasonably
12 subject to dispute. And he remained in office, going forward
13 from there he issue three reports which should never have been
14 issued. Those reports are not random little subjects that
15 don't matter; all of them are part of the larger tapestry of
16 this case in which plaintiffs make recurring continuing
17 arguments that the government has engaged in wrongdoing and is
18 always in the process of essentially feeding wrong and
19 misleading information to the District Court.
20 And these reports are part of all that and they continue
21 to be used as part of the District Court proceedings in that
22 way; in a way that's totally improper, and that use has
23 enabled, wholly apart from whether as a formality, the reports
24 are "adopted" by the District Court. The District Court
25 doesn't have to adopt them. He's opened the door for the use

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1 of these reports in the case and they're being used.

2 JUDGE RANDOLPH: Well, suppose we issued an order

3 that said the reports are vacated, right? What rule of law

4 would prevent counsel for the plaintiffs in the very next

5 proceeding before the District Court, opening up the Joint

6 Appendix, which is before us, and saying, "Now, is it a fact"

7 and then just quoting the report? Isn't it a fact that such-

8 and-such-and-such and so? What rule of law would prevent them

9 from doing that?

10 MR. BONDY: Well, they -- Your Honor, they do more

11 than that. They make --

12 JUDGE RANDOLPH: No, but answer my question.

13 MR. BONDY: I'm not sure that there would be any

14 rule of law that technically would prevent that, but, again,

15 the premise underlying that would have changed in a concrete

16 way that really matters in this case.

17 And, again, what plaintiffs are trying to tell you is

18 that, in a sense, these reports don't really matter. None of

19 this really matters any more. But, of course, they really do

20 believe it matters. If they believe that these reports didn't

21 matter, they wouldn't be here arguing with us about it. They

22 use these reports.

23 The day after the NAID report was issued, the very next

24 day plaintiffs filed a 28(j) letter in this Court before Your

25 Honors urging that the report supporting the District Court's

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1 contempt ruling that was, at that time, before you on appeal.
2 In their brief before you in this proceeding the plaintiffs
3 argue that these reports count as evidence of the truth of the
4 matter asserted therein, which are extremely serious charges
5 of government misconduct.
6 So, these reports have made their way, not just in the
7 past tense, but in the present, right up to today, as part of
8 the fabric of the ongoing proceedings in a way that is totally
9 improper. And, again, these were issued by a judicial officer
10 who was fatally and irretrievably tainted by bias before he
11 issued them. They should never have been issued and that's
12 clear.
13 JUDGE RANDOLPH: The plaintiffs say on page 29 to 30
14 of their brief that the District Court granted Interior
15 defendants' motion in limine with respect to the 4/21/03
16 Interim Report, excluding the report and any other evidence
17 regarding the Master's incomplete investigation from
18 introduction into evidence. Is that accurate?
19 MR. BONDY: Yes, but can I explain, Your Honor?
20 JUDGE RANDOLPH: Sure.
21 MR. BONDY: That was -- that was, of course, at a
22 time when critically the motion for disqualification hadn't
23 yet been ruled upon by the District Court. But what the
24 District Court did there is say that that item could not be
25 introduced as an item of evidence at the 1.5 trial in the

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1 summer of 2003. The NAID report and the other two reports
2 that we're talking about are record items in this case. They
3 have been allowed to be filed in the record and plaintiff's
4 have allowed to rely -- rely on them and cite them and use
5 them. Most recently this summer there was a three-month trial
6 on electronic security and at that trial, that ended just a
7 couple of months ago, our witnesses were cross-examined in
8 connection with this report and the report was used by
9 plaintiffs as part of their presentation. And there is --
10 JUDGE RANDOLPH: Well, I think we've already covered
11 what they can cross-examine on. They can cross-examine no
12 matter -- unless we had some ruling that said -- it's kind of
13 like *Kastagar* (phonetic sp.) -- you know, the *Kastagar* case,
14 which is kind of the use immunity. That they can't -- they
15 have to erase from their mind and they have to erase from the
16 record all the -- all copies of this report and can't --
17 MR. BONDY: Well, but it's not just That, Your
18 Honor. One -- there are many harms That flow from this. One
19 of the harms from allowing these reports to remain in
20 existence the way they are now and as part of the record is
21 That they are available for the District Court to rely on.
22 And the District Court can rely on those reports without ever
23 explicitly citing them. They're there for the District
24 Court --
25 JUDGE GINSBURG: Well, that's true whatever we say,

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1 isn't it?

2 MR. BONDY: Well, if Your Honor says they may not be

3 -- they vacate and they may not be relied upon, I think That

4 changes --

5 JUDGE GINSBURG: Well, then no one -- well, we

6 presume That they wouldn't be relied upon if we said That.

7 But it seems like an odd thing for the Court to do if there's

8 no tangible consequence.

9 MR. BONDY: Well, we think there are tangible

10 consequences for all the reasons I've said. They are in the

11 record. They continue to be used in an extremely harmful

12 way --

13 JUDGE GINSBURG: What about the fruits? Do you have

14 a fruits analysis, too? Since we're starting with Kastagar.

15 How about That?

16 MR. BONDY: Well, I think the --

17 JUDGE GINSBURG: So, you know, you want to be able

18 to say That something that's not -- That doesn't draw upon one

19 of the tainted reports is nonetheless to be excluded and not

20 relief upon by the District Court or allowed by the plaintiffs

21 to put in because they wouldn't have known about That but for

22 the tainted report, which has since been vacated.

23 MR. BONDY: I'm not sure I'd put it That way, but I

24 think there are fruits-type issues That could arise in an

25 extremely complicated way later, unless the reports are

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1 vacated now. For example, if and when in the future the
2 District Court does, in a District Court order, explicitly
3 cite one of these reports, That could give rise to serious
4 questions of unscrambling the egg at That point. And the
5 point is That right now it's clear That these reports should
6 never have been issued, cannot properly be used and should be
7 vacated at this juncture.
8 JUDGE GINSBURG: In *Brooks* when we ordered That the
9 Master's work product be suppressed, had the Court taken any
10 formal action to receive or accept those products?
11 MR. BONDY: No, of course not. And I think this
12 Court's decision obviously written by this panel in *In Re*
13 *Brooks* demonstrates the correctness --
14 JUDGE RANDOLPH: That was very different. That
15 report was not public. He had never submitted That report,
16 and the order That went out prevented him from making it
17 public or otherwise submitting it to the District Court. That
18 was the whole point of it.
19 But this thing is out and it's in the Joint Appendix and
20 everybody has copies --
21 MR. BONDY: Well, that's even worse. Here it's
22 actually being used in a tangible concrete way, which it
23 wasn't even in *In Re Brooks*. It wasn't -- it hadn't even
24 reached That point. And what this Court said in *Brooks* was
25 just the Master had to be recused, so his reports have to be

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1 recused.

2 JUDGE GINSBURG: Right, but this -- right now

3 there's -- I mean, again, it's true in Brooks as well, but in

4 each case, the -- this question arises in the context of the

5 plaintiffs saying That the case is moot because the Special

6 Master has resigned.

7 MR. BONDY: That's right.

8 JUDGE GINSBURG: And if it's not moot, it's only

9 because these reports have some continuing effect. And the --

10 in That respect, the two cases are, for the reason Judge

11 Randolph just cited, on a different footing, right? The

12 continuing effect there -- in fact, the entire effect had been

13 deferred pending the outcome of this Court's decision.

14 MR. BONDY: Well, but here the effect is already

15 starting to happen. The door has been opened.

16 JUDGE GINSBURG: Well, look, That just reinforces

17 the claim That it's moot, right? Anything that's

18 retrospective reinforces the claim That it's moot.

19 MR. BONDY: No, I mean the way we --

20 JUDGE GINSBURG: The question is what's the --

21 before we grant a writ of mandamus, we have to have some

22 pretty concrete reason to believe That there's otherwise going

23 to be a future effect.

24 MR. BONDY: Well, we think there is present

25 irreparable harm when reports are allowed in the record and

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1 can be used when they were so clearly authored --

2 JUDGE GINSBURG: Well, irreparable harm won't be

3 repaired. Right? That's the nature of irreparable harm.

4 That's what Judge Randolph was talking about. The word is

5 out.

6 MR. BONDY: Well, the word is out, but the --

7 JUDGE GINSBURG: We need some reparable harm before

8 we issue a remedy.

9 MR. BONDY: Their use in the case which is ongoing

10 and concrete and tangible. That's real and That should not be

11 allowed to be going on.

12 JUDGE GINSBURG: Mr. Bondy, we'll give you a few

13 minutes for rebuttal.

14 MR. BONDY: Thank you.

15 ORAL ARGUMENT OF MARK I. LEVY, ESQ.

16 ON BEHALF OF THE RESPONDENT

17 MR. LEVY: Good morning, Your Honors. May it please

18 the Court, my name is Mark Levy and I represent the plaintiff-

19 respondents in this Court today.

20 I think there was a little bit of a shell game going on

21 in the first part of the oral argument. The only issue before

22 this Court today arises out of Special Master Balaran's

23 retention of Mr. Smith in connection with his Interim Report.

24 My colleague, Mr. Bondy, for Interior was talking about the

25 second and third reports, the site reports. He talked about

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1 the Dallas report. He referred to a shredder and things like
2 That. This is not the time or the place to get into the
3 defense of his report. The point is That has nothing to do
4 with the retention of Mr. Smith. Those reports would have
5 happened whether or not Smith was ever hired.
6 So, I think the Court is limited today --
7 JUDGE GINSBURG: Well, but I think the government's
8 theory is That if they're right about Smith and NAID and That
9 report, then the Special Master's view of the government has
10 been tainted and unfairly made negative and skeptical and so
11 on, and so he's not an unbiased officer when he gets to New --
12 Gallup or wherever it was for the site visit.
13 MR. LEVY: Well, that's much broader than anything
14 That has to do with the taint from Smith which effects only at
15 most -- and I'll come back later to say it doesn't effect even
16 this much -- the Interim Report. But their argument really --
17 JUDGE RANDOLPH: But -- I just want to take That up.
18 I could see an argument if a District Judge in case number one
19 should have recused himself and didn't and we can vacate it.
20 That doesn't mean That every case after -- That he hears after
21 That, he's tainted. But if it's the same case. If he issues
22 an order on day one and its improper, then -- and we held That
23 he should have recused himself -- doesn't it follow That all
24 subsequent orders That he issues in the same case have to be
25 vacated?

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1 MR. LEVY: It does not follow, Judge Randolph --

2 JUDGE RANDOLPH: It doesn't?

3 MR. LEVY: It doesn't follow this Court in *Microsoft*

4 *2*. The en banc court held That it didn't follow because not

5 all of Judge Jackson's actions following his secret press

6 interviews were vacated. Indeed, the school asbestos case

7 That we cite in our 28(j) letter is an instance where a court

8 ordered no retroactive relief for a disqualification.

9 This is an issue that's not resolved by the statute.

10 It's left to the courts. The Supreme Court and this Court

11 have recognized That there's no need to Draconian remedies,

12 and there is plenty of room what whether you call it harmless

13 error or independent source or whatever you phrase it, if it

14 didn't have an effect, there's no per se rule That there's

15 full and automatic and complete retroactive relief. And

16 that's what Interior is seeking today.

17 Theirs is really a but/for argument. Not but/for the

18 hiring of Smith, but but/for the failure to recuse himself

19 even before the government moved for That, That everything

20 after That has to be eliminated.

21 JUDGE RANDOLPH: The hypothetical I gave you --

22 there's a Supreme Court case, and I get these two confused.

23 Is it -- *Liteky* is one and what's the --

24 MR. LEVY: *Liljeberg*.

25 MR. LEVY: *Liljeberg*, yeah. The hypothetical I gave

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1 you is basically *Liljeberg*, isn't it?

2 MR. LEVY: No, you have to look at --

3 JUDGE RANDOLPH: Didn't the Supreme Court vacate

4 everything the Judge did?

5 MR. LEVY: In That case -- I'm not saying there

6 would never be a case where you would reverse everything, but

7 you have to look at the particular case. And here there's

8 absolutely no reason, no taint at all of the two site reports;

9 the second and third reports. At most we really ought to be

10 focusing on the Interim Report.

11 JUDGE GINSBURG: Well, I think you're right That we

12 have to look at the particulars, and you quoted something from

13 *Microsoft* that's relevant to this. You said -- to quote it

14 here -- pardon me, you know, "Even though the Judge in the

15 *Microsoft* case was disqualified for blatantly unethical

16 conduct; i.e., giving secret interviews to the press months

17 before entering final judgement, the Court nonetheless found

18 'full retroactive disqualification unnecessary to protect

19 petitioner's right to an impartial adjudication.'"

20 Because -- but there was nothing in the disqualifying

21 conduct That betrayed bias. It was a different sort of a

22 transgression, right? It was because he met with the press

23 and embargoed the results of That. We didn't say That he had

24 acquired or revealed a bias.

25 MR. LEVY: But it wasn't just That he gave the

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1 reports. He also -- the interviews; excuse me. He also used
2 That in the way he conducted the trial, and this Court was
3 concerned certainly about the appearance of justice in the
4 case. In this case --
5 JUDGE GINSBURG: Right, but then looking back at the
6 findings That he had made, which is what we did not vacate,
7 right, we said well there's nothing -- what was going on then
8 was these meetings with the press and we didn't see any reason
9 to think That That somehow infected the findings, right, but
10 we had to disqualify him going forward.
11 MR. LEVY: That's correct.
12 JUDGE GINSBURG: Here the claim is That the judicial
13 officer acquired a bias against a party and That, therefore,
14 That presumably continues into his future work with That
15 party.
16 MR. LEVY: To continue the -- to *Microsoft*, Special
17 Master Balaran has entered a full and complete statement of
18 his reasons for retaining Mr. Smith. That has been accepted
19 and approved by the District Court. So, the case comes to
20 this Court under an abuse -- maybe a double over -- a twice
21 over abuse of discretion standard since we have both the
22 judicial officer and a reviewing court, if you will, in the
23 District Court.
24 Now, in this case it's important I think to distinguish
25 between action bias and appearance of bias. We submit That

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1 there is no real issue about actual bias in this case. The
2 District Court found there was no actual bias, the government
3 really hasn't really presented any evidence of actual bias.
4 They simply say That his hiring of Mr. Smith revealed a bias
5 he already had. But that's just their say-so. You could say
6 That in every appearance case That it shows some latent or
7 underlying actual bias. That would eviscerate the distinction
8 between subsections (a) and (b) of Section 455.
9 JUDGE GINSBURG: Excuse me, was it by hiring -- is
10 their claim, as you're restating it, That they -- That Balaran
11 revealed his bias by hiring Smith or That he acquired some
12 bias by employing Smith?
13 MR. LEVY: I think it differs about whether they're
14 talking about actual bias or appearance of bias. For the
15 actual bias, they use the formulation That it revealed a pre-
16 existing -- and that's my word and not theirs. But it
17 revealed is their word a bias. I think that's just a game --
18 a word of -- a word game.
19 There's nothing here That shows actual bias and the
20 government presented no evidence. Master Balaran has
21 presented his reasons. If the Court doesn't think those are
22 sufficient, That could -- we think it doesn't, but it could
23 give rise to an appearance of partiality under (a). We don't
24 see how it could give rise to actual bias. And I think That
25 goes to the Chief Judge's questions about the remedy.

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1 If there was actual bias in this case, That would be far
2 different. Nobody's really briefed That issue, but I can see
3 That would be different if there was actual bias. If you had
4 a Judge who'd been bribed, let's say, from day one. I'm
5 willing to accept the possibility That there would be broad
6 relief in That case, but I don't think under *Liljeberg* and
7 *Microsoft 2* That applies in a case under (b) for the
8 appearance of partiality and I submit that's at most what we
9 have here.
10 Now, on the appearance point, there are two issues, and
11 we've kind of put the cart before the horse. The first
12 question is is he disqualified; the second question is what is
13 the remedy.
14 Is he disqualified? We think not. That test, of course,
15 is an objective one. A reasonable observer who's fully aware
16 of all the relevant facts -- that's the legal standard. And
17 as I said before, this Court proceeded under an abuse of
18 discretion standard. Did Master Balaran abuse his discretion
19 in not recusing himself and did the District Court really,
20 again, abuse its discretion in rejecting the government's
21 motion to disqualify Balaran? We have two determinations here
22 That there was no bias; actual or apparent.
23 Now, what would our reasonable --
24 JUDGE GINSBURG: Was That true in *Brooks*?
25 MR. LEVY: Pardon me?

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1 JUDGE GINSBURG: Was That true in *Brooks*?

2 MR. LEVY: I'm sorry, I don't understand.

3 JUDGE GINSBURG: Was the same double denial

4 applicable in the *Brooks* facts and *Brooks* --

5 MR. LEVY: No. In That case there was an issue

6 about the Judge himself where the Court reviewed it under the

7 abuse of discretion standard and held That Judge Lamberth was

8 not disqualified. There was not a double issue as I've cited

9 for the Special Master in *Brooks*.

10 JUDGE RANDOLPH: But Balaran was.

11 MR. LEVY: Balaran was the Special Master in That

12 case.

13 JUDGE RANDOLPH: And didn't the District Judge

14 refuse to disqualify Balaran?

15 MR. LEVY: No, I think That came up later. I don't

16 think this was the same situation in That case.

17 Now, *Brooks* was -- let me jump ahead to Brooks since

18 we're talking about it. *Brooks* was different in a number of

19 respects from this case. This really goes both to the

20 disqualification and the remedy, and then if I can, I'd like

21 to get back to the basic analysis of the disqualification.

22 In *Brooks*, first of all, there was actual bias. It was

23 (b) case and as I've said, That makes a world of difference in

24 looking at both the disqualification and at the remedy.

25 Second of all, Special Balaran in That case was acting in

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1 an adjudicatory capacity. Here, of course, he was acting in
2 an investigatory capacity and in an investigatory capacity
3 only. There are more stringent rules That apply to
4 adjudicators than apply to investigators, and that's the
5 essence of the holding in *Brooks*, as it might be thought to
6 apply here.
7 Now, this Court said -- and I'm quoting from page 1046 --
8 "Special Master Balaran had ex parte contacts That may have
9 given him personal knowledge of disputed evidentiary facts
10 relevant to the contempt proceedings." In other words, the
11 holding of *Brooks* is That a person can't serve in an
12 adjudicatory capacity after he's served in an investigatory
13 capacity That has given him ex parte knowledge of relevant
14 disputed evidentiary facts concerning the proceeding.
15 JUDGE RANDOLPH: What was his -- I don't recall
16 *Brooks* That way. Balaran was just making a report to the
17 Judge, wasn't he?
18 MR. LEVY: Well, That was the contempt proceeding,
19 but he was acting as an adjudicator.
20 JUDGE RANDOLPH: What was his -- the content of his
21 report was a recommendation about who should be charged with
22 contempt and who should not be.
23 MR. LEVY: Right. But a Special Master could make
24 a --
25 JUDGE RANDOLPH: But why is That adjudication?

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1 MR. LEVY: A Special Master could make a
2 recommendation That is an adjudicatory function. There he was
3 acting on the record. Here, by contrast --
4 JUDGE RANDOLPH: That sounds like an investigation
5 to me.
6 MR. LEVY: No, but the way he conducted it was not
7 an investigation. He didn't act ex parte, he did proceed on
8 the record and so on. That's much different than what he'd
9 done in this case and much different than what he's done in
10 much of this case before. It is absolutely true, as the
11 government states, That he has had broad ex parte powers.
12 He's had broad powers to retain assistance. All kinds of
13 things That investigators do, Masters do as investigators That
14 they don't do as adjudicators.
15 And the holding of *Brooks*, as I understand it, is That
16 you can't serve as an adjudicator after you've been an
17 investigator and had ex parte knowledge of relevant disputed
18 evidentiary facts concerning the proceeding, and that's the
19 language of (b); personal knowledge of disputed evidentiary
20 facts concerning the proceeding.
21 *Brooks* has more differences as well. In That case, this
22 Court held --
23 JUDGE RANDOLPH: But you shouldn't serve as an
24 investigator if you're going to serve as an adjudicator.
25 MR. LEVY: I don't see why. Investigators are

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1 entitled to know all kinds of things That aren't in some sort
2 of judicial-like record. It works in one direction, but not
3 the other. If the Master knows things as an adjudicator --
4 JUDGE RANDOLPH: Well, if he was acting as an
5 adjudicator in *Brooks* to determine whether somebody should be
6 held in contempt or not, and at the same time conducting an
7 independent investigation, you don't have a problem with That?
8 You don't think That That -- in itself, it seems to me your
9 argument collapses.
10 MR. LEVY: Well, That certainly wasn't the holding
11 of Brooks.
12 JUDGE RANDOLPH: I would not -- I would be violating
13 our canons of ethics if I went out and did an investigation in
14 a case That I was to sit on.
15 MR. LEVY: That's correct.
16 JUDGE RANDOLPH: That's correct. And so why isn't
17 That also true of a Special Master?
18 MR. LEVY: But there are many things That Special
19 Masters do, even under Amended Rule 53 they can have ex parte
20 authority That a Judge could not have sitting as an
21 adjudicator. Masters as investigators, while they're -- we're
22 not disputing they're judicial officers for purposes of 455,
23 they are different in That respect --
24 JUDGE RANDOLPH: Do you know of any situations where
25 a Special Master goes out and conducts an investigation and

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1 then sits on the case as if he were a Judge, making a
2 recommendation to the Court?
3 MR. LEVY: That is the problem in *Brooks*. If he
4 acted as an investigator and then sat as an adjudicator and
5 had ex parte knowledge That was --
6 JUDGE RANDOLPH: Well, this is the same case.
7 MR. LEVY: -- relevant to the adjudication --
8 JUDGE RANDOLPH: This is the same case.
9 MR. LEVY: There's no adjudication at issue here.
10 He was acting solely as an investigator.
11 Now, another difference with *Brooks* is That in That case
12 the Court held That the referral never should have been made.
13 In other words, what the Master was doing was void ab initio,
14 to use the familiar legal term.
15 Here, the government has not challenged That. No one has
16 challenged Balaran's role as a Master or as an investigatory
17 Master. There's no been challenge to the November 2002 order
18 appointing him to investigate the eighth quarterly report That
19 was submitted by Interior. None of That has been challenged.
20 His role as an investigator is really not central to the
21 issue. If he hadn't hired Smith, his role as an investigator
22 would not be before the Court today. And it's been routine in
23 this case That Masters --
24 JUDGE RANDOLPH: Well, that's like saying if he
25 hadn't committed an ethical violation, we wouldn't be having

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1 this proceeding.

2 MR. LEVY: But the ethical violation is or not

3 whether he violated the canons by hiring Smith. It's not

4 whether he was violating the rules by acting as an

5 investigator. That's not the issue before the Court, and the

6 government hasn't challenged That in the past.

7 The other difference with Brooks, and That case will

8 concern this Court as I understand it, was what you called

9 selection bias; That the tainted Master might have put --

10 might have been biased in what he put in the record or didn't

11 put in the record.

12 That's simply not an issue in this case. As you well

13 know, Special Master Balaran submitted an interim report. He

14 invited Interior to submit comments in response and That

15 needed to happen before the report could become final and have

16 any semblance --

17 JUDGE GINSBURG: I don't think that's responsive to

18 the selection bias problems. He writes the report. If he's

19 biased, what goes into the report is selected in a biased

20 manner.

21 MR. LEVY: It's responsive in this way. He said --

22 and the District Court found, it's an undisputed fact, the

23 government doesn't challenge it -- That the entire Interim

24 Report was based on the 73 documents That were attached. So,

25 the government knows what the basis was for the report.

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1 If Special Master Balaran -- we don't think he did, but
2 if he did ignore 20 documents That were relevant and would
3 have proved the other side, Interior can come in and say,
4 "Selection bias, you ignored these documents; consider them."
5 Or, "You misunderstood the documents you relied on", or they
6 could have said anything else.
7 JUDGE GINSBURG: Well, that's not really --
8 MR. LEVY: This is an Interim Report --
9 JUDGE GINSBURG: That's not really an adequate
10 remedy for someone who has a biased judicial officer.
11 MR. LEVY: Well, it's adequate to the --
12 JUDGE GINSBURG: To come in and say, well you can
13 make your objections known; there's a record to show That he's
14 biased.
15 MR. LEVY: I was responding only to the point about
16 selection bias. That's not a problem in this case the way it
17 was in *Brooks* --
18 JUDGE GINSBURG: Well, I understand, but you're
19 saying, well it doesn't matter because if there is selection
20 bias, it can be pointed out and corrected, right?
21 MR. LEVY: In this case, it can; yes.
22 JUDGE GINSBURG: And I don't think that that's -- I
23 think That would be very peculiar to say -- suppose you have a
24 biased Judge and say, well what's the difference? You know,
25 you can show -- point out the record and get it reversed on

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1 appeal.

2 MR. LEVY: No, no, that's not the same thing. In

3 this case it is an Interim Report, and it was based entirely

4 on the 73 documents That were attached. Those were unusual

5 circumstances. It wouldn't apply in every case.

6 JUDGE GINSBURG: You know, there's an old FCC

7 licensing case from the 30's in the Supreme Court -- I can't

8 remember the name of it now -- in which the agency said, all

9 right, you get the license and then you get a chance to

10 contest it. And the Court said no, you can't do That. You've

11 got to let them each have a simultaneous and equal shot at it.

12 MR. LEVY: No, no, I -- that's a different kind of

13 situation. The difference here --

14 JUDGE GINSBURG: Well, you're saying, well so let

15 the bias come in and then they can worry about it afterwards.

16 MR. LEVY: No, the selection bias as I understand it

17 is That you ignore certain documents and they're entitled to

18 come in and say That. Now, the end of the matter has not been

19 what the Master had done. I mean, he could say --

20 JUDGE GINSBURG: Well, certain documents That may

21 not even be appended, right?

22 MR. LEVY: Right, that's exactly the point. That

23 they can point to things That are --

24 JUDGE GINSBURG: Well, how would they know if

25 they're not appended?

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1 MR. LEVY: They know what their record is.

2 JUDGE RANDOLPH: Is this a harmless error argument

3 you're making?

4 MR. LEVY: Well, in short it's a harmless -- I mean,

5 the over-arching argument --

6 JUDGE RANDOLPH: It's kind of like saying That just

7 because the shortstop was bribed, they would have lost the

8 game anyway.

9 MR. LEVY: It's not, though. I mean, this is not a

10 bribery case to begin with --

11 JUDGE RANDOLPH: The thing wasn't fixed.

12 JUDGE GINSBURG: No, no, and he's not a shortstop.

13 We understand That. It's an analogy.

14 MR. LEVY: I don't know what he is these days. It's

15 only That this is a different problem if it's a problem at all

16 than what you had in *Brooks*. It's not a selection bias

17 problem, as I said.

18 Now, let me go back to the basic issue of

19 disqualification, if I might. Under the objective reasonable

20 observer, what would he know? He would know the following

21 things. Would this lead him to conclude reasonably That

22 Balaran was -- his impartiality might reasonably be

23 questioned. First, he would know That the report was based

24 entirely on the 73 attached documents. Those are documents

25 That Balaran was entitled to have --

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1 JUDGE RANDOLPH: Why don't you start with what a
2 reasonable observer would think about his hiring this Smith?
3 MR. LEVY: Well, that's what I'm talking about.
4 What --
5 JUDGE RANDOLPH: Well, no, you're talking about what
6 resulted from his hiring of Smith. Let's start at the
7 beginning. What would a reasonable observer think about his
8 hiring of Smith?
9 MR. LEVY: Okay, what do we know about Smith? We
10 know these following things. Smith was held out as the
11 government to be the person most knowledgeable about the
12 documents underlying the Eighth Quarterly Report, which is
13 what Balaran is investigating. He's not investigating the
14 NAID complaint of retaliation. He's investigating whether
15 Interior concealed or withheld information in the Eighth
16 Quarterly Report. Smith was held out as the government to be
17 the person most knowledgeable about That. The government
18 brought Smith to the February 27th inspection to help Balaran
19 go through the documents, and Balaran hired him within a few
20 days after That.
21 We know That Smith, at the time Balaran hired him, was a
22 former employee of NAID --
23 JUDGE GINSBURG: It seems to me there was some doubt
24 case on whether he was ever dis-employed.
25 MR. LEVY: No, I think the record shows That he --

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1 JUDGE GINSBURG: He was employed before and he was
2 employed after and we don't know his status during, isn't That
3 correct?
4 MR. LEVY: It is not true. The Special Master's
5 statement and the District Court's findings make it clear That
6 he was not employed at the time he was doing the work with
7 Balaran. The government also says it doesn't matter to them
8 whether he was or wasn't, because they're relying only on the
9 undisputed facts. At worse that's a disputed fact, but as the
10 case comes to this Court, we think it is disputed.
11 JUDGE GINSBURG: So, let's just take it That he was
12 employed before and he was employed after.
13 MR. LEVY: That's correct, but he was not employed
14 during, so he was a former employee of NAID who had no
15 personal stake in this proceeding. So, he was the most
16 knowledgeable person; he was a former employee.
17 JUDGE GINSBURG: I thought his company had a
18 personal - a financial stake.
19 MR. LEVY: Well, but once he's no longer an
20 employee, he doesn't have a personal stake. The question is
21 whether --
22 JUDGE RANDOLPH: How do you know? He --
23 MR. LEVY: There's nothing in the record to suggest
24 he does.
25 JUDGE RANDOLPH: Now wait a minute. He was an

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1 officer in That company, right?

2 MR. LEVY: That I'm not sure of, but he was an

3 officer when he went back. I'm not sure whether he was

4 before, but I don't think it matters as long as he's former.

5 JUDGE RANDOLPH: Typically people in high positions

6 in companies hold stock in those companies. Is there --

7 MR. LEVY: If That --

8 JUDGE RANDOLPH: Is there any indication That he

9 divested himself from all --

10 MR. LEVY: There's no indication That he had it in

11 the first place.

12 JUDGE RANDOLPH: And we know he went back.

13 MR. LEVY: We know he went back.

14 JUDGE RANDOLPH: Which is some indication That That

15 was a planned move.

16 MR. LEVY: That is not so. People leave and return

17 for reasons, but --

18 JUDGE GINSBURG: Well, if I hire a law clerk from a

19 law firm, he's at liberty to go back afterwards. You can't

20 have an arrangement during That time, but he's at liberty to

21 go back to That firm. But it would be unfortunate in the

22 extreme if, during his year with me, he were to work on That

23 firm's business.

24 MR. LEVY: And if the government had any evidence

25 there was even an assumption That he might go back, That would

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1 be different, but it's their burden on disqualification and
2 doubly so their burden on mandamus to come up with these
3 things. NAID was a small company. We have no idea what the
4 officers had; whether there were stock options --
5 JUDGE GINSBURG: It is undisputed, is it not, That
6 Smith told Balaran what documents should be reviewed? That
7 was his -- That was skill --
8 MR. LEVY: Yeah, I think Smith actually provided the
9 documents That Interior was supposed to provide and was
10 woefully late in doing so.
11 JUDGE GINSBURG: So, how could there not be
12 selection -- a selection bias problem?
13 MR. LEVY: I don't think it is.
14 JUDGE RANDOLPH: Where did Smith get the documents?
15 JUDGE GINSBURG: He gets to see only the documents
16 That Smith thinks are relevant.
17 MR. LEVY: And if the government thinks other
18 documents are relevant, they can say you ignored these
19 documents. They're not among the 73 you relied on --
20 JUDGE GINSBURG: You mean after the Interim Report
21 comes out.
22 MR. LEVY: After the Interim Report. And then they
23 can take That to the Judge if they think That he has made a
24 mistake.
25 JUDGE RANDOLPH: Where did Smith get the documents?

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1 MR. LEVY: I think he got them from his work on the
2 TAAMS project. The record doesn't reveal That.
3 JUDGE GINSBURG: In other words, they came from
4 NAID.
5 MR. LEVY: I think originally some of them came from
6 Interior; I don't -- the record doesn't say where they came
7 from originally.
8 What else do we know about Smith? Contrary to the
9 government's characterization, he was not the --
10 JUDGE RANDOLPH: Well, I just want to follow up on
11 That. Interior didn't provide these documents.
12 MR. LEVY: They were supposed to, but did not,
13 that's correct.
14 JUDGE RANDOLPH: Did not. All right, so the --
15 MR. LEVY: At the time. They did later.
16 JUDGE RANDOLPH: And Smith provided them.
17 MR. LEVY: That's correct.
18 JUDGE RANDOLPH: It seems to me That the only
19 inference that's permissible there is That he got them from
20 his company.
21 MR. LEVY: I don't know where he got them, Your
22 Honor.
23 JUDGE RANDOLPH: Well, they're not just free
24 floating in the air. What other source of these documents is
25 there?

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1 MR. LEVY: I suppose he could have gotten them
2 directly from Interior; I don't know.
3 JUDGE RANDOLPH: You just said --
4 MR. LEVY: I don't know where he got them. We just
5 know what the documents are --
6 JUDGE RANDOLPH: -- Interior didn't provide them;
7 That Smith did.
8 MR. LEVY: Right. And that's one of the faults here
9 That the Master was charged with conducting this
10 investigation. His investigation began in October of '02. A
11 formal order was entered in November of '02. By February of
12 '03, Interior still had not produced the documents in response
13 to numerous requests to do so. In February they allowed an
14 inspection, which is when they brought Smith in to help
15 Balaran. Smith -- I'm sorry, Balaran asked for the documents
16 at That point. The government made a partial production in
17 April. They didn't make a complete production until June; six
18 months after this investigation began.
19 So, the use of Smith did not prejudge anything. It was
20 simply a way of moving the investigation forward in a timely
21 way because Interior was not responding to the requirements
22 That it provide these documents --
23 JUDGE GINSBURG: And Smith had the documents.
24 MR. LEVY: Smith had the documents; that's correct.
25 Now, the government refers repeatedly to Smith as the

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1 complaining witness, and that's colorful, but he wasn't the
2 complaining witness. His name is not mentioned anywhere in
3 the NAID complaint That Judge Lamberth rejected, and he didn't
4 sign or verify the complaint. Someone else at the company
5 did. So, he was involved in the TAAMS project as an employee,
6 but he was not the complaining witness in any relevant sense.
7 So, that's what we know about Smith
8 JUDGE RANDOLPH: Did Balaran, at any point, reveal
9 Smith's identity to the government?
10 MR. LEVY: He did in the timesheets, the invoices
11 That were submitted.
12 JUDGE RANDOLPH: I thought it was just initials.
13 MR. LEVY: Well, it was initials, but then the
14 invoices also in other places referred to Smith by name.
15 There was an entry on the February 27th That MSS, Smith's
16 initials, was inspecting documents at Interior. That referred
17 to the time That he was helping Balaran inspect the documents
18 which Interior certainly knew about when they saw the
19 timesheet.
20 But I'm not suggesting That we're relying on waiver or
21 consent here of the District Court --
22 JUDGE RANDOLPH: And how does Interior know about
23 Smith's presence from MSS?
24 MR. LEVY: The District Court explained That -- we
25 don't think it mattered. Let's assume That they didn't know.

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1 We think they did, but let's assume they didn't. We don't
2 think That bears one way or the other on whether Balaran is
3 disqualified because his impartiality might reasonably be
4 questioned.
5 Now, what do we know -- that's what we know about Smith.
6 What do we know about Smith's role in the process. As I said,
7 he provided the documents. He wasn't the author of the
8 report. Balaran was the sole author and wrote the report in
9 its entirety. The report did not reflect any --
10 JUDGE RANDOLPH: How do we know That? From the
11 timesheets?
12 MR. LEVY: Balaran's -- no, Balaran's -- well, we do
13 know it That way as well, if you work your way through them.
14 That's a fairly cumbersome exercise and the District Judge
15 explains it. But for this Court's purposes, I think -- and
16 it's unchallenged by the government today -- Balaran said That
17 abuse of discretion review and the District Court upheld it
18 finding there was no -- no contrary evidence in the record
19 otherwise. So, Balaran was the sole author of the entire
20 report. The report was based entirely on the 73 documents.
21 There were no oral ex parte communications or conversations
22 That were reflected in the report.
23 What else do we know? We know That -- we know That
24 Interior was grievously late in providing the information, and
25 That was another fact That Balaran relied on in hiring Smith

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1 and That the District Court accepted. If Interior had
2 provided the documents timely, we would not be here today.
3 Balaran had a practical problem That he needed to conducted
4 the investigation. Interior was -- and these are my words --
5 dragging its feet, not giving him what he needed, and Balaran
6 was trying to figure out a way to solve That problem. The
7 government brought Smith to the inspection --
8 JUDGE RANDOLPH: When you say Interior was dragging
9 its feet --
10 MR. LEVY: I'm sorry?
11 JUDGE RANDOLPH: -- there was a production of
12 document request?
13 MR. LEVY: In essence; yes. Back in October of
14 2002 --
15 JUDGE RANDOLPH: The plaintiffs made a request for
16 production of documents.
17 MR. LEVY: Yes.
18 JUDGE RANDOLPH: And --
19 MR. LEVY: I think it was actually Balaran who made
20 the request.
21 JUDGE RANDOLPH: Or, Balaran made the request.
22 MR. LEVY: I think that's right.
23 JUDGE RANDOLPH: And then was there a time limit on
24 That?
25 MR. LEVY: I believe the government represented That

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1 it would make the production at various points, which it
2 consistently missed.
3 JUDGE RANDOLPH: It missed.
4 MR. LEVY: Missed.
5 JUDGE RANDOLPH: But Balaran didn't put a time limit
6 on the production?
7 MR. LEVY: I don't remember, Your Honor. He may
8 have, and maybe it was negotiated with the government, but I
9 do remember from the record That whether it came from Balaran
10 or whether it came from the government, their time limits were
11 consistently missed and the investigation was now four months
12 old and Balaran didn't have document one from Interior.
13 JUDGE GINSBURG: Mr. Levy, as you heard, we gave Mr.
14 Bondy a hard time about whether this is of any contin --
15 whether these documents are of any continuing -- or, these
16 reports of any continuing significance warranting the issuance
17 of any relief. But I take it from your resistance That you do
18 intend to use them in some way.
19 MR. LEVY: I don't know what we're going to do. I
20 think we certainly want to, but let me say a couple of things
21 about That. First of all, as was pointed out during Mr.
22 Bondy's argument, the Judge in fact kept this report out of
23 the 1.5 trial, so we don't know what the Judge is going to do.
24 There may be other grounds than disqualification for excluding
25 this evidence. The IT security proceeding on remand from this

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1 Court is now pending. We don't know what the Judge is going
2 to do in That case. That was a bench trial so the admission
3 of evidence was very loose. So, those are the cases, the
4 appeals if they're forthcoming.
5 JUDGE RANDOLPH: Well, he kept it out because he
6 said it wasn't complete.
7 MR. LEVY: Yes, that's correct. And there may be
8 other grounds for keeping it out. We don't know what that's
9 going to be. We're trying to anticipate That. We do know the
10 Judge is not going to find there's disqualification, but there
11 could be other grounds, like incompleteness That would keep it
12 out, so I think those are the --
13 JUDGE GINSBURG: But you are, I take it, in the
14 District Court taking the position That it should not be kept
15 out.
16 MR. LEVY: There will be arguments about That. It
17 wasn't admitted. I mean, these documents were not themselves
18 admitted in the IT security proceeding. There was questions
19 and cross-examination about them, but the documents themselves
20 were not admitted in evidence.
21 JUDGE RANDOLPH: Have you tried to admit them in
22 evidence?
23 MR. LEVY: I don't know the answer to That. I'm not
24 sure. No, we did not try to --
25 JUDGE RANDOLPH: Then why did the Judge exclude

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1 them?

2 MR. LEVY: No, no, he excluded the report from the

3 1.5 trial That was held a while ago.

4 JUDGE RANDOLPH: Did you try to have it admitted

5 then?

6 MR. LEVY: In the 1.5 trial I believe we did. But I

7 was talking about the recent, just-concluded hearing in the

8 District Court on remand from this Court. We don't have the

9 Judge's decision yet. We don't --

10 JUDGE GINSBURG: That's the IT hearing.

11 MR. LEVY: Yes, the IT hearing. We don't know what

12 he's going to do in That. He hasn't written his decision yet.

13 JUDGE GINSBURG: Is That a typo or is it really 59

14 days?

15 MR. LEVY: I think it's 59 days.

16 JUDGE GINSBURG: Okay.

17 MR. LEVY: Be careful what you wish for, I guess.

18 But let me say another word about Kastagar and fruits and

19 things like That. There is -- even assuming there is ongoing

20 prospective effect That would be a read on which this Court

21 could base mandamus, we don't think there is any appropriate

22 remedy for disqualification That would immunize the underlying

23 facts or the documents. That is, we think a Special Master --

24 a new Special Master if the Judge appoints one, he wants to

25 undertake this, could look at the same 73 documents and

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1 reconstruct the report.

2 We think the plaintiffs could do That. You can't

3 immunize the underlying conduct, the facts, the documents.

4 All you can do is say That the report prepared by the Special

5 Master - most of the report prepared by the Special Master

6 can't be used itself. That's as far as this Court can go.

7 JUDGE RANDOLPH: By whom?

8 MR. LEVY: Pardon me?

9 JUDGE RANDOLPH: Can't be used by whom?

10 MR. LEVY: I suppose That the report -- report can't

11 be used by anyone. That's not to say That you can't take a

12 fact in the report or a document underlying a report and

13 introduce it in evidence or take a deposition based on it, but

14 you can't say isn't it a fact, Mr. Witness, That Special

15 Master Balaran in his Interim Report found this. That, if the

16 Court grants the relief the government requests, would be

17 foreclosed. But that's the most That would be foreclosed.

18 JUDGE GINSBURG: So, you could say, isn't it a fact

19 That there was a shredder there.

20 MR. LEVY: Yes, absolutely. Or That -- and if we

21 want to talk about the Dallas report, they could not produce

22 the documents That Balaran asked to see. This is a central

23 repository for those documents and they couldn't produce them.

24 Balaran went to some of the rooms, they were a shamble. I

25 mean, this, as I say, is not the time or the place to get into

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1 a lot of That, but I do think it's important to say That those
2 issues bear no taint from this hiring of Smith. That would
3 have happened whether or not Smith was hired, unless the
4 government's per se rule, it's but/for argument is accepted,
5 That but/for the fact That Balaran continued to sit after he
6 had hired Smith. That's the only way on which the second and
7 third reports even could be brought into this case and we
8 think That runs foursquare into this Court's en banc decision
9 in *Microsoft 2* and other cases like *School Asbestos*.
10 JUDGE GINSBURG: Further questions? Okay, thank
11 you, Mr. Levy.
12 ORAL ARGUMENT OF THOMAS M. BONDY, ESQ.
13 ON BEHALF OF THE PETITIONER
14 MR. BONDY: Your Honors, if I may, I'd like to
15 stress two points. First of all, on the bias point, I'd like
16 to make this as clear as possible. Of course, there was bias
17 here. The hiring of Mike Smith and the active collaboration
18 between a judicial officer and one side to a controversy in
19 order to gather and evaluate the evidence That is then the
20 basis for a judicial officer's report is by definition bias of
21 the most obvious kind.
22 JUDGE GINSBURG: Is it your position That the hiring
23 of Smith revealed a pre-existing bias? Or, That it created
24 and introduced a bias?
25 MR. BONDY: I'm not sure it matters, but both. It

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1 clearly was bias in and of itself, but one of the problems is
2 That once you have a biased judicial officer, That gives rise
3 to the question, well he was biased then, was he biased
4 before? And, of course, you just don't know.
5 But here there was clear bias, and it's not just the
6 hiring of Smith; off the record in a way That we can never
7 know about and untangle, the judicial officer and Smith
8 collaborated in the gathering and evaluation the evidence, the
9 analysis of the evidence That then formed the basis for the
10 judicial officer's report. That report itself is
11 irretrievably tainted and, of course, there's selection bias.
12 We --
13 JUDGE GINSBURG: Do we know anything from the record
14 about where Smith got the documents?
15 MR. BONDY: Not precisely, but I assume he had them
16 from his own source. I mean they were his somehow --
17 JUDGE GINSBURG: Right, we don't know if he made a
18 FOIA request, right?
19 MR. BONDY: No, of course not. They were his
20 somehow. I don't know; maybe he just had his own set of
21 documents. I don't know. But we --
22 JUDGE RANDOLPH: How many hours did Smith bill?
23 MR. BONDY: I think roughly a hundred. I say
24 roughly.
25 JUDGE GINSBURG: A hundred and ten, I think.

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1 MR. BONDY: I'm sorry, Your Honor.

2 JUDGE GINSBURG: A hundred and ten.

3 MR. BONDY: And the billing statements make clear he
4 was consumed with analysis of the evidence. He was just
5 hired. He helped the Judge analyze the evidence and we don't
6 know how. We don't know what they discussed. We don't know
7 what the analysis consists of. We will never know. We can
8 never know. That's extraordinary selection bias and what
9 happened here between Smith and the judicial officer is
10 astonishing. Of course it is. This is bias of the most
11 egregious kind.

12 JUDGE RANDOLPH: Well, you could know. You could
13 get discovery -- you could take his deposition and you could
14 take Balaran's deposition and you could find out exactly what
15 went on.

16 MR. BONDY: Well, I suppose that's right. But what
17 we're saying is this Court can, in a much more simpler way
18 than That -- and now if I may, let me move to my second point
19 very briefly -- take care of That problem in a much simpler
20 way right now, in a way that's totally appropriate. And,
21 Judge Randolph, you asked me what's wrong with the other side
22 or the District Court citing these materials; they're in the
23 Joint Appendix, they're out there. But they're not citing
24 them as if they're just words on paper or a Washington Post
25 article. They're citing them because they have the force of

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1 having been written by a judicial officer. And what we want
2 this Court to say is they're out there, they're words on paper
3 and in That sense maybe they can be cited, but they are not
4 things That were written by a valid judicial officer. They
5 have no force in That respect.
6 So, of course, Judge Randolph they're out there in the
7 sense That if I just scribbled a note somewhere, it's out
8 there, or a Washington Post article. But they're out there in
9 a significant sense. They were authored by someone in his
10 capacity as a judicial officer. They only force they have is
11 That they were written in That capacity, and we want Your
12 Honors to say That they were not validly done in That
13 capacity.
14 JUDGE RANDOLPH: Just to sort of follow up on That.
15 If the District Court had held That this report was created by
16 a process That violated the ethical rules, in That 1.5
17 proceeding or whatever it was, then we'd know That from That
18 point on unless the District Judge reversed himself That the
19 report would not have any force behind it, to use your words.
20 But the District Judge did something else. He said I'm
21 not going to take this because -- I'm not going to admit this
22 because it's incomplete. Now, that's not going to change
23 either, is it?
24 MR. BONDY: Well, That was one trial two years ago.
25 A different thing happened at the trial That just happened

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1 this summer where --

2 JUDGE GINSBURG: The IT hearing?

3 MR. BONDY: Yes, at the IT hearing.

4 JUDGE GINSBURG: What happened?

5 MR. BONDY: Well, plaintiffs did use the evidence

6 and use these reports in connection with That hearing.

7 JUDGE RANDOLPH: But we've already gone over That.

8 MR. BONDY: No, but, again, Your Honor it's not just

9 citing them because they are words on paper. The only force

10 they have is That they were written by a tainted judicial

11 officer.

12 And one more thing, Your Honor --

13 JUDGE GINSBURG: Are you going to be back telling us

14 the IT hearing is tainted because of this?

15 MR. BONDY: I don't know, Your Honor. I'm not sure

16 -- I'm not sure I can answer That question at this point --

17 JUDGE RANDOLPH: How -- see --

18 MR. BONDY: -- but That gives rise to an important

19 point, Your Honor. Plaintiffs have made clear in their

20 answers to Your Honors question That we are going to keep

21 fighting about this. And why? The Special Master; what he

22 did was just tainted, period. Of course it was. It was

23 tainted by the most egregious bias.

24 JUDGE RANDOLPH: When you say they used them, I just

25 want to be clear, the plaintiffs used them. Did the District

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1 Judge use them -- use the reports?

2 MR. BONDY: He didn't cite them in any written

3 order, if -- that's the best way I can answer That question.

4 JUDGE RANDOLPH: And --

5 JUDGE GINSBURG: And is there a final order out of

6 the IT hearing?

7 MR. BONDY: No, there is not. It's pending.

8 JUDGE RANDOLPH: And the way That the plaintiffs

9 used them was to base questions -- cross-examination on the

10 reports?

11 MR. BONDY: Three things, Your Honor, at the IT

12 trial. Questions, examining government witnesses; use of the

13 conclusions of the reports as part of their legal argument at

14 closing argument; and, again, outside of the IT trial context,

15 making and obtaining discovery -- further discovery in the

16 case based on these reports.

17 JUDGE GINSBURG: Thank you, Mr. Bondy. To the

18 extent That Mr. Bondy has -- in response to our questions

19 about the subject -- gone outside the record and talked about

20 the IT hearing, Mr. Levy, do you have any corrections to

21 offer?

22 MR. LEVY: I don't, Your Honor. Thank you.

23 JUDGE GINSBURG: Thank you very much. Thank you

24 both. The case is submitted.

25 (Recess.)

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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 10/20/05

[Judith A. Downey] Date

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