[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 16, 2005]

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

ELOUISE PEPION COBELL, et al., Plaintiffs-Appellees, v. GALE A. NORTON, Secretary of the Interior, et al., Defendants-Appellants.	No. 05-5068 [Civil Action No. 96-1285 (D.D.C.)]

MOTION FOR REASSIGNMENT OF THIS CASE TO A DIFFERENT DISTRICT COURT JUDGE

PETER D. KEISLER
Assistant Attorney General

GREGORY G. KATSAS
Deputy Assistant Attorney General

ROBERT E. KOPP
Director, Appellate Staff

KENNETH L. WAINSTEIN
United States Attorney

MARK B. STERN
THOMAS M. BONDY
ALISA B. KLEIN
MARK R. FREEMAN
I. GLENN COHEN
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

INTRODUCTION AND SUMMARY

Defendants-appellants respectfully request that the Court, following its disposition of this interlocutory appeal, order reassignment of the case to a different district court judge on remand. The government seeks reassignment only rarely and with great reluctance. By its actions and words, however, the district court has left us with no meaningful alternative.

On July 12, 2005, the district court issued a ruling that, in its extended vitriol, is unlike any other judicial opinion that we have ever seen. The district court began, after a gratuitous reference to "murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians," by pronouncing "our 'modern' Interior department" to be a "dinosaur – the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind." 7/12/05 Op. 2-3 (copy attached). In sweeping and categorical terms, the court then denounced what it characterized as Interior's "ignominious" record of "near wholesale abdication of its trust duties" and "unremitting neglect and mismanagement." Id. at 3-4. The court also categorically described Interior as "dishones[t]" and "vindictiv[e]" (id. at 8), accused Interior of turning its "wrath" on the Indian beneficiaries (id. at 9), and condemned what it labeled as Interior's "degenerate tenure" as trustee, "a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and * * * scandals, deception, dirty tricks and outright villany – the end of which is nowhere in sight" (id. at 11). At the end of its opinion, the court speculated (id. at 32-33):

> Perhaps Interior's past and present leaders have been evil people, deriving their pleasure from inflicting harm on society's most vulnerable. Interior may be consistently populated with apathetic people who just cannot muster the necessary energy or emotion to avoid complicity in the Department's grossly negligent administration of the Indian trust. Or maybe Interior's officials are cowardly people who dodge their responsibilities out of a childish fear of the magnitude of effort involved in reforming a degenerate system. Perhaps Interior as an institution is so badly broken that even the most well-intentioned initiatives are polluted and warped by the process of implementation. The government as a whole may be inherently incapable of serving as an adequate fiduciary because of some structural flaw. Perhaps the Indians were doomed the moment the first European set foot on American soil. Who can say? It may be that the opacity of the cause renders the Indian trust problem insoluble. [internal footnote omitted]

The district court used comparable language to describe the litigation conduct of the Department of Justice. It described one government pleading as "puerile," "disgraceful," "unsurprising from a defendant that this Court has charged with 'setting the gold standard for arrogance in litigation strategy and tactics,'" and more "disrespectful" than "countless pleadings from clinically insane litigants and prison inmates." Id. at 14-15 n.5 (citation omitted). The court also commented more generally that, if the government "feels that this Court should be in the business of avoiding absurdity," then it "should have long ago moved to strike the majority of its own pleadings from the record in this case." Id. at 23 n.10.

Weaving these accusations into an asserted "background of mismanagement, falsification, spite, and obstinate litigiousness," id. at 11, the district court categorically announced (by falsely attributing to Interior a concession) that "all trust-related information Interior communicates to Indian beneficiaries is inherently unreliable," id. at 21. Accordingly, the court ordered Interior to include with all written communications to current or former trust beneficiaries a notice stating that unidentified "[e]vidence introduced" in this litigation demonstrates the "questionable reliability" of any trust-related information supplied by Interior. Id. at 31. The order applies until the conclusion of this litigation and "without regard to subject matter" (id. at 21-22) – and thus encompasses all manner of communications regarding health, education, and other welfare benefits having nothing to do with the trusts at issue here. The order is expressly designed to discourage beneficiaries from engaging in any trust-related transactions. Id. at 19-20 & n.8. In closing, the district court threatened to "declare that Interior has repudiated the Indian trust, appoint a receiver to liquidate the trust assets, and finally relieve the Indians of the heavy yoke of government stewardship." Id. at 33.

These extraordinary pronouncements have no legal or factual basis. The district court manifestly has no authority either to liquidate statutory trusts established by Act of Congress or to place a cabinet Department of the Executive Branch into judicial receivership. Nor may that court, under the guise of compelling agency action pursuant to the Administrative Procedure Act ("APA"), seek to effect "'wholesale improvement'" of agency programs by judicial decree. See Cobell v. Norton, 392 F.3d 461, 472 (D.C. Cir. 2004) (quoting Lujan v. National Wildlife Federation, 497 U.S.

871, 891 (1990)). Moreover, this Court has determined that, as of December 2001, Interior had "made more progress * * * in six months * * * than the past administration did in six years" in performing the required accountings at issue, and that "uncontested facts are inconsistent with a finding that Secretary Norton" had not undertaken to do so. See Cobell v. Norton, 334 F.3d 1128, 1148 (D.C. Cir. 2003). Since then, Interior has continued to detail its ongoing progress with accountings in quarterly reports filed with the district court. See, e.g., Docket #2950 at 16-24. The assertedly troubling incidents cited by the district court reflect the dated accusations of former Special Master Alan Balaran, who has already been partially disqualified by this Court, see In re Brooks, 383 F.3d 1036, 1044-46 (D.C. Cir. 2004), and who has engaged in conduct that, as we show in a pending mandamus petition (No. 03-5288), required his disqualification from the entire case for actual bias. The district court thus had no basis to declare that all trust-related information is inherently unreliable – and thereby to pre-judge the very accountings at issue.

In its failure to follow this Court's guidance, the July 12 opinion continues a pattern explained at length in our briefs. In the wake of a decision warning the district court "to be mindful of the limits of its jurisdiction" under the APA, see Cobell v. Norton, 240 F.3d 1081, 1110 (D.C. Cir. 2001), the district court determined to issue broad structural injunctions encompassing virtually every aspect of trust management by Interior, see Cobell v. Norton, 226 F. Supp. 2d 1, 147-52 (D.D.C. 2002). In the wake of a decision vacating contempt sanctions against Secretary Norton as inconsistent with uncontested facts, see Cobell, 334 F.3d at 1148, the district court persisted in treating its contempt findings as "established," see Cobell v. Norton, 283 F. Supp. 2d 66, 85 (D.D.C. 2003). In the wake of a decision disqualifying Court Monitor Joseph Kieffer, who had been given an "extraordinary * * * investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system," see Cobell, 334 F.3d at 1142, the district court continued to rely on reports generated by Mr. Balaran, a similarly unconstrained Special Master, whom this Court also later partially disqualified, see In re Brooks, 383 F.3d at 1044-46. And in the wake of a decision vacating a $12 billion structural injunction deemed by Congress to be "nuts," see Cobell, 392 F.3d at 466, and reiterating that APA review requires a precise focus on "discrete agency action," see id.

at 472, the district court reissued the identical accounting injunction without meaningful response to the objections of either Congress or this Court, see Cobell v. Norton, 357 F. Supp. 2d 298 (D.D.C. 2005). The district court also has been reversed for imposing, without any evidentiary hearing, an injunction requiring the Department of the Interior to disconnect computer systems from the Internet. See Cobell v. Norton, 391 F.3d 251, 261-62 (D.C. Cir. 2004). In the three years since the district court has undertaken increasingly direct responsibility for implementing Interior's trust functions, this Court has been called upon to review no fewer than seven rulings of the district court. As noted above, this Court already has vacated four of those rulings in whole or in substantial part. Challenges to the three other rulings remain pending.[1]

The district court's legal errors and unconventional case management have impeded the progress of the very accountings that plaintiffs seek to compel and that Interior seeks to complete. The district court repeatedly has prohibited the use of statistical sampling in connection with the accountings – which Interior regards as critical – even though this Court repeatedly has approved Interior's discretion to use sampling. Similarly counterproductive has been the district court's indiscriminate use and threat of sanctions against Interior and its lawyers, which have significantly diverted agency resources, demoralized agency officials, and, in light of the court's pervasive involvement in Interior's day-to-day affairs, created a broad, in terrorem effect that undermines the vigorous performance of Interior's statutory duties. The district court also continues to pursue wholesale contempt proceedings against more than three dozen present or former government officials, based on the work product of Messrs. Kieffer and Balaran, and has repeatedly imposed effectively unreviewable sanctions on numerous Department of Justice attorneys ranging from individual line attorneys to an Assistant Attorney General.

Absent reassignment, moreover, all of this can be expected to continue indefinitely. The district court already has determined to retain jurisdiction over this case until at least 2011 and has

---

[1] See No. 05-5068 (this appeal, scheduled for oral argument on September 16, 2005); No. 03-5288 (mandamus petition challenging refusal to disqualify former Special Master Balaran, scheduled for oral argument on October 14, 2005); No. 05-5269 (appeal from July 12 order).

commented that the case may continue beyond its own life tenure. Moreover, the district court has steadily sought to expand the scope of this case (and its own role in trust management), through its repeated attempts to impose massive structural injunctions, through its pursuit of protracted collateral proceedings such as the fruitless two-month contempt trial against a sitting Cabinet Secretary, and, most recently, through its unsolicited invitation to the plaintiffs – some nine years into this litigation – to amend their complaint to include whole categories of additional new claims. See Cobell v. Norton, 226 F.R.D. 67, 81 & n.9 (D.D.C. 2005). The present state of affairs is in the interest of no one: not Interior, which can expect to be subjected to more judicial micromanagement, denunciation, and pervasive threats of contempt; not the plaintiffs, who have spent months barely defending a structural injunction that they did not seek and that they acknowledge would be impossible to implement; not Congress, which has seen its attempts to rein in the district court dismissed as "bizarre and futile," see Cobell 357 F. Supp. 2d at 306; not this Court, which in the last three years has been flooded with a series of complex and interlocutory Cobell appeals, all judged at least partially meritorious so far; and perhaps not even the district court, which has voiced a desire, on "numerous occasions," to "simply wash its hands of Interior * * * once and for all," see 7/12/05 Op. 33.

For all of these reasons, we respectfully ask that this Court, following its disposition of the structural injunction appeal, order reassignment of the case to a different judge on remand.

STATEMENT

A. Background

1. The background of this case is detailed in our merits briefs and summarized here. The Department of the Interior administers some 260,000 Individual Indian Money ("IIM") trust accounts with balances totalling approximately $400 million. In 1994, Congress enacted the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act"), which requires the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to" the governing statute. In hearings preceding the 1994 Act,

Congress found various problems in the administration of the IIM accounts. See H.R. Rep. No. 102-499, at 10. But Congress also noted the formidable difficulty in managing tiny ownership interests that Interior records to the 42nd decimal point, id. at 28 & n.94, and stressed that it "[o]bviously" would make "little sense" to spend even $300 million to audit the IIM accounts, id. at 26.

Plaintiffs filed this class action in 1996. In 2001, this Court held that the 1994 Act imposes on Interior a duty judicially enforceable through 5 U.S.C. § 706(1), the provision of the APA authorizing review to "compel agency action unlawfully withheld or unreasonably delayed," to furnish an accounting to each individual IIM beneficiary. See Cobell v. Norton, 240 F.3d 1081, 1095-97 (D.C. Cir. 2001). In performing such APA review, this Court noted approvingly that "[t]he district court explicitly left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate." Id. at 1104 ("Such decisions are properly left in the hands of administrative agencies."). The Court stressed that "[t]he actual legal breach is the failure to provide an accounting, not [the] failure to take the discrete individual steps that would facilitate an accounting." Id. at 1106. The Court upheld the use of periodic reporting requirements to monitor Interior's progress, id. at 1109, but admonished that "we expect the district court to be mindful of the limits of its jurisdiction," id. at 1110.

2. In 2002, following a two-month trial on Interior's asserted failure to commence the process of furnishing accountings to individual beneficiaries and on asserted inaccuracies in Interior's quarterly reports, the district court held Secretary Norton and Assistant Secretary McCaleb in contempt and declared that they could "rightfully take their place * * * in the pantheon of unfit trustee-delegates." Cobell v. Norton, 226 F. Supp. 2d 1, 161 (D.D.C. 2002). Based on its contempt findings, the district court terminated its remand to the agency and announced that it would issue structural injunctions governing accounting activities and trust management generally. Id. at 147-52. The court ordered the plaintiffs and Interior to submit competing plans for a historical accounting and for achieving compliance with fiduciary obligations, to be evaluated in a subsequent trial. Id. at 162. The accounting plan submitted by Interior proposed to complete the required accounting for

each individual beneficiary within five years at a cost then estimated at $335 million, subject to obtaining adequate congressional appropriations.

In July 2003, this Court vacated the contempt citations. Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003). It concluded that "in her first six months in office Secretary Norton took significant steps toward completing an accounting" and that "uncontested facts are inconsistent with a finding that Secretary Norton failed to comply with the district court's order" to do so. Id. at 1148. As for the asserted misstatements, this Court described "the reasoning of the district court" as both "mystifying" and "inconceivable." Id. at 1149-50. This Court also ordered Court Monitor Kieffer, whose reports in large part had given rise to the contempt proceedings, removed from the case. See id. at 1135, 1143-44. The Court explained that Mr. Kieffer had been improperly "charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." Id. at 1142; see also id. at 1143 ("[T]he district court's appointment of the Monitor entailed a license to intrude into the internal affairs of the Department, which simply is not permissible under our adversarial system of justice and our constitutional system of separated powers.").

3. In September 2003, the district court issued a sweeping "structural injunction" that addressed both the rendering of accountings and the implementation of a comprehensive program of trust reform. Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003). On the law, the court discerned no separation-of-powers or administrative-law restraints on its power to enter, against a co-equal branch of government, an injunction designed "to halt a group of wrongful practices by restructuring a social institution such as a mental hospital, school, or prison" (id. at 90 (internal quotations omitted)). See id. at 108-34. On the facts, the court treated its contempt findings as "established" because this Court, in vacating the contempt sanctions and rejecting their underlying reasoning, did not separately "set aside" each individual factfinding. Id. at 85.

In November 2003, Congress responded to the structural injunction by enacting Pub. L. No. 108-108, which removed any legal requirement to conduct historical accounting activities before December 31, 2004. The conference committee noted that the accounting portion of the injunction alone "would cost between $6 billion and $12 billion," and it specifically "reject[ed]" the claim that

the 1994 Act requires any "accounting on the scale of that * * * ordered by the Court." H.R. Conf. Rep. 108-330, at 117-18 (2003). Individual Senators reported widespread agreement that "we should not spend this kind of money on an incredibly cumbersome accounting that will do almost nothing to benefit the Indian people." 149 Cong. Rec. at S13,785 (2003) (Sen. Burns); see also id. at S13,786 (Sen. Dorgan) (describing court-ordered accounting as "nuts").

On December 10, 2004, this Court vacated nearly all aspects of the structural injunction. Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004). In vacating the accounting portion of the injunction in its entirety, the Court confirmed that Pub. L. No. 108-108 had been enacted "to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." Id. at 466 (noting congressional concern with "disparity between the costs of the judicially ordered accounting, and the value of the funds to be accounted for"). And in vacating the non-accounting portion (save for a single filing requirement), the Court made clear that the fiduciary nature of the duties at issue does not vitiate the normal structure of judicial review of agency action. Id. at 471-78. In particular, the Court stressed that the APA "'empowers a court only to compel an agency * * * to take action upon a matter, without directing how it shall act.'" Id. at 475 (quoting Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004)).

4. On February 23, 2005, the district court sua sponte reissued the accounting portion of its structural injunction. Cobell v. Norton, 357 F. Supp. 2d 298 (D.D.C. 2005). The court dismissed Pub. L. No. 108-108 as "a bizarre and futile attempt at legislating a settlement of this case," id. at 306, and dismissed this Court's decision vacating its prior structural injunction as simply "not relevant for the present purpose," id. at 300. The court incorporated by reference its previous structural injunction opinion, see id. & n.1, and announced that it would retain jurisdiction over the case until March 27, 2011, see id. at 306.

This Court stayed the reissued injunction pending an expedited appeal. Briefing on this appeal is complete, and oral argument is scheduled for September 16, 2005.

B. The July 12, 2005 Order

On July 12, 2005, the district court issued an order requiring Interior to include, in any written communication to any current or former IIM beneficiary, a notice that states in relevant part:

> Evidence introduced in the Cobell case shows that any information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets that current and former IIM account holders receive from the Department of the Interior may be unreliable. Current and former IIM Trust account holders should keep in mind the questionable reliability of IIM Trust information received from the Department of the Interior if and when they use such information to make decisions affecting their IIM Trust assets.

7/12/05 Order at 2 (emphases in original). The notice must accompany all written communications until the conclusion of this litigation, "without regard to subject matter," and it applies even to communications made in the "ordinary course of business." 7/12/05 Op. 21-22. In the accompanying opinion, the district court declared that "all trust-related information Interior communicates to Indian beneficiaries is inherently unreliable." Id. at 21. The court further reasoned that "the only way to fully safeguard" the plaintiffs' asserted rights "would be to suspend all trust-related decision-making until this case concludes and Interior actually provides the required accounting, so that the maximum number of decisions affecting trust assets could be as fully informed as possible." Id. at 20 n.8. Because such a course of action would be "impracticable," the court concluded that its class-wide notice "will have to suffice as an interim measure." Id. The court predicted that the notice "likely will bring to light a wealth of new evidence concerning Interior's mismanagement of the trust." Id. at 34.

An appeal from that injunction is pending (No. 05-5269). On July 28, 2005, this Court granted an administrative stay of the injunction pending its further review of our stay motion.

REASONS WHY THE CASE SHOULD BE REASSIGNED TO A DIFFERENT DISTRICT COURT JUDGE

A. Title 28 U.S.C. § 2106 provides that the courts of appeals may, upon any remand, "require such further proceedings to be had as may be just under the circumstances." That provision allows this Court "to reassign [a] case to a different judge on remand." United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam). Unlike recusal, reassignment may be considered by the courts of appeals in the first instance. See, e.g., id.; Bembenista v. United States,

866 F.2d 493, 499 (D.C. Cir. 1989); United States v. Tucker, 78 F.3d 1313, 1322-24 (8th Cir. 1996); United States v. Sears, Roebuck & Co., 785 F.2d 777, 780 (9th Cir. 1986) (per curiam).

This Court considers three "principal factors" in deciding whether to order reassignment:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind the previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected,
>
> (2) whether reassignment is advisable to preserve the appearance of justice, and
>
> (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United States v. Wolff, 127 F.3d 84, 88 (D.C. Cir. 1997) (quoting United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (per curiam)). To justify reassignment under these standards, actual bias is unnecessary, and an appearance of bias is sufficient. See, e.g., Microsoft, 56 F.3d at 1463. Reassignment is more likely to be appropriate "[w]here the judge sits as the factfinder." Robin, 553 F.2d at 10.

In Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992), the Third Circuit applied these standards to order reassignment based solely on rhetoric contained in two paragraphs of one judicial opinion. The district court in that case, in adjudicating a crime-fraud exception to the attorney-client privilege, had described the tobacco industry defendants as the "'king of concealment and disinformation'" and asked rhetorically: "'Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity!'" See 975 F.2d at 97 (quoting district court opinion). On mandamus, the Third Circuit set aside the underlying privilege order on procedural grounds, without addressing the extent of factual support for the district court's observations. See id. at 89-96 The Third Circuit also went out of its way to praise the "magnificent" abilities and "outstanding" temperament of the "distinguished" district court judge. Id. at 98. Nonetheless, given the rhetorical pitch of the remarks at issue, the Third Circuit thought it "impossible" to "vindicate the requirement of an 'appearance of impartiality' in view of the statements made in the district court's * * * opinion," and it ordered reassignment on that basis. Id.

Reassignment is also appropriate in cases where a district court has failed, wittingly or unwittingly, to follow repeated guidance from a court of appeals. Such cases squarely implicate the appearance of justice. In ordering reassignment following consecutive reversals on related points, the en banc First Circuit explained: "A third remand would put the district court judge in a very awkward position. If he ordered a new trial yet again, it might be thought that he was wedded to an outcome; if he altered his result, [one] might suppose that the judge had yielded to exhaustion or to a supposed message from this court." Conley v. United States, 323 F.3d 7, 15 (1st Cir. 2003) (en banc). Although the First Circuit had "no doubt about the good faith of the district judge," it held that reassignment was warranted "despite the cost of requiring a new district judge to master this record." Id. In Mackler Productions, Inc. v. Cohen, 225 F.3d 136 (2d Cir. 2000), the Second Circuit similarly ordered reassignment, to preserve the "appearance of justice" in a protracted and contentious case, after vacating orders in "two separate appeals – raising largely the same questions – on the sanctions issue alone." Id. at 147. Such cases also implicate efficiency considerations: if a judge "has repeatedly adhered to an erroneous view after the error is called to his attention," reassignment may be "advisable in order to avoid 'an exercise in futility in which the Court is merely marching up the hill only to march right down again.'" Robin, 553 F.2d at 11 (citation omitted).

Not surprisingly, courts repeatedly have ordered reassignment in cases involving both disparaging judicial comments and a repeated failure to follow appellate guidance. See, e.g., Mitchell v. Maynard, 80 F.3d 1433, 1450 (10th Cir.1996) ("The history of this case, combined with evidence of [the judge's] expressions of his disapproval toward [the party], his attorney and his claims indicate that in order to prevent any probability of unfairness or appearance of impropriety we should direct a new judge to hear the case on remand."); United States v. Torkington, 874 F.2d 1441, 1447 (11th Cir. 1989) (per curiam) (reassignment following two reversals and comment that prosecution was "silly" and a "vendetta"); Sears, Roebuck & Co., 785 F.2d at 781 (reassignment following three reversals and comment that prosecution was "egregious").

B. Under these standards, reassignment here is warranted to preserve the appearance of fairness, to facilitate completion of the legal duties at issue, and to mitigate the wholesale diversion of limited resources to fruitless, protracted, and steadily expanding litigation.

1. The district court's indiscriminate denunciations of an entire Cabinet Department are remarkable both for their tone and for their lack of record support. These were not offhand oral comments from the bench. In a considered opinion written for publication, the district court categorically and repeatedly condemned the Department of the Interior as degenerate at best and genocidal at worst. While we do not contend that Interior's management of the IIM trusts is beyond criticism, there is no conceivable view of the record that even remotely justifies such statements. And in any event, such rhetoric raises appearance concerns going to the heart of the fairness and decorum of Article III proceedings.

a. In Haines, the Third Circuit held that two paragraphs in a single published opinion – accusing the tobacco industry in colorful language of deliberately concealing information about the health risks of its product – warranted reassignment to preserve the appearance of fairness on remand. See 975 F.2d at 97-98. By that standard, the case for reassignment here is compelling.

The July 12 opinion contains rhetoric far more strident, far more extensive, and far more angry. The opinion begins, after a wholly gratuitous reference to "stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians," by denouncing "our 'modern' Interior department" as a "dinosaur – the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind." 7/12/05 Op. 2-3. It categorically announces Interior's "near wholesale abdication of its trust duties," id. at 3, and it deems Interior to be "degenerate," id. at 11. It describes Interior's performance as "ghastly" (id. at 3), "a nightmare" (id. at 4), "ignominious" (id.), and "abysmal" (id. at 6). In describing "the depths to which Interior has sunk" (id. at 9), it alleges "dishonesty" (id. at 8), "vindictiveness" (id.), "Machiavellian guile" (id. at 9), and "Byzantine maneuvering" (id. at 10). It alleges "scandals, deception, dirty tricks and outright villainy – the end

of which is nowhere in sight." Id. at 11. It characterizes the "majority" of government pleadings in this case as "absurd," id. at 23 n.10, and it describes one such filing as "disgraceful" and more "disrespectful" than most filings "from clinically insane litigants and prison inmates," id. at 14-15 n.5. It speculates that "[p]erhaps" Interior's leaders are "evil people, deriving their pleasure from inflicting harm on society's most vulnerable," or "apathetic people who cannot muster the necessary energy or emotion to avoid complicity in the Department's grossly negligent administration of the Indian trust," or "cowardly people who dodge their responsibilities out of a childish fear of the magnitude of effort involved in reforming a degenerate system." Id. at 32. Or, the opinion finally concludes: "Perhaps Interior as an institution is so badly broken that even the most well-intentioned initiatives are polluted and warped by the processes of implementation." Id.

The district court has made similar statements in the past. In imposing contempt sanctions later vacated by this Court, the district court described Interior as "'truly an embarrassment to the federal government,'" and it stated that "'Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place alongside [their predecessors] in the pantheon of unfit trustee-delegates.'" See 334 F.3d at 1136 (quoting 226 F. Supp. 2d at 125, 161). In reissuing the structural injunction previously vacated by this Court, the district court stated: "In this case the government has not only set the gold standard for mismanagement, it is on the verge of setting the gold standard for arrogance in litigation strategy and tactics." 357 F. Supp. 2d at 307. Recently, the district court charged Interior with "utter depravity and moral turpitude." Cobell v. Norton, 355 F. Supp. 2d 531, 541 (D.D.C. 2005). The tone, extensiveness, and persistence of such statements raise serious questions about whether the judge can render justice dispassionately – and about the actual and perceived fairness of further proceedings on remand.

b. The district court's pronouncements are even more extraordinary because they are not based on record evidence. As discussed in our briefs, the record proceeding to address compliance with this Court's 2001 mandate was the portion of the contempt trial involving Secretary Norton's alleged failure "'to initiate a Historical Accounting Project.'" Cobell, 334 F.3d at 1147 (quoting Cobell, 226 F. Supp. 2d at 20). After reviewing that trial record, this Court explained that, as of

December 2001, Interior had "made more progress * * * in six months * * * than the past administration did in six years," and concluded that "uncontested facts" were "inconsistent with a finding that Secretary Norton failed to" initiate an accounting project. Id. at 1148. Apart from the vacated contempt citations, the only other purported instances of mismanagement cited by the district court (see 7/12/05 Op. 5-7) were the dated accusations of former Special Master Balaran. But Mr. Balaran, who resigned three days before this Court was to hear oral argument on our mandamus petition to disqualify him for bias, had asserted – like the now-disqualified Mr. Kieffer, and with approval by the district court – the authority "to uncover facts and collect evidence via ex parte contacts with parties and counsel." See Site Visit Report of the Special Master to the Dallas, Texas Office of the Minerals Revenue Management Division of the Department of the Interior's Minerals Management Service (Sept. 29, 2003), at 1 (Docket #2311) (quoting 3/29/02 District Court Order). Mr. Balaran thus perceived nothing wrong with issuing reports based on evidence "obtained outside of normal channels and to which the parties may have no familiarity," Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report, at 1 n.1 (April 21, 2003) (Docket #1999). This Court already has ordered the suppression of all Special Master reports related to pending contempt proceedings against some 37 present or former government officials. See In re Brooks, 383 F.3d at 1044-46. Given Mr. Balaran's extensive ex parte contacts, the Court concluded that his reports "would be subject to selection bias," and "an observer apprised of all the facts would reasonably question his impartiality." Id. at 1046. The government has sought to disqualify Mr. Balaran more broadly after learning that his unusual "channels" of inquiry included hiring a complaining witness in a pending contract dispute with Interior. See No. 03-5288 (mandamus petition). After holding that petition in abeyance following Mr. Balaran's eleventh-hour resignation, this Court recently ordered full briefing and set oral argument on the petition for October 14, 2005. Finally, at the end of its July 12 opinion, the district court speculated that the required notice "likely will bring to light a wealth of new evidence concerning Interior's mismanagement of the trust." 7/12/05 Op. 34. That speculation obviously does not constitute independent evidence of

mismanagement. It does, however, raise further questions about the district court's seeming eagerness to pre-judge further untested allegations.[2]

The district court's allegations of dishonesty and vindictiveness fare even worse. First, the court invoked its own previous contempt citations for litigation misconduct and fraud on the court. 7/12/05 Op. 7. However, this Court vacated those citations and specifically concluded that the district court's "reasoning" on these points was "mystifying" and "inconceivable." Cobell, 334 F.3d at 1149-50. Second, the district court cited its own referral of numerous Department of Justice attorneys to disciplinary authorities for alleged ethical violations. 7/12/05 Op. 7-8. But as the court itself acknowledged, those authorities determined that no action was warranted. See id. at 8. Third, the court cited allegations that Interior decided to move an entire office from Albuquerque, New Mexico to Reston, Virginia in retaliation for testimony of one employee in the Albuquerque office. Id. at 8. The retaliation charge was contested, see Docket #684, and the dispute was settled – even to the satisfaction of the district court, see 7/12/05 Op. 9 – when the employee was allowed to continue working in Albuquerque. Fourth, the district court asserted that Interior responded to an order restricting communications about land transactions by improperly withholding checks from trust beneficiaries. Id. at 9-10. As Interior's uncontradicted affidavits made clear, the two complaining beneficiaries had received their checks in the ordinary course, see Docket #2845; Cobell, 355 F. Supp. 2d at 531-36, but the district court chose to treat the allegations as "conceded" unless Secretary Norton personally appeared in court to testify. Id. at 543. Finally, we will let speak for itself the district court's attempt to link present Interior officials to "murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians" (7/12/05 Op. 2), through its description of "our 'modern' Interior department" as "the

---

[2] The July 12 order also stated that "Interior cannot even determine which IIM account holders are members of the plaintiff class." 7/12/05 Op. 5. But as the only order cited by the court makes clear, the reference was to the wholly unremarkable fact that Interior could not immediately identify for the court all classmembers who simultaneously possessed two different types of IIM accounts (accounts opened before and after the date of class certification). See May 28, 2004 Mem. & Order, at 2-3 (Docket #2587).

morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind" (id. at 3), and its speculation that "[p]erhaps the Indians were doomed the moment the first European set foot on American soil" (id. at 33).

The district court's criticisms of the Department of Justice are equally unsustainable. For the proposition that the government "continues to litigate and relitigate, in excruciating fashion, every minor, technical legal issue" in this case, id. at 11, the district court cited its previous order denying a stay pending appeal of the reissued structural injunction and criticizing the government for repeatedly contending that "this is a simple record-review Administrative Procedures Act case," Cobell, 357 F. Supp. 2d at 306-07. This Court, however, has granted a stay pending appeal of the reissued structural injunction. Moreover, the role of the APA in shaping judicial review in this case can hardly be described as "minor" or "technical," and this Court, far from suggesting that the government's APA arguments set "the gold standard for arrogance in litigation strategy and tactics," id. at 307, has accepted those arguments to a significant degree. See Cobell, 392 F.3d at 473. We obviously cannot respond fully to the district court's facially hyperbolic statement that, if the government "feels that this Court should be in the business of avoiding absurdity as an evil in itself," then it "should have long ago moved to strike the majority of its own pleadings from the record in this case." 7/12/05 Op. 23 n.10. We note only that this Court has had a very different reaction to the government's arguments. See Cobell, 392 F.3d 461 (vacating structural injunction); Cobell, 391 F.3d 251 (vacating Internet disconnection order); Cobell, 334 F.3d 1128 (vacating contempt citations). Finally, the district court's characterization of one government pleading as "puerile" and "disgraceful" and more "disrespectful" than "countless pleadings from clinically insane litigants and prison inmates," rests entirely on a single argument heading. See 7/12/05 Op. 14-15 n.5. With respect, that reaction is out of all proportion to the language used, and suggests a broader loss of perspective.

The district court's sweeping, unqualified, and wholly disproportionate denunciations of the Department of the Interior and the Department of Justice create at least an appearance that the court

will be unable to evaluate discrete undertakings by Interior – or discrete submissions by Justice – fairly, dispassionately, and on their individual merit. Reassignment is therefore warranted.

2. The district court's repeated failure to follow this Court's guidance further counsels in favor of reassignment, both to avoid "put[ting] the district court judge in a very awkward position," Conley, 323 F.3d at 15, and "to avoid 'an exercise in futility [in which] the Court is merely marching up the hill only to march right down again,'" Robin, 553 F.2d at 11 (citation omitted). As we have shown, the district court undertook to issue detailed structural injunctions even after this Court had warned that its APA jurisdiction was limited; continues to treat as established contempt findings that this Court has held are unsupported; and continues to rely on reports generated by inquisitorial processes that this Court has condemned as both unreliable and improper. Most recently, in the wake of this Court's decision vacating the original structural injunction, the district court sua sponte reissued the historical accounting provisions of that injunction – without meaningful response either to this Court's extended discussion of the "limits placed by the APA" on this case, Cobell, 392 F.3d at 473; see Cobell, 357 F. Supp. 2d at 300 (finding that analysis "not relevant for the present purpose"), or to Congress's determination that the court-ordered accounting in this very case was a "poor use of Federal and trust resources" not compelled by the 1994 Act, H.R. Conf. Rep. 108-330, at 118; see Cobell, 357 F Supp. 2d at 306 (dismissing Pub. L. No. 108-108 as a "bizarre and futile attempt at legislating a settlement of this case"). Such habitual error, particularly when combined with the kind of rhetoric discussed above, further warrants reassignment.

3. Given all of these considerations, reassignment would not entail inefficiencies "'out of proportion to any gain in preserving the appearance of fairness,'" Wolff, 127 F.3d at 88 (citation omitted). Moreover, despite some undoubted inefficiency during a transition period, reassignment would facilitate – not frustrate – the efficient and orderly disposition of this case in the long-term.

The massive scope of this case reflects the district court's own idiosyncratic views about the nature and intensiveness of its judicial review here. Whereas this Court views Lujan and Southern Utah as governing precedents, see Cobell, 392 F.3d at 472-74, Cobell, 240 F.3d at 1095, the district court regards the APA as inapplicable, see Cobell, 357 F. Supp. 2d at 306-07, regards this case as

no different from ones asserting constitutional claims against state institutions, and therefore views the leading precedent to be the remedial decision in Brown v. Board of Education, 349 U.S. 294 (1955), see Cobell, 283 F. Supp. 2d at 91-92. That basic misconception underlay the district court's decision to issue the structural injunction, its decision to reissue the accounting portion of the structural injunction, and, most recently, its threat to "appoint a receiver to liquidate the trust assets, and finally relieve the Indians of the heavy yoke of government stewardship," 7/12/05 Op. 33. Proceedings on remand would be facilitated by a new district court judge prepared to apply the APA, rather than inapposite constitutional precedents and academic theories that regard litigation as a means "'to effect the reform of a social institution,'" Cobell, 283 F. Supp. 2d at 90 (quoting Owen M. Fiss, The Civil Rights Injunction 9 (1978)).

The district court has also frustrated progress in more tangible ways. For example, the court repeatedly has prohibited the use of statistical sampling in connection with the accountings at issue, see Cobell, 283 F. Supp. 2d at 194-98; Cobell, 357 F. Supp. 2d at 304, even though this Court repeatedly has approved Interior's discretion to use sampling, see Cobell, 240 F.3d at 1104, Cobell, 392 F.3d at 473. As a result, Interior for three years has been obstructed from using a technique that it regards as critical in moving forward with the required accountings. The district court also has inflicted significant costs – including diverted agency resources and diminished agency morale – through its indiscriminate use and threats of contempt and other sanctions, despite this Court's admonition that the APA does not contemplate "contempt charges for every legal failing," Cobell, 392 F.3d at 475. To date, the district court already has held in contempt three cabinet secretaries spanning two presidential administrations. See Cobell, 283 F. Supp. 2d at 81. It has imposed sweeping contempts on the present Secretary that this Court found entirely unjustified. See Cobell, 334 F.3d at 1148-50. In addition, it has referred more than three dozen current and former government employees for further contempt proceedings, see 226 F. Supp. 2d at 155, which have remained pending for almost three years, despite their genesis in the flawed work product of Messrs. Kieffer and Balaran. The district court also has repeatedly imposed personal sanctions on numerous Department of Justice attorneys – ranging from individual line attorneys to an Assistant Attorney

General – for, among other things, invoking the attorney-client privilege, see Cobell v. Norton, 213 F.R.D. 16, 31-32 (D.D.C. 2003), and seeking a protective order from discovery propounded by the now-disqualified Mr. Kieffer, see Cobell v. Norton, 213 F.R.D. 48, 61-62 (D.D.C. 2003). Because such sanctions are not immediately appealable (except for the now-vacated criminal contempts that the district court imposed on Secretary Norton and Assistant Secretary McCaleb, see Cobell, 334 F.3d at 1140), little practical recourse exists for those attorneys who have been – or in the future may be – personally sanctioned for seeking to represent Interior vigorously.

The district court's conduct of this litigation also threatens to inflict fundamental damage on ongoing statutory relationships and agency programs. The Department of the Interior has a historic and enduring relationship with Indian Tribes and individual Indians, as reflected in programs established by various treaties and Acts of Congress. Through its indiscriminate denunciations of Interior in published and widely publicized opinions, and through its requirement that Interior notify hundreds of thousands of IIM beneficiaries that all trust-related information supplied by Interior is of "questionable reliability" (7/12/05 Op. 31), the district court threatens to undermine those relationships. Most immediately, the district court has expressly sought to discourage IIM beneficiaries from engaging in any trust-related transactions on the basis of information supplied by Interior. See id. at 18-20 & n.8. Moreover, because the notice order applies to all communications without regard to subject-matter, it intentionally encompasses communications regarding numerous other programs administered by Interior on behalf of individual Indians – including for example health and education programs that concededly have nothing to do with this case. See id. at 23 n.10. The corrosive effect of such an order can hardly be overstated.

Finally, the district court shows no signs of moderating its course. The district court already has determined to retain jurisdiction over this case until at least 2011, see Cobell, 357 F. Supp. 2d at 306, and has commented that the case may continue beyond its own life tenure, see Cobell, 226 F. Supp. 2d at 161. It has sought to impose not only a broad structural injunction regarding the performance of historic accountings, but also another broad structural injunction regarding what the district court calls "Fixing the System" of trust administration as a whole. See Cobell, 283 F. Supp.

2d at 239-87. This Court has vacated the latter injunction as well as the former (with one immaterial exception), see Cobell, 392 F.3d at 468-78, and further proceedings on the latter still remain pending before the district court. In addition, the district court has pursued numerous protracted collateral proceedings, including such matters as a two-month contempt trial devoted largely to sensationalist – but ultimately baseless – charges that a sitting Cabinet Secretary committed litigation misconduct and frauds on the Court. See Cobell, 334 F.3d at 1145-48. Even more extensive contempt proceedings, involving more than three dozen present and former government officials, still remain pending before the district court. Recently, some nine years into this litigation, the district court at its own initiative invited plaintiffs to amend their complaint to add whole categories of additional new claims. See Cobell, 226 F.R.D. at 81 & n.9. And now, in its July 12 opinion, the district court has threatened to liquidate entirely hundreds of thousands of statutory trusts created by the United States Congress. See 7/12/05 Op. 33. It is not in anyone's interest to allow this state of affairs to persist.

CONCLUSION

For the foregoing reasons, following its disposition of the structural injunction appeal, this Court should exercise its discretion under 28 U.S.C. § 2106 to direct the reassignment of this case to a different district court judge on remand.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

GREGORY G. KATSAS
Deputy Assistant Attorney General

ROBERT E. KOPP
Appellate Staff Director

KENNETH L. WAINSTEIN
United States Attorney

MARK B. STERN
THOMAS M. BONDY
ALISA B. KLEIN
MARK R. FREEMAN
I. GLENN COHEN
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room, 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dated: August 15, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2005, I caused copies of the foregoing motion to be sent to the Court and to the following counsel by hand delivery:

The Honorable Royce C. Lamberth
United States District Court
United States Courthouse
Third and Constitution Ave., N.W.
Washington, D.C. 20001

Keith M. Harper
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 785-4166

G. William Austin
Kilpatrick Stockton
607 14th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 508-5800

and to the following by federal express, overnight mail:

Elliott H. Levitas
Law Office of Elliott H. Levitas
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309-4530
(404) 815-6450

and to the following by regular, first-class mail:

Dennis Marc Gingold
607 14th Street, N.W.
Washington, D.C. 20005

Earl Old Person (pro se)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417

Thomas M. Bondy

THOMAS M. BONDY