IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE NORTON, Secretary of the Interior, et al.,

Defendants.

Case No. 1:96CV01285
(Special Master Alan Balaran)

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND TO QUASH DEPOSITION SUBPOENAS

Plaintiffs' attempt to depose six high-level government officials and attorneys is premised on the fatally flawed assumption that they may seek, and this Court may impose, contempt sanctions for the President's exercise of his constitutional authority to remove purely executive officials and exercise of the Executive Branch's control over official testimony to Congress. In over 20 pages of briefing, the *only* subjects identified by plaintiffs as grounds for deposing six high-level government officials are the removal of Mr. Slonaker as Special Trustee and Executive Branch review of his proposed congressional testimony.

Thus, plaintiffs allege that Mr. Slonaker's "termination" is a violation of the Court's anti-retaliation Order that merits contempt sanctions. Pl. Br. 19. Plaintiffs allege that the Court has "inherent powers to ensure that witnesses who come before it cannot be intimidated and retaliated against," even if that means overruling decisions, such as the removal of a purely executive officer, that our Constitution entrusts exclusively to the President. Id. at 19. And plaintiffs argue that the President's "power to remove certain executive subordinates in the

ordinary (non-litigation) course without restriction" must give way to this Court's "inherent authority" to enforce its anti-retaliation Order. Id. at 20.

A. Plaintiffs offer no support for this extraordinary argument, which contravenes basic principles of separation of powers and nearly a century of Supreme Court precedent. Because the acts of the President in removing Mr. Slonaker and the Executive Branch in formulating official testimony to Congress may not be the basis for sanctions, and because those are the only matters identified by plaintiffs in seeking these depositions, it is clear that the depositions are not reasonably calculated to lead to *relevant* evidence and defendants are entitled to a protective order.

Plaintiffs' argument to the contrary rests on the premise that the conduct at issue is subject to this Court's Order of May 21, 1999, which generally prohibits the Department of the Interior and its officials "from . . . taking any retaliatory action, or making any threats of such action, for providing testimony or information in this action . . . ." Even putting aside the fact that the Order does not apply to any officials outside of the Department of the Interior, there is no indication whatsoever that the Court thereby intended to restrict the exercise of the President's removal authority or in any way to restrict the President's ability to receive advice from and consult with his subordinates on a matter within his sole discretion. Plaintiffs' suggestion that the Order authorizes an investigation into the manner in which the President exercised his removal powers or the reasons underlying his decision is without foundation. Nor is there any foundation for reading the Order to circumscribe the authority of Executive Branch officials to review testimony submitted by other Executive Branch officials to Congress. No basis exists for an expansive reading of the Court's Order that would raise fundamental separation-of-powers concerns.

B. The constitutional problems with plaintiffs' request are compounded by their attempt to depose high-level government officials and attorneys who should not be called upon for testimony absent a clearly demonstrated need. No such need can exist when the subject matter of the testimony is not itself calculated to produce relevant evidence.

Plaintiffs characterize the deponents as insufficiently high-level to warrant protection, but each is within a few steps of a cabinet officer or the President, and at least as high as officials the D.C. Circuit has treated as presumptively protected. Plaintiffs also claim that the presumption against deposing a party's attorney applies only to litigation counsel, but the principles underlying the presumption apply fully to a party's other counsel, as courts have recognized in applying it more broadly.

Plaintiffs also claim that no presumption against deposition should apply because the communications at issue are not subject to deliberative process, attorney-client, or other privilege under a prior opinion by the Special Master. Their claim mischaracterizes the Special Master's decision, which denies privilege *only* to communications related to the government's fiduciary duties of trust management and *not* to communications about the purely executive conduct at issue here. Plaintiffs' attempt to invoke a crime/fraud exemption to privilege rests on the untenable assertions that *any* allegation that a court order has been violated negates the defendant's right to privilege, or that removal of an executive officer or review and approval of official testimony to Congress is necessarily criminal or fraudulent in nature.

In sum, the depositions plaintiffs seek are neither reasonably calculated to discover *relevant* evidence, nor justified by a sufficient showing of need and unavailability to overcome the presumptions against deposing high-level government officials — presumptions that are fully

applicable in this case. Accordingly, this Court should issue a protective order quashing the subpoenas and barring plaintiffs from deposing the six named officials.

ARGUMENT

A. Plaintiffs' argument is premised on the assumption that the President's exclusive authority under the Constitution to remove high-level executive officers who serve at the pleasure of the President is subject to review by this court, and potential sanctions, for noncompliance with this Court's anti-retaliation Order. But even if plaintiffs could establish that Mr. Slonaker's removal or the review of his proposed testimony to Congress was retaliatory conduct within the meaning of this Court's Order — which they cannot — basic tenets of separation of powers preclude this Court from reviewing its legality and imposing judicial sanctions.

Plaintiffs do not take direct issue with the Supreme Court's longstanding recognition that the Constitution gives the President "unrestrictable power" to remove officers who perform exclusively Executive Branch functions. Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935). Indeed, plaintiffs themselves acknowledge (Pl. Br. 19) that Congress lacks power to restrain the President's removal of a purely executive officer. See Humphrey's Executor, 295 U.S. at 632; see generally Myers v. United States, 272 U.S. 52 (1926). Because the Special Trustee is a purely executive officer who serves at the pleasure of the President, he may be removed for any reason or for no reason at all. Imposing such a legal restriction on removal would violate constitutional separation of powers, which forbid even "innocuous" limitations on the President's exclusive removal power. See Swan v. Clinton, 100 F.3d 973, 987 (D.C. Cir. 1996). See also Webster v. Doe, 486 U.S. 592, 613-14 (1988) (Scalia, J., dissenting on other

grounds) (a court could not entertain "an action for backpay by a dismissed Secretary of State claiming that the reason he lost his Government job was that the President did not like his religious views," despite the fact that the claim would present "a colorable violation of the First Amendment").

Although separation-of-powers principles would limit judicial review of the exercise of the President's removal authority even in the context of a colorable constitutional claim, plaintiffs nevertheless contend that the Court may do so to enforce its Order of May 21, 1999. That Order generally enjoins the "Department of the Interior, together with all of its supervisory officials . . . from taking any retaliatory action, or making any threats of such action, for providing testimony or information in this action . . . ." Nothing in that Order suggests that the Court intended to restrict the advice offered to the President as to matters within his exclusive authority, to limit the President's exercise of that authority, or to subject to judicial review the substance of communications to and from the President. Such an order would plainly raise significant constitutional concerns. No basis exists for interpreting the Court's Order to raise such concerns, a reading that is particularly improbable because the President is not and could not be named as a defendant to this action. See Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992) (the courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties"); see also id. at 826-29 (Scalia, J, dissenting) (collecting cases).

Plaintiffs are thus wrong to invoke this Court's "remedial authority," an authority which could not, in any event, be used to penalize the government for the exercise of the President's removal authority or the basis of the President's decision. INS v. Pangilinan, 486 U.S. 875 (1988), is instructive in this regard. There, the court of appeals ordered the government to grant

American citizenship to a group of foreign nationals who had served with the U.S. Armed Forces during World War II. Id. at 880-82. Although the foreign nationals had not met the statutory criteria for naturalization, the court of appeals invoked its "equitable authority to craft a remedy" for government wrongdoing to award citizenship. Id. at 882-83. The Supreme Court reversed, holding that the court lacked the power to "disregard statutory and constitutional requirements and provisions" governing naturalization, even for the purpose of remedying government misconduct. Id. at 883-84. Here, too, plaintiffs are mistaken in urging that the Court could rely on "equitable authority" to contravene the Constitution's grant of exclusive power to the President to remove purely executive officials.

Similar principles bar plaintiffs from challenging the Executive Branch's official testimony to Congress on behalf of the Department of the Interior. In seeking to dictate the content of Executive Branch communications to Congress and to evaluate the good faith of the Executive in making the communications, plaintiffs intrude on an area that is "quintessentially within the province of the political branches to resolve." Natural Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 318-19 (D.C. Cir. 1988). Neither the Administrative Procedure Act nor any other law authorizes plaintiffs to litigate about these matters, which are not proper grounds for judicial review. See id.[1]

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[1] Plaintiffs respond to the defects in their standing to challenge the dismissal of the Special Trustee with the bald assertion that it is "absurd[]" to question their standing. Opp. 21 n.12. However, plaintiffs fail entirely to meet the substance of our argument. See Def. Mot. at 10. Plaintiffs appear to believe that 25 U.S.C. § 4043(f), which imposes a reporting requirement on the Special Trustee, creates a private right of action to challenge the adequacy and good faith of Executive Branch testimony to Congress. On its face, that statutory provision, which requires the Special Trustee to submit an annual report to Congress, has no bearing on the congressional testimony at issue here. Even if that provision were interpreted to apply to all congressional testimony by the Special Trustee, moreover, an alleged violation could not be adjudicated by this

Plaintiffs argue that their claims should be exempted from these basic constitutional principles because the Special Trustee "is not in the same position as other subordinate officials to the President" and his official statements must be "independent and direct" rather than subject to the control of the Secretary of the Interior and, ultimately, the President. Pl. Br. 20-21 & n.11. But wishing the Special Trustee were an independent trustee free from Executive Branch control will not make it so. This Court has already rejected plaintiffs' argument that Congress intended that the Special Trustee be an independent officer. See Cobell v. Babbitt, 91 F. Supp. 2d 1, 52 (D.D.C. 1999) ("If Congress truly wanted a completely independent trustee to oversee trust management, entirely independent from the well-documented historic recalcitrance of Interior, then Congress surely would have explicitly restricted the Secretary's powers over the Special Trustee and his office."). Because the Special Trustee is subject to the direct supervisory authority of the Secretary of the Interior and serves at the pleasure of the President, 25 U.S.C. § 4042(a), (b)(1), he is a purely executive officer within the plenary control of the Executive Branch.

In sum, plaintiffs cannot properly seek to review the President's exercise of his removal authority and the grounds on which it was based. Nor can they obtain judicial review of the way in which Executive Branch officials reviewed written testimony to Congress of a subordinate official. This Court's Order enjoining retaliation against witnesses has no application to plaintiffs' proposed investigation and could not constitutionally be applied in the way that

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Court at the behest of plaintiffs. A private citizen may not bring a lawsuit to challenge the adequacy of Executive Branch reporting to Congress under a provision, such as 25 U.S.C. § 4043(f), that is intended to set the terms on which the Executive will report to Congress rather than to create a right enforceable by private parties in a private lawsuit. See Natural Resources Defense Council, 865 F.2d at 316-19.

plaintiffs desire. Because plaintiffs' proposed depositions cannot produce testimony relevant to any matter properly before the Court, plaintiffs cannot meet the relevancy requirement of Federal Rule of Civil Procedure 26 and their subpoenas must be quashed. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352 (1978); Planned Parenthood Fed. of Am., Inc. v. Heckler, 101 F.R.D. 342, 344 (D.D.C. 1984).

B. The problems with plaintiffs' proposed discovery are compounded because plaintiffs have noticed depositions of persons who are presumptively immune from deposition — high-level government officials and lawyers — and plaintiffs have not shown the extraordinary circumstances necessary to overcome that presumption. Given plaintiffs' failure to make *any* showing of need or unavailability of information elsewhere, their requests to depose high-level officials and government lawyers should be rejected out of hand.[2]

1. It is well-established that litigants must show "extraordinary circumstances," such as a compelling need for information and inability to obtain it elsewhere, before they will be permitted to depose high-level government officials about official acts. See Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985); see also Def. Mot. at 12 (collecting cases).

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[2] Plaintiffs argue (Pl. Br. 6-7) that defendants must show "extraordinary circumstances" to warrant a protective order and that orders barring depositions are "extraordinarily rare." They neglect to mention, however, that courts have repeatedly found lack of relevance to a valid claim, an improper attempt to depose high-level government officials, or an improper attempt to depose a party's attorney, to be proper grounds for the type of protective order that defendants seek. See, e.g., Simplex, 766 F.2d at 586-87 (collecting cases barring depositions of high-level officials); Shelton v. American Motors Corp., 805 F.2d 1323, 1326-30 (8th Cir. 1986) (barring deposition of party's attorney); Miscellaneous Docket Matter #1, 197 F.3d 922, 925 (8th Cir. 1999) (barring deposition of witness sought to be questioned about legally irrelevant matters).

Although plaintiffs claim (Pl. Br. 13) that this rule applies only to "Cabinet level officials or agency heads," the D.C. Circuit has approved its application to executive officials at some remove from a cabinet level officer, see Simplex, 766 F.2d at 586 (protective order barring an attempt to obtain testimony from the Regional Director for the Occupational Health and Safety Administration, Department of Labor, and an Area Director for OSHA), a standard that clearly encompasses the officials at issue here.[3] Indeed, plaintiffs themselves concede that one of the deposed officials — Steven Griles, Deputy Secretary of the Department of the Interior — is sufficiently high-level that his deposition is presumptively improper. Pl. Br. 14.

Plaintiffs also argue that the rule against deposing high-level officials does not apply because the sole purpose of the rule is to protect the deliberative process privilege. Pl. Br. 14-15. Plaintiffs' misunderstand the courts' reluctance to subject high-level officials to depositions. The presumption against permitting depositions of high-level officials is not limited to instances in which a party seeks disclosure of privileged information. The rule rests instead on principles of inter-branch comity, and a recognition that officials (whose appearance might be sought in a broad variety of cases and who "have greater duties and time constraints than other witnesses") should not be called upon to testify absent a clearly demonstrated need. In re United States, 985 F.2d 510, 512 (11th Cir. 1993)(per curiam). The rule also reflects judicial recognition that litigants will rarely be able to demonstrate such a need because the mental processes of a decision-maker are generally irrelevant in assessing the validity of his actions. See Western Elec.

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[3] J. Steven Griles is the Deputy Secretary of the Interior, who reports directly to the Secretary, James Cason is an Associate Deputy Secretary, and Ross Swimmer is the Director of the Office of Indian Trust Transition. Kelly Johnson and Jeffrey Clark are Deputy Assistant Attorneys General. Kyle Sampson is an Associate Counsel and Special Assistant to the President.

Co. v. Piezo Tech.,Inc., 860 F.2d 428, 431 (Fed. Cir. 1988) (discussing United States v. Morgan, 313 U.S. 409 (1941)). Where plaintiffs' endeavor is to determine whether the President's removal of the Special Trustee rested on improper motivation — an issue clearly outside the scope of this Court's review — no clearly demonstrated need for the requested testimony can plausibly be said to exist.

In any event, plaintiffs misstate the decision of the Special Master on which they rely when they claim (Pl. Br. 14) that deliberative process privilege is inapplicable for all matters involving the Special Trustee. That Special Master's decision states that the government may not invoke privilege to shield information as to whether it exercised appropriate care and prudence in administering the Individual Indian Money trusts. Cobell v. Babbitt, No. 1:96CV01285 (RCL), slip op. at 16-17 (D.D.C. filed May 12, 1999). The decision thus requires the government to disclose communications about trust management undertaken in the government's "fiduciary" capacity, which are relevant to evaluating the government's compliance with its fiduciary obligations. Id. at 10, 16-17. That rationale does not apply, the Special Master expressly recognized, to communications made in carrying out the government's "'non-fiduciary' functions." Id at 10; see also, e.g., IIA Scott on Trusts § 173, at 465 (4th ed. 1987) ("A beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust," but not opinions sought "for [the trustee's] own protection."); In re Long Island Lighting Co., 129 F.3d 268, 272-73 (2d Cir. 1997) (distinguishing between legal advice sought in employer's fiduciary capacity as administrator of ERISA plan, which is not privileged from disclosure to plan beneficiaries, and advice sought on non-fiduciary matters,

which remains privileged). Moreover, this Court has not issued a decision on whether to adopt the Special Master's Opinion regarding limitations on privileges.[4]

The removal of a political appointee and the formulation of official testimony to Congress are purely Executive Branch functions, which do not implicate the Department's obligations as a fiduciary and are not governed by the fiduciary standards applicable to trust management. Contrary to plaintiffs' assertions, the very subject matter of their inquiries falls into the heart of matters subject to various privileges, including the protections accorded to presidential communications.

Plaintiffs' attempt to invoke a "bad faith" exception to the ban on deposing high-level officials (Pl. Br. 15-16) is also without merit. Plaintiffs appear to believe that the removal of Mr. Slonaker and the Department of the Interior's control over official testimony to Congress establishes bad faith. As we have shown, however, that conduct is within the scope of discretionary authority given to the President and the Secretary of the Interior by statute and the Constitution, and is in no way illegal or improper. And it cannot be the case, as plaintiffs suggest, that the government's prior breach of its fiduciary duties to beneficiaries of the Individual Indian Money trusts establishes bad faith for purposes of all subsequent litigation, a view that would potentially render any government official subject to discovery on any issue even tangentially related to the trusts. Plaintiffs' inflamed rhetoric notwithstanding, they have identified no basis for their claim of retaliation that would meet the heightened standard for

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[4] See Transcript of proceedings, January 4, 2002, at 1609:9-16 (noting that Court had not yet reviewed the Special Master decision on privilege).

obtaining discovery of high-ranking officers regarding matters so plainly implicating separation-of-powers concerns.

Finally, plaintiffs err in claiming (Pl. Br. 16) that defendants "have implicitly consented to deposition" of the six high-level government officials and lawyers by submitting affidavits from three of the officials in support of an unrelated motion filed several months ago. Plaintiffs did not seek discovery in response to those affidavits, or contest the accuracy of their factual statements. They may not rely on them months later to justify depositions from a large group of high-level officials on completely different topics.

2. Plaintiffs' subpoenas must also be quashed because they are directed at defendants' counsel, and plaintiffs have not made a sufficient showing to overcome the presumption that a party's lawyer should not be forced to testify.

Plaintiffs erroneously assert (Pl. Br. 8-10) that the presumption against deposing a party's counsel protects only its "litigation counsel," not other attorneys.[5] Although the doctrine is applied most frequently to litigation counsel, it has also been applied to protect other lawyers whose potentially privileged communications are sought to be discovered. See, e.g., Caterpillar Inc. v. Friedemann, 164 F.R.D. 76, 78-79 (D. Or. 1995) (corporate plaintiff's in-house attorney); N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 84-85 (M.D.N.C. 1987) (plaintiff's patent attorney). Indeed, the seminal case establishing the doctrine, Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986), involved an in-house corporate lawyer

[5] Plaintiffs also claim, incorrectly, that defendants argue that the government lawyers whose depositions are sought are protected merely because they "are licensed to practice law." Pl. Br. 8. In fact, they are presumptively immune from deposition because they are the government's lawyers, and because the information sought relates to legal advice given in their professional capacities.

who played only a supervisory role in the litigation and was not trial counsel. See *id.* at 1325-26 & n.3.

In any event, there is no reason why the presumption against deposing a party's counsel should be limited to trial counsel. The doctrine is intended to protect against delays resulting from disputes over whether communications sought to be discovered are protected by attorney-client, work-product, or other privileges, and to protect against "the 'chilling effect' . . . on the truthful communications from the client to the attorney" resulting from the attorney's fear that she may later be deposed about those communications. Shelton, 805 F.2d at 1327. Those concerns are fully implicated here, where plaintiffs seek to question government lawyers about sensitive communications at the highest levels of the Executive Branch, including presidential communications, attorney-client communications, and other internal deliberations, that are protected by longstanding privileges.[6]

Finally, plaintiffs allege that they should be permitted to depose government counsel — and no privilege should apply to the communications plaintiffs seek to discover — because government counsel have engaged in "abuse of the litigation process" and attorney misconduct. Pl. Br. 12-13. Plaintiffs provide no factual support for these scurrilous accusations. None of the cases they cite (and no other cases that we have been able to discover) supports the principle that unsupported allegations of attorney misconduct or "abuse of process" are a proper basis for deposing attorneys and rejecting privilege. More fundamentally, the conduct that plaintiffs challenge is not attorney misconduct or abuse of process.

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[6] In contrast, in cases from this circuit that plaintiffs rely on for the proposition that Shelton does not apply, the information sought to be discovered at deposition was clearly *not* privileged. See Pl. Br. 9 n.7 (collecting cases).

Conclusion

For the foregoing reasons and the reasons stated in Defendants' Motion for Protective Order and to Quash Deposition Subpoenas and accompanying Memorandum of Points and Authorities, defendants respectfully request that the Court enter an order quashing the deposition subpoenas and a protective order precluding plaintiffs from conducting such depositions.

Dated September 16, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 16, 2002 I served the foregoing *Defendants' Reply in Support of Motion for Protective Order and to Quash Deposition Subpoenas* by facsimile upon:

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