IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

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

Defendants.

Case No. 1:96CV01285
(Judge Lamberth)

DEFENDANTS' CONSOLIDATED REPLY IN SUPPORT OF (1) MOTION FOR RECONSIDERATION OF MARCH 5, 2003 ORDER DIRECTING PAYMENT TO SPECIAL MASTER ALAN L. BALARAN; AND (2) MOTION FOR RECONSIDERATION OF MARCH 5, 2003 ORDER DIRECTING PAYMENT TO SPECIAL MASTER-MONITOR JOSEPH S. KIEFFER, III

In separate motions filed on March 19, 2003, Defendants seek reconsideration of the Court's March 5, 2003 Orders directing payment to the Special Master and the Special Master-Monitor (collectively "masters") in light of an intervening change in controlling law effected by Section 132 of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11 (Feb. 20, 2003). See Defendants' Motion For Reconsideration Of March 5, 2003 Order Directing Payment To Special Master-Monitor Joseph S. Kieffer, III (Mar. 19, 2003) ("Special Master-Monitor Motion"); Defendants' Motion For Reconsideration Of March 5, 2003 Order Directing Payment To Special Master Alan L. Balaran (Mar. 19, 2003) ("Special Master Motion"). Plaintiffs' Consolidated Opposition to these motions (1) argues that Section 132 of the Consolidated Appropriations Resolution should be interpreted to impose a "cap" on total compensation rather than a new annual "rate" of compensation; (2) argues that funds

appropriated for the Department of the Treasury may be used to compensate Special Master Balaran in excess of amounts permitted by Section 132; and (3) asserts that Section 132 is an unconstitutional "bill of attainder." Plaintiffs' arguments cannot be reconciled with the statute or its legislative history, as explained below.

I. Section 132 Is Best Interpreted To Set A New "Annual Rate" Of Compensation For the Special Master and Special Master-Monitor.

Plaintiffs submit that Section 132 imposes a fiscal-year "cap" rather than a new annual "rate" on compensation that may be paid to the masters. Defendants acknowledge in their moving briefs that a possible interpretation of Section 132 would cap each master's compensation at $285,000 for fiscal year 2003. See Special Master-Monitor Motion at 2 n.2; Special Master Motion at 2 n.2. However, as noted in the moving briefs, expenditures made under the continuing resolutions that preceded the Consolidated Appropriations Resolution should count toward such a cap. See Matter of: Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution, 62 Comp. Gen. 9, 11 (1982). Under this interpretation, compensation paid to each master would exceed the cap in the immediate future, as each has already been paid in excess of $220,000 for work performed between October 1, 2002 and February 28, 2003.[1]

Plaintiffs offer no authority to support their interpretation of Section 132, which apparently would permit each master to be paid an additional $285,000 for the period February

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[1] When the Special Master-Monitor is paid in accordance with the Court's April 10, 2003 Order, he will have received in excess of $307,000 for work performed this fiscal year. When the Special Master is paid in accordance with the Court's April 2, 2003 Order, he will have received just short of $285,000 for work performed this fiscal year.

20, 2003 through September 30, 2003.[2] Such an interpretation cannot be reconciled with the intent of Congress. In its report on the House appropriations bill (which contained the provision that became Section 132 in the Consolidated Appropriations Resolution), the House Committee on Appropriations explained:

> The Committee notes that the Special Master and the Court Monitor appointed by the Court to review various aspects of trust reform at the Department are receiving compensation for their activities that exceed those of the Chief Justice and the Vice President of the United States. The Committee believes that, by any measure, the current level of compensation is excessive. Therefore, given current fiscal and budgetary constraints, the Committee has included a general provision that caps the compensation for each of these Court Officers at no more than 200 percent of the highest Senior Executive Service rate of pay.

H.R. Rep. No. 107-564, at 90 (2003). The Chief Justice receives an annual salary of $192,600; the Vice President of the United States is paid $198,600. Indeed, the masters' current compensation levels exceed that of the President, whose annual salary is $400,000. In light of

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[2] However, passages such as the following in Plaintiffs' Consolidated Opposition appear to concede that amounts paid during the period of the continuing resolutions must count toward the cap:

> Indeed, the only authority defendants cite is for a proposal they do not adopt - the more logical and constitutionally permissible interpretation, discussed below, that the compensation limitation is a "cap" for the entire fiscal year." *See* [D]efendants' Kieffer Motion for Reconsideration at 2, n.2 (discussing *Matter of: Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution*, 62 Comp. Gen. 9, 11 (1982)).

Plaintiffs' Consolidated Opposition at 3 (emphasis in original). The cited Comptroller General opinion states that "to the extent possible, obligations incurred or expenditures made under the continuing resolution are to be charged against the funds provided by the regular appropriation act."

the House Report's express characterization of current compensation levels as excessive in comparison with those of the Chief Justice and Vice President, and its citation to fiscal and budgetary constraints, interpreting Section 132 to permit each master to receive over $500,000 in compensation this fiscal year seems plainly inconsistent with congressional intent.

The interpretation Defendants propose in their moving briefs would neither unemploy the masters in the foreseeable future nor contravene the intent of Congress. To the contrary, Defendants' interpretation would give effect to the language of the statute, which imposes a maximum "annual rate" of compensation. As explained in Defendants' moving briefs, an annual rate of compensation can be converted to hourly, daily, weekly, or biweekly rates for purposes of calculating the maximum compensation permitted for a particular period (such as the period at issue, February 20, 2003 through February 28, 2003). Plaintiffs' argument that an annual rate cannot be so converted unless the rate applies to a federal employee, see Plaintiffs' Consolidated Opposition at 8-9, is without merit.[3]

Finally, Plaintiffs' suggestion that Defendants' interpretation of Section 132 assumes implicitly that the masters will work throughout all future periods of this litigation, see Plaintiffs' Consolidated Opposition at 10, is incorrect.[4] The new statutory annual rate is a *maximum* rate of

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[3] In their moving briefs, Defendants use the calculation in 5 U.S.C. § 5504(b) to convert the maximum annual rate of compensation to a rate applicable to the shorter period of time at issue here. While this statute is specifically directed to the pay rates of federal employees, it provides a mathematical formula that is universally applicable to convert yearly compensation rates to hourly, daily, weekly, or biweekly rates.

[4] Plaintiffs' accompanying argument that the Court should impose sanctions on Defendants and individuals for the purpose of "compensat[ing] its judicial officers as it sees fit," Plaintiffs' Consolidated Opposition at 10-11, is outrageous and should not be countenanced by the Court.

compensation, not a *guaranteed* rate of compensation; each master will be compensated at the appropriate rate for the amount of work he performs.

II. Funds Appropriated For The Department of the Treasury Cannot Be Used To Compensate The Special Master In Excess Of the Statutory Rate.

Plaintiffs' contention that Special Master Balaran may be compensated in excess of the maximum statutory rate from funds appropriated for the Department of the Treasury is inconsistent with the language of the statute. The Consolidated Appropriations Resolution provides:

> None of the funds in this or any other Act for the Department of the Interior or the Department of Justice can be used to compensate the Special Master and the Special Master-Monitor, and all variations thereto, appointed by the United States District Court for the District of Columbia in the Cobell v. Norton litigation at an annual rate that exceeds 200 percent of the highest Senior Executive Service rate of pay for the Washington-Baltimore locality pay area.

Consolidated Appropriations Resolution § 132. The statute restricts all funds appropriated in the Consolidated Appropriations Resolution as well as those appropriated in "any other Act for the Department of the Interior or the Department of Justice." Id. In other words, no funds appropriated in the Consolidated Appropriations Resolution, whether for the Department of the Treasury or any other department, can be used to compensate the masters in excess of the statutory rate. Moreover, if any other Act "for the Department of the Interior or the Department of Justice" also provides funds for the Department of the Treasury, funds appropriated by such an Act are similarly restricted.

A further difficulty with Plaintiffs' argument is that the Court did not – and could not consistent with its authority – require the Department of the Treasury to pay the Special Master

for overseeing the Department of the Interior's participation in the discovery process, for administering the Department of the Interior's document productions, for assessing the Department of the Interior's compliance with Court orders, or for exercising any other authority with regard to the Department of the Interior. Costs properly charged against one agency's appropriations cannot be taxed against the appropriations of another agency, nor can an agency use its appropriations to augment the appropriations of another agency. See 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.").

III. The Consolidated Appropriations Resolution Is Not A Bill Of Attainder.

Plaintiffs' characterization of Section 132 as an unconstitutional bill of attainder, see Plaintiffs' Consolidated Opposition at 4-6, is absurd. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468-69 (1977). As Section 132 neither "determines guilt" nor "inflicts punishment" upon an identifiable individual, it is not a bill of attainder.

Whether a statute inflicts a "punishment" under the Bill of Attainder Clause depends on: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852 (1984) (quoting Nixon, 433 U.S. at 473, 475-76, 478); see also Navegar, Inc. v. United States, 192 F.3d 1050, 1066 (D.C. Cir. 1999); BellSouth Corp. v.

Federal Communications Comm'n, 162 F.3d 678, 684 (D.C. Cir. 1998). None of these inquiries can result in a finding that Section 132 inflicts "punishment" on the masters.

The "historical meaning of legislative punishment includes a death sentence, imprisonment, banishment, confiscation of property and legislative bars to participation by individuals and groups in specific employments or professions." Navegar, 192 F.3d at 1066. Section 132 simply restricts the use of appropriated funds to compensate the masters at an annual rate that exceeds twice the highest Senior Executive Service rate of pay. It does not condemn the masters to death, imprisonment, or banishment. It does not confiscate property, as the masters have no property interest in any expectation of future payments from the government. Cf. Wagner v. United States, 573 F.2d 447, 454 (7th Cir. 1978) (holding that a tax lien could not attach to future wages because such wages were "contingent on . . . continued employment and thus did not represent an existing property right"); Baratt v. United States, 585 F.2d 1041, 1048-49 (Ct. Cl. 1978) ("[W]e know of no case that has held that a federal employee has a property interest in a wage formula by which his future wages will be determined."). Nor does the statute bar anyone from specific employments or professions. Accordingly, Section 132 does not fall within the historical meaning of legislative punishment.

Moreover, Section 132, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." Nixon, 433 U.S. at 475-76. The legitimate nonpunitive legislative purposes of the statute are readily apparent in the House Report, which, noting that the masters' current compensation exceeds that of the Chief Justice and the Vice President, describes the current level of compensation to the masters as "by any

measure . . . excessive," and cites "current fiscal and budgetary constraints" to justify the restriction on appropriated funds. H.R. Rep. No. 107-564, at 90 (2003).

Finally, the legislative record evinces no congressional intent to punish. See Nixon, 433 U.S. at 478. Nothing in the statute or its legislative history contains the slightest hint that Congress intended to punish either the Special Master or the Special Master-Monitor, much less the requisite "unmistakable evidence of punitive intent." Selective Serv. Sys., 468 U.S. at 855 n.15 (finding that legislative statements did not constitute "the unmistakable evidence of punitive intent which . . . is required before a Congressional enactment of this kind may be struck down"); Navegar, 192 F.3d at 1067 ("The case law instructs that under [the final prong of the Nixon test], appellants must show unmistakable evidence of punitive intent." (internal quotations omitted)); BellSouth Corp. v. Federal Communications Comm'n, 144 F.3d 58, 67 (D.C. Cir. 1998) (requiring "'smoking gun' evidence of congressional vindictiveness" to justify finding punitive intent). The statute and the legislative history "cast no aspersions on [the masters'] personal conduct and contain no condemnation of [their] behavior as meriting the infliction of punishment." Nixon, 433 U.S. at 479. Thus, there is no evidence whatsoever that "Congress was intent on encroaching on the judicial function of punishing an individual for blameworthy offenses." Id.

Because Section 132's restriction on the use of appropriated funds does not fall within the historical meaning of legislative punishment, exhibit a purely punitive purpose, or manifest a congressional intent to punish the masters, it is not an unconstitutional bill of attainder. See Navegar, 192 F.3d at 1068. "[W]hile the Bill of Attainder Clause serves as an important 'bulwark against tyranny,' . . . it does not do so by limiting Congress to the choice of legislating

for the universe, or legislating only benefits, or not legislating at all." Nixon, 433 U.S. at 471 (quoting United States v. Brown, 381 U.S. 437, 443 (1965)).

Conclusion

For all of the reasons set forth above and in their moving briefs, Defendants respectfully request that the Court reconsider its March 5, 2003 Orders in light of the intervening change in controlling law.

Dated: April 14, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

SANDRA P. SPOONER
Deputy Director
D.C. Bar No. 261495
JOHN T. STEMPLEWICZ
Senior Trial Attorney
CYNTHIA L. ALEXANDER
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 14, 2003 I served the foregoing *Defendants' Consolidated Reply in Support of (1) Motion for Reconsideration of March 5, 2003 Order Directing Payment to Special Master Alan L. Balaran; and (2) Motion for Reconsideration of March 5, 2003 Order Directing Payment to Special Master-monitor Joseph S. Kieffer, III* by facsimile in accordance with their written request of October 31, 2001.

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

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

By U.S. Mail upon:

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

By facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958

Jay St. John