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

_____)
 In re Gale Norton,)
)
 Secretary of the Interior)
 in her official capacity,)
)
)
 Petitioner.)
)
)
 _____)

No. 03-5288

RESPONSE TO ORDER OF FEBRUARY 25, 2005

INTRODUCTION AND SUMMARY

In the face of overwhelming evidence of conduct requiring his recusal, Special Master Balaran submitted his resignation on April 5, 2004, days before this Court was to hear argument on the government’s petition seeking his disqualification.

Although Mr. Balaran’s resignation mooted the question of his further participation in the case, it did not obviate the ongoing impact of the voluminous reports that the Master issued even after the government moved to disqualify him for bias. In the name of “institutional reform,” and in a “quasi-inquisitorial, quasi-prosecutorial role” that this Court has disapproved, 334 F.3d 1128, 1142 (D.C. Cir. 2003), the Master gathered evidence by whatever means he saw fit, on any subject he perceived to have even a tangential relation to trust management generally. The Master then framed reports for presentation to the district court and the public that have served as functional indictments. These reports charged Interior officials with deliberate concealment, obstruction, malfeasance, and incompetence. Indeed, the Master’s resignation letter repeated many of these baseless charges and added new ones, insisting that the government sought his recusal not because of his own misconduct but to impede his quest for the “truth.”

At the government's suggestion, this Court held the government's petition in abeyance pending the resolution of the government's appeal from the structural injunction issued by the district court in September 2003. See Order of May 11, 2004. On December 10, 2004, this Court vacated all aspects of the injunction, with the exception of a single filing requirement. Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004). Accordingly, the Court's February 25, 2005 order directed the parties to address the status of the mandamus petition in light of that decision.

However, on February 23, 2005, the district court reissued without modification the "historical accounting" portions of the original structural injunction. The government's appeal from that injunction (and its motion for an emergency stay) are pending. See No. 05-5068 (D.C. Cir.).

Inasmuch as the government's appeal from the accounting portion of the structural injunction is once more pending, the Court may determine that it is appropriate to continue to hold the petition for mandamus in abeyance pending resolution of that appeal. Alternatively, the Court may determine that it is appropriate to address the merits of the petition at this time. What is evident is that the issue of Mr. Balaran's recusal continues to present a live controversy notwithstanding the passage of time. Notwithstanding the Master's resignation, plaintiffs continue to cite his reports. As long as the Master's reports play a potential role in this litigation, the issues raised by the government's petition are very much alive.

BACKGROUND

On April 21, 2003, the Special Master, after investigating charges brought by Native American Industrial Distributors, Inc. (NAID), a government contractor, released an Interim Report containing his findings and conclusions. Pet. Exh. 1. The first footnote of the report indicated that it was based on information “obtained outside of normal channels and to which the parties may have no familiarity.” A review of the Master’s billing records noted the paid assistance of “MSS.” These notations proved to refer to Mike S. Smith, who had been Vice President of NAID at the time it sought to intervene in this litigation to press its complaint against Interior.

The government moved for the Special Master’s disqualification in May 2003. Despite repeated requests for expedition, neither the Special Master nor the district court responded to that motion until ten months later, after the government’s mandamus petition had already been filed with this Court. In the interim, the Master continued in his “quasi-inquisitorial, quasi-prosecutorial role,” 334 F.3d at 1142, investigating on his own initiative whatever matters he perceived to have any relation to trust reform. Asserting “the authority of institutional reform special masters to uncover facts and collect evidence via ex parte contacts with parties and counsel,” he issued two new reports charging the government with wrongdoing. 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. 30, 2003), at 1 (dkt. #2311) (Pet. Exh. 15) (quoting Order of March 29, 2002 (dkt. # 1235), cited in Cobell v. Norton, 237 F. Supp. 2d 71, 75 (D.D.C. Jan. 17, 2003)). See also Site Visit Report of the Special Master to the Office of Appraisal Services in Gallup, New Mexico and the Bureau of Indian

Affairs Navajo Realty Office in Window Rock, Arizona (Aug. 20, 2003), at 38 (dkt. #2219) (Pet. Exh. 14).

The Special Master finally responded to the government's recusal motion with a statement filed in district court, shortly before the deadline this Court had set for plaintiffs to respond to the government's mandamus petition. The Master left it to plaintiffs to provide this Court with a copy of his filing and subsequent submissions.

The district court did not rule on the recusal motion until March 15, 2004, after briefing on the government's petition in this Court was complete. The district court accepted all arguments advanced by Special Master Balaran, echoing its defense of the unorthodox conduct of former Special Master-Monitor Kieffer, whose appointment had been vacated by this Court. See 310 F. Supp. 2d 102 (D.D.C. 2004); 334 F.3d at 1142-45.

Nevertheless, after this Court scheduled argument on the government's petition, Special Master Balaran resigned. His resignation letter declared that the district court had been correct in finding the government's recusal motion "frivolous" and in "suggesting that it was Interior that acted improperly by impeding my investigation and that Interior had an ulterior motive for seeking my removal." Resignation Letter at 1. Referring to his ex parte visit on September 19, 2003 to the Minerals Management Service's Dallas office, the Master insisted that he was asked to leave because his recent "findings" had "implicated the agency's systemic failure to properly monitor the activities of energy companies leasing minerals on individual Indian lands." Id. at 2. The Master declared that his findings "could cost the very companies with which senior Interior officials maintain close ties, millions of dollars." Ibid. He further announced that the government's reasons for seeking disqualification "bear no relationship to the reasons it offers in

its recusal motion, but rather to my discovery of significant problems in its appraisal and record-keeping practices.” Id. at 3. His investigation into these matters, the Master asserted, “might well result in energy companies being forced to repay significant sums to individual Indians. Interior could not let this happen.” Id. at 3.¹

The district court accepted the Master’s resignation on April 6, 2004 and ordered that the resignation letter be made part of the record. In a separate order, the court required the government to pay over \$65,000 in attorney’s fees incurred by the Master with respect to the disqualification issue in the period commencing January 28, 2004.²

On April 6, 2004, plaintiffs filed a suggestion of mootness with this Court. By order dated May 11, 2004, this Court held the mandamus petition in abeyance pending resolution of the government’s appeal from the structural injunction entered by the district court.

On December 10, 2004, this Court vacated the structural injunction, with the exception of the requirement that the Department of Interior complete and file its “To Be” Plan. Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004). On February 23, 2005, the district court, acting sua

¹ The Master made these charges without mentioning the contradictory evidence in the record. For example, in March 2002, the Secretary transferred the authority to conduct valuation and appraisal of Indian trust lands from the Bureau of Indian Affairs to the Office of the Special Trustee to “ensure the independence, accountability, and oversight of the Indian trust lands valuation and appraisal staff.” Eleventh Quarterly Report, at 81 (dkt. # 1586). Subsequently, all valuation and appraisal functions for the Department were consolidated into a single Office of Appraisal Services (OAS) located within the Office of the Special Trustee. An independent review of OAS was conducted in 2003 by the Appraisal Foundation. In its August 2003 report, the Appraisal Foundation concluded that “the degree of appraisal independence within OAS is very good, with virtually no reports of pressure being placed on staff or contract fee appraisers to achieve preconceived value estimates.” Fifteenth Quarterly Report, at 61 (dkt. # 2356).

² The district court also ordered payment of fees to Mr. Balaran through April 30, 2004. Mr. Balaran has received over \$1,775,000 in fees (exclusive of expenses and payment for assistance and experts, which bring the total bill for his services to over \$3,800,000).

sponte, reissued the historical accounting portions of that structural injunction without modification. The government's appeal from that injunction is pending. See No. 05-5068.

ARGUMENT

The Special Master's Resignation Has Not Obviated The Ongoing Impact Of His Actions Or Resolved The Fundamental Issues They Raised.

The Special Master resigned on April 5, 2004. Although the resignation rendered the issue of his continued participation in the case moot, it did nothing to address the impact of a biased judicial officer on the course of this litigation.

The Special Master has essentially functioned as a prosecutor and grand jury – a role “unknown to our adversarial legal system,” 334 F.3d at 1142 – creating evidence and issuing indictments with regard to any matter that, in his view, had some relationship to trust accounting. For example, in the Interim Report of April 21, 2003 (Pet. Exh. 1), he purported to find contumacious misconduct. In his September 30, 2003 report regarding his visit to the Texas Office of the Minerals Revenue Management Division (Pet. Exh. 15), the Master purported to find mismanagement with regard to Interior's oversight of oil leases. In his August 20, 2003 report regarding his visit to the Office of Appraisal Services in Gallup, New Mexico (Pet. Exh. 14), the Master purported to find mismanagement with regard to appraisals of rights-of-way on Indian lands, and charged present officials with malfeasance even though the appraisals he purported to review were completed before they took office. The reports were developed entirely outside of the adversarial process. In his resignation letter, made part of the record by the district court, Mr. Balaran charged that the recusal motion filed by the government in May 2003 was a sham intended to prevent him from issuing the reports of his investigations.

The Master's resignation did not remove the string of indictments, their consequences in this litigation, and the seeds of mistrust that his reports have sown among trust beneficiaries and the public generally. The district court's opinion on the government's recusal motion declared that the Master's conduct was wholly unobjectionable. See 310 F. Supp. 2d 102. Plaintiffs have continued to cite the Master's reports – and even his resignation letter – to the court. See, e.g., Dtk. #2562 at 4 & n.13 (citing the resignation letter in asserting that the former Special Master had “uncovered powerful evidence of misconduct in the administration of the Trust, including without limitation document destruction, fraud, abuse, and waste of Trust assets”); id. at 5 & n.15 (citing the August 20, 2003 appraisal report in support of the motion to compel deposition testimony from the former Chief Appraiser in the BIA Navajo Regional Appraisal Office).

In considering petitions to disqualify Special Master Balaran from contempt proceedings in this case, this Court rejected the contention that the Master's resignation rendered the recusal petitions moot. See In re: Brooks, 383 F.3d 1036, 1040, 1044 (D.C. Cir. 2004). Instead, the Court observed that if the Master should have been recused from the contempt proceedings, “then any work produced pursuant to the [referrals of the district court] must also be ‘recused’ – that is, suppressed.” Id. at 1044. Thus, the Court addressed the disqualification issue, holding that the Master should have been recused from the contempt proceedings and that “any reports, recommendations, or other work product Balaran prepared pursuant to the September 17 referrals may not be submitted to the district court or otherwise disseminated in any manner.” Id. at 1046. See also United States v. Microsoft Corp., 253 F.3d 34, 116 (D.C. Cir. 2001) (“prospective

disqualification of the offending judge” is the “minimum” remedy for conduct that calls the judge’s impartiality into question).

Because Mr. Balaran’s conduct was incompatible with the standards of 28 U.S.C. § 455, the Court likewise should reverse the district court’s denial of the government’s recusal motion, and direct that the Master’s work product be vacated. The actions of a biased judicial official should not be allowed to infect this case indefinitely.

Alternatively, the Court may conclude that it is appropriate to continue to hold the petition in abeyance inasmuch as the accounting portion of the structural injunction has been reinstated without modification and is once more on appeal to this Court.

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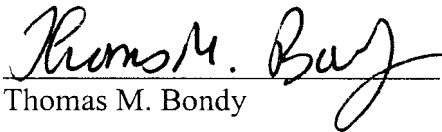
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