No. 02-5374

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' RESPONSE TO REHEARING PETITION

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Pursuant to this Court's order of September 11, 2003, Defendants-Appellants, Gale A. Norton, Secretary of Interior, et al., hereby respond to the petition for rehearing en banc filed in this matter on September 2, 2003, by Plaintiffs-Appellees. The panel's ruling is correct, and plaintiffs have identified no conflict with any other decision of this Court and no issue of exceptional importance warranting further review.

STATEMENT

1. This appeal involves plaintiffs' claim for an historical accounting of Individual Indian Money (IIM) accounts held in trust by the Department of the Interior (DOI). On December 21, 1999, the district court issued a declaratory judgment holding that the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239, requires defendants to provide an

accurate accounting of all money in the IIM trust accounts held for the benefit of plaintiffs, without regard to when the funds were deposited. Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999). Because the agency had not yet provided such an accounting, the court remanded the matter to allow DOI the opportunity to come into compliance. The court also retained jurisdiction over the matter for five years, and required DOI to file quarterly reports explaining the steps taken to rectify the breaches found. Id. at 56.

On interlocutory appeal under 28 U.S.C. § 1292(b), this Court largely affirmed. Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). The Court upheld the district court's characterization of the defendants' statutory trust duties - specifically, their duty to perform a "complete historical accounting," id. at 1102 - and its finding that those duties were judicially enforceable. Id. at 1104. The Court also affirmed the district court's decision to retain jurisdiction over the case for five years and to require periodic progress reports, id. at 1109, noting that this relief was "relatively modest," id., and "well within the district court's equitable powers." Id. at 1086. The panel admonished the district court, however, "to be mindful of the limits of its jurisdiction." Id. at 1110.

2. After this Court's decision, the district court appointed Joseph S. Kieffer, III, as a "Court Monitor" to "monitor and review all of the Interior defendants' trust reform activities and file written reports of his findings with the Court." JA 3825. DOI

consented to the appointment for a one-year period. The Monitor's reports were to comment not only on the pace of trust reform, but also on "any other matter Mr. Kieffer deems pertinent." Id. The court gave the Monitor access to "any Interior offices or employees to gather information necessary or proper to fulfill his duties," and allowed him to engage in ex parte communications. JA 3825-26.

In April 2002, the district court invited the parties to submit their views on the reappointment of the Monitor for an additional year. JA 5710. The government made clear that it would consent to the reappointment only if the Monitor was limited, among other things, to reporting on steps taken to rectify the breaches of trust declared by the court or steps that would delay an accounting. JA 5711. The court rejected this condition, but nevertheless reappointed the Monitor. JA 6875. The government subsequently moved to revoke Mr. Kieffer's appointment.

3. Pursuant to the district court's December 1999 ruling, DOI began submitting quarterly reports concerning the status of its compliance efforts in March 2000. Based on these reports, and the Court Monitor's comments on them, plaintiffs filed motions for orders to show cause why the Secretary of the Interior, an Assistant Secretary, and more than three dozen of their employees and counsel, should not be held in contempt.

On November 28, 2001, the court issued a show cause order listing four "specifications" focusing on DOI's alleged failure to initiate an historical accounting and its alleged failures to report properly on the operations of the Trust Assets and

Accounting Management System and the Bureau of Indian Affairs Data Cleanup Project. JA 4452. On December 6, 2001, the court issued a supplemental order requiring the defendants also to show cause why they should not be held in contempt for "[c]ommitting a fraud on the Court by making false and misleading representations starting in March, 2000, regarding computer security of IIM trust data." JA 4467.

On September 17, 2002, the district court issued a 265-page memorandum opinion, ordering various forms of relief and holding the Secretary of the Interior and the Assistant Secretary of the Interior for Indian Affairs in contempt. JA 275.

Although the named defendants were, as the court recognized, putative contemnors only in their official capacities, and although much of the conduct at issue took place before the present Secretary even took office, the court's contempt findings were in large measure directed at the named defendants personally. The court concluded that they were unfit to serve as trustees and invited them to resign if they had difficulties with its order. The court declared that if DOI officials, "including Secretary Norton, feel that as a result of this Court's rulings they are unable or unwilling to perform their duties to the best of their ability, then they should leave the Department forthwith or at least be reassigned so that they do not work on matters relating to the IIM trust." JA 489. The court's ultimate conclusion was that "Secretary Norton and Assistant Secretary McCaleb can now

rightfully take their place * * * in the pantheon of unfit trustee-delegates." JA 539.

Based on its conclusion that the officials responsible for the accounting program were unfit to perform their duties, the court formalized a broad agenda for trust reform to be supervised by the court in future proceedings. The court announced that it would consider further relief in a "Phase 1.5" trial. In separate orders also issued on September 17, 2002, the district court denied the motion to revoke the Court Monitor's appointment, and elevated the Court Monitor to the position of "Special Master-Monitor." JA 247, 266.

4. The government sought appellate review, making three main arguments. First, the government argued that the district court had exceeded the limits of judicial authority by effectively displacing the Secretary and taking over the underlying process of trust reform. See Opening Br. 27; Reply Br. 5. Second, the government urged that the court erred in declining to remove Mr. Kieffer as Court Monitor and in promoting him to the new role of Special-Master Monitor. See Opening Br. 52; Reply Br. 39. Third, the government contended that the findings of contempt with respect to the Secretary and Assistant Secretary were without basis and must be set aside. See Opening Br. 40; Reply Br. 19.

In a decision issued on July 18, 2003, the panel held that it lacked jurisdiction to consider the first argument, but reversed the district court with respect to the second and third arguments. Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003). With respect to

the government's first argument, the panel held that the court's order requiring further trial proceedings did not have the practical effect of an injunction and that the government "has not shown that an appeal from the district court's eventual entry of an injunction, if and when that occurs, would not provide it with adequate relief." Id. at 1138.[1]

As far as Mr. Kieffer was concerned, however, the panel concluded that the court's orders "present an appropriate occasion for mandamus." Id. at 1139. The panel explained that the government's "right to relief is clear, and the injury it alleges - interference with the internal deliberations of a Department of the Government of the United States - cannot be remedied by an appeal from the final judgment." Id. at 1140. On the merits, the panel vacated the court's orders denying the motion to revoke the Court Monitor's appointment and appointing him as Special-Master Monitor. The rehearing petition does not seek to disturb this aspect of the panel's ruling.

On the third prong of the government's appeal, the challenge to the contempt findings, the panel first accepted the government's contention that the determination of contempt in this case was reviewable. Recognizing that ordinarily an interlocutory finding of civil contempt against a party is not immediately appealable, the panel viewed the contempt citations here as "functionally

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[1]At this time, the district court has concluded the "Phase 1.5" trial, and has now very recently issued rulings based on that trial on September 25, 2003. See Orders of Sept. 25, 2003, Cobell v. Norton, Civil Action No. 96-1285 (D.D.C.).

criminal" in nature. 334 F.3d at 1140. The panel stressed the unusual nature of this case, in which the district court had gone to great lengths to personalize the proceedings, faulting the current Secretary of the Interior for the acts and omissions of her predecessors, declaring her "unfit" to carry out her duties, and explicitly suggesting that she resign if she felt unable to fulfill her proper role in light of the court's orders. See id. at 1146; see also id. at 1136.

Having found the contempt determination reviewable, the panel vacated it on the merits. The panel emphasized that the district court's own findings "clearly indicate[d] that in her first six months in office Secretary Norton took significant steps toward completing an accounting." 334 F.3d at 1148. The panel also indicated that statements in court-ordered progress reports cannot form the basis for contempt merely because they may have "painted an overly sunny picture" of the matters depicted. Id. at 1149. See also id. at 1150 ("we think it inconceivable that a departmental secretary may be held to have committed a fraud on the court because an attorney representing her Department argued in an adversarial proceeding that an adversary's motion critical of the Department was 'without merit'").

ARGUMENT

The rehearing petition seeks to call into question the portion of the panel's ruling addressing the district court's findings of contempt. The panel properly exercised jurisdiction over that aspect of the government's appeal, and properly vacated the

contempt determination on its merits. The panel's ruling does not conflict with any other decision of this Court and presents no issue of exceptional importance warranting en banc review.

A. 1. The panel properly exercised jurisdiction over the government's challenge to the district court's contempt ruling. As the panel recognized, ordinarily "an order holding a party in civil contempt in an ongoing proceeding is not appealable as a final order." 334 F.3d at 1140 (citing Byrd v. Reno, 180 F.3d 298 (D.C. Cir. 1999)). In the circumstances of this case, however, the panel viewed the contempt determination as "functionally criminal" in nature. Id. On that basis, that panel concluded that appellate jurisdiction existed. Id.

In taking issue with the panel's ruling, plaintiffs largely disregard the nature of the district court's findings and conclusions Although Secretary Norton is not a party to this suit in her personal capacity, the trial court purported to pass judgment upon her individually. Thus, the court concluded that Secretary Norton could take her place "in the pantheon of unfit trustee-delegates," JA 539, and invited her to resign "forthwith" if she felt "unable or unwilling" to perform her duties "as a result of this Court's rulings * * *." JA 489.

As the panel recognized, the contempt ruling was not designed to secure compliance with a specific court order, but was based, instead, on a retrospective judgment of past agency conduct. See 334 F.3d at 1145-47. The panel recognized that in "some circumstances a civil contempt sanction may be designed to

'compensate[ ] the complainant for losses sustained,'" id. at 1145 (citation omitted). The panel observed, however, that the court had already scheduled another trial to consider alleged institutional failures and that the sole relief linked to the contempt was an award for attorney's fees for prosecuting the contempt trial, which could not be considered relief for the alleged underlying contempt. Id. Instead, it was clear that the court's order and "in particular its statement that Secretary Norton was 'unfit,'" demonstrated that its ruling meant to serve as a "reprimand." Id. at 1146.

2. Plaintiffs contend that the panel's characterization of the contempt findings as functionally criminal was improper because the district court denominated the proceedings as civil, and because the government did not argue that they were criminal in nature. As the panel correctly observed, however, "[a] contempt proceeding is either civil or criminal by virtue of its 'character and purpose,' not by reason of the trial judge so denominating the proceeding." 334 F.3d at 1145 (quoting International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 827 (1994)). See Evans v. Williams, 206 F.3d 1292, 1294-95 (D.C. Cir. 2000). Moreover, while the government has always recognized that the district court purported to be considering issues of civil contempt against the Secretary in her official capacity, we also explained that the ruling was not designed to secure prospective compliance with a court order and urged that "the rationale for permitting immediate appeals from orders of criminal contempt" was fully

applicable in the extraordinary circumstances presented. Opening Br. 24 n.6.

Indeed, appellate jurisdiction would exist to review the district court's ruling regardless of whether this contempt matter is treated as civil or criminal in nature. As our briefs before the panel demonstrated, orders of civil contempt may in appropriate cases be reviewed under this Court's mandamus jurisdiction under the All Writs Act, 28 U.S.C. § 1651. See Byrd, 180 F.3d at 302-03. Where, as here, a district court concludes that a sitting Cabinet Secretary is unfit to execute her statutory functions, and invites her to resign if she disagrees with the court's rulings, there can be little doubt that this Court should exercise its supervisory jurisdiction to ensure that the trial judge's extraordinary conclusion is not erroneous. See Opening Br. 26; Reply Br. 44-46.

3. Plaintiffs' reliance on In re Cheney, 334 F.3d 1096 (D.C. Cir. 2003), and Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983), is fundamentally misplaced. The panel held in Cheney that appellate jurisdiction did not lie to review certain discovery orders in a suit against the Vice President and others under the Federal Advisory Committee Act, 5 U.S.C. App. 2. Nothing in that decision touches upon questions of civil or criminal contempt, or even remotely addresses the issue of the circumstances in which a contempt ruling calling into question the fitness of a sitting Cabinet Secretary may properly be subject to review.

Carducci is inapposite as well. There, this Court held that the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat.

1111, precluded judicial review of certain personnel actions which were not alleged to violate the Constitution. The Court, however, declined to reach the question of whether procedural due process protections might apply to such matters, reasoning that this issue had not been raised before the district court. 714 F.2d at 177. Again, that decision has no bearing on the case at bar, in which there is no "asserted but unanalyzed constitutional claim" (id.), and in which the government explicitly argued that appellate jurisdiction existed, in part because the rationale for permitting immediate appeals from orders of criminal contempt was fully applicable. See Opening Br. 24-27.

B. The panel also properly vacated the district court's contempt determination on its merits. The court's conclusion that the Secretary and Assistant Secretary were in contempt is legally unsustainable under any applicable standard.

The panel was plainly correct in holding that, seen from a criminal perspective, Ms. Norton and Mr. McCaleb cannot properly be held in contempt with respect to events in which they had no personal involvement and which occurred in significant part before they were in office. See 334 F.3d at 1145-50; see also Brief of Gale A. Norton In Her Individual Capacity at 23-38. Equally clearly, however, there simply was no contemptuous conduct here, regardless of whether the matter is addressed from a civil or criminal vantage point.

As noted, the contempt proceedings were based on five "specifications." The first two specifications concerned in

significant part DOI's alleged failure to undertake appropriate historical accounting efforts subsequent to the district court's December 1999 ruling. As the government noted in its briefs before the panel, however, the district court's December 1999 ruling was a declaratory judgment, not an injunctive order, and it specified no timeline within which DOI was required to effectuate particular steps. See Opening Br. 43-44. Thus, this matter involves no violation of any mandatory injunctive term, and for this reason alone cannot form the basis for contempt. See, e.g., Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993).

Moreover, even the Court Monitor admitted that within less than a year from the time of this Court's affirmance of the 1999 ruling, and from the beginning of Secretary Norton's term in office, the government had "made more progress * * * than the past administration did in six years." JA 3161. Thus, as the panel properly explained, the district court's own findings "clearly indicate that in her first six months in office Secretary Norton took significant steps toward completing an accounting." 334 F.3d at 1148. Against this backdrop, the district court's statement that the government's efforts were "too little, too late" is without basis. Id. at 1147. For these reasons, the first two "specifications" provide no plausible ground for a finding of contempt, regardless of whether such contempt might be viewed as civil or criminal, and regardless of whether any particular event

occurred prior or subsequent to Secretary Norton's assumption of office.

Similarly, specifications 3 and 4 involved allegedly misleading statements contained in DOI's quarterly reports. But as comprehensively demonstrated in our briefs, the district court's characterizations of those statements were themselves fundamentally inaccurate. See Opening Br. 51-52; Reply Br. 30-35. The reports mandated by the court were voluminous in nature, addressed a number of highly technical issues, and necessarily required the exercise of judgment regarding tone and emphasis. See, e.g., JA 540. Especially when considered in isolation and out of context, it was not contempt for a relatively small number of statements contained in hundreds if not thousand of pages of court-ordered reports to have "painted," in retrospect, "an overly sunny picture" of ongoing progress. 334 F.3d at 1149. Again, this conclusion holds true regardless of whether the contempt ruling is seen as civil or criminal in nature, and regardless of whether any particular report was prepared before or after Secretary Norton took office.[2]

Finally, the fifth specification touched upon various statements made to the court regarding computer security, including statements made by government lawyers in litigation proceedings to the effect that, in the government's view, certain of plaintiffs'

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[2]As the panel properly noted as well, it was especially "mystifying" for the district court to hold that later reports calling attention to shortfalls in earlier ones "lead to the conclusion that those [prior] reports were intentionally false and misleading." 334 F.3d at 1149.

arguments were without merit. As the panel correctly observed on this point, the government made no false statements and it is "inconceivable that a departmental secretary may be held to have committed [contempt or] a fraud on the court because an attorney representing her Department argued in an adversarial proceeding that an adversary's motion critical of the Department was 'without merit.'" 334 F.3d at 1150. For the above reasons, the panel properly set aside the district court's contempt findings on their merits.[3]

[3]For the same reasons that this case presents no proper basis for contempt, it also presents no basis for a charge of "fraud on the court." As the panel noted, fraud on the court is an extremely "narrow concept, limited to 'the most egregious conduct involving a corruption of the judicial process itself.'" 334 F.3d at 1148 (quoting 11 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2870, at 418 (2d ed. 1995)). From any objective standpoint, the matters at issue here, including optimistic assessments in court-ordered progress reports and statements by counsel to the effect that particular arguments lacked merit, do not come close to falling within the scope of that doctrine.

CONCLUSION

For the foregoing reasons, the rehearing petition should be denied.

Respectfully submitted,

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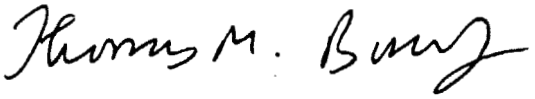

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2003, I caused copies of the foregoing response to be sent to the Court by courier and to be served on the following counsel in the manner specified.

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