

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

_____)	
ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs-Appellees,)	
)	
v.)	Nos. 03-5262, 04-5084
)	
GALE A. NORTON,)	[Civil Action No. 96-1285 (D.D.C.)]
Secretary of the Interior, et al.,)	
)	
Defendants-Appellants.)	
_____)	

RESPONSE TO MOTION FOR IMMEDIATE ISSUANCE OF MANDATE

Defendants-appellants, the Secretary of the Interior, et al., hereby respond to the “emergency motion” filed on December 23, 2004, seeking immediate issuance of the mandate.

The government does not oppose issuance of the mandate on any schedule the Court deems appropriate. We wish to make clear, however, that we in no way subscribe to the account presented in plaintiffs’ motion.

Although plaintiffs style their pleading as implicating an "emergency," there is no emergency of any kind. As discussed in this Court’s opinion, a number of Interior computer systems were reconnected to the internet pursuant to the provisions of a consent order which established procedures for reconnection with the approval of the Special Master. The systems in question that are currently on-line were reconnected pursuant to these procedures. They have thus been on-line since at least July 2003, when the district court issued a preliminary injunction that superseded the Special Master regime.

The district court's July 2003 injunction was not based on a showing that the reconnected systems were, in fact, insecure. To the contrary, the district court specifically observed in issuing its July 2003 order that “plaintiffs have not demonstrated to the satisfaction of the Court that the reconnected systems are not presently secure from unauthorized Internet access.” 274 F. Supp. 2d at 132. When the district court on March 15, 2004 ordered that these systems be disconnected, it did so without even considering the evidence of security improvements provided by Interior pursuant to the court’s order, and this Court immediately stayed the disconnection order. In its December 3, 2004 opinion, this Court ordered that the injunction be vacated, holding that it was not supported by the evidence.

It is thus wholly unclear what kind of “emergency” exists. At bottom, plaintiffs’ motion simply repeats the kind of general allegations that this Court has already concluded are not sufficient to support an injunction. Indeed, although plaintiffs seek to suggest that Interior's computer systems are insecure, a principal basis of this Court’s decision was that the evidence before the district court did not support that conclusion. Plaintiffs’ declared “emergency” is without substance.

Nevertheless, if plaintiffs have determined that they do not wish to seek further review of this Court’s decision, the government does not object to issuance of the mandate on whatever schedule the Court believes proper.

Respectfully submitted,

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DECEMBER 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December 2004, I caused copies of the foregoing motion to be sent to the Court and to the following by hand delivery:

The Honorable Royce C. Lamberth
United States District Court
United States Courthouse
Third and Constitution Ave., N.W.
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and to the following by federal express, overnight mail:

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