

TRANSCRIPT OF PROCEEDINGS

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

ELOUISE PEPION COBELL, ET AL.

Plaintiffs-Appellees,

No. 003-5262, et al.

v.

GALE A. NORTON, SECRETARY OF THE
INTERIOR, ET AL.

Defendants-Appellants.

Pages 1 through 60

Washington, D.C.

Date: September 14, 2004

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

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5 ELOUISE PEPION COBELL, ET AL.,

6 Plaintiffs-Appellees,

7 v.

No. 03-5262, et al.

8 GALE A. NORTON, SECRETARY OF THE
9 INTERIOR, ET AL.,

10 Defendants-Appellants.

11 Tuesday, September 14, 2004

12 Washington, D.C.

13 The above-entitled matter came on for oral
14 argument pursuant to notice.

15 BEFORE:

16 CHIEF JUDGE GINSBURG AND CIRCUIT JUDGES RANDOLPH
AND ROGERS

17 APPEARANCES:

18 ON BEHALF OF THE APPELLANTS:

19 MARK STERN, ESQ.

20 ON BEHALF OF THE APPELLEES:

21 G. WILLIAM AUSTIN, ESQ.
22
23
24
25

Deposition Services, Inc.

6245 Executive Boulevard

Rockville, MD 20852

Tel: (301) 881-3344 • Fax: (301) 881-3338

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P R O C E E D I N G S

THE CLERK: Case number 03-5262, et al., Elouise
Pepion Cobell, et al., versus Gale A. Norton as the
Secretary of the Interior, et al., appellants; Alan Lee
Balaran. Mr. Stern for the appellants, Mr. Austin for the
appellees.

ORAL ARGUMENT OF MARK STERN, ESQ.

ON BEHALF OF THE APPELLANTS

MR. STERN: May it please the Court. The
injunctions on appeal bar the Department of the Interior
with some exceptions from having any connection of any kind
to the Internet. It's difficult to conceive of what legal
claim or what factual showing might support an order of
this kind, which in the year 2004 is approximately has the
same effect as telling a cabinet agency that it cannot use
the telephone. What is absolute --

JUDGE RANDOLPH: You can't revise the records on
a telephone, though.

MR. STERN: Excuse me, Your Honor?

JUDGE RANDOLPH: You can't revise records on a
telephone.

MR. STERN: No. Well, Your Honor, you also
can't, I mean, if the question is, the question is what is

1 the, I mean, there are a whole layer, number of things, and
2 one of them what the, what harm plaintiffs have
3 demonstrated in this case, what its connection would be to
4 the claim that's actually at issue in this case. But on
5 the other side of the balance is what authority does a
6 District Court have to order a cabinet agency to dismantle
7 a communication system, so that normally if we identified
8 exactly what the particular legal duty was and what the
9 standard was by which it was measured, and plaintiffs had
10 prevailed on that, there would still be the question of
11 appropriate relief.

12 JUDGE RANDOLPH: No, my only point is, I
13 understand the communications analogy was that to the
14 extent that there's any finding here that it was on the
15 basis that you could hack into the system and change the
16 records, right?

17 MR. STERN: That's right, Judge Randolph.

18 JUDGE RANDOLPH: Right, and you can't do that by
19 a telephone.

20 MR. STERN: No, my point was not, was simply to,
21 you know, analogize the level of the harm, because the
22 District Court refers to being disconnected from the
23 Internet as an inconvenience, but sort of, but the point is
24 that in the year 2004, it's, to talk about being
25 disconnected from the Internet as an inconvenience is

1 approximately the same thing as saying that it's an
2 inconvenience to not be allowed to pick up your telephone,
3 and that's the only point I was trying to make on that
4 score.

5 There are at least fundamental errors reflected in the
6 Court's ruling which really sort of go to some of the
7 points that we're already starting to get into, and the
8 first is that there is a, that even though there's some
9 stated connection to the general notion of preserving
10 documents for use in the accounting, which is the sort of
11 claim that originally gave rise to this lawsuit, there's at
12 no point been any attempt to define with any clarity
13 precisely what that relation is, what the particular legal
14 duty, what the standard would be by which it would be, by
15 which it would measure whether that duty was being
16 fulfilled. And if you look to the --

17 JUDGE ROGERS: Could I just ask, though, I mean,
18 the Department entered into a consent agreement.

19 MR. STERN: Yes, that's correct, right.

20 JUDGE ROGERS: And a lot of your arguments are
21 attacking that, but the Department consented to it, and so
22 to the extent it was deficient, I just wonder how the
23 Department can attack it now. And my second point is your
24 brief says that the only enforceable legal obligations at
25 issue arise under the 1994 act, yet hasn't this Court

1 rejected that view?

2 MR. STERN: I'll deal with both questions. As to
3 the first one, no, we're not attacking the consent decree.
4 The consent decree is history.

5 JUDGE ROGERS: I know. But your brief says,
6 well, there was no timetable, there were no standards, and
7 all that. But, I mean --

8 MR. STERN: Your Honor, the question is now,
9 we --

10 JUDGE ROGERS: So that part of your brief we
11 don't need to pay attention to?

12 MR. STERN: I'd like to think that we probably
13 put it there for a reason, Judge Rogers.

14 JUDGE ROGERS: Well, I just wanted to understand
15 what the Department's position was on that.

16 MR. STERN: Well, we were trying to, well, I
17 mean, what happened, to go back to the year 2001, is that,
18 understand, even then, at no point from 2001, 2003, 2004,
19 there's never been a single witness who's taken a stand in
20 a courtroom to testify about any harm or any problem.
21 Nothing has ever been tested in a court evidentiary
22 proceeding with witnesses. What happened in 2001 was that
23 the special master came into court saying my contractors,
24 who parenthetically had already, were already familiar with
25 the Interior system architecture, because they had been

1 working with Interior, have hacked in, and on the basis of
2 that, the District Court issues a temporary restraining
3 order that says, you know, get off the Internet. And
4 Interior, you know, maybe not wisely, but it did sort of
5 to, in order to try and reconnect as quickly as possible
6 entered into a consent decree. Now, that consent decree
7 itself had a provision in it for seeking judicial relief,
8 but what Interior tried to do was to work with the special
9 master, which it tried to do for two years.

10 JUDGE ROGERS: Now, I'm not questioning the
11 Department, but I just needed to understand how we view it
12 now, because the District Court says, fine, the consent
13 decree, it worked well for a while, and now the District
14 Court says I find there is an impasse.

15 MR. STERN: And there was an impasse, and the
16 District Court therefore terminated the consent order
17 regime and said now you're in front of me. So the question
18 is now I'm going to, anything that happens is now going to
19 be governed by my preliminary injunctions. So the consent
20 order is out of the picture. What's keeping Interior off
21 the Internet right now, and there are systems that are
22 still off the Internet, (indiscernible) stayed part of the
23 District Court's order, we did not ask for at that time a
24 full stay, because we were trying to focus on the new
25 emergent conditions. What's keeping the Department off the

1 Internet and would put it off the Internet altogether are
2 the two preliminary injunctions. So the question then
3 becomes under what factual showing, you know, I mean, first
4 of all, what the legal claim would be. And Your Honor,
5 that gets to your second point.

6 JUDGE ROGERS: All right, now, and that's my
7 second question, yes.

8 MR. STERN: And the point there, Your Honor, is
9 this Court certainly said in 2001, it looked to the nature
10 and to understand what the duties were before it. It
11 rejected the Government's claim that there had been no
12 unreasonable delay, because it said, look, whether or not
13 you had a enforceable duty before, there certainly are
14 these background duties, so I'm not going to set the clock
15 running in considering how unreasonable you are. I'm not
16 going to set the clock running just from 1994, though it
17 also said even if I did set the clock running from 1994,
18 you'd still lose. Now, what the Court didn't say was that
19 (a) the background trust principles operated as separate
20 legally enforceable items. In fact, what the Court said
21 was, look, to get, to compel an agency action unreasonably
22 delayed, you've got to have a clear, specific statutory
23 mandate, and the Supreme Court in the Southern Utah case
24 from last term made clear that that was absolutely correct.
25 So the question that we have, and what this Court did was

1 it approved a remand to the agency to conduct an
2 accounting.

3 So then the question comes in, okay, now, where, you
4 know, how does this come into it? And the only possible
5 connection that could be posited would be that the, that
6 some way the judicial review could expand to take into
7 account a, something that was so overwhelmingly threatening
8 to the existence of an accounting that the Court could in
9 fact insert itself into the ongoing process to issue an
10 order.

11 JUDGE ROGERS: Well, let me ask you, we said in
12 that case that we said, you know, the plaintiffs had shown
13 that there was unreasonable delay in getting an accurate
14 accounting. And then we said that adequate computer
15 systems were vital to the completion of the accounting.
16 That's what this Court said.

17 MR. STERN: Well, this Court said that, but it
18 also, when it was at pains to say that the District Court
19 had made a mistake in thinking the provision of adequate,
20 the District Court had said, look, there are a number of
21 separate breaches of your duties, and this Court said I
22 don't understand how you're going to do the accounting
23 unless you have adequate computer systems and so forth.
24 However, you amend your order to reflect the fact that the
25 duty to perform the accounting is the actionable duty at

1 issue in this case. Now, the District Court never amended
2 its order, and that was not merely a formalistic mistake,
3 because as subsequent events, you know, demonstrated. But
4 the point is even when the Court was talking about computer
5 systems at that point, what it was talking about was, you
6 know, do you have good, you know, how good are your
7 computers? How good are you, you know, where are you in
8 terms of your ability to put out account statements? So in
9 that sense, the evidence of, gee, your computer systems
10 don't seem like right where they need to be in order to
11 start spitting out those account statements tomorrow was
12 evidence that, yeah, there, you know, was unreasonable
13 delay, and that's what this Court said.

14 The issue of hacking into a computer was not a part of
15 that proceeding. It's a very different kind of issue
16 altogether. So when the District Court says plaintiffs
17 have demonstrated a probability of success on the merits in
18 this P.I. because they obtained a declaratory judgment in
19 1999, there's a -- I'm starting to use the word disconnect,
20 but that's the wrong word to use in these circumstances --
21 that there is no adequate link between those two things.

22 And one of the reasons that the Court doesn't ever
23 address what the real merits are is it's not clear. We
24 don't know what the duty is. We don't know what plaintiffs
25 would have to do to prevail on this. And it also in the

1 District Court's view, it doesn't matter, because there are
2 never going to be further proceedings on the merits. The
3 District Court has said you are totally off the Internet,
4 period, and the Court's order sets out an elaborate scheme
5 for reconnection when the Court is satisfied that you can
6 come back on. Now, that may be, whatever that's showing
7 is, that's not the merits. We need to know what is that
8 claim, what were the standards that were being used? I
9 mean, if somebody hacks into Citibank, you know, people,
10 all computer systems, you know, can be hacked into. There
11 are always vulnerabilities. You know, if somebody hacks
12 into Citibank, that doesn't perforce demonstrate that a
13 judge could shut down Citibank's communication systems
14 because there are, you know, beneficiaries, you know, in
15 trust accounts at Citibank. It wouldn't demonstrate
16 anything on its own. It certainly wouldn't demonstrate
17 that data essential to performing an accounting are being
18 compromised in some way that would be, that the
19 (indiscernible) has been compromised at all or much less
20 that it would be an irretrievable problem.

21 And of course what the District Court's current
22 injunctions totally ignore is the fact that certainly it is
23 the case that back in 2001 Interior's security system was
24 not as good as Interior thought that it should be. We're
25 not trying to say what a great security system we had in

1 2001, only that there was no sort of evidence, you know,
2 that would support any kind of an injunction. However,
3 since 2001, the Government has invested huge resources.
4 It's been detailed in the various quarterly reports. It's,
5 you know, put up, you know, sort of, you know,
6 extraordinary focus on perimeter protection and firewalls,
7 you know, to, with a huge emphasis and focus on the hacking
8 problem. And then what plaintiffs bring to the Court's
9 attention are various reports from Government agencies,
10 from various sort of, from OMB, you know, or whatever, sort
11 of give scorecards. And the 16th Quarterly Report
12 addresses those, that sort of apples-and-oranges
13 comparison, because largely because of the District Court's
14 order with its focus on perimeter security, that's where
15 Interior has invested its time, energy, money.

16 Now, what those other reports go to are a series of
17 sort of management, you know, objectives, you know,
18 including, you know, how, you know, what sort of degrees
19 various people, you know, should, you know, have, you know,
20 what the temperature should be, you know, in particular
21 rooms. I mean, there's a whole realm of things to fall,
22 you know, that are being appraised in those reports. But
23 none of them, oh, which are all on a very general level,
24 none of which has anything to do with, you know, the
25 security of the data here. It's never mentioned. And the

1 point about it is that where Interior's put its money in
2 response to this is in protecting this data.

3 Now, none of that, you know, so we're looking at a
4 changed world from the time in 2001, when the special
5 master came in, but even in 2001, there wasn't a single
6 witness to testify about anything, and the only person who
7 is ever known to have hacked into the computer is the
8 special master using his experts. That is it.

9 JUDGE ROGERS: All right. Now, let me ask you
10 about the certifications. Let's step over the issue about
11 statutory and rule violations. Your position in part, as I
12 understand it, is that there's no evidentiary basis for the
13 injunction and that the District Court never considered the
14 merits in part of the Government's position that the
15 Department has indeed changed the world in its computer
16 systems since 2001. The Court did note, however, that the
17 certifications, even considering them, showed internal
18 inconsistencies. And your brief refers to one.

19 MR. STERN: The District Court's order, to my
20 recollection, only -- I mean, I could be wrong about this,
21 Your Honor. My recollection was the District Court's order
22 only referred to one, and that was a statement, and that
23 was a discrepancy between a table and a statement in a
24 report, the table did not indicate that a particular, you
25 know, computer, you know, was linked up. You know, that

1 information was outdated. The correct information was in
2 the report. You know, this is not, I mean, I invite the
3 Court, you know, to read this. This is 900 pages of
4 pretty, you know, specific stuff.

5 JUDGE ROGERS: Right. So as you read the record,
6 the District Court is referring only to one inconsistency,
7 and that's the inconsistency you referred to in your brief?

8 MR. STERN: I, I mean, I stand corrected, but --

9 JUDGE ROGERS: No, I know, I'm not trying to --

10 MR. STERN: But no, but there's certainly no
11 elaborate discussion of, you know, inconsistencies.

12 JUDGE ROGERS: Well, I agree not elaborate, but
13 I, okay.

14 MR. STERN: And, you know, and, you know, the
15 point is the District Court says is I don't care about
16 this, you know. And how can you not care about it? And
17 what the District Court also specifically says in 2003 in
18 issuing his injunction, he says plaintiffs have not
19 demonstrated that these systems that were already back
20 online are insecure. Well, at least as to those, that
21 should have been the end of the story. I mean, plaintiffs
22 have the burden here of demonstrating something. You know,
23 and they had not --

24 JUDGE ROGERS: Well, let me ask you, I mean, you
25 know better than I that evidence doesn't have to only be

1 testimonial. Now, we have the reports that point to this
2 ability to hack into, and so the District Court says I need
3 some certification, since time has passed since these were
4 hooked up from the Department. Your position, as I
5 understand it, is, I mean, no authority, period. But if we
6 get over that, no evidentiary basis whatsoever. And if we
7 get over that, I need to know what your position is.

8 MR. STERN: I'm trying to think what's left.
9 The, I mean, to be clear, the --

10 JUDGE ROGERS: Well, I thought in part the
11 argument was that the Court had not engaged in a proper
12 balancing of the interests.

13 MR. STERN: Oh, yes, I'm sorry, Your Honor, yes,
14 no, I mean, look, in the end, it, you still couldn't, I
15 mean, let's assume that there really was, you know, that we
16 knew exactly what the duty was, what its relevance was, you
17 know, to, you know, this case, that the link between the
18 accounting had been established, that we really had a
19 security sort of like that there was a relevant security
20 standard that was being, you know, that somebody, you know,
21 was talking about, because all the security standards
22 always, and there's always some level of risk, and they
23 always involve judgments about relative investment. Where
24 do you put your money? How safe do things need to be in
25 order to ward off what kind of risk? It's very hard to

1 know how a court could get into that business at all. But
2 even assuming that it did, it's unclear how the result
3 could be to tell the Department of the Interior to get off
4 the Internet. I mean, no private trustee would be told get
5 off the Internet. No private trustee would be told spend
6 hundreds of millions of dollars out of the trust corpus,
7 which is what private trustees would have to spend the
8 money from in order to deal, you know, with a problem that
9 as far as we know hasn't actually caused anybody in the
10 class any harm. However, does the injunction cause you
11 harm? Absolutely. I mean, if you have the full
12 disconnection that the Court's orders require, I mean, when
13 that actually started happening, class members like were up
14 in arms, because it delays getting payments. This is, you
15 know, it's the whole world starts grinding to a halt, and
16 even as to the offices that have remained offline, that's
17 only to the detriment. To deal with a chimerical problem,
18 the agencies that are most involved with an accounting,
19 like the Office of Historical Trust accounting, can't be on
20 the Internet.

21 You know, the, it's, you know, no one is being, you
22 know, helped by this, you know, and there's no authority to
23 do it, so if you, you know, if you filled in a million
24 different connections that are all missing in this case,
25 the bottom line would still be you would never issue a

1 ruling of this kind. But all of the connections are
2 missing.

3 JUDGE ROGERS: Your suggestion is the District
4 Court should have asked for reports from the Department as
5 to the status of its improvements in its security.

6 MR. STERN: Oh, the Department has regularly
7 reported to the District Court.

8 JUDGE ROGERS: That's the limit of the Court's
9 authority, you suggest.

10 MR. STERN: And, I mean, again, we could --

11 JUDGE GINSBURG: I'm not sure why you would
12 acknowledge that.

13 JUDGE ROGERS: Well, but he did in his brief, so
14 I just wanted to understand it, yes.

15 MR. STERN: Well, I mean, the point is we have
16 been reporting, you know, we've been reporting to the Court
17 on a whole number of things. The, you know, and what the
18 Court is really not in the business of doing, you know, is
19 sort of dealing with the day-to-day mechanisms of how you
20 go about performing an accounting. And --

21 JUDGE GINSBURG: Well, if you're right about
22 that, I mean, I take that to mean from your brief that the
23 Court has no legitimate concern with IT security, right?

24 MR. STERN: Certainly on the basis of what we
25 have here, yes.

1 JUDGE GINSBURG: So then presumably you would
2 object also to reporting on where you are in this field.

3 MR. STERN: Your Honor, I mean, there's been a
4 reporting requirement, you know, that was in place. The
5 Department undertook --

6 JUDGE GINSBURG: Well, maybe in the interest of
7 moving things along, you wouldn't object, but you would
8 certainly say as a matter of law that there's no authority.

9 MR. STERN: No, that's right. I mean, and it
10 really did form no part whatsoever of that original
11 declaratory, you know, judgment. I mean, you know,
12 Internet security as opposed to what are you doing to get
13 the computers in shape so that, you know, there's not going
14 to be an unreasonable delay in issuing account statements.
15 Those really are two very different things.

16 JUDGE RANDOLPH: We're dealing with preliminary
17 injunctions, and one of the, I'm trying to fit this into
18 the traditional mold, which is probability of success on
19 the merits. What are the merits?

20 MR. STERN: Your Honor, it goes back to what I
21 was trying to indicate before is we don't know what the
22 merits are, and there is never going to be a proceeding on
23 the merits. I mean, I think the answer that plaintiffs
24 would presumably say is that the merits will be the
25 determination that something is secure, but we don't know

1 what, since there's no relevant standard, we don't know,
2 other than statements that the District Court has made that
3 there is a duty to preserve, that you need to preserve
4 records to have an accounting, that is it. There's no
5 connection that's ever been specified between what you
6 would need to prove to justify an Internet disconnection
7 and that general statement. And we'd submit that there are
8 about 500 like missing links between like having, affecting
9 an accounting and, you know, possible problems in Internet
10 hacking. And that's it. And the only thing that the Court
11 has said about substantial success on the merits is you've
12 got a declaratory judgment and then you've also got a
13 structural injunction. You know, that's it. That's what
14 the District Court says about it.

15 JUDGE RANDOLPH: You, the parties, the District
16 Court, everyone uses the term "historical accounting."
17 That phrase, that term is not contained in the '94 act.

18 MR. STERN: No, it's not.

19 JUDGE RANDOLPH: Does the '94 act require a --
20 well, tell me what your definition of a historical
21 accounting is?

22 MR. STERN: Well, I think that the term flows
23 from, in part from this Court's 2001 decision, in which the
24 Court told, you know, Interior that you needed to have a
25 retrospective component to your accounting. So the 1994

1 act speaks in terms of, the accounting provision talks
2 about providing daily and annual balances. And then this
3 Court in 2001 said, well, but you've got to provide an
4 accounting, you know, for funds, you know, deposited
5 previously. So the --

6 JUDGE RANDOLPH: Well, how far back, you know?

7 MR. STERN: Well, Your Honor, that's a subject
8 of, you know, considerable controversy. You know, this
9 Court, you know, talked in terms of accounting for funds
10 deposited pursuant to the Act of 1938. The District Court
11 has said that the Government should account for all funds,
12 for everything going back to basically the beginning of
13 time. The --

14 JUDGE RANDOLPH: Are all those records, say, take
15 1938. Are 1938 records contained now on the computer
16 system?

17 MR. STERN: Interior's in the process of moving
18 those on, because what it is is basically going back to
19 1985, we're sort of in the computer era. Pre-1985 you're
20 looking at the paper records. And so one thing that you
21 have to do, you know, the further you go back, the more
22 sort of time-consuming, you know, and expensive the
23 enterprise becomes, because you've got to physically locate
24 the paper records and then put them on the computer in
25 order to be able to do that accounting.

1 JUDGE RANDOLPH: On a going-forward basis, the
2 recording of royalty payments due next week, is there a
3 contention that currently Interior is not recording
4 correctly?

5 MR. STERN: Your Honor, I'm not aware of one, but
6 there are so many contentions in this lawsuit that I
7 wouldn't presume to say. I mean, it's certainly not the
8 basis of the complaint. There's no showing that that's the
9 case. I mean, there's no showing, you know, about anything
10 in this case. I mean, the last --

11 JUDGE RANDOLPH: Well, isn't that part, that's
12 part of tomorrow's case, isn't it, not today's?

13 MR. STERN: Your Honor, I'm trying to
14 (indiscernible).

15 JUDGE GINSBURG: All right. Further questions?
16 Thank you, Mr. Stern.

17 MR. STERN: Thank you.

18 JUDGE GINSBURG: You used your time, but we will
19 give you some time for rebuttal. Mr. Austin?

20

21 ORAL ARGUMENT OF G. WILLIAM AUSTIN, III, ESQ.

22 ON BEHALF OF THE APPELLEES

23

24 MR. AUSTIN: Good morning. May it please the
25 Court. My name is Bill Austin, and I'm here representing

1 the Cobell case plaintiffs, 5,000 beneficiaries of the
2 Individual Indian Trust.

3 I want to begin by acknowledging something to the
4 Court. I find it disquieting that able counsel for the
5 Government professes not to know where the obligation to
6 preserve and protect irreplaceable trust data comes from in
7 this case. Counsel's position is all the more cause for
8 concern, given that he represents trustee delegates,
9 trustee delegates that have fiduciary obligations to
10 protect such information. Because after all, that
11 information is plaintiff's property. It's the property of
12 these trust beneficiaries we represent. And moreover, it
13 is disquieting at least as much, because we are now into
14 our ninth year in the trial court litigation, and in the
15 first month of the litigation, counsel for the parties
16 agreed that thereafter all documents relating to the
17 accounting and other fiduciary issues raised in the
18 complaint would be preserved, and when court order after
19 court order entered in the litigation since that time has
20 emphasized the importance, the critical nature of retaining
21 information pertaining to trust management and accounting
22 issues.

23 That said, I want to turn to the facts.

24 JUDGE GINSBURG: Well, Mr. Austin, wait a minute,
25 let's stay with that for a minute.

1 MR. AUSTIN: Yes, Your Honor.

2 JUDGE GINSBURG: In the 2001 decision, pardon me,
3 the Court placed some limitations on what, pardon me, we
4 thought the District Court might properly supervise by way
5 of getting to the goal of an adequate accounting,
6 historical accounting.

7 MR. AUSTIN: Yes. Yes, it did.

8 JUDGE GINSBURG: And that seems to me the source
9 of, while you expressed dismay, the source of the
10 Government's objection here that the, pardon me, that the
11 cause of action here is unreasonable delay, right?

12 MR. AUSTIN: No, Your Honor, in fact the cause of
13 action is for breach of trust.

14 JUDGE GINSBURG: Well, the common law claims
15 were --

16 MR. AUSTIN: That is what this Court determined
17 in Cobell VI.

18 JUDGE GINSBURG: Pardon me, the common law claims
19 were dismissed, right?

20 MR. AUSTIN: Your Honor, what this Court --

21 JUDGE GINSBURG: The Eighth -- go ahead.

22 MR. AUSTIN: -- recognized in Cobell VI, and
23 pardon me for interrupting, but I think it's a point that
24 bears making in response to Your Honor's question, what the
25 Court recognized in Cobell VI is that even though the trust

1 came into existence as a consequence of a statute Congress
2 enacted in 1887, once the Government took possession as
3 trustee of the trust property, of our client's lands and
4 interests related thereto, it assumed a variety of
5 obligations, and remedies came into existence that were
6 incident to the creation of the trust. Now, this is after
7 all a Mitchell II-type trust, a trust similarly recognized
8 by the Supreme Court in the White Mountain Apache case as a
9 trust that incident to its formation and the trustees
10 taking possession of property creates duties, and those
11 duties exist unless Congress specifically disclaims them,
12 and there is nothing in this case where that has happened.
13 In fact, the 1994 reform act that counsel referenced added
14 to, supplemented, and by its terms expressly did not
15 subtract from the rights and remedies available to our
16 clients as beneficiaries of this trust. Now, in --

17 JUDGE GINSBURG: Mr. Austin --

18 MR. AUSTIN: Yes.

19 JUDGE GINSBURG: -- maybe this is a fundamental
20 misconception on my part, but it seemed to me that the
21 dismissal of the common law claims and the 2001 decision of
22 this Court left us with a fairly somewhat narrowed and
23 fairly clear delineation of what the Government's
24 obligations are here vis-a-vis the trust, not denying that
25 it has this fiduciary role in terms of what this case is

1 about and what the District Court is at large to demand of
2 the Department. And that was that it bore on unreasonable
3 delay in the discharge of its obligation to provide an
4 accounting under the '94 act.

5 MR. AUSTIN: Let me respond to that, if I could,
6 Judge, by making two points. First, the dismissal of the
7 common law claims was an order entered by the District
8 Court prior to this Court reviewing and modifying the
9 approach to the issues raised. Let me elaborate. Judge
10 Lamberth in deciding the Phase I trial and in entering his
11 Cobell V opinion December 21, 1999, looked for plaintiffs'
12 rights and the remedies available to them solely by
13 evaluating the terms of the 1994 reform act. In fact, the
14 District Court went so far as to reject the notion set
15 forth in the Manchester Band case decided 25 years earlier
16 that incident to the creation of this trust many years ago,
17 other trust law principles, including those arising under
18 common law, were made available. That's part of what this
19 Court clarified in Cobell VI. It looked at what Judge
20 Lamberth had decided. It said your order is correct.
21 There is no need to do anything to change your order, but
22 your opinion is a little off the mark, and the substance of
23 this Court's analysis was incident to the creation of this
24 trust over a century ago, and incident to the Government
25 taking possession as trustee of the property, trust law

1 principles separate and apart from those expressed in the
2 1994 act were brought to bear. And hence, with all due
3 respect to what the District Court decided with respect to
4 the dismissal of common law claims, after this Court had
5 analyzed the matter and issued its opinion in Cobell VI,
6 the picture was different.

7 Now, in analyzing the accounting obligation --

8 JUDGE GINSBURG: One second.

9 MR. AUSTIN: Yes, Your Honor.

10 JUDGE GINSBURG: But the case is here, the case
11 was here in 2001 --

12 MR. AUSTIN: Yes.

13 JUDGE GINSBURG: -- under the APA, correct?

14 MR. AUSTIN: The case was here in 2001 on two
15 bases: One, federal question jurisdiction arising under 28
16 U.S.C. Section 1331 as a consequence of trust beneficiaries
17 seeking to compel an accounting and other relief as
18 beneficiaries in the trust relationship. That is,
19 plaintiffs with property interests, with standing, with the
20 ability under common law and trust principles incident to
21 the creation of this trust to hold accountable the trustee
22 delegates in this matter. Alternatively, Your Honor is
23 correct. There was extensive APA analysis, but it was as
24 an alternative basis of jurisdiction, and Your Honor, it
25 reflected what I was talking about earlier. The approach

1 that Judge Lamberth had taken in the Phase I trial, where
2 his focus was what does the statute permit? What are the
3 remedies this reform act provides? And consistent with his
4 analysis and his reliance upon the APA, this Court affirmed
5 as an alternative basis for subject matter jurisdiction
6 purposes reliance upon the Section 06 analysis and the APA.

7 JUDGE GINSBURG: Well, Mr. Austin, maybe I just
8 have to go back and start over by getting a grasp on this,
9 but here's what the Court said in 2001. I know it said a
10 lot of things, but I don't know what else it said on this
11 score.

12 MR. AUSTIN: Yes.

13 JUDGE GINSBURG: That plaintiffs rely upon common
14 law trust principles in pursuit of their claim is
15 immaterial, as here they seek specific relief other than
16 money damages, and federal courts have jurisdiction to hear
17 such claims under the APA, right? I mean, that is how, and
18 that's where we proceeded. Then we asked about whether
19 there was final agency action and so on, approaching it as
20 we always do it under the APA. So I'm not sure what more
21 there is, or at least what more we upheld in 2001 other
22 than a valid statement of a claim for unreasonable delay or
23 agency action withheld.

24 MR. AUSTIN: Your Honor, let me turn to the
25 question, where does the duty to preserve the data come

1 from, because I sense from the Court's questions to counsel
2 that that is a subject of interest, and Cobell VI answered
3 that question. What this Court held three years ago was
4 that the broad accounting duty included or imposed
5 substantial subsidiary obligations, and those obligations
6 included among other things a duty to maintain records that
7 would be necessary to ensure a complete and accurate
8 accounting. Now, we submit, it couldn't be much clearer
9 than that. That, if there was any question on the subject,
10 made it clear this Court's view was there is an obligation
11 to preserve and maintain and protect trust information,
12 whether it's in papers or in electronic form.

13 JUDGE GINSBURG: Okay, let's just stay with that
14 one, because that's the key one, I think, too.

15 MR. AUSTIN: Okay.

16 JUDGE GINSBURG: So what we have is a case that's
17 here based on unreasonable delay in getting the job done,
18 and an admonition to the Department to, or let's say a
19 ratification from this Court of the District Court's
20 admonition to the Department to maintain records sufficient
21 to avoid further delay, right? Because it's all got to be
22 hinged on unreasonable delay, it seems to me. In the
23 several places in the opinion later on, the Court talked
24 about this admittedly unspecific limitation that the
25 obligations be geared to avoiding further delay as opposed

1 to other problems that might arise, right? And if I can
2 find that passage, there's one that's very specific. Here,
3 the failure to implement a computer system is not itself
4 the breach; rather, it is indicative of appellants' failure
5 to discharge their fiduciary obligations in a reasonably
6 prompt manner. It's the promptness of this thing that's at
7 stake. There's no question about their obligation, right,
8 and what they have to do. It's the timeliness.

9 MR. AUSTIN: Well, we look at what this case
10 record shows, Your Honor, we're over a century into trust
11 administration. There has never been an accounting. There
12 has not been the accounting required by the 1994 reform
13 act.

14 JUDGE RANDOLPH: Can you tell me what --

15 MR. AUSTIN: There has not been an accounting
16 sought by plaintiffs in this action.

17 JUDGE RANDOLPH: Can you tell me what you mean by
18 an accounting? What do you mean by an accounting?

19 MR. AUSTIN: Again, this Court addressed that
20 question in Cobell VI.

21 JUDGE RANDOLPH: No, what do you mean by it?
22 When you say there's never been --

23 MR. AUSTIN: Judge, and I appreciate the
24 opportunity to address that.

25 JUDGE RANDOLPH: There's never -- I'm just --

1 MR. AUSTIN: Because it informs what we're doing
2 here.

3 JUDGE RANDOLPH: Please don't interrupt me when
4 I'm trying to interrupt you.

5 MR. AUSTIN: I'm sorry.

6 JUDGE RANDOLPH: Do you mean an audit? Is that
7 what you mean?

8 MR. AUSTIN: No, no, very different matter. An
9 accounting is an explanation, a documented explanation, a
10 showing transaction by transaction as to how the trustee
11 has conducted the administration of the trust, vested with
12 the obligation to demonstrate an undivided duty, ability to
13 avoid conflicts of interest, to exercise trust management
14 prudently. The accounting is the showing of that conduct
15 that is intended to be complete enough so that a
16 beneficiary receiving it can determine whether his or her
17 trustee has acted in accordance with those fiduciary
18 obligations. That is what it's about.

19 JUDGE RANDOLPH: You're talking going backward,
20 right?

21 MR. AUSTIN: A historical accounting is certainly
22 that, sir.

23 JUDGE RANDOLPH: Did you present any evidence to
24 the District Court that indicated that on a going-forward
25 basis there were problems?

1 MR. AUSTIN: Your Honor, part of what this
2 lawsuit is about --

3 JUDGE RANDOLPH: No, did you present --

4 MR. AUSTIN: -- is compelling changes.

5 JUDGE RANDOLPH: Did you --

6 MR. AUSTIN: So yes, the complaint has from the
7 get-go --

8 JUDGE RANDOLPH: No, that --

9 MR. AUSTIN: -- sought changes in management.

10 JUDGE RANDOLPH: My question was evidence. Did
11 you present any evidence that on a going-forward basis
12 there were, there's mismanagement?

13 MR. AUSTIN: Absolutely, and in fact the
14 quarterly reports that have been filed by the trustee
15 delegates in accordance with the Phase I proceeding
16 demonstrate the problems and the various efforts, the plans
17 to make plans, that have been undertaken to correct and
18 resolve longstanding and continuing problems.

19 JUDGE RANDOLPH: Here's why I'm, I'll tell you
20 why I'm asking the question, and it hasn't come up yet in
21 the argument, but the 2003 legislation says, as you know,
22 that nothing in the '94 act requires the Department of
23 Interior to commence or continue historical accounting
24 activities. Now, to the extent that that suggests going
25 backwards, then if the purpose of the Court's injunction

1 was to preserve information that would be used in a
2 historical accounting, then the statute, we've got a
3 question under the statute. On the other hand, if it's on
4 a going-forward basis, I don't know that the statute deals
5 with that. That's why I'm -- okay?

6 MR. AUSTIN: Thank you for that explanation, and
7 you're absolutely right. The short answer is that the need
8 to maintain trust data that is protected and secure goes
9 both to the historical accounting obligation declared by
10 the Court and also to the trust management. And as Judge
11 Lamberth noted in his March 15 opinion, the injunction
12 entered, the disconnect order that has been the focus of
13 counsel's remarks this morning, was entered not in regard
14 to that historical accounting obligation, although the
15 Court recognized you've got to have records to do an
16 adequate accounting, especially when you're going back
17 decades, but it was also necessary that that injunction be
18 entered to protect information needed to know how much
19 money the beneficiaries should receive to keep track of the
20 payments to which they're entitled. In other words, to
21 allow the Department of the Interior to function as a
22 fiduciary.

23 Let me address the facts with respect to these
24 obligations we've been talking about. First, just a point
25 about the standard of review here. We're dealing with

1 preliminary injunctions, and the issuance of such relief is
2 subject to a deferential standard. The decision whether to
3 grant or deny a preliminary injunction, as this Court noted
4 in the National Wildlife Federation case, 835 F.2d at 19,
5 is to be reversed only if the District Court is shown to
6 have abused its discretion. Findings of fact are to be
7 reviewed under the clearly erroneous standard, and the
8 District Court's balancing of the factors, and we heard
9 talk from counsel about that, in deciding whether a
10 preliminary injunction should issue, is subject to
11 particular deference.

12 JUDGE ROGERS: I mean, one of the issues --

13 MR. AUSTIN: Yes, Your Honor.

14 JUDGE ROGERS: -- though, that's raised, it seems
15 to me, by the Department is whether or not the Court, the
16 District Court, considered all of the proper factors, not a
17 question of second-guessing its balancing of factors but
18 whether it considered all of the factors.

19 MR. AUSTIN: Yes. In its July 28, 2003 opinion,
20 nearly 30 pages in length, and in the 29-page memorandum
21 opinion accompanying the disconnect order issued on March
22 15, the District Court made a careful evaluation of the
23 four factors as required by law.

24 JUDGE RANDOLPH: But it didn't consider the 900
25 pages of certifications.

1 MR. AUSTIN: Absolutely it did, Your Honor. What
2 those certifications showed, and the question was asked of
3 Mr. Stern, why was the Court not satisfied, there were any
4 number of reasons why those certifications fell short of
5 the mark. One principal deficiency in them, and I'm
6 talking about a substantive deficiency, is that in the
7 declaration submitted by Mr. Cason (phonetic sp.) on behalf
8 of the Department of the Interior. He said there is no
9 uniform standard, and it is to be left to the discretion of
10 each bureau head as to whether or not systems are secure
11 enough. Questions were asked earlier about the consent
12 order that the Government proposed and urged the Court to
13 adopt two and a half years earlier. That consent order
14 said we pledge, we commit to bringing our insecure systems
15 with their significant deficiencies that require immediate
16 attention. We pledge to bring them into compliance with
17 OMB Circular A130, Appendix 3. That is the standard for
18 Executive Branch agency information security. What does
19 the record show after 33 months have passed? We heard
20 counsel say great strides have been made, improvements.
21 What does the record in fact show? In the 16th Quarterly
22 Report submitted by Interior to the District Court in
23 February of this year, that's about a month before the
24 disconnect order was entered, Interior acknowledged that of
25 the 62 systems housing or affording access to trust data,

1 four, four of those computer systems had been certified and
2 accredited in accordance with the OMB standard. That's the
3 standard the government said it would comply with. That is
4 the standard that the government's experts in this case,
5 when called upon to assess IT security in January of 2002,
6 in April of 2002, and there is voluminous testimony about
7 these issues.

8 JUDGE RANDOLPH: Are you --

9 MR. AUSTIN: That is the same standard --

10 JUDGE RANDOLPH: Are you --

11 MR. AUSTIN: -- these experts said had to be met
12 for there to be security.

13 JUDGE RANDOLPH: Are you supporting the District
14 Court's view that the certifications were procedurally
15 defective because they stated to the best of my
16 information, knowledge, and belief?

17 MR. AUSTIN: We, as our brief indicates, it is
18 clear that what was submitted did not comply with what the
19 Court directed, but there's much more to the picture than
20 that.

21 JUDGE RANDOLPH: No, no, no.

22 MR. AUSTIN: There are substantive deficiencies
23 that reveal the absence of security.

24 JUDGE RANDOLPH: Under 17, under 28 U.S.C. 1746,
25 the only thing that's required is that it be in a form

1 substantially similar to the form that's set out there. Is
2 it your position that these certifications were not
3 substantially in compliance with the standard form, I
4 hereby declare this is true under penalties of perjury?

5 MR. AUSTIN: Yes, it is, and the concern is all
6 the greater, Judge, because of what was submitted under
7 cover of these jurats.

8 JUDGE RANDOLPH: No, I'm just, I just want to
9 focus in on that --

10 MR. AUSTIN: Yes.

11 JUDGE RANDOLPH: -- the certification, the
12 language "under penalty of perjury."

13 MR. AUSTIN: Yes, and --

14 JUDGE RANDOLPH: Doesn't anybody always, isn't it
15 implicit that it's always to the best of your information,
16 knowledge, and belief when you put something in?

17 MR. AUSTIN: No, in fact, when on December 8,
18 2001, in this case, trustee delegates sought to modify the
19 TRO that had been entered. And by the way, it's a
20 modification that the District Court readily granted. A
21 declaration was submitted by Catherine Clement in support
22 of a request to lift the TRO as to her agency, and that
23 jurat said what the statute requires. The information is
24 true is correct. It is based on my personal knowledge.
25 That is what is lacking. And that in combination with the

1 significant, substantive deficiencies.

2 Let me just, and I think I'm out of time, so let me
3 just touch upon a couple of them that are most significant.
4 I mentioned the fact that nothing is said about the clear,
5 uniform standard that the Government has recognized governs
6 its conduct in the IT security area since at least December
7 2001, but there are other significant problems with these
8 certifications. They came in large measure from the same
9 people who provided the information compiled in
10 governmental reports. For example, a report made in
11 September of last year by the Inspector General of
12 Interior, and what the Inspector General said was we don't
13 have the ability to track incidents of intrusion. In other
14 words, we can't tell you how many episodes of hacking there
15 have been of these records, because we just don't have the
16 ability as yet. We're getting around to it. We don't have
17 the ability to do so. The same government report
18 acknowledged that there was an obligation to achieve
19 compliance with this OMB standard that I've described and
20 that that obligation had not been met. None of the
21 certifications, Your Honor, none of the certifications even
22 made reference to that obligation. And that's a government
23 report issued a month after these certifications were made.
24 The certifications would cause one to wonder whether there
25 was any standard, any guidance whatsoever, when it is so

1 manifestly clear from the record in this case that there
2 are specific standards, that experts have been retained,
3 millions of dollars have been spent to come to understand
4 the terms of those requirements and to test for them.

5 Let me focus in closing --

6 JUDGE RANDOLPH: I'm just wondering where the
7 burdens are here. Is it your position that you satisfy the
8 burden for a preliminary injunction on the basis that the
9 Department of Interior hasn't proven that its system can't
10 be hacked into?

11 MR. AUSTIN: It's not as, the question is
12 probably not as simple as that. It's based on the failure
13 on the record evidence of the Department to demonstrate
14 that its computer systems housing or accessing trust data
15 are secure.

16 JUDGE RANDOLPH: Well, that means they can't be
17 hacked into.

18 MR. AUSTIN: Well, again, it's more than that.
19 In part, Judge, it's about being able to know when there's
20 hacking. Counsel mentioned earlier that even the most
21 secure system may on occasion be hacked into, but the point
22 is a system --

23 JUDGE RANDOLPH: But isn't it --

24 MR. AUSTIN: -- that is accredited and certified
25 gives one the ability to know when that happens.

1 JUDGE RANDOLPH: Isn't it your burden to show
2 that it's not secure, not the Department's burden to show
3 that it is secure?

4 MR. AUSTIN: The evidence of record
5 overwhelmingly shows the following: persistent insecurity
6 since 1989, when the first independent report advised the
7 Department of the Interior you've got a major problem.
8 That burden was created when Interior acknowledged in the
9 consent order of December 17, 2001, we have a major
10 problem. There are significant deficiencies. We need to
11 take immediate action to correct them. We need to comply
12 with this OMB standard. That was what was acknowledged
13 then, and so the question becomes what does the record now
14 show.

15 JUDGE RANDOLPH: The consent order is evidence of
16 the, supporting the preliminary injunction, is that the
17 idea?

18 MR. AUSTIN: Absolutely, Your Honor, because of
19 what it acknowledged, the admissions made therein by the
20 trustee delegates, the recognition of what the appropriate
21 standard of security was --

22 JUDGE RANDOLPH: Where is the consent order in
23 this mountain of paper?

24 MR. AUSTIN: Your Honor, I know it is in the
25 first volume of the Joint Appendix.

1 JUDGE RANDOLPH: Okay.

2 MR. AUSTIN: I would be guessing somewhere in the
3 400s. I think that's as close as I can provide the Court.
4 But at page 4 you'll see the representations that I'm
5 talking about, and at page 5 you'll see the reference in
6 that order to the need to comply, to retain experts and
7 begin achieving compliance with the OMB standard. And as
8 mentioned, as of the time the Court was called upon to
9 decide the connection issue, four of 62 systems, that's
10 about 7 percent, had in fact been made concern per the OMB
11 standard. The other 93 percent --

12 JUDGE ROGERS: Let me ask you, though --

13 MR. AUSTIN: Yes.

14 JUDGE ROGERS: -- what the, the special master
15 had --

16 JUDGE RANDOLPH: I've got it.

17 JUDGE ROGERS: -- approved the restarting up, I
18 can't think of the word right now --

19 MR. AUSTIN: Reconnection.

20 JUDGE ROGERS: -- reconnection --

21 MR. AUSTIN: Yes.

22 JUDGE ROGERS: -- of 66 systems at the time the
23 District Court entered this injunction, is that not true?

24 MR. AUSTIN: It is true that prior to the
25 cessation of the testing that was agreed upon, and there

1 was, by the way, in the record, at JA 530 an agreement
2 reflecting this. At the time that the testing by the
3 independent expert ceased, the testimony in the record is
4 that approximately 95 percent of Interior's systems had
5 been reconnected, and they'd been reconnected, Your Honor,
6 even though most if not all the systems did not yet meet
7 the OMB standard.

8 JUDGE ROGERS: No, but what --

9 MR. AUSTIN: The understanding was there would be
10 further testing, and in the event vulnerabilities were
11 revealed, those systems could be disconnected.

12 JUDGE ROGERS: But that's what I'm getting at.

13 MR. AUSTIN: Yes.

14 JUDGE ROGERS: The very person the District Court
15 had, you know, agreed should look at this had made a
16 determination that although there would be further testing,
17 he was satisfied that the systems were secure enough to
18 allow the Department to reconnect 66 of them. Now as I
19 understand it, you're taking a different -- maybe it's just
20 in response to questions you're taking the position that in
21 fact the District Court could not find that the systems
22 were secure until they met the OMB standard and until that
23 time they could not be reconnected. Is that your position?

24 MR. AUSTIN: No, let me, I appreciate the
25 question being raised, because I do want a chance to

1 explain. What was agreed upon was that systems could be
2 reconnected, even if they did not meet the OMB standard as
3 yet, provided that in exchange for that reconnection the
4 special master and his IT security consultants would engage
5 in vulnerability testing, other testing, in order to
6 determine whether the reconnected systems were in fact
7 secure, and the letter agreement signed by Mr. Cason on
8 behalf Interior of February 16, 2002, provided that if in
9 the later testing there were major vulnerabilities,
10 suggesting the systems should be disconnected, Interior
11 agreed they would be, so when that testing arrangement,
12 external, independent validation of IT security, when that
13 arrangement was lost, owing to the "impasse" described in
14 the District Court's July 28 opinion, what the master said
15 was without the independent testing, I have no confidence
16 that systems reconnected are in fact secure. And in fact,
17 Your Honor, the record referred to by the District Court in
18 its March 15 opinion indicates that there were numerous
19 vulnerabilities --

20 JUDGE ROGERS: All right, but --

21 MR. AUSTIN: -- reported by these experts when
22 they tested reconnected systems.

23 JUDGE ROGERS: But of the 66 systems, I mean, the
24 premise had been that some systems could be reconnected,
25 though the testing was not complete and though the OMB

1 standard was not met. What I'm not clear on is why in
2 exercising authority the District Court had to go as far as
3 it did, namely to say disconnect everything, as distinct
4 from saying I need information as to the specific systems
5 where there is a hacking problem that the Department has
6 not adequately addressed.

7 MR. AUSTIN: Well, as --

8 JUDGE ROGERS: In other words --

9 MR. AUSTIN: Yes.

10 JUDGE ROGERS: -- you had agreed, as I understand
11 it, to this interim position that the Department could
12 reconnect pending further testing.

13 MR. AUSTIN: Right. As indicated earlier, part
14 of the problem is, part of the challenge in making these
15 systems secure is that they aren't equipped, haven't been
16 equipped over time with the type of instruments needed to
17 detect hacking, so that's Problem No. 1. Yes, we know the
18 special master hacked on several reported occasions, but we
19 have no idea the extent to which that type of intrusion has
20 occurred over time. That gives rise to the risk of
21 irreparable harm that was at the heart of the District
22 Court's decision.

23 JUDGE ROGERS: But everybody knew that at the
24 point when these 66 systems were reconnected.

25 MR. AUSTIN: Yes. What the District Court

1 concluded, again, exercising its discretion, confronted
2 with an arrangement that had been promising, that had been
3 working. Testimony of the defendants was that the
4 arrangement with the master was a productive one, that
5 vulnerabilities were discerned that could then be
6 corrected. Once that arrangement went by the boards, the
7 Court was left with choices. It could have on July 28 said
8 disconnect. You've rejected my attempt at judicial
9 oversight. In fact, the attempt at judicial oversight that
10 you, defendants, encouraged me to adopt, and so now it's
11 time to disconnect. Instead, it gave trustee delegates the
12 best possible chance to make their best showing. It said
13 certify the security of these systems. It said provide a
14 plan for security going forward. And then seven months
15 later, after carefully analyzing the contents of the
16 submissions, what did the Court conclude? The Court
17 concluded what has been presented, and of course this is
18 the fact-finder making determinations based upon a
19 voluminous record, what has been presented doesn't
20 demonstrate that this irreplaceable trust data is in fact
21 secure. And that is the basis for the Court's decision.

22 I want to address briefly, if I could, and I know I'm
23 way past my time, what the Court was challenged to decidé.
24 It had tried a variety of other approached. It had given
25 these defendants every conceivable opportunity to solve

1 this problem for themselves, and so the March 15
2 disconnection order was entered with that three-year effort
3 behind the Court. There really was no other choice to
4 protect and preserve trust data. Otherwise, it would
5 continue to be at risk of irreparable harm.

6 JUDGE ROGERS: Well, let me ask you, what I'm
7 trying to understand here is that as I recall when the 2001
8 case was argued, the Department had gotten appropriations
9 from Congress, contracted with this new computer company,
10 and then the whole system, it failed, these are my words,
11 that the computer company overpromised what it could
12 deliver, because when it started to implement under the
13 contract with the Department, in fact it could not produce
14 the record or the system that the Department needed. So my
15 point is is that it's not as though the Department's
16 sitting on its hands, and of course it is delayed somewhat
17 by Congress, because it has to go through the congressional
18 appropriations process, so there's been a period of time
19 when things are not perfect. But until the time of the
20 special master hacking, there was no evidence that anyone
21 had hacked into the system. And in the situation that we
22 live in an imperfect world, even when you are bound by
23 trust obligations, the question is do you go so far here
24 where at least the way the system was working with the
25 special master, systems were allowed to be reconnected even

1 though they were not perfect in terms of meeting the OMB
2 standard or they may not be subject to hacking or Interior
3 may not even know the systems are being hacked into.

4 MR. AUSTIN: But that is precisely what the
5 Court's March 15 order now contemplates. You don't have
6 the special master anymore, but instead what the District
7 Court has directed is that Interior submit the names of
8 independent contractors, and they could even be supervised
9 by Interior this time as opposed to the District Court, to
10 provide independent verification, and it is entirely
11 conceivable were the trustee delegates to proceed to comply
12 with the terms of the March 15 order that you would have
13 resulting a process of reconnection, system by system, very
14 much like the system that the defendants urged the District
15 Court, over the plaintiffs' objections, incidentally, to
16 enter on December 17, 2001.

17 The point is without substantial assurance based on
18 the defendants' own certifications that IT security had
19 been achieved, the Court had to find another way to protect
20 irreplaceable trust data, data that must be had for
21 historical accounting purposes, for trust management
22 purposes, and in order to accomplish that the Court has now
23 put in place an order that gives at any time, at any time
24 the defendants the ability to come forward and say this is
25 our plan, this is our information. We've got it now. We

1 have the security issue resolved. And so with that in
2 mind, these 93 percent of the systems that I made reference
3 that are as yet not certified or accredited could begin
4 being reconnected. Here as before, subject to the
5 understanding that the goal is eventually to achieve with
6 respect to all standards compliance with the OMB standard.

7 JUDGE RANDOLPH: What is preliminary about this
8 injunction?

9 MR. AUSTIN: Your Honor, the December 17, 2001
10 consent order that the defendants urged the Court to adopt
11 contained a provision at the end that said upon achieving
12 compliance with the OMB standard, this order may be
13 vacated. That's what is contemplated. It is an
14 understanding, a recognition that the Court needs to be
15 involved to the limited extent that it is necessary to
16 maintain record evidence that must be had in order to
17 fulfill the trustee delegates' fiduciary obligations. But
18 when that standard is met, Interior is able to function
19 without oversight.

20 JUDGE RANDOLPH: The typical preliminary
21 injunction is preliminary because it's an injunction
22 pending a trial on the merits.

23 MR. AUSTIN: Yes.

24 JUDGE RANDOLPH: But I don't understand why is
25 this, what is the merits, substantial likelihood on the

1 merits. What merits are we talking about?

2 MR. AUSTIN: Okay, we have had, this is a
3 bifurcated proceeding, and per a 1998 trial court order,
4 Phase I has occurred. That trial was intended to
5 determined what needed to be done to fix the system, and
6 the Court's order, as mentioned earlier, was affirmed by
7 this Court in Cobell VI. The Phase II proceeding is yet to
8 be accomplished. Remarkably enough, 117 years after this
9 trust got created, 10 years, almost 10 years into the
10 litigation, a full 10 years after the 1990 reform act. So
11 there is a further proceeding at which time, Your Honor, it
12 is understood that the reconciliation and adjustment of the
13 trust account will take place. That is the reason for the
14 retention and protection of relevant information in order
15 to perform a court-ordered accounting that the information
16 from which would be utilized in making that final
17 determination to what extent is the trust balance to be
18 adjusted. In fact, Your Honor, if you look at it from that
19 perspective, what the District Court has endeavored to do
20 time after time in getting the trustee delegates to achieve
21 IT security is all in the Government's favor, because in
22 the end, if the systems aren't secure, if records needed to
23 do an accounting aren't maintained or are lost, corrupted,
24 destroyed, you name it, if that information is unavailable,
25 the inferences to be resolved with respect to the trustee

1 are all against the trustee. It is absolutely in the
2 interest of the United States Government --

3 JUDGE RANDOLPH: It's preliminary to --

4 MR. AUSTIN: -- to keep all such information for
5 this Phase II purpose.

6 JUDGE RANDOLPH: It's preliminary to a trial on
7 the merits about whether the Government's systems or
8 information is accurate to enable a historical accounting?
9 Is that the idea?

10 MR. AUSTIN: Part and parcel of the Phase II
11 proceeding that I've described would be issues relating to
12 the security of these systems, because of course the
13 information presented and relied upon by the trustee
14 delegates would need to be tested. Is it admissible? Is
15 it reliable? What has been done to protect these
16 electronically stored records against change, against
17 manipulation, against damage in the course of unwarranted
18 intrusions? So all of those issues will be brought to
19 bear, and hence it is absolutely in the interest of the
20 fiduciary to meet the standards, to comply with OMB, to
21 take on the task of the remaining 93 percent of these trust
22 information-containing systems and to make them secure as
23 soon as possible. And most certainly it is in the interest
24 of our clients, who continue to wait for the long-promised
25 accounting, the court-directed accounting, who continue to

1 wait for reforms that will bring the trustee delegates into
2 compliance with their fiduciary obligations to maintain
3 these records. These trust records are our clients'
4 property. The loss of these records constitutes the
5 ruination of the trust. That is contrary to the obligation
6 imposed on even the Government as a trustee as recognized
7 by the Supreme Court in the White Mountain Apache case.
8 That is the challenge. It is a shared challenge.

9 JUDGE RANDOLPH: Okay, I've got it.

10 JUDGE GINSBURG: Judge Rogers, any further
11 questions?

12 JUDGE ROGERS: No, thank you.

13 JUDGE GINSBURG: Thank you, Mr. Austin.

14 MR. AUSTIN: The order should be affirmed. Thank
15 you.

16 JUDGE GINSBURG: Mr. Stern? You used all your
17 time. I don't suppose you need much now or want much now.

18
19 REBUTTAL ARGUMENT OF MARK STERN, ESQ.

20 ON BEHALF OF THE APPELLANTS

21

22 MR. STERN: I'll try to be brief, though there
23 was a lot said.

24 One thing, the answer on to what it's preliminary to
25 is really nothing. I mean, there's been, this is it.

1 Whatever they had to show has been shown, and so then the
2 question is what was shown here? Has there been a
3 demonstration that there's some connection between any of
4 this relief and the performance of the accounting? No.
5 Absolutely not. And what plaintiff really is standing here
6 and telling you is that doesn't really matter. There's a
7 free-floating fiduciary obligation to maintain records.
8 Nobody's saying the Government doesn't have fiduciary
9 obligations. How and when they are actually capable of
10 judicial enforcement is a very different matter, and what
11 would the standards be for coming in to determine what it
12 appropriate Internet security. There is no showing here of
13 any problem that's actually ever occurred to any trust
14 record that's irretrievable.

15 JUDGE RANDOLPH: Well, there is that statement in
16 the consent decree, I looked at it, that says the
17 Department admits that there are significant deficiencies
18 in the security of the Indian Trust data.

19 MR. STERN: Absolutely, Your Honor, but were
20 there problems? Of course there were. Did we also say, I
21 think it's on virtually the next page in the Joint Appendix
22 in responding to plaintiffs' motion for a preliminary
23 injunction, we also said look, when we said that, we don't
24 mean that there's been any showing whatsoever that the
25 underlying, you know, records have been compromised. I

1 mean, you know that wasn't, you know, what we said was, you
2 know, yeah, there are problems. Everyone knows, you know,
3 to this day half the agencies or more are getting, you
4 know, Fs on their general reports cards. You know, to say,
5 everybody that there are different problems, and there's a
6 straw man built up here about uniform standards, you know,
7 which is addressed, you know, you know, in Mr. Cason's
8 declaration. This is just a red herring. I mean, all the
9 uniform standards of the OMB circulars, they address a
10 million things, just, you know, of which, of which security
11 is just, of which this kind of security is only one of
12 them, and all of those circulars in turn like recognize,
13 they leave judgment calls based on risk and cost to the
14 individuals who are managing things. That's not something
15 that Interior made up. That's something that's recognized
16 throughout the Government.

17 JUDGE ROGERS: So the Government's position is,
18 just so, and I know this goes a little further, but there
19 should be no injunction whatsoever, that the plaintiffs
20 have prevailed on liability, and in order for them to
21 actually get a judgment of money, what do they have to do?

22 MR. STERN: Money? Plaintiffs, the only reason
23 that we're not in the Court of Federal Claims is that
24 plaintiffs --

25 JUDGE ROGERS: No, no, I mean, that people have

1 owned, I mean, I could spell it out for you, but people
2 have owned property over years. There's a value associated
3 with them. How are they to get the dollar figure?

4 MR. STERN: Well --

5 JUDGE ROGERS: How are they to continue to get "a
6 royalty"? What should, so I'm clear from the Department's
7 point of view, if the records are, according to the
8 Department, unreliable, then where do the plaintiffs go?

9 MR. STERN: Well, Your Honor, there's no, I mean,
10 that's part of what, you know, is that an agency produces
11 an accounting. That's a final agency action.

12 JUDGE ROGERS: All right, so your point is
13 just --

14 MR. STERN: If there's a problem, you can review
15 it.

16 JUDGE ROGERS: I see, just let the agency produce
17 an accounting, have a trial on that, and that's the end of
18 the matter.

19 MR. STERN: If, well, have, you know, it's
20 subject to, you know, I don't know trial, but it's subject
21 to judicial review like any other final agency action would
22 be, but there's no sort of discrete sort of standardless
23 Internet security duty floating around there capable of
24 being enforced, much less getting final, do whatever is, in
25 essence final injunctions based, when there's never been a

1 single witness who has appeared and we don't know what the
2 standard would be, and we don't know what the source of the
3 duty is other than general statements about the fact that
4 the United States is a fiduciary which nobody denies, but
5 that doesn't translate into a series of different kinds of
6 enforceable actions. And that's the problem that this case
7 has turned into.

8 JUDGE RANDOLPH: Well, finish your sentence, the
9 only reason we're not in the Court of Federal Claims.

10 MR. STERN: Is that plaintiffs had disclaimed
11 back in at the time of, the Government moved to dismiss is
12 prior to this Court's 2001 decision, and they said, look,
13 you know, if these guys, you know, you know, want money, if
14 they want money they should go to the Court of Federal
15 Claims. The plaintiffs said no, we're not asking for
16 money. The District Court makes that absolutely clear.
17 The idea is, and that's why I was a little astonished to
18 hear a statement about the balance of the trust fund being
19 adjusted at the conclusion of this, since, as the District
20 Court notes, plaintiffs have represented that all of the
21 money is in the fund. They're just looking for the proper
22 accounting. So if, you know, this is not a suit to get
23 money. It could not have been. That's the basis on which
24 it has stayed in this Court all along. And what this Court
25 really did say and correctly is, look, do, you know, do an

1 accounting, sort of define to some extent what should be in
2 that accounting, and it said, you know, go ahead and do it.
3 And that's what the Department has been trying to do.

4 JUDGE RANDOLPH: So there can be no claim in this
5 case, because it's here rather than in the Court of Claims,
6 that Mr. and Mrs. X on the Navajo reservation are entitled
7 to more royalty payments than they've received?

8 MR. STERN: No, we don't think that there's a, I
9 mean, we don't think that there's a claim for actually
10 getting money in this case. Now, the accounting, you know,
11 could be taken, you know, as, you know, evidence to the
12 extent that there is a cognizable claim for getting money
13 that's in a claim that's not time-barred. You know, maybe
14 like the accounting, you know, sort of would form part of
15 somebody's action in the Court of Federal Claims. But this
16 accounting --

17 JUDGE RANDOLPH: Is there, what is the statute of
18 limitations?

19 MR. STERN: That's a subject that's also the
20 subject of considerable debate. The District Court has
21 said that there are no statute of limitations, because no
22 statute of limitations can begin to run until a trust duty
23 is repudiated, and that therefore since the trust duty has
24 not been repudiated, the statute of limitations can't run,
25 though of course it kind of has a strange idea of that you

1 actually have a claim that arises before the claim occurs,
2 so you've got the claim but it can never be time-barred.
3 But that's a matter that's addressed in the other case.

4 This is something that, you know, this really is, this
5 is an important thing. It's not the accounting isn't
6 important, but you can't come in here, as plaintiffs are
7 doing, and saying, well, here's what, you're a fiduciary, I
8 can therefore require you to do something about Internet
9 security based on standards like identified by nobody, and
10 there's no evidence that would connect it to what this case
11 is about or to any other form of statute. And --

12 JUDGE ROGERS: So I could just clarify one other
13 matter? And that is as to the '94 act, when Congress
14 itself set up this Office of Special Trustee, and the
15 special trustee came up with a need, identified the need to
16 improve these accounting systems so that the records would
17 be secure and that the accounting could be done. Is it
18 your position that that is totally separate from the suit
19 that the plaintiffs have brought?

20 MR. STERN: It's separate in the sense that the
21 legal duty here is an accounting unreasonably delayed, and
22 that's what this Court make 100 percent clear in 2001.
23 It's not to say that the entire universe of things that the
24 Department of the Interior should be doing is encompassed
25 by this lawsuit. I mean, there are lots of things the

1 Department, you know, like should, you know, could be
2 doing. That's, but, you know, the Court doesn't sit to
3 order sort of systemic, you know, action. It's focused
4 here on one thing, which is the unreasonable delay in that
5 accounting, and it didn't like among all the other things
6 that are addressed in the structural injunction, it doesn't
7 also like get to sort of say, well, and how about Internet
8 security?

9 JUDGE RANDOLPH: If I ask you about historical
10 accounting, what does accounting mean to you?

11 MR. STERN: Well, I don't think it means to the
12 same to me that it means to Mr. Austin, but the Interior
13 plan which is set out basically says that the accounting is
14 sort of, you know, what you'd get from your bag. I mean,
15 it's sort of, it's a statement of transactions, and, you
16 know, the Department -- and I'd have to correct, I said
17 that the paper records were being transferred now to
18 computer, but because of the current statute, I don't think
19 that is happening. I just wanted to correct that. The,
20 but basically you get a statement of account that shows
21 your transactions, and that's the accounting, and because
22 of the historical component, the Department goes back to,
23 you know, the plans call for the Department to go back and
24 assemble all the ledgers going back to, you know, 1938 for
25 open accounts.

1 JUDGE RANDOLPH: If I think of reports, if I
2 think of accounting in a corporate respect or audits, you
3 know, the generation of financial statements is always,
4 it's just a snapshot of a particular moment in the
5 corporation's existence, and it's always historical. It's
6 necessarily historical. It's always what happened in the
7 past. Obviously in the future it's not an accounting, it's
8 just a projection of what will happen in the future. So if
9 we're talking about accounting in that respect, everything
10 is historical accounting. Now, is that your understanding
11 of what's meant by that term?

12 MR. STERN: Your Honor, we're somewhat guided by
13 what this Court said, and I don't, it obviously wasn't our
14 position, but we're trying to comply with this Court's
15 mandate. But for us, the accounting is, you know, is the,
16 you know, it's the ledger, it's of transactions, and we're
17 doing it like not only going forward, we're doing it going
18 backward. There's also a separate sort of audit
19 verification/reconciliation function that the Department is
20 also doing, not just going forward, which it is, but going
21 backwards. You know, and that's, you know, and that's what
22 the Interior plan, you know, calls for, because it's done,
23 you know, I mean, obviously, it's tomorrow's case, but, I
24 mean, we've done everything we could, you know, to like
25 meet any understanding possible of what this Court's, you

1 know, 2001 decision meant.

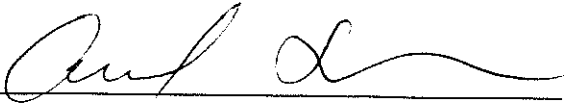
2 And the other thing I'd like to add is that while this
3 Court stayed part of the injunction when it came up, you
4 know, in March, there are parts of Interior that continue
5 to be offline that, you know, there is no legal basis, no
6 factual basis. It's certainly the Government certainly,
7 and we think it's hurting class members. It's not helping
8 anybody. And we would ask that therefore that, you know,
9 to the extent that this Court, you know, can decide this
10 matter, you know, sooner rather than later that, you know,
11 there really is a significant ongoing burden that's, you
12 know, wholly unjustifiable that's being placed by these
13 orders.

14 JUDGE GINSBURG: Thank you, Mr. (indiscernible).
15 Pardon me, Mr. Stern. And Mr. Austin, both, thank you.
16 The case is submitted.

17 (Recess.)
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CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

 9-17-04

Carol Schlenker

Date

DEPOSITION SERVICES, INC.