

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/
7 Appellants,

8 v.

No. 05-5269

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

11 Defendants/
12 Appellants.

13 Tuesday, April 11, 2006

14 Washington, D.C.

15 The above-entitled matter came on for oral
16 argument pursuant to notice.

17 BEFORE:

18 CIRCUIT JUDGES TATEL, SILVERMAN, AND BROWN

19 APPEARANCES:

20 ON BEHALF OF THE APPELLANTS:

21 PETER D. KEISLER, ESQ.

22 ON BEHALF OF THE APPELLEES:

23 KEITH M. HARPER, ESQ.
24
25

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C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
Peter D. Keisler, Esq. On Behalf of the Appellants	3; 42
Keith M. Harper, Esq. On Behalf of the Appellees	13; 54

P R O C E E D I N G S

ORAL ARGUMENT OF PETER D. KEISLER, ESQ.

ON BEHALF OF THE APPELLANTS

MR. KEISLER: Thank you, Your Honor. This second appeal is from the District Court's decision of July 12th. That decision, under the asserted authority of Rule 23(d) would require the Department of the Interior to include a warning notice over and over again in every communication it sends out on any subject member -- subject matter that might reach a class member. The District Court identified two explicit objectives in requiring this warning notice and neither is authorized by Rule 23(d).

First, from time to time trust beneficiaries choose to voluntarily sell trust assets and this warning notice implements the District Court's view that they shouldn't do that for a few years until the completion of the accounting. Instead, the District Court said they should retain their trust assets in as unaltered a state as possible until the completion of the required accounting. In fact, the District Court said that optimally all trust-related transactions would be suspended for that period of years, but it went on to say that unfortunately that would be impracticable and it regarded this warning notice as the best possible step towards achieving that end.

The second objective that this warning notice

1 implements is that it implements the District Court's desire
2 to warn beneficiaries of, in the District Court's words, the
3 danger of placing any further confidence in the Department of
4 the Interior because, the District Court states, Interior will
5 not "hesitate to lie to Indians". And, indeed, the message
6 that this notice sends out is unmistakable. It is don't trust
7 anything you get from the government.

8 Now, neither of these purposes is authorized by Rule
9 23(d). Subsection 2 authorizes --

10 THE COURT: Couldn't you first address the
11 appealability of the issue?

12 MR. KEISLER: Certainly, Your Honor. This is
13 appealable as an injunction under the *Carson* case. *Carson*
14 says regardless of how an order is nominated, it is an
15 appealable injunction if it prevents -- presents serious,
16 perhaps irreparable consequences --

17 THE COURT: Wait a minute. Why do we -- I mean,
18 even if you're right that it's not authorized by Rule 23, we
19 can just consider an injunction.

20 MR. KEISLER: Well, the District Court said --

21 THE COURT: We can consider it as that, can't we?

22 MR. KEISLER: I don't think so, Your Honor. There
23 are two separate questions. Not authorized by Rule 23(d).
24 It's an injunction in its effect, and therefore, it's
25 appealable. But because the District Court didn't regard it

1 as an injunction, it was explicit in Note 7 in saying I'm not
2 relying on my injunctive authority; I'm relying on Rule 23(d),
3 the District Court didn't do any of the things it would have
4 to do before you would issue an extraordinary --

5 THE COURT: No, that may be why -- that may be the
6 reason why we would vacate the injunction.

7 MR. KEISLER: That's right, Your Honor.

8 THE COURT: But since you're arguing that we have
9 jurisdiction because it's an injunction, then even if we --
10 why don't we just go ahead and consider the merits of it?

11 MR. KEISLER: I'm happy to do that --

12 THE COURT: Let's just assume you're right about
13 Rule 23(d) and go on and look at the merits.

14 MR. KEISLER: If that's the assumption of members of
15 the Court and there's no question that this isn't authorized
16 by Rule 23(d) --

17 THE COURT: Well, I'm only speaking for myself. My
18 colleagues may have 23(d) questions.

19 MR. KEISLER: If there are no questions about Rule
20 23(d), then let me move to defend this as an injunction -- or,
21 attack this as an injunction.

22 THE COURT: I thought -- you didn't mean defend.
23 Did you say defend --

24 MR. KEISLER: I meant to attack --

25 (Interruption off the record.)

1 MR. KEISLER: If this order is like anything, we
2 compared it in our brief to an extraordinary hypothetical
3 injunction in products liability case in which defendant would
4 be required to post a warning notice outside his products. As
5 I said, the District Court didn't do anything that it would
6 have to do to justify an injunction under this Court's
7 decision in the last internet disconnection order where this
8 Court said there's an injunction, there's disputes, there has
9 to be a hearing, there have to be rigorous findings and a
10 clear showing of irreparable harm likely to excess bounds of
11 equities. None of that happened here because the District
12 Court said in Note 7 it wasn't relying on its injunctive
13 authority.

14 THE COURT: Is it --

15 MR. KEISLER: Nor do we think --

16 THE COURT: Is it your view that the - do you take
17 the position that the statement that the District Court -- set
18 aside the question of it being sent with every document, okay?
19 Just set that aside for a minute. But is the statement that
20 -- is the statement that account information "may be
21 unreliable" -- is that a not accurate statement? Is that an
22 inaccurate statement?

23 MR. KEISLER: We don't believe there's any factual
24 basis for a pronouncement today --

25 THE COURT: So, you think all the information's

1 reliable?

2 MR. KEISLER: Based on what we're seeing today, we
3 have no indication that the trust data is unreliable to the
4 degree that a prudent person would postpone a trust
5 transaction as a result.

6 Let me talk about the two types of data that the District
7 Court might have had in mind, Your Honor, and answer your
8 question directly in that context. First, there are
9 appraisals, and that's the kind of information that trust
10 beneficiaries actually consider in deciding whether to sell
11 their lands.

12 THE COURT: Suppose all it said was, you know, you
13 go on and make whatever decisions you want, but you need to be
14 careful because we can't assure you that the information in
15 these accounts is reliable? Would that be a problem?

16 MR. KEISLER: There would have to be some record
17 today based on our knowledge today that would support that,
18 and that's what the District Court didn't do. It relied on an
19 impressionistic survey of what it called accumulated detritus
20 of nine years spent examining Interior's odious performance as
21 trustee delegates.

22 THE COURT: You think the -- you think Interior's
23 2003 plan is too old to rely on?

24 MR. KEISLER: In the decision that this Court issued
25 in the Fall reversing the second structural injunction, it

1 criticized the District Court for, among other things, relying
2 on the findings of fact from its vacated contempt decision.
3 You said -- first, you vacated that contempt decision so you
4 can't rely on those --

5 THE COURT: No, no, I was asking you about
6 Interior's --

7 MR. KEISLER: Right, but the section --

8 THE COURT: -- '03 plan, which acknowledges that the
9 information is unreliable.

10 MR. KEISLER: It acknowledges that there's an
11 accounting to do.

12 THE COURT: Right.

13 MR. KEISLER: The fact that there --

14 THE COURT: No, but it also acknowledges that the
15 information is unreliable.

16 MR. KEISLER: We don't say the information is
17 unreliable. The accounting is going to produce at the end of
18 the day --

19 THE COURT: Wrong. Let me quote. "Without an
20 assurance that all current account balances are reliable,
21 Interior cannot assure an accurate accounting." That's your
22 own compliance report.

23 MR. KEISLER: That explains the purpose of
24 historical accounting. It is to provide the assurance --

25 THE COURT: But why would you do an accounting if

1 they were -- oh, you think the historical accounting they show
2 they're all accurate?

3 MR. KEISLER: Absolutely, Your Honor. Your Honor,
4 time hasn't stood still since 1999 when all the findings the
5 District Court rely on were made. Congress has obligated more
6 than \$100 million and we've been spending that money and we've
7 been working on it, and I don't want to make any statement
8 until the end of the accounting, but based on what we're
9 seeing now, so far we are not finding systemic errors or
10 systemic unreliability. And if any injunction of this sort
11 were to issue, it would have to be based on some -- of the
12 knowledge today; not the accumulated detritus, in the District
13 Court's words of nine years of litigation. And that's what
14 Your Honor --

15 THE COURT: But how will you know until the
16 accounting --

17 MR. KEISLER: Exactly --

18 THE COURT: -- all we have in the record is an
19 enormous amount of evidence, including the Department's own
20 reports that this data may be unreliable, and I was only
21 asking whether or not -- what would be the problem with a
22 statement which says we cannot assure you -- I mean, it sounds
23 to me that that's an accurate statement of the current
24 situation.

25 MR. KEISLER: Not --

1 THE COURT: Quote, that the Interior Department
2 cannot assure you. I'm not saying the argument -- the
3 information may be unreliable. I'm simply asking what's wrong
4 with the statement the Department cannot assure you of its
5 reliability? You're not saying that that's --

6 MR. KEISLER: Look, Your Honor, context --

7 THE COURT: Isn't that, in fact, the -- isn't
8 that --

9 MR. KEISLER: Let me respond to that.

10 THE COURT: Yeah.

11 MR. KEISLER: I don't think in the context it is
12 accurate. Just as no internet system is one hundred percent
13 secure, no piece of data, nothing you get from Wachovia is one
14 hundred percent reliable. When you issue a notice that says
15 this data may be unreliable, you should keep that in mind in
16 deciding whether to engage in trust transactions, you're --

17 THE COURT: Well, you just changed my hypothetical.

18 MR. KEISLER: I was taking from the notice, but if
19 you send out a notice saying the data may be unreliable --

20 THE COURT: No, no, no. I didn't mean to say that.
21 I wasn't asking you about this order. I was asking about a
22 different one, which is, "We cannot assure you of this
23 information's reliability".

24 THE COURT: Until the accounting is completed.

25 THE COURT: "Until the accounting is completed."

1 MR. KEISLER: I think the proper way to write a
2 notice of the sort Your Honor is describing -- and, by the
3 way, it wouldn't require an injunction, but could be done
4 straight under Rule 23(d) would be a classic Rule 23(d) notice
5 that says there's a suit that's been filed -- accounting. The
6 District Court issued a declaratory ruling in 1999 finding
7 that Interior was in breach of its duty to provide a timely
8 accounting that unreasonably delayed the accounting. The
9 lawsuit is ongoing. The accounting is ongoing. If you have
10 questions of class counsel, Mr. Gingold and Mr. Harper, here
11 is their phone number. And what that does in the scheme that
12 Rule 23 envisioned, that advice about whether or not you need
13 to know something about the litigation that would affect your
14 investment or whether you should trust or mistrust the
15 Department of Interior is advice that goes from attorney to
16 client. It doesn't go from court to class, it doesn't go from
17 the court to the Interior. It goes from attorney to client.
18 And Rule 23(d) sets up a perfectly reasonable mechanism for
19 accomplishing any sort of professional advice that the class
20 should get of what it should do with trust transactions, what
21 it should know about the data it receives. And that's - and
22 that's --

23 THE COURT: So, your fundamental objection is what
24 it does is it undermines more than you think should be done
25 the Department's credibility.

1 MR. KEISLER: Absolutely.

2 THE COURT: That's your fundamental concern, right?

3 MR. KEISLER: Imagine what happens when this notice
4 goes out, Your Honor. First of all, we start getting phone
5 calls from all of the beneficiaries, or many of them --

6 THE COURT: Well, wouldn't it have the same thing if
7 it came from class counsel?

8 MR. KEISLER: But then it's our statement, Your
9 Honor. Then it's not a court-ordered statement. When we get
10 phone calls saying what does this mean, and if it came from
11 counsel, we can say we disagree with it. But any field office
12 person who said I disagree with this court-ordered notice
13 would be up before the Court on a contempt proceeding right
14 away. So, they'd have to say we can't tell you anything about
15 this. Just read the notice; that's the Court's order.

16 THE COURT: Uh-huh.

17 MR. KEISLER: And then they'd get another notice
18 again when they're invited to back-to-school night in a
19 written communication from the Interior-run school. And then
20 they get it again when they get some benefits from the
21 Department of Interior and so for years and years, they keep
22 on getting this legend attached to all sorts of extraneous
23 written communications that have nothing to do with it.

24 And I think what that -- I don't know they were
25 supposed to do with this information, but I do think the

1 confusion and mistrust that would result from something that's
2 simultaneously this vague and this threatening indicates that
3 this really isn't about conveying information at all; it is
4 about an attempt to induce paralysis -- paralysis in trust
5 transactions and to sow mistrust on the Department of Interior
6 because those are the District Court's two stated objectives.
7 We don't think those are justified under Rule 23(d). We don't
8 think they're justified under any other source of authority
9 we're aware of. There's absolutely no showing sufficient to
10 support an injunction to create those kinds of irreparable
11 (indiscernible).

12 If the Court has no further questions, I'll reserve
13 the remainder of my time for rebuttal.

14 THE COURT: Thank you.

15 ORAL ARGUMENT BY KEITH M. HARPER, ESQ.

16 ON BEHALF OF THE APPELLEES

17 MR. HARPER: Good morning, Your Honors. May it
18 please the Court, Keith Harper for plaintiffs, Elouise Cobell,
19 et al. and 500,000 individual Indian trust beneficiaries.

20 First, I would like to address the appellate
21 jurisdiction. There is no appellate jurisdiction in the
22 circumstances. The government's principle argument that this
23 is appealable as an injunction under 1292 is absolutely
24 incorrect.

25 They point to three things. They say that it

1 directs conduct, that it's punishable by contempt, and that
2 somehow it cannot be reviewed at the end of the case and
3 creates a serious or irreparable harm. That final factor
4 doesn't exist, but more importantly, that is not sufficient
5 for appellate jurisdiction. If that were sufficient, many,
6 many discovery orders would be appealable because they
7 obviously mandate the party taking action, they are subject to
8 contempt proceedings as set forth in Rule 37, and further,
9 they can be certainly irreparable harm at the end. If you
10 have to produce documents, you have to produce the documents.

11 Those kinds of discovery orders and these kinds of
12 case management orders are routinely denied appellate
13 jurisdiction. They are not appealed. You need -- they are
14 not injunctions. You need another factor.

15 THE COURT: Suppose you deal with counsel's
16 hypothetical. Suppose in a product liability case, class
17 action, a District Judge issues or directs a notice to be sent
18 to the class indicating the product is unreliable?

19 MR. HARPER: If it was similar to this circumstance,
20 Your Honor, then the fact that it was unreliable would be
21 undisputed in the court below --

22 THE COURT: I beg your pardon? Would it be
23 appealable?

24 MR. HARPER: It would not be appealable.

25 THE COURT: Would not be appealable.

1 MR. HARPER: No, Your Honor.

2 THE COURT: District Judge could say that before
3 trial a notice must go out to all the owners of the product
4 indicating that the product is unreliable and dangerous.

5 MR. HARPER: Well, the question would be, Your
6 Honor --

7 THE COURT: Then let's stop. Unreliable and
8 dangerous. Appealable?

9 MR. HARPER: I'm not sure if that particular fact
10 pattern is appealable. The question would be does it provide
11 some or all of the substantive relief in the case? The Avery
12 decision that the government --

13 THE COURT: What's the answer?

14 MR. HARPER: In that circumstance I don't know. It
15 may or may not --

16 THE COURT: You're supposed to know. You're the
17 lawyer. I'm supposed to be in doubt.

18 MR. HARPER: That is true. And I would say that it
19 would be appealable because it grants substantive relief that
20 is sought for in the complaint. And that's --

21 THE COURT: So, why is that not different -- why is
22 that different from this case?

23 MR. HARPER: Because in this case there is no
24 substantive relief that's granted. Your Honor, I turn your
25 attention to the actual order here. It's a notice. Provides

1 basic information. It tells --

2 THE COURT: Wait a minute. I sat here last fall to
3 hear counsel start to describe all the equitable relief that
4 you expected down the road in this case, and it looked --
5 sounded to me like a more than an accounting. So, why
6 wouldn't this be part of the relief?

7 MR. HARPER: Because we haven't sought --

8 THE COURT: Yet.

9 MR. HARPER: There's nothing in our complaint, nor
10 have we at any juncture sought this relief. Now, let me
11 explain what this relief is. All this relief is is not curing
12 the problem, but warning of the problem.

13 THE COURT: You want to freeze the linebackers. No
14 transactions.

15 MR. HARPER: That's not true, Your Honor. We don't
16 want a freeze. What we want is so that individual trust
17 beneficiaries, when making critical decisions that can affect
18 their rights in this litigation, have at least a warning that,
19 to quote the notice, evidence introduced shows -- evidence
20 introduced shows that the information regarding individual
21 Indian trusts may be unreliable.

22 THE COURT: Now, that sounds like a preliminary
23 injunction to me. It's preliminary to an injunction that
24 after the trial would say the information is unreliable.

25 MR. HARPER: Your Honor, our hope is that at the

1 end --

2 THE COURT: You may be right that you need this, but
3 I -- it's very hard for me to see why it's not preliminary
4 injunctive relief. You're not just advising the parties of
5 some procedural elements of the case, which is what 23(d)
6 seems to be about. You're ordering the Department to take a
7 preliminary step towards a remedy.

8 MR. HARPER: Your Honor, I -- respectfully I
9 disagree that we are asking for anything preliminary and any
10 relief at all. All we're saying is that individuals should be
11 warned that the data that they make decisions on is not
12 necessarily reliable.

13 THE COURT: Well, how is that different from the --
14 then it sounds exactly like the hypothetical in the brief and
15 that Judge Silverman just asked you about in products
16 liability cases.

17 MR. HARPER: No, because in that circumstance --

18 THE COURT: You warn them that the toys may be
19 unsafe.

20 MR. HARPER: In that circumstance, Your Honor, that
21 is granting some of the substantive relief or is in the
22 pathway toward the substantive relief. And under the
23 precedents that is considered injunctive in nature.

24 Here, you don't have that necessary missing element.

25 THE COURT: But doesn't this notice attempt to

1 protect the interest of the class members and their trust
2 assets and isn't that part of the substantive relief that
3 you're seeking?

4 MR. HARPER: No, Your Honor. In our view what this
5 notice does is merely provide you warning.

6 THE COURT: Wait, excuse me. That's not the relief
7 you're seeking?

8 MR. HARPER: Ultimately, the relief that we're
9 seeking is an accounting and a restatement of accounts --

10 THE COURT: Well, just answer Judge Brown's
11 question. Just answer the question she asked.

12 MR. HARPER: I'm sorry, Your Honor. Could you --

13 THE COURT: Doesn't the notice seem to protect the
14 interests of the class members and their trust assets, and
15 isn't that, in fact, part of the substantive relief that
16 you're seeking?

17 MR. HARPER: Our ultimate relief is to protect the
18 assets of the trust; that is correct. But this does not
19 protect the assets in the trust. It protects their interest
20 in the litigation, and that's the purpose of the order. This
21 is an information notice, Your Honor.

22 THE COURT: But it's not -- ordinarily, under Rule
23 23, you would be seeking to protect their ability to
24 participate in the lawsuit.

25 MR. HARPER: That is one of the functions of Rule 23

1 and 23(d) (2). They set forth a non-exhaustive list of
2 functions for the rule and they are intended to generally
3 protect the members of the class, as is stated in Rule 23
4 expressly. This we believe does protect the members of the
5 class and their interest in this litigation.

6 THE COURT: But it's going beyond their interests in
7 the litigation, isn't it? It's going to the protection of the
8 actual trust assets. The idea is don't do anything. Don't
9 dissipate your trust assets until the case is resolve. Isn't
10 that what the Court's trying to do here?

11 MR. HARPER: I think that there is some language in
12 the order -- excuse me, in the memorandum opinion that would
13 suggest that. The actual order, however, is very limited in
14 focus. All it provides -- all it provides is that some
15 evidence at trial in the case indicates that the information
16 may be unreliable. That's far narrower, far more modest and
17 falls squarely within the ambit of 23(d).

18 THE COURT: Is there anything in the record that
19 indicates that any information other than the accounts
20 themselves is unreliable?

21 MR. HARPER: I'm sorry, Your Honor; I didn't --

22 THE COURT: Is there anything in the record to
23 indicate that there's any concern about a liability other than
24 the accounts themselves?

25 MR. HARPER: Oh, yes. There is extraordinary

1 amounts in the record regarding unreliability.

2 THE COURT: Well, no, that wasn't my question.

3 MR. HARPER: I'm sorry, Your Honor.

4 THE COURT: I know there's evidence of the
5 unreliability of the accounts. But this notice has to be sent
6 with every mailing, whether it has to do with an account or
7 not, correct?

8 MR. HARPER: That is correct --

9 THE COURT: I mean, it has to be included in
10 mailings about education programs --

11 MR. HARPER: That's correct.

12 THE COURT: -- that have nothing to do with this.
13 Is there any evidence that that's unreliable?

14 MR. HARPER: Well, it only points to the information
15 -- the individual Indian trust information is unreliable. It
16 does go to people in other circumstances.

17 THE COURT: Well, why would you do that? What's --
18 where did the -- what would be the reason for sending this --
19 to have this sent for -- let's assume you're right, that you
20 can justify warning recipients about the reliability of their
21 trust accounts. Why would you require this notice in every
22 mailing, even those that have nothing to do with the trust
23 account?

24 MR. HARPER: Well, there's two answers there. The
25 first answer is what the District Court actually says with

1 respect to why he had this order sent out beyond merely two
2 communications with respect to the trust accounts, and that is
3 that he wanted to be over-inclusive and make sure --

4 THE COURT: Can a District Court do that?

5 MR. HARPER: It certainly may, Your Honor --

6 THE COURT: But this is injunctive relief. How can
7 a District Court be over-inclusive?

8 MR. HARPER: Well, this is not --

9 THE COURT: Isn't it supposed to balance? Well,
10 assume you're wrong about whether it's an injunction.

11 MR. HARPER: If we're wrong on whether it's an
12 injunction, then the District Court does have an obligation to
13 balance the interests.

14 THE COURT: Right.

15 MR. HARPER: But we believe that in this
16 circumstance there's no harm to the defendants. What is the
17 harm? They have not demonstrated that this is overburdensome
18 in any way. They don't even make that argument on appeal. If
19 they made the argument that it's somehow overburdensome,
20 then --

21 THE COURT: Well, their argument on appeal is this
22 is, in effect, a scarlet letter, if you're familiar with
23 literature on that. You know what a scarlet letter is?

24 MR. HARPER: I do, Your Honor.

25 THE COURT: That's what this is; a scarlet letter

1 notice. And that's not harm? There's no harm to that?

2 MR. HARPER: No, Your Honor, and I'll tell you why.
3 For two reasons.

4 THE COURT: Hester regarded it as a harm. As an
5 adulteress.

6 MR. HARPER: We are talking about here a trust that
7 this Court has held is being managed in a way that is
8 hopelessly inept. This Court has called their actions not
9 nonfeasance, not misfeasance, but malfeasance, meaning evil-
10 doing, intentional wrongdoing.

11 THE COURT: So, this notice is to describe to the
12 class that the government is an evil-doer.

13 MR. HARPER: No, that's not -- see, although this
14 Court held that, this particular notice is far more modest.
15 All this requires --

16 THE COURT: Is likely to be an evil-doer.

17 MR. HARPER: Perhaps. Your Honor, the point being,
18 if I may, that this order is very modest. It says evidence
19 introduced at trial in this case shows --

20 THE COURT: It's more than what you asked for, isn't
21 it?

22 MR. HARPER: No, Your Honor. It's less than what we
23 asked for. We asked for --

24 THE COURT: That's a change.

25 MR. HARPER: We asked for -- we asked for a

1 declaration in essence that they had --

2 THE COURT: All you asked for -- in your order all
3 you asked for was a statement that they don't know whether the
4 information they are providing to you is accurate. That's all
5 you asked for.

6 MR. HARPER: And then we said --

7 THE COURT: And the District Court said any
8 information related to the IIM trust or the lands or other
9 assets, etcetera, etcetera, etcetera may be unreliable. The
10 District Court broadened this considerably beyond what you
11 asked for.

12 MR. HARPER: The District Court added some language,
13 Your Honor, and it deleted a substantial amount of language.
14 There were substance-based objections made by the trustee
15 delegates. And each and every substance-based objection they
16 made, the District Court considered those and not only
17 considered those, modified the order in conformity with those
18 suggestions. The government never suggested below that the
19 information was reliable. They never made that suggestion.
20 In fact, until this appeal, they have never made that
21 suggestion. And there's a reason for it.

22 The reason is, Your Honor, because the information
23 is not reliable. They have conceded that point time and
24 again. Right now presently, there is a data cleanup sub-
25 project that is ongoing. The purpose of that data cleanup

1 sub-project, Your Honors, is to clean up the data; meaning to
2 correct incorrect information because there's such a long
3 history of inaccurate information that they well concede.

4 This project is in its pilot phases in Oklahoma.
5 How possibly can they have accurate data if they have a
6 project spending millions of dollars to correct incorrect
7 data? So, that -- and that's presently today. Their present
8 auditors say that they cannot even do an audit because they're
9 not sure about the systems; whether the systems have
10 integrity.

11 THE COURT: Why can't you get -- why couldn't you
12 have gotten adequate relief under Judge Tatel's hypothetical,
13 a notice typical under Rule 23, which simply states what the
14 lawsuit's about and suggests that the beneficiaries be given
15 your phone number?

16 MR. HARPER: Your Honor, had the government raised
17 that below -- you recall, Your Honor, that the analysis
18 here --

19 THE COURT: Well, the government doesn't have to
20 raise that. The government's arguing that the notice that
21 they're required to give is illegal and improper. They don't
22 have to come up with a suggestion as to what would be a proper
23 notice. I'm asking you why wouldn't you get all the adequate
24 relief with a proper notice under Rule -- well, I've assumed a
25 conclusion when I say a more orthodox notice under Rule 23

1 which Judge Tatel had hypothesized?

2 MR. HARPER: Because we have 500,000 individual
3 Indian trust beneficiaries and we would -- and we believe that
4 they have -- that they ought to be warned, they ought --

5 THE COURT: No, no, no, they could get -- they could
6 get -- well, should we call it a Tatel letter under Rule 23.

7 MR. HARPER: Or, a Judge Silverman letter; either.

8 THE COURT: No, but wouldn't that provide the relief
9 you seek?

10 MR. HARPER: No, I don't think that would be
11 adequate, Your Honor.

12 THE COURT: Why?

13 MR. HARPER: The reason it wouldn't be adequate is
14 because it wouldn't put them on notice the information they're
15 actually receiving may be unreliable.

16 THE COURT: Well, when they call you, you could tell
17 them that.

18 MR. HARPER: But, Your Honor --

19 THE COURT: That's your claim.

20 MR. HARPER: -- 500,000 -- and we welcome the phone
21 calls. And we've received many phone calls because of other
22 23(d) notices and we welcome those, and we've learned a lot of
23 information because of that. And we continue to welcome
24 those.

25 THE COURT: I know, but why do you think -- well,

1 finish your answer.

2 MR. HARPER: I was just going to say the point being
3 -- and this is why I was getting into the substance of the
4 notice. If the notice -- the government agrees that there is
5 not challengeable information, the information is not
6 contestable, then there's no reason you can't include it in a
7 23(d). They didn't contest it and the question here is is it
8 an abuse of discretion for the District Court to issue out a
9 23(d) notice and the government never challenged it on those
10 grounds.

11 THE COURT: If you don't have a --

12 THE COURT: Let me ask you about that. How would
13 they challenge it if there was no hearing there?

14 MR. HARPER: Your Honor, they could have challenged
15 it in their brief. Their brief challenges the notice on many,
16 many different counts, Your Honor. It says that it's -- it
17 was wrong in timing, that it should -- they made substance-
18 based challenges to the language utilized in our proposed
19 notice. And even though our proposed notice talked about the
20 fact that the information was unreliable, they never once in
21 their entire brief said, "Hold on, Your Honor; don't send out
22 that notice because that information that you're saying
23 regarding the unreliability is inaccurate." They never
24 challenged that part of it.

25 They did make other substantive-based challenges to

1 the notice --

2 THE COURT: Don't they argue here that the
3 information the District Court relied on for that is stale?

4 MR. HARPER: Yes, Your Honor.

5 THE COURT: Well, so they do -- they do argue that.

6 MR. HARPER: They don't argue that in the District
7 Court.

8 THE COURT: No, they argue it here.

9 MR. HARPER: They do argue here that it is -- that
10 the finding of unreliability is inaccurate in the Court of
11 Appeals, but they've already waived that, as Ned Charter in
12 this Court's 2002 decision makes clear, this applies with
13 special force -- waiver rules apply with special force in
14 fact-based assessments because you deprive the District Court
15 of the ability to weigh the evidence. As Judge Silverman
16 earlier noted, this Court does not normally make findings of
17 fact. You don't want the entire record on appeal; all the
18 vagaries of all the evidence to weigh in this Court. That's
19 what the District Court's job is.

20 THE COURT: Do you think there should have been an
21 evidentiary hearing that would have gone on for another 60
22 days, 120 days as to whether the information is reliable or
23 not reliable?

24 MR. HARPER: Your Honor, it wouldn't have required a
25 hearing like that. First, the government never challenged it

1 below.

2 THE COURT: Suppose the government said, "Hey, wait
3 a minute. We think the information is reliable; at least it
4 hasn't been determined to be unreliable yet." Now, should
5 there be a separate hearing to -- not the accounting, but a
6 separate hearing associated with the notice to determine
7 whether the information is reliable?

8 MR. HARPER: Based on the record evidence, I do not
9 think the Court would have had to have a separate hearing.

10 THE COURT: (Indiscernible) they could rely on the
11 accumulated (indiscernible) of the last nine years.

12 MR. HARPER: That's not what he relied on for this
13 order, Your Honor. That was explaining the reason why that
14 this notice should go out. It wasn't explaining why this
15 order and why information was unreliable. The reason the
16 information is unreliable is, as Judge Tatel points out, they
17 have admitted it time and time again in their 2003 report. On
18 the --

19 THE COURT: No, no, all they've admitted is that an
20 accounting will produce more reliable figuring, more reliable
21 data. And that's always true of any accounting.

22 MR. HARPER: That's inaccurate, Your Honor, with due
23 respect.

24 THE COURT: What?

25 MR. HARPER: I said this is actually not what the

1 record indicates. What the record indicates, for example, is
2 that Mr. Paul Homan testified at trial. He was the special
3 trustee. "Do you believe that these systems are reliable?"
4 "Absolutely not." "Do you think that the data on these
5 systems has integrity?" "No." I don't think you can get
6 clearer than that. Our brief is filled with items like this.

7 THE COURT: Same as the District Judge made such a
8 finding?

9 MR. HARPER: Well, the District Court --

10 THE COURT: Has the District Court made a finding
11 that the data on the Interior Department computers with
12 respect to Indians is unreliable?

13 MR. HARPER: The District Court has talked about the
14 data as having -- lacking integrity, but Your Honor --

15 THE COURT: No, no, no. Has the District Court made
16 that ultimate finding?

17 MR. HARPER: No, because it was never --

18 THE COURT: I didn't think so.

19 MR. HARPER: May I complete my answer?

20 THE COURT: But you want to -- go ahead, counsel.

21 MR. HARPER: Your Honor, all I was going to say is
22 the District Court never reached that question because it was
23 admitted.

24 THE COURT: Well, I think that's an overstatement.

25 MR. HARPER: Your Honor, they never challenged it

1 below. They have never, until this appeal, ever suggested
2 that their information is reliable. There are -- there is a
3 substantial amount of evidence -- the Griffin report
4 provides --

5 THE COURT: Well, you know there's a difference
6 between stating your information is reliable and your
7 information is unreliable. There's a gap between where you
8 don't know for sure.

9 MR. HARPER: I --

10 THE COURT: That's what I assume the accounting
11 purpose is.

12 MR. HARPER: And I agree. Without the accounting,
13 it's clear that there's no check on it. But, even with --
14 with respect to -- even if you take aside the accounting
15 issue, the -- John Miller, the deputy special trustee said
16 this; "The database is plagued by missing records, unreliable
17 information, and severe security deficiencies and unverifiable
18 audit trials." That's their senior official. Another one,
19 "serious issues with quality of data and the integrity of the
20 data."

21 They talked about -- in the fiduciary compliance
22 plan, Your Honor, they talk about the fact that their -- their
23 ownership databases are not "synchronized". Do you know what
24 that means? There's two databases; the Land Record
25 Information System and the Integrated Resource Management

1 System. They both contain ownership information for the same
2 plot of land and they reflect different owners. Dominick
3 Nussy (phonetic sp.) explained at trial what that means is one
4 has beneficial ownership and one has actual ownership. The
5 actual owner does not get paid in leases; the beneficial owner
6 does --

7 THE COURT: But counsel -- counsel, after a year-
8 and-a-half looking into the intelligence information in the
9 United States in different agencies, I can assure you that
10 this is not a unique problem to Interior.

11 MR. HARPER: Your Honor, it is a unique circumstance
12 in the trust. Because there is no way you can properly manage
13 a trust if you have different people owning the same plot of
14 land. That's just not possible. And that is one of many of
15 the problems with respect to the unreliability of data.

16 Again, the record is absolutely clear on this point.
17 Unreliability throughout their information systems. They
18 never challenged that in the District Court. It is not --
19 this -- the question --

20 THE COURT: Of course, if the notice is
21 inappropriate, it doesn't matter whether they challenge it.
22 They certainly challenged the notice. If the notice is
23 inappropriate under Rule 23, that's the end of the game, isn't
24 it?

25 MR. HARPER: Well, but Your Honor the two are tied,

1 and they're this way. That the government concedes that if
2 the information that is provided -- for example -- for
3 example, if the information said that the Cobell VI panel held
4 that you breached -- that the government breached its trust
5 responsibilities, I don't think that they seriously argued
6 that that is outside the ambit of 23(d).

7 THE COURT: Well, I don't think they would. But
8 we'll see what they say.

9 MR. HARPER: Well --

10 THE COURT: In response.

11 MR. HARPER: I -- to close, Your Honor --

12 THE COURT: Well, we're not going to close yet.

13 MR. HARPER: Your prerogative.

14 THE COURT: Yeah. You said earlier in response to
15 one of my questions, you started talking about waiver. Are
16 you referring to these points you make in your brief at around
17 page 15? Are these the waiver arguments you're talking about?

18 MR. HARPER: We make two waiver arguments, Your
19 Honor. The first waiver argument we make is that they never
20 challenged below -- they never challenged that this falls
21 outside the ambit of 23(d). That's the first --

22 THE COURT: Here's what your brief says. Your brief
23 says, "As the District Court determined, Interior has conceded
24 the Court's authority to enter this order pursuant to Rule
25 23(d)." That's what you say, right?

1 MR. HARPER: That's correct.

2 THE COURT: Here's what the District Court said.
3 "Interior has previously conceded this Court's authority to
4 restrict Interior's communications with Indian beneficiaries."
5 It doesn't say anything at all about conceding the authority
6 of this order under Rule 23.

7 MR. HARPER: But, in fact, Your Honor, if you look
8 at the brief of the government --

9 THE COURT: I'm referring to your statement in your
10 brief and the District Court language you cite, which doesn't
11 support the concession you say.

12 MR. HARPER: Your Honor, the point we're trying to
13 make, and maybe --

14 THE COURT: Well, let's stick with this for a
15 minute. I mean, you've argued waiver here.

16 MR. HARPER: Yes.

17 THE COURT: But the District Court decision does not
18 support your argument that they've conceded that the Court has
19 authority under 23(d) to issue this order. Do you agree with
20 that, having heard the sentence?

21 MR. HARPER: I agree that the District Court did not
22 expressly make that holding.

23 THE COURT: The District Court didn't do it
24 implicitly. It said -- the only thing it said was that they
25 had the authority to restrict Interior's communications with

1 the parties; not to enter this order under 23(d).

2 MR. HARPER: Your Honor, whether the District Court
3 in fact made -- I will concede that the District Court --

4 THE COURT: While we're talking about statements
5 about concession in your brief --

6 MR. HARPER: Sure.

7 THE COURT: -- here's another one. "The government
8 urged the District Court to accept as undisputed fact that
9 Indian trust data is wholly unreliable", right?

10 MR. HARPER: That is correct, Your Honor.

11 THE COURT: The undisputed fact that the government
12 agreed to was that plaintiffs had said that; not that it was
13 true.

14 MR. HARPER: But, Your Honor --

15 THE COURT: Look at 802 -- Joint Appendix 802.
16 That's all it is.

17 MR. HARPER: Your Honor, the entire import of that
18 quotation is not that plaintiff said it. The import of the
19 quotation is that it, in fact, reflected a true statement.
20 And in their reply brief --

21 THE COURT: Counsel, counsel you're gilding the lily
22 and you did that throughout your brief. We noticed it, too.

23 MR. HARPER: Your Honor, well to the extent that you
24 believe we gilded the lily, we apologize, but that was not the
25 intent of our brief.

1 THE COURT: But you -- in your brief you accuse the
2 government of all sorts of vicious things, misrepresentations,
3 etcetera. That's a misrepresentation of your own. And I
4 wonder at the tenor of the briefs that you filed and the
5 accusations in your brief of the government's behavior. It
6 struck me as excessive and almost bordering on unprofessional.

7 MR. HARPER: Your Honor, if I can address that
8 point, because I think that there is a reason why we set that
9 out in the manner that we did. And we don't relish the
10 opportunity to do that.

11 But the fact is, for example, the government argued
12 in their motion to remove the Judge, to reassign the case,
13 they argued the Court ought to be -- the District Court Judge
14 ought to be removed for no other reason than that he relied on
15 "inapposite precedent" like *Brown v. Board of Education* and
16 other cases of that ilk.

17 In *Cobell VI*, this Court cited *Brown v. Board of*
18 *Education* --

19 THE COURT: Wait, wait, wait, counsel. You're
20 completely off the subject. We were both asking you about
21 your claims that there were waivers. That's all.

22 MR. HARPER: I thought the question was the tenor of
23 my argument. I apologize, Your Honor.

24 THE COURT: In fairness, Judge Tatel, I did broaden
25 the point and I shouldn't have broadened the point to refer to

1 the adjectives you use in your brief in describing the
2 government, which seemed to me excessive. I'm not talking
3 about the Judge. I'm talking about your accusations about
4 your opponent.

5 MR. HARPER: I understand, Your Honor. And I was
6 trying to explain to you how the reasons --

7 THE COURT: But why don't you go back to Judge
8 Tatel, who is going step by step through your brief, pointing
9 out the misrepresentations you make.

10 MR. HARPER: With respect to the representation on
11 the -- in the summary judgment motion, they act that -- they
12 asked that that point be accepted as a matter of fact in the
13 summary judgment, Your Honor.

14 THE COURT: I think if you look at it, you'll see
15 that they -- what they state is that that's plaintiff's
16 position.

17 MR. HARPER: Well, again Your Honor, we didn't
18 intend to --

19 THE COURT: Okay.

20 MR. HARPER: -- suggest that that was --

21 THE COURT: Yeah, but that's what it says. I just
22 had one other question. You said with some degree of
23 certainty earlier in your argument that there's no doubt that
24 this order is permissible under Rule 23(d)?

25 MR. HARPER: Yes.

1 THE COURT: What is your view about what the
2 District Court relied on? He didn't cite any particular
3 provision in 23(d), did he?

4 MR. HARPER: He cited some language in 23, but --

5 THE COURT: Right.

6 MR. HARPER: -- he did not cite specific --

7 THE COURT: Do you think that language supports this
8 order?

9 MR. HARPER: I think that the language of 23(d) does
10 support this order.

11 THE COURT: No, I'm talking about the language the
12 District Court cited, which is that the District Court has
13 authority, "to impose conditions on the representative
14 parties." That's the only quote in his decision that I saw.

15 MR. HARPER: Well --

16 THE COURT: Do you think that that supports this
17 order?

18 MR. HARPER: I think that this is a condition that
19 is imposed on the parties in --

20 THE COURT: But that's not what the language says.
21 It says the Court allows to impose conditions "on the
22 representative parties". You're the representative party, not
23 the Interior Department.

24 MR. HARPER: Your Honor, with respect to the -- that
25 may be the fact that we are the representative parties.

1 THE COURT: So, where does the authority come from
2 under 23(d)?

3 MR. HARPER: 23(d)(2) is a non-exhaustive list of
4 when notices can be provided in order to protect class
5 members.

6 THE COURT: But it's all for -- it's all -- it's not
7 to protect class members. It's all designed to advise them of
8 the steps in the litigation. It's to advise them of the
9 process.

10 MR. HARPER: But it's --

11 THE COURT: It's not to protect them.

12 MR. HARPER: It also plainly provides, Your Honor,
13 that it is to protect the members of the class. Notice is to
14 protect the members of the class, and it's considered a non-
15 exhaustive list as set forth in the advisory committee notes
16 to Rule 23(d)(2). And we think that this, therefore, falls
17 comfortably within that ambit.

18 THE COURT: Yeah, you did. You quoted for the
19 protection of the members of the class, right?

20 MR. HARPER: Correct.

21 THE COURT: That's what you quoted. But you
22 completely left off the last part of that provision of 23,
23 which says, "of any step in the action or of the proposed
24 extent of the judgment or the opportunity of members to
25 signify whether they wish representation." It's all to advise

1 them of steps -- it's to protect them by advising them of
2 steps in the litigation. Not to enter preliminary relief.

3 MR. HARPER: Your Honor, the case law has provided
4 that the -- including *Gulf Oil* that the duty and the
5 responsibility and the powers of the District Court under Rule
6 23(d) are extraordinarily broad. They're broad and it's
7 flexible to protect members of the class. That is the rule --

8 THE COURT: Every case you cite -- *In Re School*
9 *Asbestos*, all the rest -- the required notice, simply advise
10 the parties of the status of the class action; who the parties
11 were. Every one of the cases are procedural. There isn't one
12 of these cases you cited where the District Court used 23 to
13 order substantive relief. Preliminary substantive relief.

14 MR. HARPER: Well, Your Honor, we don't believe this
15 is preliminary substantive relief. We believe that this
16 provides information, Your Honor, to the members --

17 THE COURT: Right, okay.

18 MR. HARPER: -- of the class.

19 THE COURT: May I just -- may I just then continue
20 on and make references to your brief, which I think are
21 excessive? Page 38 you say in this appeal trustee delegates
22 have abandoned misrepresentations they made to this Court in
23 procuring the vacature of the March 15th, 2004 preliminary
24 injunction in *Cobell XIII*. On Page 42 you say trustee
25 delegates compound the misrepresentation they made to this

1 Court in their motion to stay the injunction by asserting
2 falsely that an internet disconnection would frustrate the
3 ability of MMS to receive process and disburse over \$500
4 million. On Page 46 you refer, again trustee delegates argue
5 dishonestly that the injunction would have a particularly
6 harsh impact on services to Indians.

7 One can disagree with your opponent in a litigation
8 without using such language.

9 MR. HARPER: I --

10 THE COURT: I found it sort of shocking and
11 stunning. I wondered whether this had become more than
12 litigation, but rather the moral equivalent of war.

13 MR. HARPER: Well, Your Honor, I'd like to address
14 -- it's difficult for me to address that brief because that
15 was the IT security brief, so I apologize for that. I'm just
16 not as prepared on that as I am for this argument.

17 But let me say something generally about our
18 briefs --

19 (Discussion off the record.)

20 THE COURT: This is the brief in the -- you're
21 right, this is the brief from the disconnect case. You're
22 right.

23 MR. HARPER: So, I'm sorry that I can't address --

24 THE COURT: But I'm not sure that I don't find
25 similar language in the disconnect, but it just pervades the

1 -- you know, we have so many pieces of litigation, it pervades
2 the entire litigation and I'm enormously troubled by it.

3 MR. HARPER: Well, Your Honor, I think that that's
4 because there has been a pattern -- and unfortunately, there
5 has been a pattern and practice by some on the government side
6 to attempt to undermine this litigation. And we're going to
7 certainly talk about that further --

8 THE COURT: I think they're trying to win their
9 case. That isn't the same.

10 MR. HARPER: It does, Your Honor, but part of this
11 case is reforming a system that has been broken for a hundred
12 years that victimizes a certain group of people.

13 THE COURT: I don't think -- I don't think you
14 enhance your position by making misrepresentations that Judge
15 Tatel referred to in your case or in the other case making
16 accusations against counsel.

17 MR. HARPER: Well, I would -- I'd just like to say
18 with respect to the accusations, you could look at them on the
19 merits. For example, the government argues in their brief to
20 remove the District Court Judge, they assert that he should be
21 removed for following inapposite precedent like *Brown v. Board*
22 *of Education*.

23 THE COURT: I don't think we've gotten to that, have
24 we?

25 THE COURT: No, that's the next issue.

1 THE COURT: That's the next issue.

2 MR. HARPER: Well, I'm giving it as an example --

3 THE COURT: Yeah, counsel, I think your time is up.

4 Let's -- did counsel have any -- I think he had some time
5 left, right? Four minutes. Go ahead.

6 MR. HARPER: Thank you, Your Honors.

7 ORAL ARGUMENT OF PETER D. KEISLER, ESQ.

8 ON BEHALF OF THE APPELLANTS

9 MR. KEISLER: Of course it's a scarlet letter, Judge
10 Silverman. It's a scarlet letter in two respects. Like
11 Hester Prynne, we have to bear the message of our own
12 condemnation and like Hester Prynne it's pervasive. She wears
13 it everywhere she goes. It affects every interaction she has
14 with anyone in town. And it's because the scarlet letter --
15 that's why they want it, Your Honor, instead of a normal Rule
16 23 notice. And to seek and obtain a scarlet letter injunction
17 and then say it's unappealable, with respect to the language
18 Mr. Harper quoted that it must grant some of the relief
19 ultimately sought in litigation, if that were true, the IT
20 injunction we just talked about wouldn't be appealable,
21 because, of course, the ultimate relief in this litigation is
22 a shut-down of the IT system.

23 The language from the Third Circuit's decision in
24 *Hershey* is what Judge Brown referred to, to it must grant or
25 protect some of the relief ultimately sought in this

1 litigation. And while we think both those injunctions are
2 ill-designed and improper, they are both -- have the purpose
3 of protecting the ultimate relief in this litigation.

4 With respect to waiver, what Mr. Harper said is
5 simply false. What we said below in our filing was that this
6 was improperly substantive relief in the guise of a notice
7 under Rule 23(d). We said it was improper to include in a
8 Rule 23(d) notice --

9 (Break in recording.)

10 MR. KEISLER: -- exactly what we said; the
11 suggestion of a wavier is manufactured.

12 You know, beyond that, most of what we've all been
13 talking about has been in the hypothetical world in which the
14 District Court understood and treated this as an injunction
15 proceeding. I think our case is ultimately fairly simple.
16 There's no authority under Rule 23(d) and the District Court
17 didn't remotely do the things it would need to do to support
18 an injunction.

19 If the Court has no further questions?

20 THE COURT: No.

21 THE COURT: We see that one's yours, too.

22 MR. KEISLER: Thank you, Your Honor. However
23 inappropriate, unfounded, and poisonous to our relationship
24 with Indian country the specific relief ordered here may be,
25 it follows from and, in our view, pales in comparison to the

1 broader indictment the District Court issued in this opinion
2 against the Department of the Interior, in which he
3 characterized as a pathetic outpost of Anglo-centrism, a
4 morally and culturally oblivious hand-me-down of a
5 disgracefully racist and imperialist government that should
6 have been buried a century ago. It still treats Indians as if
7 they are somehow less than deserving of the respect that
8 should be afforded all people in a society where everyone
9 should be treated equal.

10 And the indictment is not only institutional; it's
11 personal, because the District Judge speculates that the
12 people that serve at Interior may be evil people, deriving
13 their pleasure from inflicting harm on society's most
14 vulnerable. And those are, as I'm sure the panel is aware,
15 direct quotes. They're not my paraphrases.

16 Now, I think the Court knows how very rare it is
17 that we request reassignment in a case. We lose our share of
18 cases and rulings every week in courts across the country. We
19 come under our share of strong criticism. Sometimes we may
20 think the criticism is unjustified, but it is exceptionally
21 rare for us to make the request that we make today; and we do
22 make this request today, and we make it urgently because we
23 think it is absolutely essential to restore the appearance of
24 fairness in this proceeding.

25 The District Court has issued the most --

1 THE COURT: Do you know -- do you know if any -- are
2 there any cases where -- except for situations where a
3 District Judge relies on extrajudicial information or behaves
4 in a certain way out of court, are there any situations where
5 we've removed a District Judge because of something the
6 District Judge said in an opinion?

7 MR. KEISLER: I don't have a citation from this
8 Circuit, but the case that comes to mind is the Third
9 Circuit's decision in the *Haines* case --

10 THE COURT: No, but that's very different though,
11 because in *Haines*, that was all pretrial. Here -- I mean,
12 there was a question in the *Haines* case about whether the
13 District Judge prejudged what he was about to hear. This case
14 we've got years and years of testimony in evidence. It's very
15 different.

16 MR. KEISLER: And according --

17 THE COURT: The reason I ask you the question is --
18 I mean, I take your point that the government has thought
19 about this very, very carefully. But, we need to also, it
20 seems to me -- I mean, if we -- don't we -- if we cross the
21 line in this circuit and recuse a judge for something the
22 judge wrote in an opinion, aren't we opening up the
23 possibility that we will get not lots of recusal motions, but
24 could significantly undermine the independence of the District
25 Judges?

1 MR. KEISLER: Your Honor --

2 THE COURT: Isn't that a risk?

3 MR. KEISLER: -- there is -- you know, any ruling
4 you do will spark people trying to push the edges of it --

5 THE COURT: Right.

6 MR. KEISLER: -- of course. There is no opinion out
7 there -- we have not been able to find it, plaintiffs have not
8 been able to cite it -- that have language at the level and
9 character and tone of this one. If you look at cases where
10 District Judges have been reassigned, they haven't used
11 language like this. If you look at cases involving convicted
12 criminals, judges don't talk about litigants this way.

13 THE COURT: But that's because -- you know, you're
14 relying on -- you've got all these cases where -- the cases
15 you rely on in your brief, the cases like *Wolf*, right, which
16 -- where the question is can the District Court on remand set
17 aside the District Court's previous views? But I don't think
18 that's your argument here. You're arguing bias. And *Wolf*
19 itself says -- *Wolf* doesn't apply to bias situations.

20 MR. KEISLER: Your Honor, we don't need --

21 THE COURT: Isn't that right?

22 MR. KEISLER: Not entirely, Your Honor. We don't
23 need --

24 THE COURT: No?

25 MR. KEISLER: -- this Court to make a ruling that

1 the District Court is biased. The question is whether there's
2 the appearance of --

3 THE COURT: The appearance of, which isn't the *Wolf*
4 line of cases. Those are all cases --

5 MR. KEISLER: Excuse me, but the second prong of
6 *Wolf* is whether reassignment is necessary to preserve the
7 appearance of justice in the case and that's --

8 THE COURT: *Wolf* says -- *Wolf* says its three factors
9 apply, except in the limited cases where personal bias
10 requires recusal.

11 MR. KEISLER: And in those three factors, the second
12 factor is an appearance of justice factor, and that is what we
13 are asserting here. And our position is that there can't be
14 an appearance of fairness when a judge has leveled the most
15 scathing, deeply personal, sweeping, and unprecedented moral
16 accusation against one of the parties without any foundation
17 whatsoever in the record. And I'd like to emphasize that
18 point, because that's quite critical. There is no shred of
19 evidence in this record that supports the District Court's
20 accusations about Interior's motives; the accusations of
21 racism, and I suppose the word is sadism, and plaintiffs
22 haven't cited any.

23 The one cite they offer is very telling. The cite
24 the testimony of an historian. An historian who testified
25 that in the first part of the 20th century, the Commissioner

1 of Indian Affairs thought white people were superior to
2 Indians. If the judge had limited himself to an historical
3 observation, we wouldn't be here. We wouldn't even disagree.
4 But point after point, again and again, in each of the four
5 occasions when he accused the Department of racism he made
6 quite clear, explicit, he's talking about modern day Interior
7 Department, present day leaders, how Interior still treats
8 Indians.

9 And the question is whether any litigant in the
10 country --

11 THE COURT: Are you saying --

12 MR. KEISLER: -- could get a fair hearing from a
13 judge who has subjected it to this kind of completely --

14 THE COURT: So, if he had a -- so, if had had made
15 findings supporting those accusations in the present, you
16 wouldn't object?

17 MR. KEISLER: If you have a racist before you in the
18 court and there's documented record evidence that the person
19 is a racist and there's a case-related reason in the opinion
20 to refer to that evidence and make a finding, then, of course,
21 that would be okay. But the reason reassignment --

22 THE COURT: Well, suppose there was. Suppose the
23 District Judge thought there was evidence in the record that
24 racism did, in fact, animate the Interior Department's
25 behavior today? Would it be -- would you be arguing that

1 there should be a reassignment if the District Judge made such
2 a finding?

3 MR. KEISLER: Our argument would be weaker. I could
4 imagine instances in which language could be so excessive and
5 reveal such a degree of antagonism that even if there were a
6 record -- could be an issue, but we don't face that here.

7 THE COURT: You mean, even if there was a Title VII
8 violation going right up and down the whole --

9 MR. KEISLER: It's not that you call someone a
10 racist, Your Honor; it's that you make such a grave charge
11 without any basis in the record. It's the combination of the
12 gravity of the charge and the complete absence of support that
13 creates the situation in which the antagonism is so deep that
14 no litigant in the country would believe it would get a fair
15 hearing.

16 And there are two aspects of this opinion that I'd
17 particularly like to focus Your Honor's attention on. First,
18 the District Court says these aren't peripheral musings. He
19 describes the accusation of racism as the raw, shocking,
20 humiliating truth at the bottom of the case. It is the prism
21 through which he has announced this entire case should be
22 understood. That's not a finding of fact you can set aside.
23 It's not a legal conclusion you can reverse. It is his
24 announcement of how he believes all the evidence in this case
25 needs to be understood. It's the lens through which he views

1 it.

2 And the only remedy for that -- the only way to get us
3 out from under that lens, because you could write an opinion
4 saying you shouldn't say it, you could write an opinion saying
5 there's nothing in the record to support it, you could write
6 an opinion saying you disagree --

7 THE COURT: Let me -- let me read you a sentence
8 from *Lydicki* (phonetic sp.) and ask you why it isn't this
9 case, okay?

10 MR. KEISLER: Sure.

11 THE COURT: "A judge who presides at a trial may,
12 upon completion of the evidence, be exceedingly ill-disposed
13 towards the defendant who has been shown to be a thoroughly
14 reprehensible person, but the judge is not thereby recusable."

15 MR. KEISLER: Who has been shown to be, Your Honor.

16 THE COURT: Yeah.

17 MR. KEISLER: Who has been shown to be. We have not
18 been shown to be the hand-me-down of a disgracefully racist
19 and imperialist government. Who has been shown to be is
20 absolutely the critical language, because the Court in *Lydicki*
21 made clear that it wasn't saying that the grounds for recusal
22 have to be limited to situations in which there was an
23 extrajudicial source. That was what the Court of Appeals had
24 held. And while the --

25 THE COURT: But how do you draw the line between

1 this case and a case where a judge makes a finding that's
2 clearly erroneous and is offensive, but is not recusable?

3 MR. KEISLER: I think the combination --

4 THE COURT: And we have -- you know, it's not
5 unusual for a Court of Appeals to find District Court findings
6 clearly erroneous, and not supported by the evidence.

7 MR. KEISLER: If the --

8 THE COURT: It doesn't mean his statements are
9 subject -- it doesn't mean he'd be recused.

10 MR. KEISLER: If the District Court had found that
11 we signed a contract on a particular date and the Court held
12 that there was no record of it in support of the fact that we
13 had signed that contract, there wouldn't be a recusal. It's
14 the gravity --

15 THE COURT: I'm just trying to understand where you
16 -- where we draw the line --

17 MR. KEISLER: And --

18 THE COURT: -- to make this an unusual case. Is it
19 that -- is it that there's an accusation of racism?

20 MR. KEISLER: It is the gravity of the accusation
21 combined with the utter absence of any support --

22 THE COURT: But, you know --

23 THE COURT: Should we -- excuse me. Should we take
24 into account any prior litigation and the fact that this Court
25 of Appeals has now reversed the District Judge a number of

1 times?

2 MR. KEISLER: Well, I think it goes to the third
3 factor of *Wolf*, because what the Court has said is we balance
4 against the concerns about fairness and the ability of the
5 District Judge to put aside previously expressed views against
6 some loss in efficiency. This is not a case in which loss of
7 efficiency is something that could possibly be feared. We've
8 had seven appeals that the government has brought since 2003.
9 We've won all four of the ones that have been decided. We've
10 had to seek five stays. They've been granted all the time.

11 The whole effort to do an accounting has been
12 stymied because for years we've had this mammoth \$14 billion
13 injunction that seemed immune from reversal of the Court that
14 have displaced the normal conversation that ought to have
15 taken place between Interior and Congress in order to develop
16 a plan to proceed.

17 This is not an instance in which there is a loss of
18 efficiency problem and this is not an instance where we just
19 have the end of the case about to happen; one trial and one
20 decision. This case, the District Court has said, is going to
21 stretch on to 2011 and beyond, and it's constantly, for that
22 reason, a series of interlocutory decisions; only a few of
23 which are appealable. The vast majority of which, in which
24 people are ordered to show cause why they shouldn't be held in
25 contempt of sanctioned, we can't even bring up here because

1 they, unlike these cases today, are not appealable. So,
2 there's absolutely a pressing urgency to make sure that
3 there's fairness here.

4 And I would also focus Your Honors attention on one
5 other passage in this opinion, which I think sometimes gets
6 lost in comparison with all the other extraordinary things
7 that are said, which is that the judge in this case in this
8 opinion has engaged in an explicit act of prejudgment about
9 evidence that's not yet been presented. At the very end of
10 the decision in extolling the benefits of the notice order, he
11 says one benefit is that it will likely bring to light the
12 wealth of evidence about Interior's mismanagement of the
13 trust.

14 He didn't say that if there is evidence out there
15 that I haven't yet seen, this notice order will bring it to
16 light. He said I'm convinced there's likely evidence out
17 there that I haven't seen of issues of mismanagement which
18 have not yet been presented to me. That is an explicit act of
19 prejudgment. It's wrong because it's a predisposition and
20 we're entitled to an open, fresh evaluation of evidence in the
21 sixth year of a case, in the seventh year of a case, in the
22 eighth year of a case as much as we are in the first year of
23 the case.

24 And it's wrong because when a judge publicly announces in
25 a published opinion that it has this predisposition -- we're

1 ON BEHALF OF THE APPELLEES

2 MR. HARPER: May it please the Court, Your Honors,
3 Keith Harper again for the plaintiffs.

4 We believe that this reassignment motion of the
5 government should be denied. It is true that the words are
6 troubling, but they are troubling not because he uses harsh
7 language, not because he uses strong terms. They are
8 troubling because they aptly describe the conduct of the
9 United States with respect to this litigation and with respect
10 to how they have managed this trust.

11 THE COURT: Is there any evidence in the record that
12 the racism of 150 years ago is animating the Department of
13 Interior today?

14 MR. HARPER: I don't think the judge accused them of
15 that racism, Your Honor. There's nothing in the opinion that
16 actually accuses them of racism. What he says is that they
17 are treated as -- treated as less than deserving. I think
18 this is -- when you have -- for example, in the no accounts
19 receivable system, you have a system where the management has
20 been described by this Court as hopelessly inept, egregious
21 misconduct --

22 THE COURT: Wait, wait, wait, wait. Let's go back
23 to Judge Silverman's question. The judge says -- he accuses
24 them of being "morally and culturally oblivious hand-me-downs
25 of a disgracefully racist and imperialist government. The

1 last pathetic outpost of the indifference in Anglo-
2 centricism."

3 Now, that doesn't sound -- that sounds like he is
4 accusing this -- the people in the Interior Department today
5 of indifference and Anglo-centricism. I don't think he's
6 accusing them of, you know, being pro-British here, right? I
7 mean, what do you think Anglo-centricism is in the context of
8 this case?

9 MR. HARPER: I think that there's record evidence
10 that show, for example in the testimony of Mr. Tex Hall, who
11 talked about inability for the governmental -- government
12 officials to understand what is going on in the --

13 THE COURT: Okay --

14 MR. HARPER: -- or, for individual Indians when, for
15 example --

16 THE COURT: -- they may be -- they may be
17 incompetent. They may be competent and they may be -- and
18 they may not understand it, but is that the same as being a
19 racist?

20 MR. HARPER: I don't think he said racist, though,
21 Your Honor. I think he said hand-me-down of a racist --

22 THE COURT: What do you think that means?

23 MR. HARPER: -- entity, and that's clear.

24 THE COURT: Well, what does Anglo-centrism refer to?

25 MR. HARPER: I think Anglo-centrism refers to the

1 fact that they have not -- because of their own cultural
2 framework, do not understand how these things impact
3 individual Indians on the ground; how they suffer all the time
4 because of the mismanagement that's going on.

5 THE COURT: Well, he could have said that. "After
6 all these years, our government still treats Indians as if
7 they were somehow less than deserving".

8 MR. HARPER: Oh, I believe that is about the
9 present, Your Honor.

10 THE COURT: Well, that's what I'm saying. You were
11 saying this was all -- that they were just --

12 MR. HARPER: No, I said the racist charge was past.
13 I didn't say all the charges were past. Some of the charges
14 are appropriately and aptly described present. When he says
15 treated as, he means that individual Indians are treated as
16 less. How could that not be the case? I mean, the fact of
17 the matter is is that we do not have the most basic functions
18 with respect to our monies. How are we not -- how are we
19 treated as other trust beneficiaries, for example? How are we
20 treated as others are treated when one entity manages their
21 money? We are treated as less than deserving of the normal
22 rights attributed to all in this type of a situation.

23 THE COURT: Let me ask you a different kind of
24 question, which Judge Silverman alluded to in his question to
25 government counsel. You both -- both the parties spend a

1 tremendous amount of time debating the words of this opinion
2 and what they mean and whether they're supported by evidence.
3 I'm curious about what you think about the fact -- how we
4 should deal with the fact that since *Cobell VI* -- since *Cobell*
5 *VI* this Court has reversed the District Judge five consecutive
6 times. All cases -- in all those cases it was relief granted
7 for the plaintiffs and against the -- against the Interior --
8 *Cobell VIII* and *XII*, *In Re Brooks XIII* and *XVII* -- and these
9 reversals were for abuse of discretion, shifting the burden --
10 inappropriately shifting the burden to Interior, acting more
11 as a prosecutor, under value of the burden on Interior,
12 etcetera.

13 What are we to make of that pattern; five orders --
14 four against Interior, five orders reversed, all for abuse of
15 discretion and no orders that we've been able to see that are
16 -- favor Interior? What do we do with that -- that trend?

17 MR. HARPER: Well, there have been a number of
18 orders that have been favorable to Interior that plaintiffs
19 have not appealed, and I'm not saying we had the ability to
20 appeal. There have been 80 published decisions in this
21 matter. And this is a very difficult case --

22 THE COURT: Can you give me some -- I was going to
23 ask you that question. You say in your brief that the
24 District Court has ruled against the plaintiffs or limited
25 their relief, but you don't give any examples.

1 MR. HARPER: Sure.

2 THE COURT: Can you give me an example of a -- where
3 -- of a request for significant relief --

4 MR. HARPER: Sure.

5 THE COURT: -- that the District Court's denied?

6 MR. HARPER: Yes, Your Honor. In December 31st,
7 2004, for example, the -- we filed a motion requesting a trial
8 date in order to determine whether or not the defendants Ernst
9 and Young Accounting was, in fact, an accounting such that it
10 met their -- the normal trust law definition. Did it provide
11 sufficient information to the beneficiary so the beneficiary
12 could readily ascertain whether or not the trustee has carried
13 out its fiduciary duties.

14 The government vigorously objected to that and the
15 Court denied our motion. That was -- that was an issue of
16 great significance because we believe that that would have
17 demonstrated that the accounting that they did in the Ernst
18 and Young report was nowhere near what is required by law.
19 So, that was obviously a very significant decision.

20 THE COURT: Any other examples?

21 MR. HARPER: Pardon me?

22 THE COURT: Any other examples?

23 MR. HARPER: They -- that come to mind, the Court
24 has denied -- in 1998 the Court denied our relief requested
25 regarding interim -- interim relief. A number of times the

1 Court has refused to grant our desired remedy. For example,
2 we wanted receivership imposed on the government in line with
3 cases like *Adams*, that -- so that because of the mismanagement
4 was so severe, the management so inept that the District Court
5 was in a position, we felt, to impose a receivership. The
6 Court denied that request as well.

7 THE COURT: Counsel, I want to turn to the language
8 at page 50 of the government's brief in which they
9 emphasize --

10 MR. HARPER: I'm sorry, I'm having a little trouble
11 hearing you.

12 THE COURT: I'm sorry, is it my fault?

13 MR. HARPER: No --

14 THE COURT: The machine's come on.

15 MR. HARPER: -- it's the fan.

16 THE COURT: Oh, okay. Go to page 50 of the
17 government's brief, in which they refer to the speculation the
18 District Judge entered into concerning the Department of
19 Interior's leadership. "Are they evil people, deriving their
20 pleasure from inflicting harm on society's most vulnerable?
21 Are they apathetic people who cannot muster the necessary
22 energy or emotion -- complicity in the gross negligent
23 administration of the Indian trust. Or maybe Interior's
24 officials are cowardly people who dodge their responsibility."

25 Evil? Cowardly? Wow. Isn't that language almost

1 -- isn't that language unprecedented, number one? And then to
2 go on to say that the story is portrayed as a seamless --
3 well, no, that's the government's characterization. The
4 quotes are "scandalous deceptions, dirty tricks, and outright
5 villainy, the end of which is nowhere in sight."

6 MR. HARPER: Your Honor, can I take those
7 separately? On the first -- on the first, you didn't -- you
8 continued that paragraph. What the Court was doing is it was
9 proposing what it called plausible hypothesis --

10 THE COURT: One of which is they're evil, one of
11 which is they're cowardly, and one of which is they're
12 apathetic. I guess given that choice, the Department of
13 Interior would say we're apathetic.

14 MR. HARPER: What the Court did is set forth their
15 conduct with respect to how they managed the trust and how
16 they litigated the case. He goes on to say, "Perhaps Interior
17 as an institution is so badly broken that even the most well-
18 intentioned initiatives are polluted and warped by the process
19 of implementation." And then he drops a footnote right after
20 that and says, "This hypothesis may be the most plausible, as
21 there is some evidence to substantiate it."

22 THE COURT: You mean they're so -- the fact that the
23 District Judge entertains the hypothesis that the people he's
24 dealing with are not evil, as he suggests is one possibility,
25 redeems his speculation?

1 MR. HARPER: No, I think what he actually says is
2 that is the most plausible explanation.

3 THE COURT: I see. So it may not be that they're
4 just flatly evil.

5 MR. HARPER: That -- in fact, what I think footnote
6 15 indicates is that the other hypothesis are likely
7 inaccurate and what is likely accurate, the most plausible, as
8 he puts in footnote 15, is the final explanation; that the
9 institutions are just so badly broken.

10 THE COURT: What about counsel's last point with
11 respect to the evidence that the District Judge is antipating
12 will come forward through the notice?

13 MR. HARPER: Well, I think that there is a
14 unquestioned record here of what this Court called
15 malfeasance, inept mismanagement, egregious behavior,
16 egregious breach of fiduciary duties. There's obviously
17 evidence out there of a breach. This Court has already held
18 there's been a breach.

19 So, the fact that the District Court said that this will
20 bring up more evidence is hardly saying that what he's going
21 to do with that evidence; whether he's going to weigh that
22 evidence to substantiate --

23 THE COURT: But if you assume -- if a District Judge
24 assumes that there's evidence outside the record, isn't that
25 coming very close to exactly the problem in the first

1 *Microsoft* case?

2 MR. HARPER: No, Your Honor. In the first *Microsoft*
3 case, the --

4 THE COURT: The District Judge read a book --

5 MR. HARPER: Hard drive.

6 THE COURT: A hard drive; yes. I remember it
7 vividly. Read a book and relied on a book that wasn't record
8 evidence.

9 MR. HARPER: Correct.

10 THE COURT: But, when a District Judge issues a
11 notice saying look, I'm looking for certain evidence that I
12 expect to be out there, isn't that very close to relying on
13 evidence outside the record? Or, at least anticipating or
14 expecting bad evidence to come in?

15 MR. HARPER: He didn't say that it was necessarily
16 bad evidence.

17 THE COURT: No, it was evidence --

18 MR. HARPER: He said it was evidence that could be
19 utilized in the case. Think about -- that's a completely
20 reasonable statement. I mean, the fact is is we've had an
21 ineptly managed trust for a hundred years. There's been no
22 accounting for a hundred years. This Court has called it
23 malfeasance. We have had -- we have no accounts receivable
24 system, Your Honor. They don't know what monies are owed.

25 THE COURT: But what's --

1 MR. HARPER: There's not evidence --

2 THE COURT: -- what is different about this case is
3 the District Judge's opinion refers to the moral quality of
4 one of the parties to the case, does he not?

5 MR. HARPER: And I think that that -- on that issue,
6 whether or not that there has been villainy, for example,
7 whether there has been vindictiveness, is all based on the
8 record of the case. We have retaliations in violation of
9 retaliation orders. We have filing of motions, like the GAO
10 accounting. This is a very important one, Your Honor. The
11 government filed a motion. They were told by the General
12 Accounting Office that this motion -- that the suggestions
13 they were making in that motion that the General Accounting
14 Office had accounted from 1920 to 1950 for individual Indian
15 monies was inaccurate. Nevertheless, they go ahead and file a
16 motion, fail to turn over the documents that are against their
17 motion, even though they were subject to a discovery order,
18 and then file a motion that is plainly at odds with the
19 General Accounting Office's own statement about what they did.
20 And, further, they ask for summary judgment so that they
21 wouldn't be required to once again, in their view, do an
22 accounting from 1920 to 1950.

23 I mean, this is not a slight misstep. This is --
24 this is an attempt to undermine the litigation itself. Mona
25 Infield (phonetic sp.), the retaliation with respect to her.

1 The government likes to throw all kinds of facts on it. It's
2 very simple. Mona Infield was an employee, was to be there
3 for four additional years. That was the deal that she was
4 presented with. As soon as she filed an affidavit that showed
5 that the information was insecure and that the information
6 lacked integrity, they responded by rescinding that offer,
7 sending her home, and taking away all her trust reform duties.

8 How is that anything but a casebook example of
9 retaliation? That fits squarely within this Court's
10 precedents with respect -- like *Raponi* (phonetic sp.)
11 regarding what constitutes retaliation and it's plainly
12 willful.

13 Your Honor, we're not talking about slight missteps
14 here. We're talking about egregious misconduct. This Court
15 noted such egregious misconduct in *Cobell VI*. What you said
16 about it is that -- is that their conduct with respect to the
17 first contempt was egregious and it was made more severe -- it
18 was compounded because of the simultaneous destruction of
19 documents.

20 Let me break that down a little bit. During a
21 contempt trial -- during a contempt trial for failing to
22 produce documents and for failing to report on the failure to
23 produce documents, the government destroyed 162 boxes of
24 documents. And then failed to report it to the Court for
25 three months. And that wasn't the end of it. The second

1 contempt trial -- the government likes to paint that as some
2 kind of complete reversal. It wasn't. This Court held that
3 the second contempt should have been criminal because the
4 District Court did not give coercive or compensatory
5 sanctions, and so, therefore, it was functionally criminal.

6 And then it did an analysis of whether or not the
7 Secretary could have been held in criminal contempt. Very --

8 THE COURT: I would point out that the District
9 Judge didn't bother to consider the efforts made by the
10 present -- the then leadership of the Department to try to
11 solve the problem.

12 MR. HARPER: Your Honor, this Court held that those
13 -- that the reports that were made by this current
14 administration -- this current were misleading. You said, "To
15 be sure, they are misleading." That was the finding of this
16 Court in *Cobell VIII* that reversed that contempt. There was
17 no doubt that they were misleading.

18 Let me read, if I could, the closing arguments -- from
19 the closing arguments of Mr. Nagle, lead counsel for the
20 government in *Cobell II* -- I'm sorry, the second contempt. "No
21 one could have participated as counsel or witness or any other
22 capacity or observe these proceedings without having a
23 keen" --

24 THE COURT: *Cobell II* was the one holding
25 Secretaries Babbitt and Rubin in civil contempt?

1 MR. HARPER: I misspoke, Your Honor. I was saying
2 the second contempt trial; yes. *Cobell II* -- I'm sorry, the
3 Cobell that I'm referring to is *Cobell VII* that was holding
4 Secretary Norton --

5 THE COURT: It's a bipartisan contempt proceeding.
6 Everybody's in contempt. Democratic administrations and
7 Republican administrations.

8 MR. HARPER: That has been the unfortunate record of
9 the management of the trust. But, if I can continue, Your
10 Honor? Basically, no witness or any other person who observed
11 these proceedings without having a keen insight and
12 appreciation for the duration and the magnitude of the
13 shortcomings in the trust reform efforts and the shortcomings
14 in reporting on these efforts to the Court. Hardly -- hardly
15 the picture that they paint in their brief that *Cobell VIII*
16 was somehow a complete endorsement of their conduct.

17 This demonstrates by their own words that they had
18 these severe shortcomings in how they reported to the Court.
19 And it's in there. Mr. Mahach recently testified -- the chief
20 security officer in the IT security appeal that just occurred
21 -- he testified that he still told only to report the
22 positive. 2005. At what point does that stop? Of course the
23 District Court is frustrated. He's frustrated because we have
24 conduct that is odious. And it is morally reprehensible when
25 you file a GAO motion like that. Your Honor?

1 THE COURT: Why is all of this relevant to the order
2 that was before him in this case?

3 MR. HARPER: Your Honor, I think it was relevant --

4 THE COURT: Do you understand my question?

5 MR. HARPER: I do understand it.

6 THE COURT: I mean, the District Court actually said
7 in this order -- and we're talking about the 23(b) order.
8 That's where all this appears, right?

9 MR. HARPER: This is correct.

10 THE COURT: Or, 23(d) order. That's where all this
11 appears. It's in the order requiring that the class be
12 notified that the materials might be inaccurate, right?

13 MR. HARPER: That's correct, Your Honor.

14 THE COURT: Okay. And in it, the District Court
15 itself said that the relevant facts were all conceded; there
16 were no factual issues. So, why was all this relevant in this
17 case? What role was it playing?

18 MR. HARPER: The reason I think he felt the purpose
19 of setting out this record is to inform -- answer the question
20 why should we provide this notice? I don't think it's
21 necessary for -- he didn't need to make --

22 THE COURT: But why is it -- why is it -- why does
23 the accusation of the Anglo-centricism have anything to do
24 with whether notice should be provided?

25 MR. HARPER: I think he was painting a picture

1 regarding -- Your Honor, regarding the context --

2 THE COURT: Well, isn't it just a very simple
3 question. Is the data sufficiently inaccurate to require
4 notice? It's just a factual question. What difference does
5 it make how anybody behaved in the past?

6 MR. HARPER: Actually, Your Honor, that question was
7 not before the Court. That question was not before the Court
8 because the government had waived it.

9 THE COURT: Well, I don't think you want to go back
10 to that issue.

11 MR. HARPER: But the question that was before the
12 Court is whether he should exercise his broad discretion under
13 Rule 23(d) to enter this type of order. And by explanation of
14 why he was doing it, he was setting forth the record of the
15 case to demonstrate that in this circumstance this kind of
16 order is the most modest relief that he should enter because
17 it has to inform the class members -- class-wide notice -- why
18 are you telling them this? He's saying that because of this
19 odious record, and it's this reprehensible conduct both in the
20 litigation and how they managed the trust.

21 THE COURT: So, your basic position then is that all
22 of these statements are supported by record evidence, end of
23 case, right?

24 MR. HARPER: We have two points, Your Honor.
25 There's nothing extrajudicial and as you pointed out earlier,

1 like he says that it have -- it essentially -- if it happens
2 in the proceedings of the case, even if it's harsh
3 conclusions, even if it's harsh words, that is not sufficient
4 for bias under 455(a) and the *Microsoft* --

5 THE COURT: Yeah, but what about my second point?

6 MR. HARPER: Pardon me?

7 THE COURT: What about my question, which is that I
8 think it's your position is that all of these statements are
9 supported by the record?

10 MR. HARPER: They are indeed, Your Honor.

11 THE COURT: Now, suppose we were to disagree with
12 you about that?

13 MR. HARPER: Well, I think even if you were to
14 disagree with us that all the record evidence -- that all the
15 holdings, all the findings that the Judge made --

16 (Recording ends abruptly.)

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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.

Judith A. Downey

Date

DEPOSITION SERVICES, INC.