

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELOUISE PEPION COBELL, et al.,)	
on their own behalf and on behalf of)	
all persons similarly situated,)	
)	
Plaintiffs,)	
)	
vs.)	Case No.96CV1285 (RCL)
)	
GALE NORTON, Secretary of)	
the Interior, et al.,)	
)	
Defendants.)	
)	
)	
)	
)	
)	

PLAINTIFFS’ NOTICE IN RESPONSE TO THE MARCH 3, 2005 ORDER

On March 3, 2005, this Court ordered that any briefs submitted to the Special Master that are relevant to plaintiffs’ pending motions for order to show cause be re-filed with this Court no later than March 18, 2005. This filing is made in response to that order.¹ Preliminarily, plaintiffs

¹Plaintiffs again restate their concern, and respectfully request, that this Court **not** rely on any information filed with the former special master pursuant to procedures prescribed by him under the authority of the contempt order of reference. As has been the practice of the trustee-delegates, their counsel, and the contemnors in this litigation, the government and disgruntled contemnors will surely move to vacate contempt orders entered against them, claiming as support for such motions alleged *ultra vires* activities that include information gathered by the master through his *ex parte* communications with certain contemnors and other government officials. As this Court is well aware, the government expressly has consented to specific orders and procedures – including *ex parte* communications between the master and Interior Department officials – yet they unabashedly have complained that such communications alone (including those that they themselves had initiated) must disqualify the master and this Court. Such allegations have been rejected soundly as to this Court; however, the special master-monitor was disqualified and the special master was forced to resign. Plaintiffs expect that these same tactics will be used against this Court in these contempt proceedings. Therefore, plaintiffs urge this Court to move forward with the subject contempt proceedings **wholly independent of the record made with the master** – including all such papers filed with the master and transcripts of hearings, arguments, and other proceedings that were heard by the master – to eliminate the risk that contemnors’ counsel will use such a record to

again note that there has been no discovery nor any investigation whatsoever into contemnors' violations of law and this Court's orders.² None. This is incontestible and, indeed, not one single contemnor states otherwise. In their defense, contemnors suggest that plaintiffs have not met their evidentiary burden and that a show cause order should not issue. Nothing can be further from the truth and such claims merely seek to distort the clear and substantial record before this Court.

In the interest of judicial economy, plaintiffs respectfully note that their pleadings, in accordance with this Court's prior instructions, had been filed with both the Court and Special Master and refer, below, to the date and docket numbers for each pleading.

Docket # 892 (October 19, 2001) Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One (reply filed November 21, 2001, Docket #1159).

This motion subsumed two additional motions for order to show cause.

Docket # 734 (May 17, 2001) Motion for Order to Show Cause Why Secretary Norton, Her Employees and Counsel Should Not Be Held in Contempt (reply filed November 16, 2001, Docket #988).

And,

Docket # 801 (August 27, 2001) Memorandum in Support of Motion for Order to Show Cause Why past and Present Interior Defendants and Their Employees and Counsel

further attack this Court and undermine these proceedings.

²See Plaintiffs' Exhibit 1 at 2 (November 4, 2002 Letter from Special Master to contemnors' counsel and plaintiffs) ("**In accordance with the position urged by the majority** of counsel for the Named Individuals, the Special Master will preliminarily decide whether the individual Bills of Particular warrant dismissal before initiating any discovery.") (bold emphasis added, underline original). Plaintiffs note that this Court's order of reference did not condition plaintiffs' discovery or the Master's investigation on an affirmative vote of contemnors' counsel. It should be of no surprise that all "votes" went against plaintiffs. The Special Master also polled contemnors' counsel as to whether plaintiffs' requests for enlargements should be granted. As a result, every single motion for an enlargement was granted when requested by contemnors' counsel and each request for an enlargement was denied when requested by plaintiffs.

Should Not Be Held in Contempt (no opposition filed).

In connection with this motion for an order to show cause, plaintiffs filed certain bills of particulars. These are set forth as follows:

1. Docket #1431 (August 20, 2002) *“Bill of Particulars” for Edith Blackwell in Support of Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Violating the December 21, 1999 Order to Conduct an Accounting of Individual Indian Trust Funds* (reply filed September 6, 2002, Docket # 1464).
2. Docket # 2029 (April 29, 2003) *Plaintiffs’ “Bill of Particulars” for John Berry in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One* (Filed October 19, 2001)
3. Docket # 2028 (April 29, 2003) *Plaintiffs’ “Bill of Particulars” for Edith R. Blackwell in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One* (Filed October 19, 2001)
4. Docket #2032 (April 29, 2003) *Plaintiffs’ “Bill of Particulars” for Phillip A. Brooks in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One* (Filed October 19, 2001)
5. Docket # 2030 (April 29, 2003) *Plaintiffs’ “Bill of Particulars” for Michael Carr in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One* (Filed October 19, 2001)
6. Docket # 2031 (April 29, 2003) *Plaintiffs’ “Bill of Particulars” for Ed Cohen in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One* (Filed October 19, 2001)
7. Docket # 2033 (April 29, 2003) *Plaintiffs’ “Bill of Particulars” for Charles W. Findlay in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One* (Filed October 19, 2001)
8. Docket # 2035 (April 29, 2003) *Plaintiffs’ “Bill of Particulars” for Sarah D. Himmelhoch in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court*

Orders and for Defrauding this Court in Connection with Trial One (Filed October 19, 2001)

9. Docket # 2038 (April 30, 2003) Plaintiffs' "Bill of Particulars" for Robert Lamb in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One (Filed October 19, 2001)
10. Docket 2040 (April 30, 2003) Plaintiffs' "Bill of Particulars" for Lois J. Schiffer in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One (Filed October 19, 2001)
11. Docket # 2041 (April 30, 2003) Plaintiffs' "Bill of Particulars" for David F. Shuey in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One (Filed October 19, 2001)
12. Docket 2039 (April 30, 2003) Plaintiffs' "Bill of Particulars" for Steve Swanson in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One (Filed October 19, 2001)
13. Docket 2045 (May 1, 2003) Plaintiffs' "Bill of Particulars" for Bruce Babbitt in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One (Filed October 19, 2001)
14. Docket #2043 (May 1, 2003) Plaintiffs' "Bill of Particulars" for Kevin Gover in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One (Filed October 19, 2001)
15. Docket # 2044 (May 1, 2003) Plaintiffs' "Bill of Particulars" for Sabrina Mccarthy in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One (Filed October 19, 2001)
16. Docket # 2047 (May 1, 2003) Plaintiffs' "Bill of Particulars" for Anne Shields in Support of Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection with Trial One (Filed October 19, 2001)

Finally, plaintiffs opposed contemnors' efforts to dismiss various bills of particulars

(exclusive of e-mail destruction matters which are discussed more fully below):

Docket # 2170 (August 4, 2003) *Plaintiffs' Opposition to Named Individuals' Motions to Dismiss Plaintiffs' Bills of Particular*

With respect to matters within the scope of plaintiffs' motion for an order to show cause regarding contemnors' spoliation of irreplaceable trust records, plaintiffs made the following filings:

Docket # 1203 (March 20, 2002) *Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel, Should Not Be Held in Contempt for Destroying E-mail* (reply filed April 15, 2002, Docket # 1258)

Plaintiffs filed many bills of particulars in that regard. They are as follows:

1. Docket # 1392 (July 22, 2002) "*Bill of Particulars*" for Edward B. Cohen in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Criminal Contempt for Destroying E-mail (3/20/02) and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt (reply filed August 12, 2002, Docket # 1419)³
2. Docket # 1399 (July 29, 2002) "*Bill of Particulars*" for Edith Blackwell in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Destroying E-mail (3/20/02) and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt
3. Docket # 1635 (December 1, 2002) "*Bill of Particulars*" for Phillip Brooks in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Destroying E-mail (3/20/02)
4. Docket # 1649 (December 2, 2002) "*Bill of Particulars*" for Charles W. Findlay, III, in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Destroying E-

³Plaintiffs respectfully note that they also filed a *Notice of Supplemental Authority in Support of "Bill of Particulars" for Edward B. Cohen in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Criminal Contempt for Destroying E-mail and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt* on August 14, 2002 (Docket # 1422).

mail (3/20/02)

5. Docket # 1637 (December 2, 2002) “*Bill of Particulars*” for Gale Norton and Neal Mccaleb in Support of Plaintiffs’ Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Destroying E-mail (3/20/02)
6. Docket # 1636 (December 2, 2002) “*Bill of Particulars*” for Willa Perlmutter in Support of Plaintiffs’ Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Destroying E-mail (3/20/02)
7. Docket # 1638 (December 2, 2002) “*Bill of Particulars*” for Lois Schiffer in Support of Plaintiffs’ Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Destroying E-mail (3/20/02)
8. Docket # 1648 (December 2, 2002) “*Bill of Particulars*” for James Simon in Support of Plaintiffs’ Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Destroying E-mail (3/20/02)

In addition, plaintiffs opposed contemnors’ effort to dismiss plaintiffs’ bills of particulars regarding the knowing and willful destruction of irreplaceable e-mail:

Docket # 1815 & 1816 (February 19, 2003) Plaintiffs’ Consolidated Opposition to Gale Norton’s and Other Named Individuals’ Consolidated Motion to Dismiss Plaintiffs’ March 20, 2002 Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not Be Held in Contempt for Destroying E-mail and “*Bills of Particular*” in Support of Such Motion, And Plaintiffs Consolidated Reply to Gale Norton and Named Individuals’ Oppositions to Plaintiffs’ Motion for Order to Show Cause for Destroying E-mail and “*Bills of Particular*’ in Support of Such Motion

Finally, plaintiffs respectfully request that this Court take notice of the oral argument before the special master regarding contemnors’ motion to dismiss the aforementioned bills of particulars.

The transcript of this two day oral argument is attached as Plaintiffs’ Exhibit 2 and 3.

Respectfully submitted,

/s/ Dennis Gingold

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Attorneys for Plaintiffs

March 18, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' NOTICE IN RESPONSE TO THE MARCH 3, 2005 ORDER was served on the following via facsimile, pursuant to agreement, on this day, March 18, 2005.

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/s/ Geoffrey Rempel

Geoffrey M. Rempel

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MEMORANDUM

To: All Counsel

From: Special Master Alan L. Balaran 

Re: Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause

Date: November 4, 2002

On September 17, 2002, the Honorable Royce C. Lamberth referred the following matters to the Special Master: (1) plaintiffs' October 19, 2001 Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court in Connection With Trial One and (2) plaintiffs' March 20, 2002 Motion for Order to Show Cause Why Interior Alleged Contemnors and Their Counsel Should Not Be Held in Contempt for Destroying E-mail.¹ By memorandum dated October 7, 2002, the Special Master set out a proposed schedule and rules to which he invited comment. On October 30, 2002, a case management conference was convened to discuss these comments.

Upon consideration of both the written submissions of counsel and oral representations made during the case management conference, the proposed schedule set out in the October 7, 2002 memorandum is amended as follows.

¹ Regarding the first matter, the Court directed the Special Master to "develop a complete record with respect to these 37 non-party individuals . . . [and] upon completing his review of these matters, issue a report and recommendation regarding whether each individual should be ordered to show cause why he or she should not be held in (civil or criminal) contempt of court, or whether other sanctions are appropriate against such individuals." Memorandum Opinion at 255 (September 17, 2002). By separate order, Judge Lamberth ordered "that the plaintiffs' motion for order to show why Interior defendants and their counsel should not be held in contempt for destroying e-mail, filed March 20, 2002, shall be referred to Special Master Balaran. Special Master Balaran shall issue a report and recommendation on the issues raised in the plaintiffs' motion." Order at 4 (September 17, 2002).

SCHEDULE OF PROCEEDINGS

The Special Master will initially address those issues relevant to plaintiffs' March 20, 2002 Motion for Order to Show Cause Why Interior Alleged Contemnors and Their Counsel Should Not Be Held in Contempt for Destroying E-mail and then turn his attention to plaintiffs' October 19, 2001 Motion for Order to Show Cause with respect to each of the 37 Named Individuals. In accordance with the position urged by the majority of counsel for the Named Individuals, the Special Master will preliminarily decide whether the individual Bills of Particular warrant dismissal before initiating any discovery.

Schedule For The Investigation Regarding E-Mail Backup Tape Destruction

- November 11, 2002: Special Master issues memorandum setting out revised schedule.
- December 2, 2002: Deadline for plaintiffs to provide Bills of Particulars with respect to the following individuals named in their Motion for Order to Show Cause Why Interior Alleged Contemnors and their Counsel Should Not be Held in Contempt for Destroying E-Mail (March 20, 2002): Secretary Gale A. Norton; Assistant Secretary Neal A. McCaleb; Department of Justice attorneys Phillip A. Brooks, Charles W. Findlay III, James Simon; former Assistant Solicitor Willa Perlmutter; and former Assistant Attorney General Lois Schiffer. Plaintiffs' Bills of Particulars shall articulate with specificity whether the conduct alleged against each of these Named Individuals warrants the imposition of civil sanctions, criminal sanctions and/or constitutes a fraud on the court.²
- January 6, 2003: Deadline for Named Individuals to file briefs explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.
- February 17, 2003: Deadline for plaintiffs to respond to briefs filed by Named Individuals explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.
- March 3, 2003: Deadline for Named Individuals to reply to plaintiffs' response to briefs filed by Named Individuals explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.
- March - April 2003: Oral arguments on Bills of Particulars – schedule to be determined.

² Plaintiffs have already filed Bills of Particulars with respect to Deputy Associate Solicitor Edith Blackwell and former Deputy Solicitor Edward Cohen.

- Thereafter: The Special Master issues a report and recommendation to the Court regarding the legal sufficiency of the claims lodged against each of the Named Individuals.

Schedule for Investigation of Allegations Concerning Violation of Court Orders and Defrauding the Court in Connection with Trial One

- May 1, 2003: Deadline for plaintiffs to file Bills of Particulars with respect to the conduct of the following individuals named in their Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court In Connection With Trial One (October 19, 2001): Former Secretary of the Interior Bruce Babbitt; Former Assistant Secretary for Policy, Management and Budget John Berry; Deputy Associate Solicitor Edith Blackwell; former Deputy Commissioner for Indian Affairs M. Sharon Blackwell; former Assistant Solicitor Michael Carr; former Deputy Solicitor Edward B. Cohen; Office of the Special Trustee Chief of Staff James Douglas; Deputy Solicitor Timothy Elliott; former Assistant Secretary for Indian Affairs Kevin Gover; Deputy Assistant Secretary for Budget and Finance Bob Lamb; former Solicitor John Leshy; former Deputy Commissioner for Indian Affairs Hilda Manuel; Assistant Solicitor Sabrina McCarthy; former TAAMS Project Manager Chester Mills; Solicitor William Myers; National Park Service Chief Information Officer Dominic Nessi; Counselor to the Secretary Michael Rossetti; Office of Trust Records Director Kenneth Rossman; Management Information System specialist Glenn Schumaker; former Chief of Staff to the Secretary Anne Shields; former Assistant Solicitor Stephen Swanson; Office of Trust Responsibility Director Terrence Virden; former Department of the Interior Chief Information Officer Daryl White; Department of Justice attorneys Phillip A. Brooks; John A. Bryson; Tom C. Clark; Peter Coppelman; James A. Eichner; Charles W. Findlay III; K. Jack Haugrud; Sarah D. Himmelhoch; John S. Most; David Shilton; David F. Shuey and James Simon; Acting Assistant Attorney General John C. Cruden; and former Assistant Attorney General Lois Schiffer. Plaintiffs' Bills of Particulars shall articulate with specificity whether the conduct alleged against each of these Named Individuals warrants the imposition of civil sanctions, criminal sanctions and/or constitutes a fraud on the court.
- June 2, 2003: Deadline for Named Individuals to file briefs explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.
- August 4, 2003: Deadline for plaintiffs to respond to briefs filed by Named Individuals explaining why the Bills of Particulars should be dismissed with respect to them.

- August 18, 2003: Deadline for Named Individuals to reply to plaintiffs' response to briefs filed by Named Individuals explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.
- September - October 2003: Oral argument on Bills of Particulars – schedule to be determined.
- Thereafter: The Special Master issues a report and recommendation to the Court regarding the legal sufficiency of the claims lodged against each of the Named Individuals.

OTHER MATTERS

I. CIVILITY

The Special Master has a responsibility not to permit attorneys to ignore the concept of civility when its disregard may hinder the quest for a just resolution of the underlying issues.³ As was noted during the October 30, 2002 case management conference, civility has been conspicuously absent during the development of this action. These proceedings will be different. Ad hominem attacks, spurious accusations and inappropriate tactics will not be tolerated. Named Individuals will be addressed either by title and name or as a "Named Individual(s)."

II. PRIOR FINDINGS AND REPORTS

Findings stemming from proceedings in which the Named Individuals have not been afforded the opportunity to participate and/or comment will not be considered during these proceedings.

III. PROTECTIVE ORDER

With a singular exception, counsel for plaintiffs and for the Named Individuals oppose the imposition of a protective order. The Special Master concurs and will not impose any such restrictions except to note that any information, the public disclosure of which may jeopardize the security of Interior's computer systems, will be placed under seal.

³ Civility has been defined as "[The] decent behavior and treatment characterized by generally accepted social behavior and politeness practiced toward those with whom we come into contact whether they be judge, lawyer, witness, or court personnel." Bruce S. Mencher, CIVILITY: A CASUALTY OF MODERN LITIGATION, *The Washington Lawyer*, Sept.- Oct. 1993, at 19, 20.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- - - - -X

ELOUISE PEPION COBELL, :
 et al., : Case No.
 Plaintiffs, : 1:96CV01285
 v. : (Judge Lamberth)
 GALE NORTON, Secretary of :
 the Interior, et al., :
 Defendants. :

- - - - -X

Washington, D.C.
Wednesday, April 23, 2003

ORAL ARGUMENTS concerning Named
 Individuals' Motions to Dismiss Plaintiffs' Bills of
 Particulars related to Plaintiffs' March 20, 2002
 Motion for Order to Show Cause Why Interior Alleged
 Contemnors and their Counsel Should Not be Held in
 Contempt for Destroying E-Mail, taken before Special
 Master Alan Balaran, at the office of DFI
 International, 1717 Pennsylvania Avenue, N.W.,
 Washington, D.C., at 9:00 a.m., Wednesday, April 23,
 2003, and the proceedings being taken down by
 Stenotype by PAUL A. GASPAROTTI, and transcribed
 under his direction.

Page 2	Page 4
<p>1 APPEARANCES:</p> <p>2</p> <p>3 On behalf of the Plaintiffs:</p> <p>4 DENNIS GINGOLD, ESQ.</p> <p>5 1275 Pennsylvania Avenue, N.W.</p> <p>6 9th Floor</p> <p>7 Washington, D.C. 20004</p> <p>8 202-661-6380</p> <p>9</p> <p>10 On behalf of the Defendants:</p> <p>11 TRACY L. HILMER, ESQ.</p> <p>12 Civil Division</p> <p>13 United States Department of Justice</p> <p>14 601 D Street, N.W.</p> <p>15 Washington, D.C. 20004</p> <p>16 202-307-0474</p> <p>17</p> <p>18 On behalf of Department of Justice Attorney</p> <p>19 Phillip A. Brooks, in his personal capacity:</p> <p>20 WILLIAM H. BRIGGS, JR., ESQ.</p> <p>21 MARC E. RINDNER, ESQ.</p> <p>22 Ross, Dixon & Bell, LLP</p> <p>23 2001 K Street, N.W.</p> <p>24 Washington, D.C. 20006-1040</p> <p>25 202-662-2000</p>	<p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 On behalf of Department of Justice Attorney</p> <p>4 James Simon, in his personal capacity:</p> <p>5 EUGENE R. FIDELL, ESQ.</p> <p>6 MATTHEW S. FREEDUS, ESQ.</p> <p>7 Feldesman, Tucker, Leifer, Fidell &</p> <p>8 Bank, LLP</p> <p>9 2001 L Street, N.W.</p> <p>10 Washington, D.C. 20036</p> <p>11 202-466-8960</p> <p>12</p> <p>13 On behalf of former Assistant Attorney General</p> <p>14 Lois Schiffer, in her personal capacity:</p> <p>15 JEFFREY D. ROBINSON, ESQ.</p> <p>16 MELISSA H. MCNIVEN, ESQ.</p> <p>17 Baach, Robinson & Lewis, PLLC</p> <p>18 One Thomas Circle</p> <p>19 Suite 200</p> <p>20 Washington, D.C. 20005</p> <p>21 202-883-8900</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
Page 3	Page 5
<p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 On behalf of Former Assistant Solicitor Willa</p> <p>4 Perlmutter, in her personal capacity:</p> <p>5 WILLIAM L. GARDNER, ESQ.</p> <p>6 Morgan, Lewis & Bockius, LLP</p> <p>7 1111 Pennsylvania Avenue, N.W.</p> <p>8 Washington, D.C. 20004</p> <p>9 202-739-5180</p> <p>10</p> <p>11 On behalf of Department of Justice Attorney</p> <p>12 Charles W. Findlay III, in his personal</p> <p>13 capacity:</p> <p>14 GREGORY S. SMITH, ESQ.</p> <p>15 Sutherland, Asbill & Brennan, LLP</p> <p>16 1275 Pennsylvania Avenue, N.W.</p> <p>17 Washington, D.C. 20004-2415</p> <p>18 202-383-0454</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 ALSO PRESENT:</p> <p>4 PHILLIP A. BROOKS, ESQ.</p> <p>5 CHARLES W. FINDLAY III, ESQ.</p> <p>6 JAMES SIMON, ESQ.</p> <p>7 WILLA PERLMUTTER, ESQ.</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

<p style="text-align: right;">Page 6</p> <p>1 CONTENTS</p> <p>2</p> <p>3 Afternoon Session - Page 126</p> <p>4</p> <p>5 EXHIBITS</p> <p>6 EXHIBIT NO. FOR IDENTIFICATION</p> <p>7 A Web Page Printout 172</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 8</p> <p>1 the first instance as motions to dismiss, I</p> <p>2 apologize. However, I will be hearing argument as if</p> <p>3 they are such. I don't believe any of the parties</p> <p>4 are prejudiced as a result of that since there's no</p> <p>5 need to meet and confer on a motion to dismiss of</p> <p>6 this sort anyway. Okay?</p> <p>7 I set out a schedule that I would like to</p> <p>8 follow, giving the government obviously the first</p> <p>9 instance to present its argument on behalf of those</p> <p>10 individuals that are implicated in their professional</p> <p>11 capacity. But first I would like to take any issues</p> <p>12 up that need to be taken up as a preliminary matter.</p> <p>13 Okay.</p> <p>14 MS. HILMER: Good morning, Mr. Balaran.</p> <p>15 We appreciate the opportunity to be heard on our</p> <p>16 motion to dismiss.</p> <p>17 SPECIAL MASTER BALARAN: Could you state</p> <p>18 your name for the record?</p> <p>19 MS. HILMER: I'm Tracy Hilmer for the U.S.</p> <p>20 Department of Justice, representing the government</p> <p>21 here today. We would appreciate the opportunity to</p> <p>22 reserve 30 minutes of our time for rebuttal on</p> <p>23 Friday, but of course we will answer whatever</p> <p>24 questions you may have, and view this as an</p> <p>25 opportunity for you primarily to ask those questions.</p>
<p style="text-align: right;">Page 7</p> <p>1 PROCEEDINGS</p> <p>2 SPECIAL MASTER BALARAN: This is Alan</p> <p>3 Balaran. I was appointed in February of 1999 to be</p> <p>4 special master in the matter of Cobell v. Norton,</p> <p>5 96-1285. On September 17th, 2002, I was asked to</p> <p>6 decide certain issues, specifically today issues</p> <p>7 raised in plaintiffs' March 20th motion regarding</p> <p>8 E-mail issues, potential destruction of E-mails and</p> <p>9 possible cover-up by nine named individuals.</p> <p>10 Before we begin the oral argument that I</p> <p>11 would like to hear today, I wanted to set some ground</p> <p>12 rules. The purpose of today's hearing is not to lend</p> <p>13 itself to a lot of invective or vitriol, it's not to</p> <p>14 call people names, it's not to dissemble into</p> <p>15 anything, but it's an argument of fact. It's an</p> <p>16 argument of law and that's it. Either they have made</p> <p>17 their case or they haven't. These are motions to</p> <p>18 dismiss.</p> <p>19 Now I understand that in my letter, my</p> <p>20 revised procedures, I used the word briefs. It has</p> <p>21 been my intention, and I believe that everybody that</p> <p>22 has filed something with me has understood the</p> <p>23 intention that these were to be motions to dismiss.</p> <p>24 I believe they have been treated as such, so to the</p> <p>25 extent that I was inartful in not captioning them in</p>	<p style="text-align: right;">Page 9</p> <p>1 Plaintiffs have had multiple</p> <p>2 opportunities, both before and since March 20th of</p> <p>3 2002, to state claims that would rise to the level</p> <p>4 that would justify the extraordinary remedies that</p> <p>5 they seek against seven named individuals and the two</p> <p>6 parties in their official and personal capacities,</p> <p>7 although we understand the Secretary and the</p> <p>8 Assistant Secretary to be solely in their official</p> <p>9 capacity.</p> <p>10 SPECIAL MASTER BALARAN: That's right.</p> <p>11 MS. HILMER: In that time frame, given the</p> <p>12 volume of pleadings that have been exchanged,</p> <p>13 plaintiffs have failed to come close to meeting the</p> <p>14 standards that are required to justify the imposition</p> <p>15 of these sorts of penalties on these individuals. We</p> <p>16 are now before you most particularly on the last</p> <p>17 round of that pleading, the bills of particulars that</p> <p>18 the plaintiffs were charged by you with filing on</p> <p>19 December 2nd, 2002.</p> <p>20 Plaintiffs have shifted theories. They</p> <p>21 started out with the theory that there were</p> <p>22 violations of orders. They have moved away from that</p> <p>23 to saying now there is a destruction of federal</p> <p>24 records and a fraud on the Court theory. But under</p> <p>25 any theory, the allegations that they've laid out</p>

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1 simply don't amount to anything like the severity
 2 that's required for a civil or criminal contempt, or
 3 a fraud on the Court.
 4 SPECIAL MASTER BALARAN: What standard
 5 should I be imposing here?
 6 MS. HILMER: Well, the standard you should
 7 impose is the standard that the Court has set out.
 8 For civil contempt, you should impose the standard
 9 that requires plaintiffs to demonstrate, first, the
 10 existence of an order and second, the violation of an
 11 order. And furthermore, that order should have been
 12 reasonably specific and unambiguous.
 13 For criminal contempt, it's those elements
 14 plus the additional element of willfulness, so there
 15 is a mens rea with the criminal intent.
 16 And then for fraud on the Court, there are
 17 three elements there. The element of first finding a
 18 wrongful conduct in the context of a fraud on the
 19 Court. The severity of that conduct has been
 20 mentioned in many cases and is in the nature not
 21 merely of an inaccurate representation or even an
 22 incorrect statement in an interrogatory, but
 23 something that goes to the very integrity of the
 24 judicial mechanism itself, something like an attempt
 25 to bribe a judge or a member of the jury, or to

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1 fabricate evidence with the assistance of counsel.
 2 SPECIAL MASTER BALARAN: But as far as the
 3 civil contempt, for example, am I to construe all
 4 pleadings in favor of the non-moving party?
 5 MS. HILMER: No, there is no basis for
 6 doing that. Our position is that they need to
 7 establish a prima facie case, but at a minimum here,
 8 their allegations don't even amount to what you could
 9 construe to be a prima facie case, even if you did
 10 give them that benefit.
 11 SPECIAL MASTER BALARAN: But are you
 12 saying they need to create or present to me a
 13 prima facie case factually at this point?
 14 MS. HILMER: Well, I believe at least as
 15 far as presenting you with the concept that there is
 16 an order that has been violated, that there is an
 17 actual order, they certainly need to demonstrate
 18 that. If there is not an order in place that meets
 19 the requirements of being reasonably clear and
 20 specific, in terms of requiring the government to
 21 have maintained the backup tapes that were
 22 overwritten, case closed. There cannot be a civil
 23 contempt or criminal contempt without such an order.
 24 SPECIAL MASTER BALARAN: Is it your
 25 position, then, that the six orders set out on page

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1 12 of the March 20th motion do not articulate with
 2 any specificity, do not create the requirement on the
 3 government to have saved the E-mail backup tapes at
 4 issue?
 5 MS. HILMER: It is our position that none
 6 of those orders, with the exception of the special
 7 master's, your directive in your November 2000
 8 letter, and the oral directive that preceded that,
 9 with the exception of those two items, none of those
 10 orders that they cite dealt with the question of
 11 preserving additional backup tapes. We don't find
 12 any basis there for saying that that occurred. Now
 13 with respect to your directives, while of course the
 14 government intends to follow your directives, and I
 15 think did attempt to do that with you, those are not
 16 court orders, and I don't believe under the case law
 17 that you can have a contempt finding without an
 18 actual order from an Article III court in place.
 19 SPECIAL MASTER BALARAN: If I would
 20 construe the order for production with respect to the
 21 third formal request for production as subsuming
 22 backup tapes and the information contained on those
 23 tapes, would you agree with me that that would be an
 24 order specific enough under which I can make a
 25 decision as to whether or not it has been violated?

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1 MS. HILMER: No, I think the order has to
 2 be more specific than that, particularly in this
 3 field, Mr. Balaran, because the whole concept of
 4 using backup tapes for discovery is a relatively new
 5 one. I think we have all seen that there is not a
 6 great deal of case law on when backup tapes should be
 7 resorted to and then how extensively, and I think
 8 what you're dealing with here is simply a situation
 9 where people just didn't think about backup tapes as
 10 being a source of discoverable information. Now
 11 certainly you did find that they were. You did find
 12 that.
 13 SPECIAL MASTER BALARAN: And that was
 14 uncontested. I mean, there was never a pleading in
 15 this case that contested whether or not these backup
 16 tapes contained information that should have been
 17 kept under any of the discovery orders.
 18 MS. HILMER: The issue with the backup
 19 tapes had to do with whether it was necessary to
 20 review the tapes when the government had in place a
 21 paper record-keeping system, as I understand it. I
 22 wasn't representing the government at that time, but
 23 my reading of the pleadings and the course of
 24 proceedings is that the government identified for you
 25 on -- well, this was before your appointment,

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1 actually. The government identified the assistance
 2 of a set of backup tapes that had been preserved at
 3 the request of --
 4 SPECIAL MASTER BALARAN: Of the inspector
 5 general. That was for a specific investigation.
 6 MS. HILMER: Right, the special
 7 prosecutor, the independent counsel Carol Bruce.
 8 Normally backup tapes were routinely overwritten
 9 because they were not used as an archival system,
 10 they are not acceptable under the National Archives
 11 regulations as an archival system, and so they
 12 weren't used as an archival system and they weren't
 13 thought of as a proper source for searching for
 14 responsive documents.
 15 SPECIAL MASTER BALARAN: But there must
 16 have come a point in time that the government was
 17 aware that that was in issue.
 18 MS. HILMER: Well, you know what I think
 19 happened is that there was a developing
 20 understanding. In other words, what the thought was
 21 in 1998 when this set of backup tapes and the process
 22 by which they were being maintained was disclosed to
 23 the Court in the government's first motion for a
 24 protective order back in July of 1998, and what
 25 transpired over the course of the next really

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1 two-and-a-half years in terms of understanding what
 2 was expected of the government with regard to those
 3 backup tapes, was a developing situation. The
 4 government --
 5 SPECIAL MASTER BALARAN: When did it fully
 6 mature?
 7 MS. HILMER: Well, I think it fully
 8 matured when you issued your order on May 11th of
 9 1999. You know, I have to say that there were some
 10 changes, some significant changes of counsel on the
 11 Department of Justice's part in that time period,
 12 although I'm not sure exactly when those transitions
 13 occurred.
 14 SPECIAL MASTER BALARAN: But that wouldn't
 15 relieve the government of responsibility simply
 16 because of a shift of counsel, would it?
 17 MS. HILMER: It would not relieve the
 18 government of responsibility for not complying with
 19 the discovery request as you found it should have
 20 done. It would not necessarily set up the basis for
 21 a contempt or fraud on the Court, or indicate that
 22 somebody intended to deceive you or the Court.
 23 SPECIAL MASTER BALARAN: Putting intent
 24 aside for a moment, because -- do we need intent for
 25 the civil contempt component?

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1 MS. HILMER: No.
 2 SPECIAL MASTER BALARAN: Let's put intent
 3 aside. Let's assume that it's been done and it has
 4 been fully matured. Are you saying that there is no
 5 order that you can point to that they may have
 6 violated in destroying or erasing or overwriting any
 7 of these backup tapes?
 8 MS. HILMER: During the time period in
 9 question, there is no order that specifically
 10 required the government to maintain backup tapes
 11 clearly on an ongoing basis. The plaintiffs'
 12 discovery request talked about E-mails and it talked
 13 about tapes. The government, in an abundance of
 14 caution in July of 1998, disclosed the fact that it
 15 was holding backup tapes at the request of
 16 Independent Counsel Bruce, and that these tapes,
 17 which normally would have been overwritten and which
 18 normally would not exist, because their purpose was
 19 solely to recover the system, did exist, because she
 20 asked them to be preserved. And in an abundance of
 21 caution, the government disclosed them and said we
 22 have them here, but please don't make us search them
 23 because they are really very difficult to manipulate.
 24 And then over the course of the next
 25 couple of years, as you're aware, the government

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1 persisted in that position that they were very
 2 difficult to manipulate, but there was never an order
 3 from the Court that required the government
 4 specifically to maintain backup tapes on an ongoing
 5 basis. In other words, what was disclosed was what
 6 was being done for the independent counsel, and the
 7 government did continue to maintain those tapes that
 8 had been saved at her request.
 9 SPECIAL MASTER BALARAN: So the issue is,
 10 because it wasn't in the normal course of business
 11 for the government to save these things, that there
 12 had to be a specific order identifying them as such.
 13 Is that correct?
 14 MS. HILMER: Well, I think in order for
 15 there to be a contempt, then yes.
 16 SPECIAL MASTER BALARAN: So if the judge
 17 orders that you keep all information related to the
 18 trust and you destroy paper documents, for example,
 19 would you say that that might be contemptuous?
 20 MS. HILMER: Well, I think that there is a
 21 difference here. The government did have a paper
 22 record-keeping system and the point of the paper
 23 record-keeping system was so as not to have to rely
 24 on backup tapes as an archival system because they
 25 are not stable. So the government had a paper

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1 record-keeping system in place whereby individuals
 2 were instructed from, you know, the early days when
 3 this case began, to preserve E-mails by printing them
 4 out and placing them in paper files.
 5 MS. HILMER: Was that pursuant to the
 6 Federal Records Act or other specific acts?
 7 MS. HILMER: It was pursuant both to the
 8 obligations under the Federal Records Act and
 9 pursuant to specific directives issued within the
 10 Department of the Interior to preserve documents,
 11 including E-mails, related to this case, in other
 12 words, to preserve evidence.
 13 SPECIAL MASTER BALARAN: So I go back to
 14 my initial question. Because there was nothing in
 15 place at the time, it wasn't in the normal course of
 16 business for the government to retain backup tapes,
 17 that's why an order demanding that all trust
 18 information be kept would not necessarily apply?
 19 MS. HILMER: Right, and I don't think you
 20 could call that -- I would say that's the case,
 21 because you know, the government, if the government
 22 were relying on those backup tapes in violation of
 23 the National Archives regulations, there would be a
 24 problem, because those backup tapes would not
 25 necessarily be stable and the data stored on them

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1 would not necessarily be recoverable years and years
 2 later. So those backup tapes had a specific set
 3 purpose which was not a record-keeping purpose.
 4 That they may have had some information
 5 that the plaintiffs would like and might be able to
 6 get under Rule 26 because of its breadth is a
 7 different question from what the government
 8 understood its obligations to be and what reasonably
 9 the discovery orders in place could be interpreted as
 10 requiring.
 11 SPECIAL MASTER BALARAN: If the government
 12 had an archival system for E-mail backup tapes, would
 13 any of these orders apply sufficiently to at least
 14 meet the first element of contempt?
 15 MS. HILMER: Are you talking about the
 16 early orders, the general --
 17 SPECIAL MASTER BALARAN: The general
 18 discovery orders.
 19 MS. HILMER: The general discovery orders,
 20 I believe that if there were orders that required the
 21 government to hold on to documents, specifically,
 22 then yes, could every -- well, you know, this is a
 23 difficult thing. Would every time that somebody
 24 accidentally lost a paper record result in a
 25 contempt?

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1 SPECIAL MASTER BALARAN: But I'm not
 2 asking you --
 3 MS. HILMER: See, I think that's the
 4 problem, is that you know, there is an obligation of
 5 diligence.
 6 SPECIAL MASTER BALARAN: I am not asking
 7 you if ultimately it's contemptuous. I really want
 8 to focus just on the order, either there is an order
 9 in place that can be an umbrella for this, or there
 10 isn't. If there's not, then we can go home. So I
 11 need you to articulate this as clearly as possible.
 12 Are you saying if the government did have an archival
 13 E-mail backup system that the discovery orders that
 14 were identified, the six discovery orders identified
 15 in the March 20th motion, might apply and might be
 16 sufficient to define contempt?
 17 MS. HILMER: They might be to the extent
 18 that the documents didn't exist in some other
 19 identical form. For example, if there was a
 20 redundancy, if they had a paper record-keeping system
 21 that captured the same or substantially the same
 22 information as that stored on the electronic archival
 23 system, then you know, the plaintiffs are only
 24 entitled to one version of the document.
 25 SPECIAL MASTER BALARAN: And if it was

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1 different, if one contained information that was
 2 different than the other?
 3 MS. HILMER: I think you would have to
 4 look at what the difference in the information was,
 5 and I recognize that you had On Track review the
 6 differences between the two, and we might take issue
 7 with whether some of those differences are really
 8 significant, like the Internet Gateway doesn't seem
 9 very significant.
 10 SPECIAL MASTER BALARAN: Some of them were
 11 to cc's and bcc's that may be significant in
 12 identifying who had awareness of what at what time,
 13 would you agree?
 14 MS. HILMER: Well the bcc's. I don't
 15 believe it said cc's weren't captured, just bcc's.
 16 That would assume that people used bcc's. That would
 17 assume a lot of things that have not yet at this
 18 point been established.
 19 SPECIAL MASTER BALARAN: But we're only
 20 trying to establish whether it's an order that's
 21 sufficiently articulated on which to ground contempt.
 22 MS. HILMER: On which you can ground
 23 contempt, I don't believe there is one. There is not
 24 one that tells the government to abandon its normal
 25 practices of using backup tapes solely for system

<p style="text-align: right;">Page 22</p> <p>1 reconstruction. The order talks, the discovery 2 orders as I understand them, speak in terms of 3 producing records. Now some records exist solely on 4 tape or predominantly on tape, you know, some types 5 of data, perhaps royalty data that the MMS maintains 6 makes it predominantly or solely on tape for certain 7 periods of time. 8 But that's different from backup tapes. 9 Backup tapes are not meant to last. They are meant 10 to restore the system when it crashes, and the 11 government never looked to those as an archival 12 system because it had a paper record-keeping system. 13 And I believe that people honestly assumed that the 14 documents that would exist on the backup tapes would 15 be virtually identical to what was in the paper 16 record-keeping system. Therefore, I do believe it 17 would require a specific order. 18 SPECIAL MASTER BALARAN: Okay, thank you. 19 MS. HILMER: And I don't believe there was 20 one. I haven't found one and plaintiffs haven't 21 pointed to one. 22 SPECIAL MASTER BALARAN: Well, I'm going 23 to work off the six that are here on page 12, since 24 that's what the Court order to me says, I'm limited 25 to March 20th.</p>	<p style="text-align: right;">Page 24</p> <p>1 orders that come more than a year after she left the 2 government. 3 SPECIAL MASTER BALARAN: Okay. 4 MS. HILMER: Now, with regard to the 5 November 9th, 1998 order, this was a denial of the 6 government's motion for protective order that was 7 filed in July of 1998 in which the backup tape 8 accumulation that the independent counsel had 9 requested had been disclosed. And the court's order 10 denies the motion, but doesn't address the issue 11 regarding the backup tapes, doesn't say anything 12 about the backup tapes. And so, there is nothing 13 here, certainly there is nothing here. Left alone, 14 what this might require is that the government now 15 has to go and review those backup tapes and produce 16 documents responsive to the third request. But there 17 is certainly nothing in here that requires the 18 government on a going-forward basis to continue to 19 accumulate. 20 SPECIAL MASTER BALARAN: Plaintiffs third 21 request incorporates the first request definition of 22 records; is that correct? 23 MS. HILMER: That's my understanding, yes. 24 SPECIAL MASTER BALARAN: And does that 25 include all media that might include backup tapes as</p>
<p style="text-align: right;">Page 23</p> <p>1 MS. HILMER: Right. And the six that we 2 have there, starting with, if I might just digress, 3 or begin to address some of the bills of particulars 4 as to some of the individuals, but let me start with 5 Ms. Perlmutter, if I may. Not one of these orders 6 was in place when Ms. Perlmutter was still working. 7 SPECIAL MASTER BALARAN: She left July 8 '97; is that correct? 9 MS. HILMER: She left July '97. And the 10 only thing that the plaintiffs are now alleging 11 against her is that she deleted her own E-mails from 12 her hard drive. As I said before, the government had 13 a paper record-keeping system. There has been no 14 evidence adduced, or even a suggestion that she 15 deleted anything that she should not have deleted 16 without first saving it. 17 SPECIAL MASTER BALARAN: And that is the 18 evidence that came out in a colloquy in court where 19 an objection was raised and that was sustained; is 20 that correct? 21 MS. HILMER: It is a very partial question 22 and answer. The judge precluded any further inquiry 23 in that area, so yes. I mean, it is just from that 24 pure statement, so it is really beyond me how Ms. 25 Perlmutter could even be implicated in any of these</p>	<p style="text-align: right;">Page 25</p> <p>1 well? 2 MS. HILMER: Well you know, I think if you 3 construed it broadly, which the government attempted 4 to do in an abundance of caution in the July 1998 5 motion for protective order, then you would say all 6 right, they mention E-mails and they mention tapes, 7 so we happened to have this set of records which is 8 kind of some of both, you know, the tapes are not 9 necessarily only E-mail tapes. There may be other 10 things on the backup tapes, so they are not 11 specifically mentioning backup tapes as the 12 independent counsel had requested, she specifically 13 asked for those. But nonetheless, in an abundance of 14 caution, the government discloses it and says look, 15 we have these things, we'd rather not have to go 16 through and review them. 17 SPECIAL MASTER BALARAN: But if they did 18 ask for that and if it was subsumed within that, 19 would you agree with me then that a discovery order 20 that requires this be turned over or preserved or 21 retained would naturally include it? I mean, how do 22 you carve out that exception because it doesn't -- 23 you know, how do you carve out the exception? 24 MS. HILMER: I guess how I carve out the 25 exception is looking at the practical situation at</p>

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1 the time. And looking at the other cases, most of
 2 which are decided within a very short time frame
 3 after your July 27, 2001 decision, that are appearing
 4 to address the problem of backup tapes for the very
 5 first time. People have been doing discovery under
 6 the Civil Rules since what, the 1930s, I think it
 7 was. Backup tapes didn't exist at that time, and so
 8 the notion that they would be a source of
 9 discoverable information really only occurred to the
 10 government as a result of the independent counsel's
 11 request, specific request that these documents be
 12 preserved, this set of documents, not all of the
 13 tapes, but just some.

14 SPECIAL MASTER BALARAN: But they weren't
 15 asking for all, were they? I understand they were
 16 asking for all that were responsive in this
 17 particular instant to the third request. And my
 18 question to you is, why didn't you at any time during
 19 any of the request for production seek a protective
 20 order regarding tapes if you felt that either your
 21 system didn't handle it, or it was too onerous or
 22 burdensome to do so, or the technology that you were
 23 employing at the time simply wasn't capable of doing
 24 so?

25 MS. HILMER: My understanding of how this

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1 developed is essentially that people just didn't
 2 appreciate that the backup tapes would be a source
 3 for discovery. That occurred only when they had a
 4 set that normally would have been overwritten, but
 5 they had a set, and they felt it incumbent to
 6 disclose that they had a set and ask for the court's
 7 guidance on what to do with it. I think that's where
 8 we were, we were in an age of rapidly advancing
 9 technology, and things have changed quite a bit in
 10 terms of how discovery is conducted and what are the
 11 sources for it.

12 SPECIAL MASTER BALARAN: If you were
 13 served with that order today, would it change your
 14 manner in which you -- would you still be overwriting
 15 tapes?

16 MS. HILMER: If we were served with
 17 that --

18 SPECIAL MASTER BALARAN: In another
 19 litigation, let's assume, where the sensitivities
 20 weren't running so high.

21 MS. HILMER: Well, I think in view of the
 22 orders that have been entered in this case, in view
 23 of how things have developed, not just your own
 24 decision but the public decision of Magistrate
 25 Fasciola, the better part of prudence would be to

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1 have some discussion up front about whether backup
 2 tapes were going to be a source for discoverable
 3 information or not, to address that in other words
 4 up front, rather than to leave it ambiguous. I mean,
 5 certainly in my own practice that's what I would do.

6 SPECIAL MASTER BALARAN: Okay.

7 MS. HILMER: Following the November 1998
 8 order of the Court which denied the government's
 9 protective order or protective motion, the next order
 10 that the plaintiffs identify was the May 11th, 1999
 11 report and recommendation from you in which you
 12 concluded that the backup tapes should be reviewed
 13 for responsive information and in which you indicated
 14 that you understood the backups tapes were continuing
 15 to be accumulated. At that point as you know, you
 16 were informed by Government Counsel Brooks both by
 17 telephone and later in a pleading, that due to an
 18 error which we concede, you know, we can't tell you
 19 anything else and we don't retract what we said
 20 before, backup tapes were in fact overwritten between
 21 November 23rd, 1998, and the time of your order,
 22 approximately the time of your order, although not
 23 all periods in that time were lost because of the
 24 retroactive nature.

25 Also, it began to become apparent only

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1 after your May 11th, 1999 report and recommendation,
 2 that there was a misunderstanding about the scope of
 3 the backup tapes that were now being preserved.
 4 Beginning with your ruling on, in May of '99, the
 5 government did issue a series of directives to
 6 preserve backup tapes, but there was not an
 7 appreciation that there was a need to do so broadly,
 8 in other words throughout the agency, or at least
 9 with respect to offices that did IIM work for a bit
 10 of time. That did become apparent later on.

11 By November of 1999, we have included in
 12 our brief the letter of Mr. Urie, Government Counsel
 13 Urie, identifying that the government was looking
 14 through both headquarters office and through the
 15 field offices that most likely had IIM information.
 16 In other words, where responsive tapes or responsive
 17 information on tapes may exist. So that's by
 18 November of 1999, and that process occurred over that
 19 time period.

20 The initial disclosures both to you and to
 21 the Court simply indicate that the government was
 22 thinking about the original accumulation of backup
 23 tapes and the process by which those had been
 24 accumulated. In other words, the independent counsel
 25 had asked for specific backup tapes to be preserved,

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1 those in the headquarters solicitor's office, those
 2 in the Twin Cities. And what it appears occurred is
 3 that in the initial few weeks after your order, that
 4 was still the concept, that that was what was the
 5 problem, that that process of preserving tapes in
 6 headquarters and the Twin Cities had been
 7 discontinued, not that there needed to be a broader
 8 preservation.
 9 So there certainly were errors along the
 10 way and there was not a complete effort to preserve
 11 backup tapes immediately, but rather, as counsel
 12 became more aware of what was at issue, they began to
 13 do that. I don't see any effort here to conceal
 14 anything. Certainly they came and they told you what
 15 happened.
 16 Now, I want to turn to the August 1999
 17 document retention order, and our position on that is
 18 very clear. There simply was not a requirement in
 19 that document preservation order to preserve E-mails
 20 in the solicitor's office at all, much less to
 21 preserve backup tapes. So we don't see how that
 22 could form a basis for the plaintiffs' motion.
 23 Further, we've argued the application of
 24 Armstrong versus the Executive Office of the
 25 President to the Court's December 21st, 1999

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1 declaratory judgment and we stand by that, that a
 2 declaratory judgment is not a sufficient basis for a
 3 contempt.
 4 And moreover, there is not any indication
 5 in the judge's declaratory judgment that there is a
 6 need to preserve backup tapes specifically, that's
 7 not addressed. Again, to the extent that backup
 8 tapes duplicate the information that's available in
 9 the paper record system, the plaintiffs really aren't
 10 entitled to it, it's a duplicate of the document.
 11 SPECIAL MASTER BALARAN: And if they
 12 don't, then they are entitled to them.
 13 MS. HILMER: If they don't and they're --
 14 if they don't, then they could be ordered to be
 15 produced, yes. The question becomes whether the
 16 difference is so significant or material that it's
 17 worth the cost of going through them to pull that
 18 information out.
 19 SPECIAL MASTER BALARAN: And who would
 20 make that decision?
 21 MS. HILMER: Presumably the special master
 22 would make that decision and then it would be
 23 reviewed by the Court, and that's what happened.
 24 That decision obviously can be briefed by the parties
 25 and it has been, and the government has made that

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1 position known to you many times.
 2 Following the judge's declaratory
 3 judgment, we then move to the oral discussion at the
 4 hearing of October 27, 2000, that you held, wherein
 5 there was substantial colloquy about what was
 6 supposed to be preserved. And in particular, you
 7 indicated that what the government should preserve on
 8 a going forward basis was backup tapes that the
 9 solicitor's office generated that may be related to
 10 IIM information, but only on servers that were
 11 sending E-mails out. You said at that time you
 12 weren't concerned about servers that received
 13 solicitor's office E-mails.
 14 SPECIAL MASTER BALARAN: Except to the
 15 extent that they were intra-agency, I believe. I
 16 said if it goes to the Italian consulate, I wasn't
 17 that concerned with protecting their servers, but I
 18 was concerned if it was intra-agency, I believe.
 19 MS. HILMER: I don't recall seeing that.
 20 I recall that this was essentially just to try to get
 21 some agreement at that point about what was going to
 22 be done pending your decision. I don't recall any
 23 discussion about the receiving end, and certainly a
 24 document that's received may be essentially a
 25 duplicate of the one that was sent, the only thing

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1 that might be different is the heading on a printout
 2 as to, you know, whose computer it came off. And
 3 whether that would be material is highly
 4 questionable, if the substance were the same and all
 5 the other information.
 6 So at that point, the government had been
 7 attempting to do that already based on Mr. Urie's
 8 letter from 1999. We had been attempting to do that
 9 already, preserving backup tapes in those offices
 10 where responsive information was likely to exist.
 11 And you confirmed that they should do that and there
 12 was an agreement that that would happen.
 13 Obviously there were mishaps along the way
 14 and the government did inform you when those sorts of
 15 things occurred, if backup tapes were lost in the
 16 mail, if backup systems crashed and tapes for
 17 whatever reason failed, there was an attempt to
 18 inform you.
 19 Subsequently, you issued a letter to
 20 Mr. Findlay on November 20th of 2000 and required
 21 that all backup tapes throughout the solicitor's
 22 office agency wide be preserved, and there is no
 23 evidence that that was not done in good faith. I
 24 mean, again, we can't sit here and guarantee that
 25 every single tape that has ever been run didn't

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1 somehow lose its integrity, because they do, but that
 2 is where we are today.
 3 And frankly, all along the line here,
 4 there has been no showing that the government didn't
 5 attempt to really work with you on trying to make
 6 sure that the backup tapes were preserved and to let
 7 you know when things fell apart. Your decision of
 8 July 27, 2001 was critical in some regards of the
 9 government and the way it handled the backup tapes,
 10 but I don't believe that there is any part of that
 11 opinion that would lend to the argument that the
 12 government was dishonest with you or didn't come
 13 forward and disclose to you when these mishaps
 14 occurred, didn't disclose to you when the initial
 15 overwriting that was of concern occurred, and there
 16 is really no basis in these orders for holding
 17 anybody in contempt. No order, no violation, at this
 18 point.
 19 Now, if that's -- do you have other
 20 questions on that subject?
 21 SPECIAL MASTER BALARAN: You have 20
 22 minutes. If you want to reserve that at the end,
 23 that's fine.
 24 MS. HILMER: Well, I would like to say
 25 just very briefly, although I'm sure that he named

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1 individuals' counsel will ably say the same, that we
 2 have looked through the current bills of particulars
 3 and what we find is a shift, and no longer really a
 4 reliance on these orders that had been the main
 5 component of the March 20th motion, but rather, a
 6 claim of cover-up and deceit and destruction of
 7 federal records, and nowhere has there been any
 8 recitation of any type of evidence that could support
 9 that against any of the named individuals.
 10 The pleadings themselves rely on faulty
 11 standards, such as in the case of Mr. Brooks and
 12 Mr. Findlay, a knew or should have known standard,
 13 which is a negligence standard and not a contempt
 14 standard; an aiding and abetting standard for
 15 Mr. Simon; and a negligence supervision standard for
 16 Ms. Schiffer. With regard to Mr. Cohen and Ms.
 17 Blackwell, those items were briefed earlier and the
 18 only order that they relied on at that time was the
 19 November 1998 order.
 20 And with regard to Mr. Cohen specifically,
 21 they only sought criminal sanctions at that time.
 22 So, there has to be a showing of willfulness, and
 23 there has not been any attempt to do that. There is
 24 a voluminous record here.
 25 SPECIAL MASTER BALARAN: Well, to show

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1 willfulness at this stage, wouldn't you agree that
 2 they don't have to produce any evidence that might
 3 show the willfulness?
 4 MS. HILMER: I think they have to show you
 5 some indication. This is a collateral matter where
 6 they have made very serious charges against people.
 7 SPECIAL MASTER BALARAN: I'm not
 8 suggesting they're not serious. I'm just asking,
 9 we're at a motion to dismiss stage before any
 10 evidence has been taken at all, and I'm asking you,
 11 what is the threshold that they have to cross over in
 12 order to show willfulness?
 13 MS. HILMER: In order to show willfulness,
 14 I think the judge made it clear that he was expecting
 15 to see at least some evidence in their bills of
 16 particulars that somebody knowingly did something
 17 wrong, and I don't see any evidence of that. I mean,
 18 it may be that it's clear that there was an error
 19 that was made that the government should have applied
 20 to the Court before continuing the overwriting of the
 21 backup tapes, but there is simply no evidence that
 22 there was any intent to deprive the plaintiffs of
 23 discovery to which they are entitled.
 24 SPECIAL MASTER BALARAN: Thank you.
 25 MS. HILMER: Thank you. I will reserve

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1 the rest of my time.
 2 SPECIAL MASTER BALARAN: Mr. Gingold.
 3 MR. GINGOLD: Thank you, Mr. Balaran.
 4 Just a note at the outset. Plaintiffs take exception
 5 to those who did not file motions to dismiss to
 6 participate in this proceeding. The rules are quite
 7 clear with regard to the requirement for motions to
 8 dismiss, that in fact they are not as liberal as they
 9 are being construed here, and every opposition brief
 10 filed by plaintiffs for several years could be
 11 construed as a separate motion for order to show
 12 cause and that is not only clearly not the case, the
 13 Court requires very specific pleadings in order to
 14 move forward in that regard. So plaintiffs take
 15 strong exception to the interpretation of the special
 16 master in that regard and do not believe that either
 17 local rules or the procedures that have been in place
 18 in this case for seven years have been followed.
 19 Plaintiffs have no problem with changing
 20 procedures because the rules are changed on
 21 plaintiffs on a regular basis, we would just like to
 22 have more advance knowledge when they are done, and
 23 we can deal with appropriate knowledge. But the
 24 facts are what the facts are, the record speaks for
 25 itself, so we will not dwell on that.

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1 This is a matter that has been in
 2 litigation for nearly seven years. From the very
 3 beginning of this case on June 10th, 1996, from the
 4 first conversations with counsel for defendants, the
 5 issue of electronic media was raised. It was
 6 confirmed four days later after the filing of this
 7 case with Mr. Simon, who was then the Deputy
 8 Assistant Attorney General for Environment and
 9 Natural Resources.

10 Issues of electronic documents are not
 11 new. The 1970 comments to Rule 34 specifically
 12 address that and identify the fact that electronic
 13 records are exactly the type of records that are
 14 included within the definition of document. So to
 15 suggest that there has been some extraordinary
 16 advance in the law over the last seven years doesn't
 17 explain how the 1970 amendments to Rule 34
 18 explicitly, the comments explicitly identify the fact
 19 that those amendments, electronic is included within
 20 the definition of document, electronic media.

21 And let's not miss one other point, and
 22 the important point that this is not an ordinary
 23 litigation. This involves enforcement of trust and
 24 it involves the authority of the Court and the
 25 jurisdiction of the Court in equity. It is an action

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1 in equity, and that is the jurisdiction of this
 2 Court. What this Court has stated and the Court of
 3 Appeals has stated in its decision on February 23rd,
 4 2001, is that the accounting and record-keeping is at
 5 the heart of this trust. At the outset of this
 6 litigation with the first trial team that represented
 7 the Department of Justice, these specific issues were
 8 not only discussed, they were understood and agreed
 9 to, because there was an effort at the outset of this
 10 litigation to engage in what was called then a
 11 cooperative effort to try and establish an
 12 expeditious way of resolving this case.

13 In that regard, the government itself
 14 drafted what was the November 27th, or what became
 15 the November 27, 1996 order, and as part of the
 16 determination to try and resolve this case
 17 expeditiously was paragraph 19 of that particular
 18 document, which was designed to provide both
 19 plaintiffs' experts and defendants' experts with
 20 sufficient information within which a determination
 21 could be made if statistical sampling could be
 22 employed in lieu of a traditional accounting because
 23 of the acknowledged problems associated with the
 24 record-keeping of the Department of the Interior and
 25 the record-keeping of the Department of the Treasury.

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1 There were numerous reports filed by
 2 government experts at that point in time which
 3 identified in essence the absence of a record-keeping
 4 system, hard copy record-keeping system, electronic
 5 record-keeping system. The tribal trust
 6 reconciliation report which was prepared by Arthur
 7 Andersen, explicitly identified that the
 8 record-keeping problems were so massive and
 9 significant that they could not go forward with a
 10 reconciliation of the individual Indian trust for
 11 merely a 20-year period, 1972 to 1992.

12 So at the outset of this litigation, it
 13 was well-known among counsel and it was well-known
 14 among the parties based on the discussions that
 15 plaintiffs, plaintiffs' counsel, defendants and
 16 defendants' counsel had on these very issues as part
 17 of the cooperative effort to resolve this case
 18 quickly.

19 I will also say that none of the
 20 individuals from the government were involved, who
 21 are identified as named individuals for purposes of
 22 this contempt proceeding, were participating at all
 23 in those discussions. They were not to our knowledge
 24 members of the trial team, other than Ms. Schiffer,
 25 Mr. Simon, and of course the solicitor's office

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1 lawyers were involved at the very beginning. Ms.
 2 Perlmutter was one of those who was involved in those
 3 discussions as a matter of fact.

4 So while the Court did not specifically
 5 identify the November 27th, 1996 order, which
 6 explicitly required the production of information,
 7 all information that's literally drafted by the
 8 Justice Department that relates to, refers to or
 9 embodies the individual Indian trust information of
 10 the named plaintiffs, it was all information for a
 11 reason, it was inclusive, it was a very clear
 12 understanding of what the problems were, it was
 13 acknowledged that there was no system in place.

14 And now it has been suggested that
 15 plaintiffs' theories have modified. They have not
 16 modified. We have always incorporated by reference
 17 the original motions for orders to show cause, and we
 18 continue them. While the plaintiffs were prohibited
 19 by the Court from taking discovery in this regard and
 20 although plaintiffs were authorized by the Court in
 21 the more recent order, the September 17th order to
 22 take discovery, plaintiffs have still be prohibited
 23 from taking discovery in this regard.

24 Let me also say, inasmuch as Mr. Urie was
 25 raised, there were sight visits that plaintiffs' and

<p style="text-align: right;">Page 42</p> <p>1 defendants' counsel took with the special master, I 2 believe in early February of 1998. During the course 3 of those sight visits with Mr. Urie, accompanied by 4 the special master, along with, I believe Mr. Swanson 5 of the solicitor's office, there were explicit 6 discussions during that time about the need for 7 saving E-mail because of the admission by the 8 Billings solicitor's office that they had not saved 9 their E-mail. 10 SPECIAL MASTER BALARAN: Were these 11 discussions on the record? 12 MR. GINGOLD: These discussions were not 13 on the record, but they were discussions that do 14 exist in this case, if the special master would like 15 to strike that. 16 SPECIAL MASTER BALARAN: I'm just asking a 17 question. 18 MR. GINGOLD: To my knowledge, they are 19 not on the record. These matters were brought up in 20 conferences with the special master and defendants' 21 counsel present, and indeed with Mr. Urie present 22 during those particular meetings. There was no 23 ex parte communication about that and indeed, Mr. 24 Urie told me during those particular meetings that he 25 communicated with Mr. Findlay and with Mr. Brooks,</p>	<p style="text-align: right;">Page 44</p> <p>1 admitted, that archival records are established based 2 on recommendations from the defendants and categories 3 of documents provided by the defendants to the 4 National Archives on how those particular records are 5 to be stored. That has nothing to do with records 6 that are used for management of a trust and it has 7 nothing to do with records that must be preserved by 8 the parties and by counsel when they are in 9 litigation or they suspect they are likely to be in 10 litigations. 11 Now one of the most important aspects of 12 the tribal trust reconciliation report was the 13 various discussion in the press, before Congress and 14 otherwise, by the defendants and the special trustee 15 at that time, who all anticipated that litigation was 16 to be filed based on the report and the report of 17 Arthur Andersen in the tribal trust reconciliation 18 report. Plaintiffs did not file this litigation 19 until after that report was issued. So to suggest 20 that there was no anticipation of litigation, to 21 suggest there was no obligation to preserve these 22 records is, in our opinion, in error. We believe 23 based on the documents that have been periodically 24 produced in this case that there was a clear 25 understanding that litigation was likely to occur.</p>
<p style="text-align: right;">Page 43</p> <p>1 and they specifically said they didn't want these 2 issues raised. So if the issue is whether or not 3 there was knowledge or an understanding, that is not 4 on the record, that's one thing. If it's a question 5 about what discovery would reveal if plaintiffs are 6 ever able to take a discovery that they're entitled 7 to under the Federal Rules, that's a different issue. 8 But, let me go further. 9 The Court noted prior to the first 10 contempt trial, which began in January 1999, and I 11 guess noted again in his February 22nd, '99 opinion 12 holding Secretary Babbitt, Secretary Rubin and 13 Assistant Secretary Gover in contempt, that it was 14 unusual for the attorneys, to move to exclude them 15 from the contempt for the failure to produce 16 documents, and that the Court assumed that this was 17 by agreement with parties, but it was in a 18 conspicuous note made. 19 What we are hearing in this proceeding is 20 once again, an effort by the attorneys to avoid 21 responsibility for actions and duties that they have 22 in litigation. The reality is that all records must 23 be preserved. Archival records are not litigation 24 records. This issue itself has been litigated in 25 this case and the Court has noted, as have defendants</p>	<p style="text-align: right;">Page 45</p> <p>1 As all of us as lawyers know, in the first 2 instance we as lawyers have the responsibility to 3 inform our clients that records that are relevant to 4 litigation must be preserved. One of the major 5 problems in this case is as of today, there is no 6 definition of a trust record, there is no definition 7 of individual Indian trust data. How do the lawyers 8 represent to their clients and discharge their duty 9 as officers of the Court that records are being 10 preserved if as of today there is no definition of 11 exactly the same records that are required to be 12 preserved in this case as those records would be 13 preserved if lawyers were representing any corporate 14 client, any bank, or anyone else in this country? 15 There is no exception that plaintiffs have had for 16 the United States Government. 17 Indeed, as the inspector general pointed 18 out, for the Department of the Interior, in its 19 report, it in Exhibit 3.C explicitly identified the 20 Justice Department's own standards that they provided 21 to the Interior Department for what constitutes a 22 federal record and explicitly what E-mail constitutes 23 a federal record. There is no issue that's being 24 discussed today that wasn't discussed five years ago, 25 that wasn't discussed six years ago, that wasn't</p>

<p style="text-align: right;">Page 46</p> <p>1 discussed three years ago. Indeed, this was a major 2 issue in the trial in the summer of 1999, and it was 3 such an issue because of the failure to produce the 4 electronic records or copies of the electronic 5 records that the Court in an effort to avoid having 6 the trial be bogged down into one that was going to 7 be much longer than it was, actually deferred those 8 issues and turned over those issues principally to 9 the special master, which resulted in the orders that 10 Ms. Hilmer and the special master discussed. 11 That was not something that occurred in 12 May or August of 1999. Those discussions began 13 almost immediately after the special master was 14 appointed on February 24th, 1999. We're dealing with 15 an extraordinary period of time here. We are dealing 16 with records and a records system that the government 17 itself has admitted -- as a matter of fact, Ms. 18 Himmelhoff, one of the former attorneys representing 19 the Department of Justice, or sorry, representing the 20 Department of the Interior and the Department of 21 Treasury, explicitly pointed out that to the extent 22 that records do exist in various agency and area 23 offices of the Department of the Interior that are 24 relevant to the individual Indian trust, they could 25 not assure the special master that those records</p>	<p style="text-align: right;">Page 48</p> <p>1 SPECIAL MASTER BALARAN: Uh-huh. 2 MR. GINGOLD: I'm well aware of the 3 limitations you identified earlier with Ms. Hilmer. 4 I also would like to point out that based on Webb 5 versus District of Columbia, the Court has the 6 authority, the inherent authority to ensure the 7 integrity of the judicial process and litigation. 8 One thing that is abundantly clear in this case is 9 there is no integrity in this litigation. 10 As the Court pointed out recently in 11 another decision, the pattern and practice of deceit 12 is topical. As the special master has recently 13 pointed out, during the contempt, the second contempt 14 trial, which was a trial that was a three-month trial 15 that concluded on February 28th of 2002, during that 16 same contempt trial, deliberately false information 17 was provided to the Secretary in defense of her 18 contempt. 19 What we're dealing with here is another 20 issue and that is, what is the inherent authority of 21 the Court to enforce its orders with contempt. And I 22 acknowledge, by the way, that is not provided in the 23 order of reference here with regard to this 24 particular issue. 25 SPECIAL MASTER BALARAN: And would you</p>
<p style="text-align: right;">Page 47</p> <p>1 would be protected, or could be protected. They were 2 at risk. 3 So to suggest that there is a system of 4 records in paper form that provide the information 5 that may be relevant to what has been destroyed is 6 not only fiction, it is in conflict with the record 7 of this case. 8 SPECIAL MASTER BALARAN: May I interrupt 9 you for one second? 10 MR. GINGOLD: Yes. 11 SPECIAL MASTER BALARAN: I just want to 12 address a very specific topic before you go on. Ms. 13 Hilmer mentioned the issue of Ms. Perlmutter and 14 specifically the fact that she left office in July of 15 1997, I believe, and the first order that was 16 identified in your March 20, 2002 motion, which I'm 17 incorporating to the December 17, 2002 order of the 18 Court, the first order is November 9th, 1998. Can 19 you tell me which order Ms. Perlmutter may have 20 violated in any capacity? 21 MR. GINGOLD: First of all, yeah, I could 22 tell you that. The fact is, and this is an area 23 where there probably is going to be some vigorous 24 debate, the November 27th, 1996 order is clearly 25 violated. If I may finish?</p>	<p style="text-align: right;">Page 49</p> <p>1 agree that my authority is circumscribed by this 2 order of reference for these proceedings? 3 MR. GINGOLD: No, I would not concede that 4 because I think the special master would appear to 5 have plenary authority as he interprets the local 6 rules with regard to how various things are to be 7 done. Indeed, it would appear to be much more 8 narrower because the specific order of reference as 9 plaintiffs understand it, was not to revisit the 10 special master's finding that there was systemic 11 destruction of solicitor's office E-mail, and not to 12 determine whether or not those facts exist, but those 13 facts exist and for the special master to determine 14 the culpability, whether or not there's culpability 15 of particular individuals identified, and to allow 16 the plaintiffs to take discovery. So we believe 17 based on the special master's interpretation, he has 18 plenary authority to do pretty much what he wants to 19 do. 20 SPECIAL MASTER BALARAN: Let me ask you 21 this. Putting discovery aside for the moment, 22 because if my authority is in fact limited by the 23 September 17th order 312, which says, it is ordered 24 that plaintiffs' motion for orders to show cause why 25 Interior defendants and their counsel should not be</p>

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1 held in contempt for destroying E-mail, filed March
 2 20th, 2002, shall be referred to Special Master
 3 Balaran. If in fact that represents the metes and
 4 bounds of my authority, would you agree with me that
 5 there is no discovery that could possibly implicate
 6 Ms. Perlmutter in any of the six orders that you have
 7 identified on page of your March 20th, 2002 filing?
 8 MR. GINGOLD: Assuming that, if --
 9 SPECIAL MASTER BALARAN: With my
 10 assumption.
 11 MR. GINGOLD: The answer is no. The
 12 answer is, the reality is, it is well settled in this
 13 circuit and elsewhere, although Judge Lamberth seems
 14 be the leading authority of contempt, but it is also
 15 well settled elsewhere, that while normally there
 16 needs to be a clear and specific order, a violation
 17 of which must be identified in order to find
 18 contempt, if in fact the inherent authority of the
 19 Court has been challenged and the judicial process is
 20 undermined, if in fact there is fraud -- as a matter
 21 of fact, Mr. Nagel himself conceded during the second
 22 trial that in fact fraud itself may be sufficient to
 23 constitute contempt for purposes of these
 24 proceedings, and fraud exists whether or not an order
 25 has been issued.

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1 If your assumption is there can be no
 2 contempt unless an express order is violated, then
 3 based on your assumption, you are correct. We don't
 4 believe the law supports that position. We also
 5 don't believe the Court excluded issues that relate
 6 to the undermining of the judicial process that we
 7 have seen in unprecedented fashion in this
 8 litigation. Plaintiffs are aware of no other case.
 9 SPECIAL MASTER BALARAN: Well then, how
 10 are these people supposed to defend themselves if
 11 they're not exactly sure what it is, if we're talking
 12 about the most broad and overarching fraud on the
 13 Court, I mean, aren't they entitled to a bill of
 14 particulars or some specificity at least making them
 15 aware of the charges that are pending against them,
 16 either civil, criminal or otherwise?
 17 MR. GINGOLD: Well then, perhaps you and I
 18 are reading a different record in this case. I was
 19 under the impression plaintiffs did provide bills of
 20 particulars, Mr. Balaran. In addition, Mr. Balaran,
 21 plaintiffs provided specific delineations of events
 22 of circumstances which constitute contempt, of
 23 destruction issues, and we are dealing with mass
 24 spoliation in this case, where even the special
 25 master has determined in such cases of spoliation,

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1 the individuals or the parties were involved in the
 2 spoliation.
 3 SPECIAL MASTER BALARAN: Aren't those
 4 adverse inferences discovery adverse inferences that
 5 may weigh against the party who fails to produce
 6 documents, as opposed to adverse inferences that may
 7 exist in a contempt proceeding?
 8 MR. GINGOLD: I haven't seen that.
 9 SPECIAL MASTER BALARAN: Well, spoliation
 10 is the idea that I destroy the documents or I simply
 11 allow them for whatever reason, and as a result, the
 12 issue that those documents may have spoken to, that
 13 may warrant or trigger an adverse inference, but not
 14 against the particular person that may have taken the
 15 action. I mean, I have never seen a case to that
 16 effect.
 17 MR. GINGOLD: Well, I think we're looking
 18 at the Enron case, Mr. Balaran, which suggests quite
 19 the contrary. As a matter of fact, even when you're
 20 looking at Sarbanes-Oxley with regard to those
 21 particular issues, Congress itself has pointed out
 22 that that type of destruction constitutes a criminal
 23 act, if I might add. So no, perhaps -- and let me go
 24 beyond that.
 25 There are numerous cases, especially in

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1 the context of discovery with regard to electronic
 2 records going with, what is it, Kosloski and Sears
 3 and other cases of that sort, where those particular
 4 issues did result with regard to sanctions with
 5 regard to issue and evidentiary preclusion. But
 6 there has been no case that I've seen, Mr. Balaran,
 7 and maybe you can point it to me, which says that the
 8 individuals who are responsible for destroying the
 9 documents, where documents must be preserved whether
 10 by duty, and that's trust duty, whether by litigation
 11 duty as parties in litigation, or as officers of the
 12 Court, and that they themselves are not to be held
 13 accountable, using the inherent authority of the
 14 Court, we have not seen a case which says that, Mr.
 15 Balaran.
 16 SPECIAL MASTER BALARAN: I wasn't speaking
 17 to that, I was speaking to something else, but let me
 18 continue, if I will. Let's assume again, for the
 19 purpose of my hypothetical, that my authority is
 20 circumscribed by the September 17th, 2002 order. And
 21 let's assume for a moment that that inherently
 22 subsumes the six orders that are in your March 20,
 23 2002 motion.
 24 MR. GINGOLD: This only deals with Ms.
 25 Perlmutter, correct?

<p style="text-align: right;">Page 54</p> <p>1 SPECIAL MASTER BALARAN: Well, I actually 2 was going to move on from there, so let me just 3 finish the question. 4 MR. GINGOLD: Uh-huh. 5 SPECIAL MASTER BALARAN: How does that 6 affect, if somebody was not in fact in office at the 7 time, how can that possibly implicate somebody in any 8 capacity if they in fact weren't there? 9 MR. GINGOLD: I don't know, maybe you 10 should talk to Judge Lamberth, who made it very clear 11 in his December 17th, 2000 opinion that the 12 individuals who were in an official capacity were 13 responsible for damage that was done in an official 14 capacity by their predecessors. But he also points 15 out that Mr. Gover was in precisely that same 16 situation. Mr. Gover was held in contempt on 17 February 22nd, 1999, replaced former Assistant 18 Secretary Ada Deer. The principal acts which 19 constituted contempt for purposes of that proceeding 20 were conducted during Ms. Deer's period of time. 21 Nonetheless, Mr. Gover was held in contempt and 22 indeed in the official capacity, as the Court 23 specifically pointed out clearly in his opinion. 24 And by the way, that matter obviously is 25 on appeal right now with oral argument to be argued</p>	<p style="text-align: right;">Page 56</p> <p>1 purges himself of that order and that has -- of that 2 contempt, and that has not been done, Mr. Snow is in 3 a contemptuous situation, vis-a-vis the Court, 4 because that contempt stands as of today. And I 5 might add, that's the same situation with regard to 6 Ms. Norton in her official capacity. 7 That is materially different from the 8 personal capacity, but the Court has made it very 9 clear that there is responsibility that continues, 10 there is a responsibility to purge contempt and that 11 if that is not done, the parties are still in 12 contempt, and that's absolutely right, but there 13 still must be a trial in that regard, by the way. 14 SPECIAL MASTER BALARAN: Ms. Hilmer raised 15 a point that the opinion and order of a special 16 master cannot ground contempt. Do you have any case 17 authority to the contrary? 18 MR. GINGOLD: Cannot ground contempt? I 19 haven't seen a single case that says that, Mr. 20 Balaran. As a matter of fact, what I find 21 particularly disturbing would reflect further fraud 22 on the Court, that was a negotiated order, that was a 23 negotiated order with Mr. Brooks and Mr. Findlay 24 actively involved in negotiations of the terms of 25 that order and all the meetings that led into that</p>
<p style="text-align: right;">Page 55</p> <p>1 tomorrow, but the Court specifically held that an 2 individual in his or her official capacity is 3 responsible in his or her official capacity for the 4 contemptuous conduct of his or her predecessor. 5 SPECIAL MASTER BALARAN: So in this 6 particular instance, we would have assistant 7 secretaries going on into the indefinite future who 8 would have to take the heat, if you will, for what 9 Ada Deer did. 10 MR. GINGOLD: No. As a matter of fact, 11 Mr. Gover was already held in contempt for that. And 12 as a matter of fact, as the special master I'm sure 13 is quite aware, the contempt has not been purged. 14 One of the things that was required by Court, because 15 there is a mechanism for dealing with exactly that 16 issue, Mr. Balaran, on February 24th pursuant to your 17 order as part of the responsibility, the Court 18 explicitly provided, I think in paragraph 8, that the 19 plans of the defendants should be provided to the 20 special master to demonstrate that if they are 21 executed properly they will enable the defendants to 22 bring themselves into compliance with the violated 23 order, and there was an explicit procedure set forth 24 by the Court for purging that. So until, as a matter 25 of fact, the Secretary of the Treasury for example,</p>	<p style="text-align: right;">Page 57</p> <p>1 order, the issues specifically dealing with E-mail or 2 electronic media were discussed because 3 Mr. Schumacher, one of the individuals from the 4 solicitor's office, was brought in. 5 SPECIAL MASTER BALARAN: You're referring 6 to the August 12, 1999 order? 7 MR. GINGOLD: That's correct. 8 SPECIAL MASTER BALARAN: I'm actually 9 referring to the May 11th, 1999 order, the October 10 27, 2000 order, and the November 20th order to retain 11 E-mail, I'm referring to those specifically. Do you 12 know of any situation where a court has grounded 13 contempt upon a reading of a special master or court 14 monitor's order? 15 MR. GINGOLD: A, with regard to -- the 16 answer is, I'm not aware of a proceeding where a 17 court declined to impose contempt for a violation of 18 an order, whether it was entered by a special master 19 or otherwise. And by the way, I'm not aware that a 20 court monitor has issued an order in this case. 21 SPECIAL MASTER BALARAN: I was just doing 22 it by extending the example, but let's just stick 23 with the special master. 24 MR. GINGOLD: And let me point one other 25 point which is also important, and this is again, not</p>

<p style="text-align: right;">Page 58</p> <p>1 the usual case. But Mr. Brooks himself at the 2 conclusion of the contempt trial, who quite 3 eloquently argued for the appointment of a special 4 master with strong powers, because of the problems 5 that Mr. Brooks identified that he had not been 6 personally responsible for in the failure to produce 7 documents under paragraph 19, which was the basis for 8 that particular contempt trial. 9 SPECIAL MASTER BALARAN: How would 10 Mr. Brooks's comments to the Court in that particular 11 scenario have any bearing on these proceedings? I 12 mean, in urging that a strong special master be 13 appointed, how would that have any bearing on whether 14 or not a specific order, as any of these specific 15 orders on page 12, whether or not they are grounded 16 in this? 17 MR. GINGOLD: Grounded in what? 18 SPECIAL MASTER BALARAN: Well, in these 19 six orders. How would that have any bearing on these 20 proceedings, what he may have said in court regarding 21 the imposition of a strong special master? 22 MR. GINGOLD: Well, one of the issues that 23 was raised by Ms. Hilmer was intent. 24 SPECIAL MASTER BALARAN: But that's only 25 criminal contempt.</p>	<p style="text-align: right;">Page 60</p> <p>1 So intent is a matter that is directly 2 related to many of the things that are raised here. 3 The Court itself refashioned plaintiffs' motions for 4 orders to show cause relative to the contempt trial 5 that was concluded and the decision that was entered 6 on September 17th, 2002, to recast it in the terms of 7 various counts of fraud. So to the extent that this 8 mirrors what was done with regard to Secretary Norton 9 and former Assistant Secretary McCaleb in her 10 official capacities, this may be quite pertinent to 11 how the ultimate specifications, as they were 12 characterized by Mr. Nagel, are employed going 13 forward. 14 So to the extent that Mr. Brooks's 15 comments which actually encouraged the Court to 16 appoint a special master with powerful authority to 17 ensure these problems don't occur again, to the 18 extent that there were orders that were ordered by 19 the special master, and to the extent that the 20 parties were obeying those orders, operating in 21 accordance with those orders, acting at all times 22 relevant to this litigation, that these orders have 23 the full force and effect and they were not 24 challenged, I think it would be tantamount to 25 estoppel for them to now say that these have no basis</p>
<p style="text-align: right;">Page 59</p> <p>1 MR. GINGOLD: Well, intent can be 2 inferred, as a matter of fact, for willful violations 3 of orders, because one of the issues that's involved 4 here is if in fact there is a determination of 5 contempt ultimately, then the question has to deal 6 with what type of sanctions are going to be imposed. 7 Sanctions are supposed to be imposed in accordance 8 with the nature and scope of the culpability. If in 9 fact someone inadvertently violated an order, one 10 would argue, A, they shouldn't be held in contempt at 11 all, but B, if they inadvertently violate an order 12 multiple times, there is a question about other 13 things that are not necessarily related to contempt. 14 But if you act in bad faith, it is plaintiffs' 15 position that the sanctions that should be fashioned 16 should be considerably different from those where 17 there was no bad faith. So while it is not necessary 18 for a determination of contempt, that is intent, as 19 the judge pointed out -- as a matter of fact, when 20 the judge pointed out, even for fraud in the 21 September 17th, 2002 decision, was that fraud is not 22 necessary to be, which normally requires some sort of 23 intent, the intent that is necessary for that can be 24 inferred from the facts, especially when there is so 25 much spoliation.</p>	<p style="text-align: right;">Page 61</p> <p>1 for contempt. 2 SPECIAL MASTER BALARAN: Let me back up. 3 Do you have any evidence that you've put in the 4 record in your bills of particulars, and I'm going to 5 focus on Mr. Brooks for a moment only because you 6 brought him into play, do you have any statement 7 that's attributable to Mr. Brooks where he might have 8 told somebody that you should destroy E-mails or not 9 preserve E-mail backup tapes? Do you have any? I 10 have not seen anything in the record that even 11 implies that he may have given any direction to 12 anybody to do so. 13 MR. GINGOLD: Unless you've been reading 14 different briefs than I have, I don't recall 15 plaintiffs saying that. 16 SPECIAL MASTER BALARAN: I'm just asking 17 you. 18 MR. GINGOLD: I don't recall plaintiffs 19 saying that, Mr. Balaran. Further, Mr. Balaran, you 20 have precluded plaintiffs from taking discovery that 21 the Court has explicitly authorized to take in that 22 regard. 23 SPECIAL MASTER BALARAN: I understand. 24 MR. GINGOLD: In that regard, Mr. Balaran, 25 I would like to point out that the Court itself</p>

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1 identified the factors that, how a motion to dismiss
 2 under the circumstances where discovery has not
 3 occurred, and those standards were established by the
 4 judge on November 5th, 1998, and to our knowledge,
 5 Mr. Balaran, they have not been altered by the Court,
 6 and if they have, I would appreciate it if you would
 7 inform me.
 8 He set those standards as follows: And
 9 this is my paraphrasing of his standards, they are
 10 not literally from the opinion itself. A motion to
 11 dismiss may only be granted if and only if it is
 12 clear that no relief can be granted under any set of
 13 circumstances or facts that could be proved
 14 consistent with the allegations, and the language
 15 that could be proved consistent with the allegations
 16 is directly cited from the Court's decision itself.
 17 Further, the Court went on to say, that all
 18 plaintiffs' allegations must be accepted as true for
 19 purposes of a motion to dismiss. And three, that all
 20 facts must be resolved and inferences must be made in
 21 favor of plaintiffs, vis-a-vis a motion to dismiss,
 22 which is what plaintiffs understood this proceeding
 23 was about.
 24 SPECIAL MASTER BALARAN: You're absolutely
 25 right, but does that somehow from articulating with

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1 the necessary specificity the bills of particular
 2 against each individual?
 3 MR. GINGOLD: If you're suggesting to me
 4 that they are vague and ambiguous, we would argue
 5 that they are clear.
 6 SPECIAL MASTER BALARAN: I'm just asking
 7 as a matter --
 8 MR. GINGOLD: The answer is, we stated
 9 with you clear and unambiguous language paragraph by
 10 paragraph, that's never been done in any other
 11 contempt proceeding, including the contempt
 12 proceeding brought by the Department of Justice
 13 against Mr. Backley, the former special assistant to
 14 Kenneth Starr during those proceedings, where the
 15 Department of Justice brought those specifications
 16 for criminal contempt against Mr. Backley without any
 17 of the specificity that plaintiffs brought here. So
 18 if you're applying the standard to plaintiffs that
 19 the Justice Department itself doesn't apply when it
 20 believes individuals are held in contempt, then I
 21 would like to know that because it's just another
 22 change in rules that apply to plaintiffs, and if we
 23 know that in advance, we can deal with it.
 24 SPECIAL MASTER BALARAN: Okay. Is there
 25 anything else in your argument regarding Ms. Hilmer,

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1 or to counter Ms. Hilmer's argument regarding
 2 individuals and their official capacity?
 3 MR. GINGOLD: Yes, I would suggest that
 4 there has never been a series of motions for orders
 5 to show cause that contain the specificity and the
 6 documentation that these particular motions and
 7 related bills of particulars contain. As a matter of
 8 fact, we have searched throughout this country for
 9 any case where motions for orders to show cause have
 10 been filed which can contain even remotely the type
 11 of documentation and specification that is provided
 12 here, and we would be happy to correct our position
 13 if in fact we are provided by the special master with
 14 cases that show the type of specificity plaintiffs
 15 have provided here are inadequate.
 16 Further, the specifications that this
 17 Court has relied on, and this is the law of the case,
 18 to proceed against two Secretaries of the Interior, a
 19 Secretary of the Treasury, and two Assistant
 20 Secretaries of the Interior for contempt, one of the
 21 contempt proceedings actually resulted in fraud, are
 22 considerably less specific and particular than those
 23 that are provided in these proceedings here. The
 24 specificity here is unprecedented, as is the
 25 misconduct in this case. Plaintiffs are aware of no

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1 other case.
 2 As a matter of fact, the only other case
 3 that plaintiffs' counsel is aware of where there was
 4 the hiding of evidence from a party was involved
 5 several years ago involving the antitrust case where
 6 Donovan Leisure was counsel, John Dorr was the lead
 7 trial counsel, his second in command was the head of
 8 the litigation division. Poor Donovan Leisure, two
 9 documents were placed in the trunk of a car of one of
 10 the partners of Donovan Leisure, they were not
 11 destroyed. It was an associate, and Donovan Leisure
 12 pointed out to the Federal District Court judge in
 13 the Southern District of New York that these
 14 documents in fact there, when Donovan Leisure did not
 15 turn them over in response to production, the
 16 attorney, the partner who was responsible for putting
 17 those documents in the trunk and for concealing for
 18 that period of time, that information from the Court
 19 and their opponents was not only disbarred, he was
 20 put in jail.
 21 So we have a situation here where as this
 22 Court has pointed out, and the special master has
 23 been quite eloquent in his own assessment of the
 24 issues related to the Treasury destruction of
 25 document, both, and I think most specifically with

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1 regard to his February 2000 supplemental report,
 2 there are requirements of the attorneys and a
 3 responsibility to be candid with the Court and a
 4 responsibility to be candid with the opposing
 5 parties. It would be extraordinary if you reviewed
 6 fraud case after fraud case, whether it's 10(b)(5),
 7 common law or otherwise, where there are material
 8 omissions in disclosure, and parties rely on those
 9 omissions, and the courts rely on those omissions, it
 10 would be an extraordinary situation where there isn't
 11 fraud that is found.

12 What we have here meets every standard
 13 that has ever been adopted by any court that we are
 14 aware of. And again, if the special master can
 15 provide us with decisions to the contrary, plaintiffs
 16 would appreciate it, we will revise our position.

17 But we have reviewed everything we can find and under
 18 these circumstances, including the fact there's been
 19 massive spoliation, including the fact there is no
 20 hard copy system of records, including the fact there
 21 never was an electronic system of records, including
 22 the fact that there were routine overwriting and
 23 destruction of records, and in fact based on
 24 paragraph by paragraph specification supporting each
 25 one of the charges, it is clear that's what happened.

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1 Now plaintiffs have also said, and I
 2 apologize to Mr. Brooks just because I know he's
 3 going to be dealing with this personally, but as we
 4 said, if Mr. Brooks was not aware and he was told by
 5 his client that they were preserving the records that
 6 should be preserved, our position with regard to
 7 Mr. Brooks would be changed as well. We do not
 8 believe that any attorney is an insurer for his
 9 client. We do believe that attorneys have the
 10 obligation as officers of the Court to be candid with
 11 the Court. We believe they have an obligation to be
 12 candid with their adversaries.

13 We believe that especially in a trust
 14 case, where massive documents were destroyed before
 15 this case was ever filed, and that was a key issue in
 16 this case, that there must be decent instructions and
 17 important instructions to ensure which documents must
 18 be preserved, how they must be preserved, whether
 19 they are in electronic or hard copy form. We see no
 20 evidence that that was done.

21 I am not suggesting and plaintiffs have
 22 not suggested that Mr. Brooks instructed anybody to
 23 destroy documents. We have not asserted that and
 24 have no evidence that's the case. However, we do
 25 know that through brief after brief after brief after

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1 brief that were signed by Mr. Brooks, prepared by
 2 Mr. Brooks, after oral arguments that Mr. Brooks made
 3 representations. The representations in plaintiffs'
 4 opinions were representations that the documents have
 5 been preserved, they would be preserved, and that
 6 plaintiffs' concerns were not only without merit, but
 7 they are hysterical in many respects.

8 SPECIAL MASTER BALARAN: Well, let me stop
 9 you there. Since we're picking on Mr. Brooks for the
 10 moment, in looking through the bills of particulars,
 11 and I really have to focus us again on E-mail backup
 12 tape issues because that really is the gravamen of
 13 your March 20, 2002 motion, that it was E-mail backup
 14 tapes that were overwritten and all the conduct that
 15 was attendant to that.

16 Basically I see it as there was a
 17 statement that was made that DOI has retained E-mail
 18 backup tapes but has not undertaken the time
 19 consuming and costly search demanded by plaintiffs.
 20 In reading your bill of particulars, that was the
 21 only statement that I can find that was attributable
 22 to Mr. Brooks in any sense concerning the E-mail
 23 backup tape issue.

24 MR. GINGOLD: Well, I respectfully
 25 disagree. I can recall references in the bills of

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1 particulars and Mr. Balaran, as you know, we have
 2 incorporated by reference the various factual
 3 appendices that were part of the motions themselves.
 4 Those factual appendices themselves detail various
 5 statements made by Mr. Brooks during status
 6 conferences with the Court, in hearings with the
 7 Court dealing specifically with this issue. If you
 8 are now suggesting to me, Mr. Balaran, that what we
 9 have incorporated by reference is not incorporated in
 10 the bill of particulars, I'd like to take a strong
 11 exception to that.

12 SPECIAL MASTER BALARAN: Okay. Anything
 13 else? I don't want to take up time with any more
 14 particulars.

15 MR. GINGOLD: Yes, one last point.
 16 SPECIAL MASTER BALARAN: Please.

17 MR. GINGOLD: The courts have also pointed
 18 out that the cost and burden of preserving and
 19 maintenance is irrelevant if in fact the party was
 20 obligated to maintain the system, did not maintain
 21 the system once litigation is commenced at the very
 22 least, and that's independent of the fact that this
 23 was a trustee who was destroying the documents. But
 24 once litigation is commenced, there is an obligation
 25 to ensure that if you have inadequate systems, that

<p style="text-align: right;">Page 70</p> <p>1 they will provide adequate security for the documents 2 that must be preserved, for documents that can be 3 searched to determine whether or not there was other 4 discoverable evidence, that is not an excuse that 5 burden cost is too much. The courts have gone to 6 great lengths saying that that is the responsibility 7 of the parties to make sure they have an adequate 8 system in place. 9 No one has ever argued that the archival 10 system is a system for litigation, and no one has 11 ever argued in good faith that an archival system for 12 purposes of archiving federal documents is good 13 enough for a trustee who must provide those documents 14 to a trust beneficiary under the duties that have 15 been established by Congress and by the courts based 16 on their affirmative responsibility to keep and 17 maintain accurate records and provide material 18 information to the trust beneficiaries. 19 So what we have here are in our opinion, 20 are arguments that are not a defense. We believe 21 that orders have been violated. We believe they have 22 been stated in particularity. We believe that 23 officials are responsible not only for their own acts 24 while they're officials, they're responsible for the 25 acts of their predecessors, and that is particularly</p>	<p style="text-align: right;">Page 72</p> <p>1 those documents were preserved, and the destruction 2 that went on during that particular period of time in 3 plaintiffs' opinion is unprecedented in litigation in 4 this country, including Enron, Global Crossing and 5 all the others, and we believe that based on the 6 judge's own standards set forth on November 5th, 7 1998, that this proceeding must go forward, 8 especially because plaintiffs are still denied the 9 right that every party has in litigation to take 10 discovery. 11 SPECIAL MASTER BALARAN: Question. If I 12 find that the during the Assistant Secretary or 13 Secretary's tenure, the acts complained of concerning 14 the overwriting of E-mails has abated or been 15 corrected, would you agree that I could not implicate 16 her in her official capacity? And the same question 17 would obviously apply to Mr. McCaleb. 18 MR. GINGOLD: First of all, it can't apply 19 to Mr. McCaleb because he is no longer Assistant 20 Secretary, so with regard to Mr. McCaleb, as we 21 pointed out in our opposition, the official capacity 22 doesn't apply, and we have not sought sanctions 23 against Mr. McCaleb in his personal capacity, so 24 that's a separate issue. 25 The fact that this destruction was going</p>
<p style="text-align: right;">Page 71</p> <p>1 important in circumstances like this, where the 2 Secretary of the Interior is a trustee delegate, she 3 is a fiduciary, she has a unique role with regard to 4 virtually any other government official other than 5 the Secretary of the Treasury, and the Court of 6 Appeals itself has specifically stated that the 7 duties of a fiduciary and a trustee delegate are 8 materially different, and that's why the Secretary of 9 the Interior in an official capacity has no chevron 10 deference in dealing with the individual Indian 11 trust. 12 The individual Indian trust and the tribal 13 trust are the only two trusts managed by the United 14 States Government. There is no other circumstance. 15 The Social Security fund is not a true trust under 16 common law. This is it. So the duties are unique, 17 the circumstances of the case must be identified 18 accordingly. The individuals in the Environment and 19 Natural Resources Divisions are the general outside 20 litigation counsel for the trustee delegate and trust 21 counsel. To the extent they were not aware of what 22 their duties were, that is not an excuse. To the 23 extent they know, that is not an excuse. The failure 24 to preserve these documents notwithstanding repeated 25 efforts by the plaintiffs' counsel to ensure that</p>	<p style="text-align: right;">Page 73</p> <p>1 or for a lengthy period of time during Secretary 2 Norton's tenure, and to our knowledge is still going 3 on because we haven't seen evidence to the contrary, 4 as the Court pointed out in its decision of September 5 17th, 2002, and during the various discussions 6 between plaintiffs' and defendants' counsel during 7 that period of time, specifically Mr. Nagel and 8 Mr. Lawrence, it is not just the abatement of 9 contemptuous conduct. The question then becomes what 10 must be done to compensate plaintiffs because of the 11 contemptuous behavior. This issue was specifically 12 addressed with regard to what is count 5 of the 13 specifications for which Secretary Norton and former 14 Assistant Secretary McCaleb were held in contempt. 15 As you recall, Mr. Balaran, there were 16 settlement negotiations underway, during which time 17 to decide how to handle the fifth count of contempt, 18 which was the IT security, and that was based on the 19 special master's own extraordinary compendium on the 20 failure to secure individual Indian trust data. 21 During that period of time there was an order that 22 was agreed to by the defendants which conferred 23 specific authority on the Court, who translated that 24 to an order for the special master to oversight, and 25 the systems were shut down in lieu of a continuing</p>

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1 temporary restraining order and in lieu of a
 2 permanent injunction. The Court explicitly said
 3 count 5 would remain because plaintiffs were not
 4 compensated for the costs associated with the
 5 contemptuous behavior.
 6 So Mr. Balaran, based on the record of
 7 this case, that wouldn't be correct.
 8 SPECIAL MASTER BALARAN: Okay. Thank you.
 9 Why don't we take a ten-minute break.
 10 (Recess.)
 11 SPECIAL MASTER BALARAN: In keeping with
 12 the schedule that was articulated in the revised set
 13 of procedures and in the letter I sent to Ms. Hilmer,
 14 we're going to ask Mr. Brooks' counsel, Mr. Briggs,
 15 to present argument on behalf of his client.
 16 MR. GINGOLD: And Mr. Balaran, may I just
 17 make a brief statement? The plaintiffs object for
 18 the reasons stated before. We don't believe, to our
 19 knowledge, no motion to dismiss was filed by personal
 20 counsel for Mr. Brooks and that it was plaintiffs'
 21 understanding that our motion to this proceeding was
 22 going forward. But if you would like, Mr. Balaran, I
 23 would just have a general objection so we don't have
 24 to do this prior to each one.
 25 SPECIAL MASTER BALARAN: I appreciate it.

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1 Does anybody else want to make a statement regarding
 2 that? Please identify yourself.
 3 MR. FIDELL: Eugene Fidell, representing
 4 Mr. Simon. A motion was made by the plaintiffs. The
 5 proper response to a motion in in opposition. I
 6 don't believe that it was incumbent upon anybody to
 7 make motions literally to dismiss.
 8 In any event looking to the substance of
 9 the matter, which I'm sure the Court will want to do,
 10 the parties have expressed their views and we would
 11 ask that if -- we don't believe it was incumbent upon
 12 us or anybody to file a motion to dismiss. If it
 13 was, we would ask and assume that the Court would
 14 treat our submissions as in the nature of such
 15 motion.
 16 SPECIAL MASTER BALARAN: Does anybody else
 17 wish to say anything on that issue? Please, if you
 18 would identify yourself.
 19 MR. SMITH: Greg Smith, representing
 20 Charles Findlay. Special Master Balaran, I guess I
 21 want to call your attention to an order entered by
 22 Judge Lamberth dealing with this issue, where Ed
 23 Cohen asked for extra time to respond to a bill of
 24 particulars. The Court indicated it didn't need to
 25 grant the motion because the bill of particulars was

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1 neither a pleading nor a motion and in light of that,
 2 we don't believe there is any requirement or need for
 3 a mechanism by which we would move to dismiss the
 4 bill of particulars.
 5 SPECIAL MASTER BALARAN: Anybody else?
 6 Please.
 7 MR. GINGOLD: Plaintiffs filed the motion
 8 for order to show cause with regard to the named
 9 individuals. Bills of particulars were supplemental
 10 information based on claims, at least to my
 11 understanding, based on claims by counsel for the
 12 named individuals that there was insufficient clarity
 13 in the motions themselves. So the motions, the Court
 14 did not dismiss the motions for orders to show cause,
 15 the Court asked for additional clarity. So the
 16 motions for orders to show cause are still pending,
 17 which is one of the reasons I made the statement
 18 earlier that to our knowledge, if we filed an
 19 opposition brief to something filed by the defendants
 20 that we believe was false or otherwise contemptuous,
 21 merely suggesting that the matter was contemptuous in
 22 our opinion based on our understanding of the law,
 23 that is not viewed by a court as a motion for an
 24 order to show cause.
 25 That means the Court has the ability sua

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1 sponte to deal with it himself or in the alternative,
 2 as the Court did with regard to the first contempt
 3 trial, the Court explicitly asked plaintiffs on
 4 November 24th, 1998, to file specific motions because
 5 no such specific motion was made at that point in
 6 time, although the same issues were raised in
 7 briefing before the Court. So I respectfully
 8 disagree with that position.
 9 SPECIAL MASTER BALARAN: Let me clarify
 10 this, if I may. I set out in my memorandum to
 11 counsel November 4, 2002, that January 6, 2003 was
 12 the deadline for named individuals to file briefs
 13 explaining why plaintiffs' bills of particulars
 14 should be dismissed with respect to them. As far as
 15 I'm concerned, those that have filed such briefs, and
 16 they may have captioned them as motions, they may
 17 have captioned them as oppositions, they may have
 18 captioned them as responses, almost all to the last
 19 person has either in the opening sentence or in the
 20 opening paragraph have stated that that is exactly
 21 what they have done, and I have concluded as such, a
 22 consolidated opposition was filed and as far as I
 23 consider, was filed to those oppositions that were
 24 either labeled as such, labeled as responses, or
 25 labeled as motions to dismiss.

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1 All I'm concerned about is the substance.
 2 I have asked for these parties to come forward and
 3 give me their specific views as to whether or not
 4 this can withstand a motion to dismiss, whether or
 5 not these should be dismissed or not. I believe you
 6 have done so, I'm going to construe it as such. The
 7 objections are noted.
 8 MR. FIDELL: Thank you, Mr. Balaran. I
 9 would like to say that the underlying document that
 10 sort of has prompted this proceeding is a motion for
 11 an order to show cause.
 12 SPECIAL MASTER BALARAN: Correct.
 13 MR. FIDELL: On April 4th, 2002, my client
 14 filed an opposition to the motion for an order to
 15 show cause. That is the proper procedure under the
 16 Federal Rules for Civil Procedure and the local rules
 17 of this Court.
 18 MR. GINGOLD: We're not disagreeing that
 19 oppositions are required. A motion to dismiss, based
 20 on my experience, is different from an opposition
 21 brief. A motion to dismiss is, the issues are
 22 different with regard to that. And as the special
 23 master noted, plaintiffs did file a consolidated
 24 opposition and explicitly distinguished the
 25 opposition to the motions to dismiss from the reply

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1 to the opposition briefs. So plaintiffs never
 2 treated them as the same, and to suggest that merely
 3 because they are in a consolidated brief that we're
 4 treating them the same, we believe is in error.
 5 SPECIAL MASTER BALARAN: Okay. Again --
 6 oh please, go ahead.
 7 MR. SMITH: Greg Smith again. Special
 8 Master Balaran, I appreciate very much what you said
 9 and how you're treating this. The only reason I rise
 10 again is to suggest that there may be more at issue
 11 here than mere procedure. To the extent that
 12 Mr. Gingold in the last speech talked about 12(b)(6)
 13 standards, the issue I think goes more importantly to
 14 the issue of burden.
 15 If this were treated as a motion to
 16 dismiss, which I don't believe it is, then the burden
 17 would be on those seeking to move. What I might
 18 suggest to you is, I don't see any need for us to
 19 discuss anything. I don't care if the bill of
 20 particulars is filed and in the record. I don't care
 21 if the motion to show cause is filed and remains
 22 there. As long as no action is taken on it, I don't
 23 care. I might suggest that I believe the only motion
 24 referred to you and the only motion that is relevant
 25 is a motion to show cause and the question of whether

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1 that should be granted or not granted, and that is
 2 their motion and I submit, their burden. We have no
 3 burden on any motion to dismiss here because I don't
 4 think it is properly couched as a motion to dismiss.
 5 SPECIAL MASTER BALARAN: I have asked you
 6 to brief for me the legal sufficiency of their bill
 7 of particulars and their motion to show cause. I
 8 believe you have done so. I believe my authority
 9 allows me to make a decision based on the pleadings,
 10 based on these briefs as to whether or not this
 11 should go forward, whether or not discovery should be
 12 had and then from there whether or not the matter
 13 should be referred even further. The whole purpose
 14 of taking this interim step was not to waste the
 15 Court's time or the resources by engaging in
 16 discovery if in fact you can present arguments to my
 17 satisfaction that there is no legal sufficiency,
 18 either that they have not met their burden by setting
 19 out the elements for civil or criminal contempt, or
 20 fraud on the Court, or have not met their burden in
 21 any respect whatsoever and simply this should not go
 22 forward. I'm construing it as such.
 23 At the end of the day we can call it what
 24 we like and I'm not shifting the burden. I have
 25 asked you to brief this for me, you have done so,

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1 I'll make my decision accordingly as to whether this
 2 should go to the discovery phase. Okay?
 3 And to the extent, again, as I stated when
 4 I sat down, I apologize if in fact the use of briefs
 5 and/or motions to dismiss were used interchangeably.
 6 I realize that it has certain implications, but
 7 ultimately to the extent that the arguments are in
 8 front of me, I believe I have what is necessary to
 9 render a proper decision. If in fact a party feels
 10 the decision does not inure to their benefit and
 11 because of this procedural glitch that they have been
 12 prejudiced, then obviously there is a mechanism by
 13 which we can take care of it. Okay?
 14 MR. GINGOLD: Your Honor, I agree to a
 15 certain extent with counsel for Mr. Findlay. The
 16 standards are very different with regard to a
 17 briefing and an opposition to a motion for an order
 18 to show cause than they are with regard to a motion
 19 to dismiss. The standards are different and indeed,
 20 the order of reference that was entered by the Court
 21 explicitly identifies that the special master in my
 22 opinion has this very authority to do this, but in
 23 order to decide, in order to provide discovery if in
 24 fact there is a sufficient basis for going forward
 25 based on a motion to dismiss, I presume, but I do not

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1 and I was not informed that this is a hearing on the
 2 order to show cause itself, it was my understanding
 3 that this is a hearing on, or arguments on motions to
 4 dismiss that have been construed as motions -- that
 5 oppositions have been construed as motions for this
 6 purpose, and if I'm wrong, I would appreciate being
 7 corrected.
 8 SPECIAL MASTER BALARAN: Okay. Any other
 9 comments on that? Okay. Again, just to put some
 10 closure to this, I am accepting the arguments that
 11 have been made as arguments challenging the legal
 12 sufficiency of this. I believe that was set out in
 13 my letter, in my memorandum rather. I think it was
 14 articulated clearly enough. I believe you have all
 15 done so in recognition of my instructions. I believe
 16 the opposition actually stated in its own way was
 17 addressing those arguments that you made respectively
 18 in the guise of being an opposition or a response, or
 19 even a motion to dismiss.
 20 So I'm going to treat it as such. If at
 21 the end of the day I feel this should not go forward
 22 with discovery, I believe I have the authority to do
 23 so regardless of how it's captioned. Okay?
 24 Let's proceed, Mr. Briggs.
 25 MR. BRIGGS: Thank you, Special Master

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1 Balaran. My name is Bill Briggs, and I represent
 2 Phil Brooks in his individual capacity in this
 3 proceeding. With me is my colleague Marc Rendner,
 4 and Mr. Brooks is also with me in this room today.
 5 I don't want to beat a dead horse but I do
 6 want to tell you what our position is on the question
 7 of legal sufficiency, what is the standard that
 8 Mr. Gingold has to show in order for these
 9 proceedings on this E-mail overwrite, backup E-mail
 10 overwrite issue to proceed.
 11 I would hope that we could agree that the
 12 burden is on Mr. Gingold and if Mr. Gingold doesn't
 13 meet that burden, these proceedings should be
 14 terminated by a recommendation from the special
 15 master.
 16 The next thing I would hope we could agree
 17 is on is that there would be specific allegations
 18 that were made, which allegations would support a
 19 finding of civil contempt, of criminal contempt or
 20 fraud on the Court as to the target of the motion,
 21 for me as to Mr. Brooks in his individual capacity,
 22 for others as to their individual clients, for the
 23 government as to these people in their official
 24 capacity.
 25 I would expect the pleading to set forth

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1 the standards for civil contempt, the standards for
 2 criminal contempt if that's what he's seeking, the
 3 standards for fraud on the Court if that's what he's
 4 seeking, and then explain to the Court and to me and
 5 my client how he intends to meet each element of
 6 those matters. Who did what and who did it when,
 7 what orders have been violated, what fraud has been
 8 committed.
 9 But I believe, and here I expect that we
 10 will have some disagreement, that you have to go
 11 beyond mere allegations. You have to present some
 12 evidence, and I expect that everybody would agree
 13 there has to be some evidence; the disagreement might
 14 be on the quantum of that evidence.
 15 I know that in September of 2002, Judge
 16 Lamberth issued an opinion called Stewart versus
 17 O'Neill, at 225 F.Supp. 6, and he said in that, the
 18 Court must have some indication that sufficient
 19 evidence exists that the Court might find evidence
 20 sufficient to hold the defendants in contempt. He
 21 said that's the showing that has to be made before he
 22 will grant a motion to institute show cause
 23 proceedings, which is what basically we have here.
 24 Other courts have stated it more strongly
 25 and more differently and in particular I want to

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1 refer the Court to a case out of North Carolina,
 2 called RIRA Holdings, and there Judge Beatty said,
 3 unless the movant makes the necessary showing to
 4 support what he's asking for, contempt, by clear and
 5 convincing evidence, there is no need to require the
 6 object of that cause to show cause why they should be
 7 held in contempt.
 8 I think what the correct answer is, is the
 9 evidence that's presented to you at this stage must
 10 be such that if un rebutted, it would support a
 11 finding of contempt and it would support it by clear
 12 and convincing evidence. Now if that is the case,
 13 then I think what you would do is issue a
 14 recommendation to Judge Lamberth that he institute
 15 show cause proceedings and at that point in time
 16 discovery rights would attach, and at that point in
 17 time a burden might come on Phil Brooks and the other
 18 individuals to present evidence, to come forward with
 19 evidence sufficient that the prima facie showing
 20 would be rebutted.
 21 SPECIAL MASTER BALARAN: Is that the
 22 standard I should be employing for civil, criminal
 23 and fraud on the Court?
 24 MR. BRIGGS: I believe it is. Now of
 25 course the standard for what you need to show for

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1 civil, criminal and fraud on the Court is different,
 2 and I think it's fairly clear what you need to show.
 3 For civil contempt, you need to show an order and you
 4 need to show a reasonably clear and specific order
 5 that was violated by the individual. I don't think
 6 you need to show intent, but I think you have to show
 7 a clear violation of that order and you have to do it
 8 by clear and convincing evidence.
 9 Criminal contempt is much harder to show
 10 because you have to show willfulness, you have to
 11 show a mens rea contempt, I knew this order was there
 12 and by God I was going to violate it because I wanted
 13 to, I intended to, and you have to prove it beyond a
 14 reasonable doubt. And I think you would have to have
 15 evidence which if left un rebutted would rise to that
 16 level before you could recommend order to show cause
 17 proceedings on criminal contempt.
 18 Fraud on the Court, again, you need
 19 knowing intentional conduct, not of some misstatement
 20 in a brief, but of some major fraud designed to
 21 undermine the integrity of the judicial process,
 22 bribing a judge, putting on perjured testimony, or to
 23 completely rob the plaintiffs of their ability to
 24 litigate the case.
 25 SPECIAL MASTER BALARAN: Let me back up.

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1 This is a matter of some concern to me. Plaintiffs
 2 were required to file bills of particulars here. In
 3 most cases bills of particulars are usually filed, as
 4 I understand, where an indictment is insufficient on
 5 its face to apprise the defendant or whomever of the
 6 charges pending against him, and therefore bills of
 7 particulars are raised simply to allow that person to
 8 know when and where and what in fact they have done.
 9 Couldn't I decide that this simply doesn't rise to
 10 the necessary level to warrant discovery, much less
 11 go to the next level, an order to show cause, by
 12 finding in fact that the bills themselves were not
 13 sufficiently particularized?
 14 MR. BRIGGS: I absolutely think you could
 15 and I think you should. I think the issue of
 16 standard is truly an interesting academic issue, but
 17 I think it is an academic issue. Because I don't
 18 care where you draw the line, I don't think there are
 19 allegations of specificity such against my client
 20 that this matter should go forward any further at
 21 all. And I think I'm saying to you that I agree with
 22 you.
 23 As you know, Judge Lamberth on March 15th
 24 of last year said to Mr. Gingold, he wanted him to
 25 lay out the evidence so each of these individuals

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1 would know exactly what it is they have to defend
 2 themselves against. You asked the question today,
 3 how do these individuals know how to defend
 4 themselves?
 5 And while Mr. Gingold said a lot of
 6 things, one of the things he said was the level of
 7 specificity was unprecedented here. As to Mr. Brooks
 8 it's certainly not unprecedented, because the level
 9 of specificity as to Mr. Brooks is not there. And I
 10 think we need to have both as a matter of law and in
 11 compliance with the judge's March 15th statement and
 12 in compliance with your ruling on November 4th,
 13 specific facts that will tell us what is the order
 14 that we have violated and how have we violated, what
 15 is the fraud that we have perpetrated and how have we
 16 perpetrated it.
 17 And I don't think you can do it. It
 18 certainly hasn't been done in anything that I have
 19 read, and it's certainly not sufficient to say this
 20 case has been going on for six years or seven years,
 21 or whatever Mr. Gingold says, and you just have to
 22 read all the pleadings and you can figure it out for
 23 yourself. Well, that's just not good enough.
 24 SPECIAL MASTER BALARAN: Does Mr. Brooks
 25 take the position that the six orders articulated in

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1 the March 20th, 2002, are the orders that have to
 2 ground contempt?
 3 MR. BRIGGS: That's the universe of orders
 4 from which you have to make a decision. And you will
 5 note in the bill of particulars that we responded to,
 6 those orders weren't even identified, or the specific
 7 ones of those that we were alleged to have violated
 8 weren't identified. And I frankly think the reason
 9 they weren't identified is there is no way you can
 10 allege that Mr. Brooks overwrote backup E-mail tapes,
 11 that Mr. Brooks took some action to destroy this
 12 evidence.
 13 And Mr. Gingold even said, I'm not even
 14 asserting that Mr. Brooks told someone to destroy
 15 tapes. So there is just no nexus between what
 16 Mr. Brooks is alleged to have done in this case and
 17 the violation of any order.
 18 SPECIAL MASTER BALARAN: How about the one
 19 statement that's attributed to Mr. Brooks in the
 20 footnote?
 21 MR. BRIGGS: I didn't see that, and that's
 22 the footnote in a statement that was written February
 23 12th, 1999, and what he said was, DOI has retained
 24 the backup tapes but has not undertaken the time
 25 consuming and costly search of the backup tapes.

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1 That statement, I don't think could even
 2 be alleged to violate any order. I mean if it is,
 3 assuming it is a completely false statement, it still
 4 doesn't violate any order.
 5 SPECIAL MASTER BALARAN: But could that
 6 rise to impugning the dignity of the Court or could
 7 that rise to being obstructive to the orderly process
 8 of the Court to rise to fraud on the Court, if in
 9 fact Mr. Brooks knew at the time that the statement
 10 was false?
 11 MR. BRIGGS: I think that's the only place
 12 that inquiry should be focused on, and I think in
 13 fact it can't. The facts that are laid out in the
 14 papers before you that we laid out in the papers and
 15 the facts as they exist are that on February 12th in
 16 a footnote, a single sentence of a footnote, that
 17 statement was made. When you issued your ruling on
 18 May 11th, three months later, a meeting was held
 19 between DOJ and DOI people, and at that point in time
 20 the DOJ attorneys who were present, and I don't even
 21 think Mr. Brooks was present at that meeting, learned
 22 that in fact this statement wasn't accurate, that
 23 they had been overwriting the backup tapes as a
 24 routine matter.
 25 And Ms. Hilmer told you those facts when

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1 she made her presentation and she told them to you
 2 accurately. As soon as Mr. Brooks found out about
 3 that, as soon as he learned what happened, he made a
 4 phone call to you on the Monday after he learned
 5 that, Wednesday or Thursday. Two days later, three
 6 days later, he filed another pleading which is
 7 Exhibit 2 to our papers, where he said that was
 8 wrong, that statement was incorrect.
 9 That kind of action, putting a statement
 10 in a footnote, immediately correcting the record as
 11 soon as the information in the footnote is found to
 12 be false, is the antithesis of a fraud on the Court.
 13 It evidences no intention on Mr. Brooks's part to
 14 mislead anyone. It is as a matter of just common
 15 sense ludicrous to observe that if you wanted to
 16 commit a fraud on the Court, you would stick the
 17 false statement in a footnote and then you would
 18 correct it three months later. It just doesn't rise
 19 to that level, and that's the facts that we're
 20 dealing with insofar as Mr. Brooks is concerned.
 21 SPECIAL MASTER BALARAN: Let's assume for
 22 a moment that Mr. Brooks intended in fact to make
 23 this statement, knowing it was false. Do you believe
 24 legally that that rises to the standard of fraud on
 25 the Court?

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1 MR. BRIGGS: No, I don't. And I will say,
 2 I'm assuming that fact just for purposes of answering
 3 your question, because I don't think there is any
 4 evidence that that's the case. I think fraud on the
 5 Court is an extraordinary showing, it is used loosely
 6 here and it is used in my view too loosely. The case
 7 law talks about it being the "very unusual case
 8 involving far more than injury to a single litigant."
 9 Cases where judges are bribed, where witnesses are
 10 put on who knowingly present perjured testimony, and
 11 as Judge Lamberth said, it means that you have
 12 sentiently set in motion some unconscionable scheme
 13 calculated to interfere with the judicial system's
 14 ability to impartially adjudicate a matter by
 15 improperly influencing a trier of fact or unfairly
 16 hampering the presentation of the opposing party's
 17 claims.
 18 A footnote statement in a pleading about
 19 backup E-mail tapes being preserved simply cannot
 20 rise to that level, even if it were made
 21 intentionally with a design, I just think I'll tell a
 22 lie today, and so on, stick that in the papers.
 23 I would say to you that there is another
 24 underlying thing that I would like you to keep in
 25 mind as you consider Mr. Brooks's situation. These

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1 are serious charges. I mean, you're accusing someone
 2 of violating a court order, you're accusing someone
 3 of criminal actions, you're accusing someone of
 4 committing a fraud on the Court. One would think
 5 with those kinds of accusations, there would be some
 6 motive. What possible motive could there be to lie
 7 about backup E-mail tapes being preserved?
 8 SPECIAL MASTER BALARAN: Well, motive is
 9 not an element in this.
 10 MR. BRIGGS: It's not an element but it's
 11 important if you're looking for intent, if you're
 12 looking for the kind of knowing fraud that you have
 13 to have for fraud on the Court. One would think that
 14 maybe this means that we will win this case and I
 15 will get to be lawyer of the year for the Department
 16 of Justice. That's ridiculous. One would think
 17 there's some personal or professional benefit that
 18 could be gained by this. I can't even imagine one
 19 and frankly, I don't even think Mr. Gingold can
 20 imagine one, although I will certainly be blessed
 21 with his views on that in a few minutes.
 22 We just don't have the kind of conduct
 23 even alleged against Mr. Brooks that warrants any
 24 action.
 25 There is one other thing I would like you

<p style="text-align: right;">Page 94</p> <p>1 to think about on the civil contempt, fraud on the 2 Court side. If you're going to go down the road of 3 civil contempt, it must be to achieve one of two 4 purposes, to remedy something or to compensate 5 somebody for a loss. There is no way that the 6 remedial purposes of civil contempt can be met with 7 regard to Mr. Brooks. Even if he somehow or the 8 other had a clear order that he violated, even if Mr. 9 Brooks said I'm going to go out and destroy backup 10 E-mail tapes just for the fun of it, and I'm 11 violating an order that had been issued, that of 12 course is not what we have, but you could never bring 13 those tapes back. Civil contempt wouldn't be the way 14 you would go to resolve that issue. 15 And as far as compensation, in your July 16 27th order of 2001, I believe, you ordered that 17 Mr. Gingold be compensated for the expenses he has 18 incurred in this matter. That's a moot issue as 19 well. There is no purpose that could be served by 20 instituting an order to show cause proceeding against 21 Mr. Brooks for civil contempt. 22 And then as far as criminal contempt, I 23 think that is a ludicrous charge, I think that is a 24 charge that has absolutely no basis. You need an 25 order, you need a showing of willfulness, you have to</p>	<p style="text-align: right;">Page 96</p> <p>1 pleadings, and the Court explicitly stated that it 2 must be clear that no relief can be granted under any 3 circumstances or facts that could be proved 4 consistent with the allegations, that all plaintiffs' 5 allegations must be accepted as true, and that all 6 facts must be resolved and inferences must be made in 7 favor of the plaintiffs. 8 SPECIAL MASTER BALARAN: Can I stop you 9 with that, because that's something that you read 10 earlier. You are absolutely correct that that's the 11 standard under 12(c) for a judgment on the pleadings, 12 and on 12(b)(6) where you can't state any cause 13 that's legally grounded. But aren't we talking about 14 something that has to be threaded through Rule 9(d), 15 I believe it is, which requires a specificity in 16 fraud or requires sufficient pleadings? In which 17 case, yes, you still have to give a short and plain 18 statement and yes, 12(c) applies, but isn't there a 19 heightened standard still to specify with some 20 particularity what it is that you're alleging? And 21 if that's the case, can't this complaint or bill of 22 particulars be dismissed even under 12(c) for failure 23 to state fraud with the requisite particularity? 24 I mean, here the Court imposed a 25 requirement that bills of particulars be filed. Why</p>
<p style="text-align: right;">Page 95</p> <p>1 show it beyond a reasonable doubt. To the extent it 2 is ludicrous to suggest civil contempt out of these 3 facts, it is madness to suggest criminal intent. 4 So here's what we're asking you to do. 5 You have to make a recommendation to the Court. We 6 want you to recommend to the Court that insofar as 7 Mr. Brooks in his individual capacity is concerned, 8 the plaintiffs have not met the burden they need for 9 these proceedings to go on, that they have not 10 presented any evidence, much less allegations that he 11 has acted in contempt of court or has committed fraud 12 on the Court. We think the bills of particulars are 13 deficient, we think the motion is deficient, and we 14 ask the special master to enter a recommendation that 15 these proceedings against Mr. Brooks be terminated at 16 once. 17 SPECIAL MASTER BALARAN: Thank you. 18 Mr. Gingold. 19 MR. GINGOLD: Yes. Plaintiffs 20 respectfully disagree with Mr. Briggs' 21 characterization of the burden in the case. As I 22 indicated earlier, the Court on November 5th, 1998, 23 established the burden and the standards for motions 24 to dismiss. The Court has stated they are to be 25 treated the same way as motions for judgment on the</p>	<p style="text-align: right;">Page 97</p> <p>1 wouldn't 9(d) apply and in which case, why wouldn't 2 you still be under the burden to state whatever it is 3 your allegations are, but again, with that requisite 4 specificity? 5 MR. GINGOLD: Well, I don't agree with 6 anything you said, Mr. Balaran. First of all, the 7 Court did not impose a standard of bills of 8 particulars. That characterization was adopted by 9 plaintiffs. You can search the judge's record high 10 and low and not see those words used. 11 SPECIAL MASTER BALARAN: Well, I said 12 articulate with specificity, so just indulge me in 13 this, if you will. I mean, this thing got rolling 14 where I set into motion something that said everybody 15 had to articulate, but it was never objected to, it 16 was never brought back to me as too onerous a 17 standard, or a standard that simply didn't apply to 18 these proceedings, or one that was in contravention 19 to a prior court order, or an inference of something 20 the Court may have said. And as a result of that, I 21 expected bills of particulars that laid out with 22 specificity, tell me time, place, person, order, 23 et cetera, of what these people did, what they didn't 24 do, et cetera, that would warrant the imposition or 25 the going forward either on a discovery basis or</p>

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1 recommendation to the Court.
 2 And I'm saying, you're absolutely right
 3 that that's the standard, but doesn't that standard
 4 take on a different sort of patina, if you will, when
 5 you look at it through 9(d), which says that you
 6 still have to state what it is you want to state with
 7 the requisite specificity required?
 8 MR. GINGOLD: The answer is no, again,
 9 Mr. Balaran, for several reasons, one of which I
 10 think you misstate and misapply it with regard to
 11 this situation, because the circumstances of 9(d)
 12 don't apply to fiduciary situations. I believe it's
 13 9(c) that does, and that's an entirely different
 14 situation because of the affirmative obligation on
 15 the part of the fiduciary and the fiduciary's counsel
 16 to provide that material information to the parties.
 17 So to rely on 9(d) in plaintiffs' counsel's opinion,
 18 Mr. Balaran, is in error.
 19 Secondly, plaintiffs believe that the
 20 specificity, as I've stated before, is quite clear.
 21 There are literally scores of paragraphs which
 22 identify the issues, and to be a little more specific
 23 since we're dealing with Mr. Brooks, let's deal with
 24 some of the representations that Mr. Brooks made.
 25 Now I thought this was an issue with regard to a

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1 motion to dismiss and whether or not as a matter of
 2 law it could be dismissed, but apparently this
 3 proceeding is turning into something else as well,
 4 but that's okay, Mr. Balaran.
 5 I would also like to point out that prior
 6 to the June 10th, 1999 trial, the issue was raised
 7 with regard to E-mail and Mr. Brooks specifically
 8 told the Court that there was no reason to deal with
 9 the E-mail because essentially there was nothing
 10 relating to the case. That is a patently false
 11 representation because in the few E-mail documents
 12 that have been copied and produced, there is clearly
 13 information that is directly pertinent to all the
 14 issues in this case, including the malfeasance that
 15 was identified by the Court of Appeals with regard to
 16 management of the individual Indian trust.
 17 I would also like to point out that -- and
 18 by the way, these items were identified in
 19 specificity in plaintiffs' factual appendices to the
 20 motions for orders to show cause, and they were
 21 restated in part in the bill of particulars with
 22 regard to Mr. Brooks himself. I would also like to
 23 point out during the discussion with the Court, and
 24 inasmuch as by the way, plaintiffs have never said
 25 the fraud is on the plaintiffs alone. Indeed, the

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1 fraud is significantly on the Court because at least
 2 it has been up until today plaintiffs' understanding
 3 that the Court must receive candid information and
 4 responses from counsel who are representing parties.
 5 Perhaps the special master has a different view than
 6 that.
 7 But one of the points that was made by Mr.
 8 Brooks is stated, let's see, on paragraph 60 and 61
 9 of Plaintiffs' Exhibit 43 of the factual appendix to
 10 plaintiffs' motion for and order to show cause, and
 11 it talks about Mr. Brooks's description. There is a
 12 condition -- this is language directly from the
 13 transcript, and I believe it is accurate. There is a
 14 condition on the E-mail, and that is to the extent
 15 that it was produced, it may give, and has not yet
 16 been produced and will be produced as the trial goes
 17 along, it may lead the plaintiffs to need to reopen
 18 if they have closed their case, and to call
 19 additional witness or witnesses to put in E-mails
 20 that either give them information that they didn't
 21 previously have, or lead them to witnesses they
 22 didn't previously have, and I will have to address
 23 those as we go along. I believe that was the Court's
 24 description of the colloquy you had with Mr. Brooks.
 25 And then it goes on where Mr. Brooks made

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1 a response to the Court, and this is at appendix
 2 paragraph 57 and it states, I would like to identify
 3 a couple of other things that counsel talked about,
 4 and our language, we added plaintiffs' counsel, and
 5 this is going on with what Mr. Brooks says, said
 6 destroying E-mail, not true. Not true. And I think
 7 that is inappropriate to suggest that the solicitor's
 8 office is destroying E-mails, when what he is talking
 9 about is not the archival system that got canned, but
 10 a system crash where there was a mistake and someone
 11 overwrote it.
 12 Now, it is very difficult to review the
 13 record of this case and conclude there was an in
 14 advertent crashing of the E-mail system that resulted
 15 in what the special master found was systematic
 16 overwriting of E-mail and the failure to disclose
 17 that. Now again, if the special master has
 18 reconsidered his opinion, plaintiffs would like to
 19 hear that, because again, if we're dealing with
 20 different ground rules, we would like to at least be
 21 informed about it before it occurs.
 22 And then Mr. Brooks went on, and this is
 23 found at paragraph 59 of the contempt motion factual
 24 appendix and it states, now what's the question they
 25 keep raising? They said, well, the solicitor's

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<p>1 office E-mails were destroyed. That's not so. I 2 mean, what was overwritten were backup tapes and that 3 was for a couple of months. 4 Now, I do not believe anybody can honestly 5 state in this case that the E-mails for the 6 solicitor's office as well as the backup tapes and 7 apparently as well as the hard copy documents, 8 because they haven't been produced, have not been 9 destroyed, and it's more than a couple of months, 10 it's years. How that statement could be made when 11 this issue was such a hot issue which was extremely 12 important and clearly would lead to discovery of 13 additional information is beyond me. Is that 14 inadvertent? It may be inadvertent. Was Mr. Brooks 15 misinformed by his client? I don't know that. If 16 that's the case, as I said earlier, that's a 17 different situation. No lawyer is responsible for 18 hiring an FBI agent to check on the validity of his 19 client. 20 SPECIAL MASTER BALARAN: What order did 21 Mr. Brooks violate? Of the six, and again, I'm going 22 to ask you to rest on my hypothetical for a moment 23 that my authority is circumscribed to the March 20th, 24 2002 motion and the six orders that you stated on 25 page 12.</p>	<p>1 that was ordered by the Court was a complete and 2 accurate accounting of all funds, not some funds, not 3 most funds, not 90 percent of the funds, all funds. 4 And if in fact the documents aren't able to be 5 preserved and the information was misrepresented as 6 being preserved, when further action could have 7 insured the protection in our opinion, that is a 8 violation of the order. 9 Is that clear enough, Mr. Balaran? 10 SPECIAL MASTER BALARAN: No. 11 MR. GINGOLD: Okay. What more do you 12 want? 13 SPECIAL MASTER BALARAN: I'll tell you. 14 Since this issue is focused on the E-mail backup 15 tapes, I need to know specifically what order 16 Mr. Brooks violated, which of the six or all of the 17 six, and tell me what specifically he did in 18 violation. I mean, I'm assuming for the moment, and 19 I'm not going to challenge the representations as 20 being accurate as you have read them, and let's even 21 assume for the moment that he did it with the 22 necessary scienter. I'm asking you, which order did 23 he violate in making the representations? 24 MR. GINGOLD: As I said, he violated every 25 single order that required the preservation and</p>
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<p>1 MR. GINGOLD: Each one of the document 2 production orders and the document preservation 3 orders. 4 SPECIAL MASTER BALARAN: And Mr. Brooks 5 has violated those orders? 6 MR. GINGOLD: I think I just answered the 7 question. You asked me which orders did he violate 8 and my response was -- let me be clear. It has been 9 our position and this has been stated in this 10 litigation for quite a long time, if you destroy 11 documents, you can't produce them, you violate a 12 court order to produce documents. If you know about 13 the destruction and don't inform the Court, so 14 actions can be taken to preserve whatever documents 15 are being made, that undermines the Court order. 16 It is plaintiffs' understanding, and maybe 17 the special master will correct me where I'm wrong, 18 that the purpose of the litigation is to, and the 19 purpose of Federal Rules of Evidence, and the purpose 20 of some of these court orders was to ensure that 21 whatever documents hadn't been destroyed to those 22 particular dates would be preserved and available for 23 not only discovery of plaintiffs relative to certain 24 issues, but to ensure that the accounting ordered by 25 the Court could be conducted. And the accounting</p>	<p>1 production of documents. You cannot preserve 2 documents if they're being destroyed. You cannot 3 produce documents if they are being destroyed. 4 SPECIAL MASTER BALARAN: But are you 5 saying that Mr. Brooks destroyed the documents, 6 because I believe you said to the contrary before. I 7 just need to understand, again, because this is 8 contempt and because under any standard requires a 9 certain level of specificity, I have six orders that 10 you laid out yourself, and I need to know which of 11 these orders Mr. Brooks has violated and what conduct 12 he has taken that has actually violated these orders. 13 Simply answering my question to say every order in 14 this case just doesn't do it. 15 MR. GINGOLD: That's not what I said, Mr. 16 Balaran. You said six orders. There are a hell of 17 lot more than six orders in this case. 18 SPECIAL MASTER BALARAN: And I'm asking 19 you if you would, to focus on the six that are in the 20 March 20th, 2002 motion. 21 MR. GINGOLD: And as I said, each specific 22 order that requires preservation of documents, 23 documents are described and defined find in the 24 Federal Rules of electronic records as well. 25 Armstrong specifically references the fact that there</p>

<p style="text-align: right;">Page 106</p> <p>1 are multiple types of documents and multiple types of 2 electronic documents, and electronic documents in 3 their various forms are documents that must be 4 preserved. The definition of a federal record for 5 purposes of preservation was articulated in the 6 inspector general report when it restated the 7 standards provided to the Interior Department by the 8 Justice Department. Each one of those standards, if 9 you'd like me to go through, I will. 10 But in plaintiffs' opinion, Mr. Balaran, 11 when an attorney has an obligation under a court 12 order and by the way, as an officer of the Court and 13 other factors as well, to ensure that the documents 14 of his client are protected, he does not do that, and 15 to represent to the Court -- and to engage in due 16 diligence to be sure they are still being protected 17 -- but to represent otherwise when they are being 18 destroyed and not being preserved, in plaintiffs' 19 opinion is a violation of an order that requires 20 production, and it is a violation of an order that 21 requires preservation. 22 Is it Mr. Brooks's direct destruction that 23 is in issue? No. If it is the special master's 24 position that it is only the individual who is 25 responsible for the destruction or the failure to</p>	<p style="text-align: right;">Page 108</p> <p>1 adverse inferences, by the way, as the Court himself 2 has stated, is an inference that fraud was committed. 3 And again, Mr. Nagel in representing the 4 Secretary during the contempt trial that spanned 5 three months specifically stated, intent wasn't 6 necessary explicitly to find it, and in fact the 7 Court addressed that in detail in his opinion, 8 Mr. Balaran. But, is there intent? I would suggest 9 that based on what the judge has ordered, and 10 plaintiffs do try and comply with orders, 11 notwithstanding the special master's suggestion that 12 we apparently put together vague and ambiguous bills 13 of particulars, plaintiffs believe there were clear 14 and unambiguous bills of particulars that explicitly 15 incorporated by reference various paragraphs and 16 sections of the motions that were filed and the 17 factual appendices as well. 18 Moreover, I would also like to point out, 19 it's not limited to a couple of statements. What was 20 used in the details of plaintiffs' motion were 21 illustrations, because we incorporated the paragraphs 22 by reference, which identified with specificity each 23 brief filed with the name of Mr. Brooks on it, either 24 as the signer of the brief or as on the brief. The 25 special master -- which deal with these</p>
<p style="text-align: right;">Page 107</p> <p>1 produce who is culpable, that is inconsistent, 2 literally, with the language of this Court's February 3 2nd, 1999 order where the Court specifically held in 4 contempt Secretary Rubin, Secretary Babbitt, and 5 Assistant Secretary Gover, for not only the failure 6 to produce documents but their cover-up of their 7 failure to produce documents. It wasn't isolated 8 simply to the failure to produce, Mr. Balaran. 9 Now again, if in fact this Court has 10 changed its position, plaintiffs would like to be 11 aware of that. 12 SPECIAL MASTER BALARAN: Is it your 13 contention that Mr. Brooks's representations that you 14 read before from your appendix, that he did so 15 willfully? 16 MR. GINGOLD: I am not going to speak at 17 this point to Mr. Brooks's intent. However, as the 18 Court pointed out in its September 17th, 2002 19 decision, the Court can infer intent for purposes of 20 fraud based on the conduct and the record and the 21 circumstances of the case. I would suggest where 22 this special master himself has identified the 23 consequences of spoliation in its February 2000 24 report on the Treasury documents, where there was 25 spoliation, adverse incidents, and one of those</p>	<p style="text-align: right;">Page 109</p> <p>1 representations on the E-mail, I might add, not only 2 to the special master, were these briefs filed, but 3 they were also filed with the Court directly. Those 4 are identified with specificity in the factual 5 appendices. 6 Further, as the special master stated 7 explicitly, the attorneys who signed the briefs and 8 are on the briefs even as of counsel, are responsible 9 for the accuracy of the information in those briefs. 10 And you cited, I can recall, Mr. Balaran, both a book 11 that was authored by the former Deputy Attorney 12 General for the statement with regard to the 13 government lawyers' responsibility in particular and 14 lawyers in general, and the specific duties of candor 15 that attorneys owe to parties and to the Court. 16 Now, has the Court relied on this 17 information? In plaintiffs' opinion, it has, and 18 that's where the problem is, because for years 19 actions weren't taken to deal with these particular 20 issues, relying on the representations of Mr. Brooks 21 and his colleagues. So now the question is, have 22 plaintiffs' counsel relied on it? Plaintiffs' 23 counsel couldn't rely on it, plaintiffs' counsel 24 challenged it every single time because the 25 information that plaintiffs' counsel was getting was</p>

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1 completely in conflict with what Mr. Brooks was
 2 representing, and a tremendous amount of resources
 3 were expended in that regard. So contrary to what
 4 Mr. Briggs has suggested and contrary to what the
 5 special master suggested before, that reliance on
 6 compensation is important.
 7 Now one of the other elements that Mr.
 8 Brooks pointed out is an important element, and that
 9 is the corrective or remedial measure associated with
 10 civil contempt. As Mr. Briggs properly characterized
 11 the purpose of civil contempt, it is remedial
 12 principle and is compensatory to the extent the party
 13 is injured by the contemptuous conduct.
 14 If you read some of the cases that
 15 district courts have reviewed this issue on contempt,
 16 unlike the situation where a government lawyer left
 17 the government, is no longer on the case, where a
 18 government lawyer is still in the government, and
 19 although that government lawyer either because of
 20 recusal or otherwise is no longer participating in
 21 the case, the remedial consequence of the sanctions
 22 in addition to the compensatory aspect, was noted by
 23 several courts because of the corrective behavior of
 24 the counsel still working on the case.
 25 The whole point of civil contempt as we

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1 understand it is to correct behavior that's
 2 considered improper. What must be done to correct
 3 that behavior is for the most part within the
 4 discretion of a court depending on the nature and
 5 scope of the behavior. Now under circumstances like
 6 these where this Court has stated repeatedly that he
 7 has been duped, that he has been deceived, that the
 8 matters have been hidden from him -- this is not
 9 plaintiffs' language, this is the language of Judge
 10 Lamberth, that is precisely the extraordinary
 11 situation that Mr. Briggs made reference to.
 12 I have only been practicing law for 29
 13 years and this spoliation was the most serious ever
 14 made to him, with regard to the extraordinary finding
 15 of fraud by a sitting cabinet official, and this is
 16 three sitting cabinet officials. And as the judge
 17 pointed out and suggested in his opinion, it wasn't
 18 done by the cabinet officials alone. Lawyers have
 19 litigated this case, every brief has been signed by
 20 lawyers, every brief has been drafted by lawyers.
 21 The first team of lawyers in this case was
 22 replaced. The second team led my Mr. Brooks came in.
 23 The third team is now in this case, and that third
 24 team has been referred to the disciplinary panel of
 25 the United States District Court for unethical

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1 behavior. Is this an extraordinary situation? Yes,
 2 it is, and I concur with Mr. Briggs.
 3 Does civil contempt restrict itself under
 4 these circumstances to bribing a judge? Heavens no.
 5 Does civil contempt go to the circumstances that
 6 we've seen in this case, and yes, it is important to
 7 look at the history of this case. And why was it so
 8 important about how Mr. Brooks came in? Because when
 9 Mr. Brooks came in, if you recall, Mr. Balaran, there
 10 was a dialog between Mr. Brooks and the Court in open
 11 court, and Mr. Brooks saying the need to have
 12 basically a new beginning, refreshing information,
 13 candor to the Court.
 14 And it is very clear to the plaintiffs
 15 that the Court relied on Mr. Brooks's
 16 representations. And for years, the plaintiffs in
 17 this case have been damaged, and they have been
 18 damaged in terms that are not compensable or
 19 quantifiable, because this is a trust and there are
 20 innocent people being harmed as this is being
 21 delayed. The failure to produce documents has
 22 delayed this case. The destruction of documents has
 23 delayed this case. The representations with regard
 24 to destruction has delayed this case, as have the
 25 violations of orders that required production within

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1 certain periods of time. And if it is the special
 2 master's view that under those circumstances, if it
 3 is not -- and again, I'm not going to pretend to
 4 understand the position of the special master, but if
 5 the view is now that lawyers do not have the duty, do
 6 not have due diligence responsibilities, do not have
 7 the obligation, as Mr. Brooks I believe was stated
 8 specifically to have, to make sure based on the
 9 circumstances of this case, based on the record of
 10 his clients, to go back and verify the accuracy of
 11 the information before he says that, then that's
 12 okay, we're dealing with a different set of rules,
 13 and at least the plaintiffs understand that, but we
 14 know the rules have changed, and we respectfully
 15 would defer to the special master as he understands
 16 whatever these new rules seem to be.
 17 But I will restate this. It is
 18 plaintiffs' position, orders can be violated in a
 19 variety of different ways. Orders are entered for a
 20 variety of different purposes, and orders in this
 21 case were entered to preserve documents, they were
 22 entered to produce documents, they were entered to
 23 preserve documents so an accounting can be performed
 24 as the Court of Appeals said was the most fundamental
 25 duty, and E-mail is directly related to that, as is

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1 the backup tapes, especially because the defendants
 2 themselves have admitted they had massive destruction
 3 of the hard copy documents themselves.
 4 So the purpose of this case is to enforce
 5 the trust, Mr. Balaran, including its terms,
 6 including the accounting that is owed, that this
 7 Court has found is owed, that the Court of Appeals
 8 has found is owed, and as a matter of fact, as
 9 recently as within the last month, the United States
 10 Supreme Court has confirmed the common law trust
 11 duties that apply to the Secretary of the Interior
 12 with regard to the trust. These duties are
 13 paramount, they are the highest duty owed by the
 14 United States Government as articulated by the Court.
 15 At the same time, counsel for the
 16 fiduciary, the trustee, is representing that
 17 documents aren't being destroyed when they are. At
 18 the same time, documents are being destroyed when he
 19 represented they're being preserved? And at the same
 20 time, documents are being produced when they are not.
 21 Under those circumstances, I do not believe that it
 22 can be argued that that conduct is not a violation of
 23 the order.
 24 I will also say once again, because I have
 25 said it twice before, if Mr. Brooks was deceived by

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1 his client, that lets him off the hook in my opinion,
 2 because he is in the same position the plaintiffs are
 3 in. Mr. Brooks has never said that by way of
 4 affidavit or otherwise, and these issues were raised
 5 time and time and time again, and when it's
 6 conspicuous that that's not the case, when it's
 7 conspicuous that he had the obligation, when his boss
 8 Jim Simon confirmed to plaintiffs in June of 1996
 9 that all electronic records were going to be
 10 preserved at Interior and Treasury, and then nothing
 11 was preserved after that, including the fact of the
 12 special master's finding of systemic destruction,
 13 there's a violation of these orders in our opinion.
 14 And again, we have tremendous respect for
 15 the special master in this case. We believe that he
 16 has done work that nobody probably could have done in
 17 this case. We respect his analysis and conclusion,
 18 but we strongly disagree with the special master's
 19 suggestion that behavior that conceals destruction,
 20 that obstructs the enforcement of court orders, and
 21 that harms the fiduciaries, the plaintiffs in this
 22 case, is not contemptuous conduct.
 23 SPECIAL MASTER BALARAN: Mr. Briggs.
 24 MR. BRIGGS: If I could be very brief,
 25 Mr. Gingold give an impassioned speech which we've

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1 heard once before today and I'm sure we will hear
 2 again, about what a horrible thing has been done to
 3 his clients, about the broad duties of the government
 4 to their fiduciaries about enforcing the trust.
 5 I'm not here to defend the government, I'm
 6 not here to defend what may or may not have happened.
 7 I'm here to defend an individual that has been
 8 accused of criminal misconduct, of violating court
 9 orders, and of committing a fraud on the Court, and I
 10 believe falsely accused.
 11 What Mr. Gingold says about fiduciary
 12 obligations may be fine from a theoretical point of
 13 view. Mr. Brooks had no fiduciary obligations to his
 14 client. He was an attorney who had a fiduciary
 15 obligation and an ethical obligation to his client.
 16 SPECIAL MASTER BALARAN: And to the Court.
 17 MR. BRIGGS: And to the Court, absolutely,
 18 but not to the plaintiffs.
 19 We're not talking here about general
 20 destruction of E-mails and general destruction of
 21 documents. We're talking about overwriting backup
 22 E-mail tapes and that's all we're talking about, and
 23 loose language to the contrary helps Mr. Gingold's
 24 case not a bit.
 25 SPECIAL MASTER BALARAN: Let me ask you,

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1 Mr. Briggs, if I may, if I construe the order
 2 requiring the production of the third production as
 3 to include the information on E-mail backup tapes,
 4 and this is a question I posed to Ms. Hilmer, would
 5 you agree or disagree that by representing that such
 6 conduct did not take place, would you believe that's
 7 contemptuous of the order?
 8 MR. BRIGGS: An intentional
 9 misrepresentation?
 10 SPECIAL MASTER BALARAN: Well, let's take
 11 the word intent out for a moment. Let's just say
 12 that I go before the Court and I said that's not
 13 happening, whether I intended to do so or not, would
 14 you believe that rises in any manner to a level of
 15 contempt of the Court in terms of violating that
 16 order?
 17 MR. BRIGGS: I don't believe it's a
 18 violation of that order. I'm not condoning that if
 19 it happened, that that would be appropriate, but no,
 20 I don't think it does. We're talking about a very
 21 narrow, very confined issue when we talk about civil
 22 and criminal intent, and fraud on the Court.
 23 SPECIAL MASTER BALARAN: Doesn't an
 24 attorney have an obligation toward the Court
 25 vis-a-vis his client, to make sure the instructions

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1 of the Court are carried out in the manner set out by
 2 the Court?
 3 MR. BRIGGS: Unequivocally, yes, but how
 4 is that enforced? Is it enforced through a contempt
 5 proceeding or is it enforced by forwarding something
 6 to the Office of Professional Responsibility? I
 7 think that's the issue. And while I categorically
 8 deny that there is any misrepresentations here and I
 9 am certainly not defending an attorney's right to
 10 make a misrepresentation to the Court, and I don't
 11 want anything I say to be --
 12 SPECIAL MASTER BALARAN: I know you're
 13 not.
 14 MR. BRIGGS: But what you did ask Mr.
 15 Gingold is what orders did Mr. Brooks violate, and
 16 his response was the typical response that we get
 17 every time in the papers and every time so far today,
 18 he violated all the orders, many, many orders, even
 19 more than the six you're talking about. He has not
 20 focused on a specific order and the specific language
 21 that's being violated and the specific acts that are
 22 taken, he will not focus on that, he cannot focus on
 23 that, but he must focus on that in order to let these
 24 proceedings go further against Mr. Brooks.
 25 MR. GINGOLD: One last point I would like

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1 to correct. Former Solicitor Krulitz issued an
 2 opinion in 1978, he's a former Solicitor of Interior,
 3 and he explicitly stated in his opinion that the
 4 Justice Department lawyers indeed do have a fiduciary
 5 responsibility to the individual Indian trust
 6 beneficiaries and the tribal trust beneficiaries
 7 because of the unique fiduciary relationship that the
 8 United States has to the individual Indians and
 9 Supreme Court cases are decided by that. That
 10 opinion of the Solicitor has not been withdrawn.
 11 That opinion of the Solicitor was introduced into
 12 evidence in this case. There are opinions of other
 13 solicitors and assistant solicitors just like that
 14 that were relied on by the United States Court of
 15 Appeals similarly.
 16 So we have a situation that again, I
 17 presume everyone here has tremendous trust experience
 18 in litigation because that's what we're dealing with
 19 in these issues, and that's specifically what we're
 20 dealing with with regard to counsel who is
 21 representing the trustee in litigation and otherwise.
 22 There are different standards. This is not
 23 litigation about a failed government program. This
 24 is litigation about a real trust, and information
 25 where there is a heightened duty of candor and every

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1 court, including the United States Supreme Court
 2 recently, has stated that same statement. So whether
 3 or not the Justice Department feels they don't have
 4 that particular fiduciary duty, as a matter of law
 5 they do, and that has been expressed many times in
 6 the courts.
 7 Further, I have stated several times that
 8 each one of those six orders, I'm not discussing the
 9 other orders because Mr. Balaran hasn't asked me to
 10 do that, but those six orders that deal with the
 11 preservation of trust information and the production
 12 are violated. And once again, let me point out, how
 13 in the world is it possible for Mr. Brooks to even
 14 properly instruct his client as to what records must
 15 be protected in accordance with those court orders if
 16 his client doesn't understand what a trust record is.
 17 SPECIAL MASTER BALARAN: Okay. I have
 18 your argument.
 19 Mr. Gardner, I know you want to make, to
 20 at least speak on behalf of your client, Ms.
 21 Perlmutter, take five minutes. Does anybody object
 22 to proceeding accordingly, just sort of accelerating
 23 this? I believe Mr. Gardner has other commitments.
 24 MR. GARDNER: Thank you, Your Honor.
 25 SPECIAL MASTER BALARAN: Would you mind?

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1 MR. GARDNER: Thank you. My name is
 2 William Gardner. I represent Willa Perlmutter.
 3 I believe, Your Honor, Mr. Balaran, that
 4 the scope of your mandate here relates to the six
 5 orders. Ms. Perlmutter left government before any of
 6 those orders were entered. She couldn't have
 7 possibly have violated them. She can't possibly be
 8 held in contempt for violating any of those orders.
 9 In the original motion for an order to
 10 show cause, she appeared in a footnote on the last
 11 page. I'm as perplexed today as I was then about why
 12 she is in this case. I believe there is no basis for
 13 it, I believe that any under any standard that has
 14 been articulated here hasn't been met. There is no
 15 showing she violated a court order. I respectfully
 16 suggest that the proper course for you is to make a
 17 recommendation to the Court that she not be subject
 18 to a motion to show cause.
 19 SPECIAL MASTER BALARAN: Thank you.
 20 Mr. Gingold.
 21 MR. GINGOLD: I addressed Ms. Perlmutter's
 22 position before. It is our position that under Webb
 23 versus the District of Columbia, that the Court has
 24 the inherent authority to preserve the -- as a matter
 25 of fact, I will read the exact language to you -- to

<p style="text-align: right;">Page 122</p> <p>1 preserve the integrity of the judicial process, and 2 Webb versus District of Columbia at 146 F.3d 964, 3 971, D.C. Circuit, 1998, it says the following: The 4 Court has the inherent authority to protect its 5 integrity and prevent abuses of the judicial process 6 by holding in contempt or ordering sanctions for such 7 conduct. 8 In our opinion, as the Court specifically 9 noted during the cross-examination of Ms. Perlmutter, 10 Ms. Perlmutter's testimony with regard to her conduct 11 in this case is not believable. That is, that 12 testimony as explicitly noted in plaintiffs' bill of 13 particulars with regard to her. 14 Further, she admitted specifically that 15 she destroyed E-mail, her own E-mail. That is in our 16 opinion directly undermining the judicial process 17 which required the preservation of all information 18 necessary to litigate this case and to provide an 19 accounting. 20 And we believe we understand what the 21 special master is saying with regard to the 22 limitations of the six. With regard to Ms. 23 Perlmutter's count, if in fact that's the position 24 with regard to Mr. Balaran, I would suggest then Ms. 25 Perlmutter's matter is not referred to Mr. Balaran,</p>	<p style="text-align: right;">Page 124</p> <p>1 add if you do that, that you reject Mr. Gingold's 2 suggestion that there would be outstanding a motion 3 for an order to show cause before the Court, because 4 I don't believe that's the case. I believe that this 5 matter has been referred to you, and you make a 6 recommendation to the Court, that takes care of it. 7 And if he wants to go back on commenting on her 8 testimony five or six years ago and file something 9 new before the Court, I can address it at that time, 10 but I believe this would wrap it up. 11 SPECIAL MASTER BALARAN: Okay. 12 MR. GINGOLD: Mr. Balaran, does okay mean 13 you're going to comply with Ms. Perlmutter's counsel? 14 SPECIAL MASTER BALARAN: I will set it out 15 in writing. 16 MR. GARDNER: Thank you for the courtesy 17 on hearing me this morning. 18 SPECIAL MASTER BALARAN: Of course. We'll 19 take lunch and come back at one o'clock for 20 Mr. Findlay. 21 (Whereupon, at 11:44 a.m., the hearing in 22 the above-entitled matter was recessed, to reconvene 23 at 1:00 p.m., this same day.) 24 25</p>
<p style="text-align: right;">Page 123</p> <p>1 then that matter is standing before the Court because 2 Mr. Balaran's authority is limited to those 3 particular matters where the order to show cause 4 vis-a-vis Ms. Perlmutter, which goes beyond that, is 5 still a matter pending in the Court and in fact 6 probably as a matter of jurisdiction, if 7 Mr. Balaran's understanding is correct, have never 8 been referred and is not subject to the order of 9 reference. Therefore, that's a matter that's still 10 pending before the Court. 11 SPECIAL MASTER BALARAN: Okay. Regarding 12 Ms. Perlmutter, if you don't mind, I find that my 13 order of reference is in fact circumscribed by the 14 complaint as of March 20th as articulated by the 15 Court on September 17th, and I am therefore going to 16 make a recommendation on the record that Ms. 17 Perlmutter's case not proceed any further, and 18 recommend dismissal. 19 MR. GINGOLD: And the plaintiffs will 20 object to that because you're stating for the record 21 you don't have authority over it, so you don't have 22 the authority to make a recommendation in that regard 23 either. 24 SPECIAL MASTER BALARAN: Okay. 25 MR. GARDNER: Mr. Balaran, I would also</p>	<p style="text-align: right;">Page 125</p> <p>1 AFTERNOON SESSION 2 (1:02 p.m.) 3 MR. BALARAN: We're back on the record. I 4 want to take the argument for Mr. Charles Findlay. 5 Please, counsel, identify yourself for the record. 6 MR. SMITH: Yes, Greg Smith from 7 Sutherland, Asbill & Brennan. Do you mind if I 8 stand? 9 SPECIAL MASTER BALARAN: Not at all. 10 MR. SMITH: Thanks. May it please the 11 proceeding: My name is Greg Smith and I represent 12 Charles W. Findlay III, nicknamed Spinner. 13 Plaintiffs' counsel today asked the Court 14 to hold their former adversary in contempt. Although 15 I'm speaking first, as I mentioned earlier, I believe 16 the burden is squarely theirs. In the Stewart case 17 that has been mentioned from Judge Lamberth, he 18 indicates quite clearly from citing a D.C. Circuit 19 case, the burden of proof in civil contempt 20 proceedings rests on the moving party. 21 The question is whether their March 20th 22 motion for an order to show cause will be granted. 23 They must establish to your satisfaction a 24 prima facie case of contempt against Spinner. What 25 does a prima facie case mean? Not a prima facie case</p>

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1 such as in an employment case, if I might suggest.
 2 It's a prima facie case in a contempt context, where
 3 the plaintiffs are asking for a collateral proceeding
 4 not initiated by the Court. Where even civil
 5 contempt is considered a "extraordinary" remedy,
 6 where courts are expressly directed that they must
 7 impose it with caution, if I might be so bold, I
 8 don't think that anyone would ever suggest that a
 9 prima facie case in an employment context was an
 10 extraordinary situation or should only occur with
 11 caution. Nor would I, if I might, I don't think that
 12 even in a fraud case that anyone would say that those
 13 kinds of proceedings can only be imposed with caution
 14 or that that's an extraordinary kind of matter.
 15 And I might suggest further, at least with
 16 Spinner, at least with Spinner, that you should be
 17 especially cautious here, where they're seeking
 18 contempt against a former adversary. You need to
 19 recognize the precedential situation that you could
 20 create, if anytime allegations against an adversary
 21 are enough to force collateral proceedings with the
 22 opportunity to depose your adversary, I suggest to
 23 you that that is not a situation in which mere
 24 allegations, or even specific allegations along the
 25 lines of fraud should be sufficient to allow that

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1 process to go forward.
 2 The question is what is meant by
 3 prima facie in the context of contempt proceedings?
 4 What is meant by that, especially here? I submit
 5 that the standard ought to be whether the facts on
 6 the record before you, whether the facts on the
 7 record before you as confined by the bill of
 8 particulars here, since that was ordered in this
 9 case, would justify a finding of contempt, whether
 10 the facts on the record before you as confined by the
 11 bill of particulars ordered in this particular case
 12 would justify a finding of contempt? Not does
 13 justify a finding of contempt, that's the standard at
 14 the end of the trial, but would justify a finding of
 15 contempt, using the same standard that you would
 16 apply, standards of proof that you would apply at a
 17 trial. Or as Stewart says, whether the Court has, or
 18 whether you have some indication that sufficient
 19 evidence exists, not will exist, but exists, that the
 20 Court might find evidence sufficient to hold
 21 defendant in contempt.
 22 The RIRA case that has been cited makes
 23 the point, if the complainant cannot make the
 24 requisite showing for contempt, there is no reason to
 25 require the alleged contemnor to appear and argue for

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1 the court to exercise its discretion not to issue a
 2 contempt order. Unless the plaintiff makes the
 3 necessary showing as outlined above, there is no need
 4 to require defendants to show cause why they should
 5 not be held in contempt.
 6 The threshold, particularly in the
 7 situation where they're seeking to depose their
 8 adversary, should be quite high. As I mentioned,
 9 we're going to have an onslaught of these things if
 10 allegations alone against an adversary give you the
 11 right to depose.
 12 This is not, if I might suggest, a
 13 situation like a motion to dismiss or a fraud Rule 9
 14 case or even a summary judgment. This is an animal
 15 all its own with unique standard. I'm not aware of
 16 anywhere else where courts say it's an extraordinary
 17 remedy, impose it with caution on any other kind of
 18 thing.
 19 Let me give you an example. If their case
 20 on the merits were shut down because of a Rule 12
 21 dismissal or a Rule 9 lack of particulars, or even a
 22 Rule 56 summary judgment motion, they could appeal,
 23 they have a right to the matter and they can appeal
 24 it. Here, if their motion for an order to show cause
 25 is denied, they have no right to appeal at all,

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1 because they have no right to the proceeding. The
 2 Court can deny it for good reasons, bad reasons, or
 3 even no reasons at all, and we cited cases to the
 4 Court in which even when the elements are met that
 5 could justify a show cause hearing, the courts have
 6 declined to exercise their discretion. And there's
 7 no right to appeal, because they have no right to
 8 this proceeding, it is a collateral proceeding, it is
 9 supposed to be extraordinary. Even if the elements
 10 are met, the Court can decline to exercise its
 11 discretion and the parties are stuck with that.
 12 Special Master Balaran, candidly, there's
 13 an element of gut feeling in this process. An
 14 element of gut feeling. You have to decide, should
 15 we even go there. If you do go there, the Court of
 16 Appeals has suggested that this is more than a
 17 perfunctory matter, and they will not give the same
 18 sort of discretion they give to -- abuse of
 19 discretion standard that would necessarily apply.
 20 They expressly said that review will not be
 21 perfunctory, and the reason for that is they want to
 22 keep these types of actions extraordinary. They want
 23 them to remain extraordinary. So they will, even if
 24 you exercise discretion, give it some review.
 25 But here the question is, will you follow

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1 the plaintiffs' suggestion to initiate a collateral
 2 criminal proceeding against non-parties?
 3 SPECIAL MASTER BALARAN: Excuse me for a
 4 second. Aren't we really talking about whether or
 5 not we should initiate discovery that might result in
 6 a recommendation to the Court as to what should
 7 happen? Aren't we at such a preliminary stage of
 8 this that while I appreciate the chilling effect that
 9 you're stating here, aren't we just saying, is there
 10 enough here to simply say let's flesh out this record
 11 and from a more informed posture make a
 12 recommendation to the Court one way or the other,
 13 utilizing the standards that you have just
 14 articulated?
 15 MR. SMITH: Respectfully, I don't -- I'm
 16 not familiar with a three-stage motion for an order
 17 to show cause process such as you've outlined, where
 18 a motion is filed, and then discovery is held and
 19 then the order to show cause is granted. I have not
 20 seen anything. And if I might, the Stewart case,
 21 this is Judge Lamberth's decision. I don't think you
 22 can read Stewart without seeing that the allegations
 23 themselves seem pretty specific. This is what the
 24 Court says in there in its footnote. Plaintiffs have
 25 failed to submit any affidavit supporting their

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1 factual assertions. The Federal Rules of Civil
 2 Procedure and prior Federal Courts have expressed a
 3 clear preference for the submission of affidavits.
 4 The submission -- further on -- the submission of an
 5 affidavit would have been the preferable course for
 6 petitioner's counsel to have followed.
 7 And I guess -- and more importantly, there
 8 are disputed facts in Stewart. The plaintiff says
 9 that a consent order wasn't filed, a settlement
 10 agreement, and they put out some pretty specific
 11 stuff, and the Court doesn't say well, you know,
 12 there's enough here where I'm going to allow
 13 discovery to sort it all out. The Court acknowledges
 14 at one point that the record on these categories of
 15 information is muddled, but notwithstanding the fact
 16 that they are muddled, the Court denies the order to
 17 show cause and doesn't grant discovery. There is no
 18 three-stage process that I'm familiar with.
 19 SPECIAL MASTER BALARAN: And I'm not
 20 saying that there is in most situations or in any
 21 other situation. But here, I was presented with
 22 numerous recommendations which I thought made a lot
 23 of sense saying look, before we start getting into
 24 witness lists, document production, et cetera, and
 25 the affidavits such as what you described, let's see

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1 if as a matter of law we even have, you know, sort of
 2 a soap box to rest this on. And you're right in the
 3 sense that that might artificially be contrived and
 4 seem to be a tripartite stage which has not been
 5 implemented before.
 6 But I would suggest to you, A, these are
 7 different proceedings than normal. I don't know of
 8 any situations where a contempt proceeding has been
 9 turned over to a special master for review. And B, I
 10 would also suggest to you that the procedure I'm
 11 following is one that I believe was represented to me
 12 and I believe is also the wise and prudent way to go,
 13 because again, if the situation should arise that I
 14 should find that Mr. Findlay's bill of particulars
 15 doesn't suffice, why should I subject him to the
 16 discovery process of then the affidavits and then the
 17 possible deposition process and then all the
 18 documents that he may have to produce. I would say
 19 that would be a much more onerous burden.
 20 MR. SMITH: Than?
 21 SPECIAL MASTER BALARAN: Than simply just
 22 allowing me to make this initial stage determination
 23 that as a matter of law, or whether or not they have
 24 met their burden.
 25 MR. SMITH: I guess a couple of responses,

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1 if I might. One is with there being criminal
 2 allegations in the mix, that would make that process
 3 a very difficult one to proceed. But I guess what
 4 I'm suggesting is I don't know that the civil rules,
 5 even if it's only civil, are geared toward civil
 6 discovery for the purpose of these types of
 7 extraordinary collateral proceedings. This is not a
 8 complaint. They're essentially asking the Court
 9 through the special master to start a whole new
 10 proceeding against non-parties.
 11 It's a matter over which they have no
 12 right to proceed and I at least speaking for Spinner,
 13 we believe that the law sets this threshold for a
 14 reason, that before you proceed any further beyond
 15 the motion stage, whether it's the show cause
 16 proceedings or any discovery and as I say, I'm not
 17 familiar with any time ever of discovery being
 18 granted in these kinds of proceedings, and I think
 19 collectively around the room, we are not familiar
 20 with that process ever being used. We believe that
 21 the proper course on a motion to show cause because
 22 it is side-tracking the Court from the merits of the
 23 case, it's a gut level fish or cut bait decision.
 24 Have they given you enough to where we're going to
 25 start an entirely new collateral proceeding,

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1 particularly with non-parties. Most contempt actions
 2 are brought against parties.
 3 SPECIAL MASTER BALARAN: But the problem I
 4 have is the Court ordered me to present it with a
 5 complete record and I can't, I don't know how I could
 6 present a complete record to the Court without
 7 benefit of documents, et cetera. And that's, I think
 8 one of the arguments that plaintiffs have made is
 9 that how can we proceed, this is your mandate, get
 10 him as much as possible. Now whether that's in
 11 accordance with other courts, et cetera, this is the
 12 operating order that I proceed under.
 13 MR. SMITH: Well, I think that the
 14 September order actually said an investigation in
 15 connection with the October motion to show cause and
 16 didn't specifically say in connection with this one.
 17 And if I might, the plaintiffs own motion here,
 18 Special Master Balaran, their own motion for an order
 19 to show cause, this is how it begins: On July 27,
 20 2001, the special master completed an investigation.
 21 I think that the reason perhaps why Judge
 22 Lamberth didn't order you specifically to do an
 23 investigation related to this motion was because as
 24 the plaintiffs themselves say, you have completed an
 25 investigation. And I don't think that developing a

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1 complete record requires discovery outside the
 2 process that would be the norm. You can develop a
 3 record as is normally done in a show cause proceeding
 4 where they bring their best to the table, and you
 5 make a decision at that point based on the record
 6 they bring, which is the complete record that we have
 7 now, whether there is enough to proceed and issue an
 8 order to show cause.
 9 This is not a situation where I'm familiar
 10 with anybody ever doing this sort of discovery
 11 process on the side. It's supposed to be a brief
 12 short, you know, if we're going to sanction somebody,
 13 let's bring it on kind of matter. It's a gut level
 14 feeling.
 15 SPECIAL MASTER BALARAN: Well, the gut
 16 level feel that you keep referring to is also a
 17 standard I've not seen. I have to tell you, maybe I
 18 can articulate it or you can articulate it a little
 19 better, but there has to be objective parameters by
 20 which one party can say this is the way you should be
 21 viewing this.
 22 MR. SMITH: Well, I think that the
 23 standard is -- I mean, Judge Lamberth says at this
 24 stage, plaintiffs are not required to show by clear
 25 an convincing evidence that defendants should be held

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1 in contempt, but the Court must have some indication
 2 that sufficient evidence exists, not will exist, but
 3 exists, that the Court might find evidence sufficient
 4 to hold defendant in contempt. And I think that
 5 unless you get to that threshold, that's I guess the
 6 gut level that I'm talking about, and I didn't mean
 7 to throw out a phrase, but does sufficient evidence
 8 exist based on what has been brought to you on the
 9 table.
 10 And I suggest to you that in particular in
 11 a situation where they are going against their
 12 adversary, are you going to brand Spinner, or allow
 13 proceedings to move forward in a criminal or
 14 quasi-criminal, as simple contempt has been called.
 15 When I talk about the gut level, are you going to put
 16 that kind of a brand on a 20-year career government
 17 servant who's never been accused of any misconduct
 18 outside this case, who didn't even ask to be put on
 19 this case. Is it worth deviating from the merits of
 20 the case to address this as a collateral matter,
 21 especially when an alternative remedy such as adverse
 22 inferences could exist in the main case without
 23 having to start a collateral issue.
 24 SPECIAL MASTER BALARAN: But that's not my
 25 choice. You're asking questions that I can't

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1 possibly answer, whether this proceeding should have
 2 been brought in the first instance, whether it should
 3 have been referred, whether or not Mr. Findlay's
 4 illustrative record has any bearing on it, whether he
 5 chose to be part of this litigation or not. I would
 6 vouch that there is not an attorney that's associated
 7 with this case that wishes they hadn't been brought
 8 in at one point or another.
 9 So all I'm really asking from you is,
 10 there have been bills of particulars filed, if we can
 11 focus for the moment anyway on whether you feel that
 12 those bills of particular under whatever standards
 13 you want to articulate have met the necessary
 14 threshold that you're talking about, I would like to
 15 focus on that.
 16 MR. SMITH: We tried to do that in our
 17 brief, but I don't think that they are particular
 18 enough. I think we cite the Tree case, which is the
 19 needle in the haystack, and I submit that the
 20 plaintiff saying that you can find it in the record
 21 is analogous to that. I think that you can deny the
 22 notion alone on the ground that they have not given
 23 specifics about what exactly Spinner did that
 24 violated, or that constituted fraud, or aided and
 25 abetted any violation.

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1 You know, their theories, and I submit to
 2 you that some sort of willful misconduct is required
 3 even under an aiding and abetting theory, and if
 4 their theory here is that Spinner hid and only
 5 temporarily -- I mean, there is not question.
 6 Spinner is not accused of destroying documents, he's
 7 not accused of not telling you ultimately -- I mean,
 8 you heard it from him that these remote offices were
 9 not, had not overwritten their normal overwriting
 10 policy for a period of time. So he told you that.
 11 If their theory is that he hid it and only
 12 temporarily, in essence the least important
 13 documents, I submit.
 14 Their theory is that he revealed to you
 15 repeatedly the bad stuff when there was overwriting,
 16 but on this stuff where he in essence had been told
 17 there are no responsive -- these offices don't do
 18 trust work, that he risked his reputation in order to
 19 withhold that from you and even for a temporary
 20 period of time, even during the same periods of time
 21 when he was disclosing things that were the most
 22 damaging.
 23 SPECIAL MASTER BALARAN: Is there anything
 24 on the record that indicates that he was told or
 25 informed by anybody that in fact there are no such

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1 responsive documents and he represented accordingly?
 2 MR. SMITH: Your Honor, I think that there
 3 is. The November 19, 1999 letter from Mr. Urie says,
 4 I am told that certain members of those offices, or
 5 of the 18 field and regional solicitors' offices, I
 6 am told that certain members of seven of those
 7 offices may have prepared E-mail messages essentially
 8 responsive.
 9 SPECIAL MASTER BALARAN: And you're saying
 10 that what Mr. Urie brought to the table was something
 11 I can attribute to your client, the same knowledge?
 12 MR. SMITH: I think, if there is no
 13 indication to the contrary, that's right. And even
 14 beyond that, plaintiffs themselves incorporated by
 15 reference the recent OIG report in which they
 16 themselves note, if I can find it, in their notice of
 17 supplemental authority, the last line of the August
 18 13th, 2002 filing, he says importantly, "Blackwell
 19 stated that she thought Cohen was the one who issued
 20 the directive that backup tapes were to be saved only
 21 in the seven field offices and HQ office." Where is
 22 there any suggestion whatsoever that Spinner did that
 23 or aided and abetted that? He wouldn't have had to
 24 if this is true what they're saying about Ed Cohen.
 25 I guess what I'm saying, if I might, I

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1 just don't think they have reached the threshold to
 2 where you can say what Judge Lamberth seems to say
 3 you have to require. There's not some indication
 4 that sufficient evidence exists that Spinner can be
 5 held in contempt here.
 6 SPECIAL MASTER BALARAN: Thank you.
 7 Mr. Gingold.
 8 MR. GINGOLD: First, I would like to
 9 briefly address the Stewart case. My recollection of
 10 the Stewart case is the judge acknowledged that he no
 11 longer had jurisdiction over the matter, that the
 12 matter was a contract action that had to be dealt
 13 with separately even though it was a consent order
 14 that had resolved the case and he no longer had
 15 jurisdiction. If I'm wrong, I would like to be
 16 corrected on that.
 17 In this case, this Court has jurisdiction.
 18 Collateral matters have been the focus of this case
 19 for a long time, and in fact tomorrow morning before
 20 if U.S. Court of Appeals, one of these collateral
 21 matters is going to be heard. And notwithstanding
 22 Mr. Smith's statement that there is no right to
 23 appeal, which by the way, plaintiffs would concur
 24 wholeheartedly with, until the case itself receives
 25 final judgment, we would also say that, and that was

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1 not added by Mr. Smith.
 2 The Interior defendants, Secretary Norton
 3 and Mr. McCaleb, have in fact filed an appeal based
 4 on the September 17, 2002 decision. So although we
 5 are in agreement with Mr. Smith that no appeal should
 6 be filed on an interlocutory basis, nevertheless,
 7 there seems to be disagreement with the Justice
 8 Department in that regard, and they would seem to
 9 take a different view from Mr. Smith. We believe the
 10 law is settled in the Circuit, however, that
 11 Mr. Smith's statement is correct, as long as he
 12 finishes it by saying once the final judgment is
 13 rendered in a civil case.
 14 So the fact this is collateral is not a
 15 problem for Mr. Smith, and is not a problem for
 16 Mr. Findlay. It's a problem for plaintiffs. They
 17 have been caught up in this litigation for seven
 18 years based on stonewalling and destruction and
 19 misrepresentations, among those Mr. Findlay
 20 personally contributed to.
 21 SPECIAL MASTER BALARAN: Let's focus on
 22 those, if we can.
 23 MR. GINGOLD: Let me point out, however, a
 24 couple of things. As a preliminary matter, the judge
 25 made this statement in court, that we cited in the

<p style="text-align: right;">Page 142</p> <p>1 E-mail contempt factual appendix at paragraph 58. 2 THE WITNESS: It is plaintiffs' position 3 that the Court expressly warned defendants' counsel, 4 in that case it was Mr. Brooks who was involved in 5 the colloquy with the Court, not to make 6 representations until those representations were 7 verified. And the Court specifically stated, if I 8 have this quote correctly, I guess the other 9 disturbing thing he said was, the solicitor sends a 10 memo to gather the supplemental documents, and then 11 just takes what documents those people send in 12 response to memo. How can that really be adequate 13 for attorneys in this case with the history you have 14 in this case to accept that kind of supplemental 15 production without any check yourselves of documents, 16 records and inspection yourselves. How can that be a 17 responsible action by attorneys in this case? 18 And again, I agree with Mr. Smith. This 19 is not an ordinary employment case. As a matter of 20 fact, there is no aspect of this case which is 21 ordinary. 22 It's also worthwhile to point out that the 23 Court explicitly referenced the fact that this case 24 involves matters of, for which in two separate 25 contempt trials, involves matters that the parties</p>	<p style="text-align: right;">Page 144</p> <p>1 Systemic spoliation was found by the special master 2 himself. 3 SPECIAL MASTER BALARAN: Could I interrupt 4 you for a moment? 5 MR. GINGOLD: Sure. 6 SPECIAL MASTER BALARAN: I don't know, but 7 for some reason sending me a report and five letters 8 telling me about backup tapes being overwritten, 9 backup tapes not being made for a certain area, 10 backup tapes lost in the mail, seems to reflect 11 candor, not deception. You know, your point might be 12 well taken if I got nothing, or a letter saying that 13 all is well with the world, which I believe was the 14 statement that you directed against Mr. Brooks, who 15 made statements you say to the Court alleging that 16 all was well with the world. 17 Here I have Mr. Findlay who is telling me, 18 and I'm sure somewhat sheepishly at the time, given 19 the notoriety that this had engendered, that there is 20 a problem and there is a series of problems, and eh's 21 doing this in a rather timely manner. So, I fail to 22 see how these particular instances inure to your 23 argument. 24 MR. GINGOLD: Well, that's one of the 25 areas that the special master and plaintiffs are</p>
<p style="text-align: right;">Page 143</p> <p>1 themselves were involved in that were subject to 2 contempt, and attorneys in this case should be 3 particularly vigilant. 4 Unless we hear, unless the special master 5 has a different theory, plaintiffs do not believe 6 it's possible for documents to destroy themselves, 7 plaintiffs don't believe it's possible for attorneys 8 to make representations about documents that are 9 supposedly existing when they don't exist. The 10 reality is the Court has pointed out specifically 11 with regard to a material omission. He noted the 12 declaration of Deputy Secretary Griles with regard to 13 certain matters that were presented to the Court. 14 And the Court specifically noted that the omission of 15 material information from Deputy Secretary Griles's 16 declaration, itself bordered on the perjurious, 17 because the omission of information is just as 18 important as the affirmative misrepresentation of 19 that same information. 20 What we have here through various letters 21 of December 21, 1999; or April 12, 2000; April 13, 22 2000; April 19, 2000; June 22, 2000; June 27, 2000, 23 are representations that were made but they 24 materially omitted the fact that backup tapes were 25 continuing to be destroyed and it was unabated.</p>	<p style="text-align: right;">Page 145</p> <p>1 strongly disagreeing over. This is a question of 2 fact which I guess we will have to deal with on an 3 appeal basis. The fact of the matter is that when 4 you state that backup tapes in Billings were 5 mistakenly overwritten, and backup tapes are being 6 deliberately overwritten at the same time, plaintiffs 7 believe that's a material omission. We understand 8 that the special master doesn't feel the same way. 9 When the statement is made that Billings 10 information is being overwritten when in fact Mr. 11 Urie and I and Mr. Brooks and Mr. Findlay knew that 12 the Billings office was overwriting E-mail on a 13 regular basis back in the beginning at least of 1998, 14 to tell you April 12th, 2000 is timely, I guess we 15 have a different view of what timely is. 16 SPECIAL MASTER BALARAN: Do me a favor. 17 Don't tell me what I think and don't think. You 18 know, I may not be the most articulate guy but I will 19 say it for the record and if I don't do it 20 particularly artfully, I apologize, but don't presume 21 to speak for me. 22 MR. GINGOLD: You stated it was timely, 23 Mr. Balaran. 24 SPECIAL MASTER BALARAN: I'm just saying 25 -- but that's not the first time you've actually</p>

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1 taken a barb at me.
 2 MR. GINGOLD: But you stated it was
 3 timely. I'm pointing out that in 1998, the beginning
 4 of 1998, Mr. Findlay, Mr. Brooks, plaintiffs' counsel
 5 was aware that the Billings tapes were being
 6 overwritten. I'm suggesting that notwithstanding
 7 your good judgment, and we do not challenge your good
 8 judgment, Mr. Balaran, that April 12th, 2000 is not
 9 timely. That's my statement, and that's not a barb,
 10 Mr. Balaran, that's my assertion of fact.
 11 SPECIAL MASTER BALARAN: Let's not be
 12 specific if you and I are going to take issue as to a
 13 fact. I'm just here to hear argument and pose
 14 questions to you so you can give me the benefit of
 15 your thoughts. Let's leave it at that as to whether
 16 or not we agree or disagree. That will come out
 17 ultimately in the record.
 18 MR. GINGOLD: I'm not challenging you in
 19 that regard.
 20 SPECIAL MASTER BALARAN: Let's just move
 21 on from there, okay?
 22 My question to you is, again, my feeling
 23 is that I have a number of letters in front of me and
 24 a report which seem to indicate that unlike the
 25 allegations you have against Mr. Brooks, here is

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1 somebody that is coming forward to me and
 2 sequentially telling me on the 12th, 13th, 19th, and
 3 then a couple of months later that there are
 4 problems. And I am just suggesting to you, or
 5 questioning whether or not these reflect a sense of
 6 candor and not the deception that you seem to mask
 7 these as.
 8 MR. GINGOLD: Well, we don't think we were
 9 masking anything, Mr. Balaran. We felt that what was
 10 being masked was what was actually going on in these
 11 particular cities. For example, when the statement
 12 was made on April 19th, 2000, by Mr. Findlay, that
 13 some backup tapes were not being made in Phoenix, the
 14 fact of the matter is nearly all, very few backup
 15 tapes were being made in Phoenix. If we make a
 16 representation that X doesn't exist when in fact you
 17 know or should be aware that nothing exists, is that
 18 candid? That's exactly the point the Court made with
 19 regard to the Griles deposition, Mr. Balaran.
 20 And when a statement is made that 12
 21 Albuquerque tapes got lost in the mail, when in fact
 22 Albuquerque was routinely overwriting E-mail, is that
 23 a candid and forthright statement, is there material
 24 information missing from that?
 25 Now again, it's plaintiffs' perspective

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1 and I know we have a minority view here, but that is
 2 not disclosure of material information. If in
 3 fact -- especially in the situation in Billings,
 4 where Billings was a particularly unique situation,
 5 because it was admitted that they weren't doing it.
 6 That's the Billings solicitor's office, regional
 7 solicitor's office. And by the way, what was finally
 8 revealed was the fact that very few of the backup
 9 tapes in any of the solicitor's offices were being
 10 retained.
 11 As a matter of fact, based on the hearing,
 12 or based on the deposition that you took of
 13 Mr. McCaleb, Mr. McCaleb actually testified that the
 14 solicitor's office never told him to save his E-mail,
 15 and that's one of the reasons he felt free to be able
 16 to destroy his E-mail. I'm not going to characterize
 17 his testimony exactly on that, but he was very clear
 18 at saying the solicitor's office never told him, nor
 19 did the Justice Department ever tell him not to do
 20 what he did, and that was within the last few months.
 21 So we're dealing with a situation where,
 22 if you report that certain tapes are being
 23 overwritten, whether it's in Billings or Phoenix or
 24 Albuquerque, and plaintiffs have been saying
 25 repeatedly that the tapes aren't being saved, then

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1 the response is generally plaintiffs are wrong, there
 2 is no evidence to that, and in fact it turned out
 3 that was the case, why is it that a brief statement
 4 that some tapes were mistakenly overwritten, some
 5 tapes were lost, plaintiffs do not believe it's fair
 6 to characterize that as a fair and complete
 7 disclosure that's required by counsel under the
 8 judge's rules.
 9 SPECIAL MASTER BALARAN: Let me step back
 10 with you for a second on this, because in reading
 11 your motion of March 20th, you seem to make two
 12 separate points. The first point is that the
 13 Secretary in her capacity as a fiduciary and trustee
 14 delegate, was responsible for the systemic spoliation
 15 of evidence, and I might, if I mischaracterize this,
 16 I apologize, but I believe you refer to the systemic
 17 destruction in violation of court order to retrieve
 18 and retain all information, but this seems to be
 19 something that's specifically directed against the
 20 Secretary.
 21 And then you say again, there's no
 22 question the Secretary has destroyed massive amounts
 23 of critical and irreplaceable IIM trust documents by
 24 their pervasive and wholesale destruction.
 25 Then we go on in terms of notifying the

<p style="text-align: right;">Page 150</p> <p>1 Court. That seems to be a very different issue, and 2 that's the issue where it has been misrepresented to 3 the Court as to the state of affairs, okay? 4 Now, I guess I have to go, since those are 5 two discrete issues, I have to ask you, if in fact 6 Mr. Findlay materially omitted information, which 7 order did he violate, because according to the very 8 motion that you filed, the only person that could 9 have violated this is the Secretary. 10 MR. GINGOLD: I thought we addressed that 11 before, but I will go into it again. 12 SPECIAL MASTER BALARAN: Please. 13 MR. GINGOLD: It is plaintiffs' position, 14 I think it would appear to be the Court's position 15 too, and I would like to read a statement from the 16 Court on September 17, 2002, in his memorandum and 17 order, which says, two sets of government attorneys 18 have been dismissed during the course of this 19 litigation for conduct involving matters addressed in 20 two contempt trials held by this Court. Now a third 21 set of government attorneys has either failed to make 22 appropriate inquiries and conduct the requisite due 23 diligence or suppressed their knowledge -- and I cut 24 out some language from the order. 25 SPECIAL MASTER BALARAN: But isn't that a</p>	<p style="text-align: right;">Page 152</p> <p>1 interpretation. The difference here is that's not 2 what I said. What I was pointing out was the fact 3 that the Court has inherent -- you made a statement 4 that it has to be tied to a specific order. I said 5 no, it doesn't, contempt doesn't have to be tied to a 6 specific order. While the general rule is precisely 7 as you have articulated, Mr. Balaran, as I pointed 8 out, Webb versus District of Columbia and other 9 contempt cases do suggest that the contrary is the 10 case. 11 Now with regard to this particular issue 12 which is subject to your mandate, that's a different 13 matter. 14 SPECIAL MASTER BALARAN: Let's talk about 15 that for a little. I apologize if I was less than 16 clear. My focus here is really on this proceeding 17 and my jurisdiction over this proceeding. Would you 18 agree with me that my jurisdiction, and I think this 19 is a question we've brought up several times before, 20 but just so we can tie this down, my jurisdiction is 21 limited to what has been given to me in my orders of 22 reference of February 1999, August 12th, 1999, and 23 more recently as expanded by the September 17th, 2002 24 order. 25 MR. GINGOLD: No, but for purposes of</p>
<p style="text-align: right;">Page 151</p> <p>1 bar, counsel, Rule 11? Aren't there mechanisms 2 available if in fact the Court feels that counsel has 3 not been forthright? I mean, why is this -- if 4 contempt has to be tied to a specific order, I'm just 5 asking what order did this man violate? 6 MR. GINGOLD: Well, first of all, it was 7 as I stated earlier, based on Webb versus District of 8 Columbia and a whole series of other contempt cases, 9 it doesn't have to be tied to a specific order. If 10 the litigation itself, the actual judicial process is 11 being undermined based on their conduct, then the 12 Court has inherent authority. 13 SPECIAL MASTER BALARAN: Then I think what 14 you're saying is I have to turn this over to the 15 Court, because it seems to me -- 16 MR. GINGOLD: No. 17 SPECIAL MASTER BALARAN: Let me just 18 finish. It seems to me, and this is again with the 19 issue with Ms. Perlmutter, that I believe my 20 jurisdiction, as all special masters, is very 21 narrowly circumscribed under the order of reference 22 given to me. I don't think I have any authority to 23 deviate or stray from it one inch. 24 MR. GINGOLD: Well, you know, you can read 25 your order as you deem appropriate, that's your</p>	<p style="text-align: right;">Page 153</p> <p>1 argument, I will accept that. 2 SPECIAL MASTER BALARAN: Okay. If we 3 accept that, would you also agree with me that the 4 September 17th, 2002 order specifically references at 5 least on one occasion your October motion for 6 contempt which involves the 30-some odd individuals, 7 and here we have the March 20th, which is the 8 proceeding directly in front of us, correct? 9 MR. GINGOLD: Absolutely. 10 SPECIAL MASTER BALARAN: Okay. If that's 11 the case, and your March 20th order directs our 12 attention to only six orders, and those orders are 13 set out on page 12 and then you state that all six 14 orders are clear and reasonably specific, and in fact 15 your entire argument that you base this on is based 16 on the clarity of those orders and the fact that they 17 apply directly to these named individuals. 18 MR. GINGOLD: Yeah. 19 SPECIAL MASTER BALARAN: Okay. If that's 20 so, would you agree with me then that if it can't be 21 shown that there's no nexus between the conduct 22 accused of and one of these orders, that as far as my 23 jurisdiction goes, that this has to be dismissed just 24 as far as my jurisdiction, that I have no authority, 25 or can't go ahead and recommend further proceedings?</p>

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1 MR. GINGOLD: Could you restate the
 2 question. Let me ask you a question. Are you saying
 3 if in fact there is no -- as a matter of fact, the
 4 language that I think Mr. Smith stated is actually
 5 it, if there is no indication that sufficient
 6 evidence exists, that Mr. Findlay for example was in
 7 violation of those orders, if that is the question,
 8 the answer is your responsibility, as I would
 9 understand it and as you've stated it is to recommend
 10 that no further contempt proceedings in this regard
 11 should proceed against Mr. Findlay, if that's your
 12 question.
 13 SPECIAL MASTER BALARAN: That is my
 14 question.
 15 MR. GINGOLD: Okay.
 16 SPECIAL MASTER BALARAN: Then I guess what
 17 I have to ask you, the conduct that Mr. Findlay is
 18 accused of here, and specifically, and I'll read it
 19 from the bill of particulars, the above
 20 representations, which are the ones we have been
 21 speaking of at this moment, the December 21st, 1999
 22 report and the five letters beginning April 12th,
 23 2000, ending with June 27th, 2000. You state, the
 24 above representations omit any mention of systemic
 25 spoliation and reflect the full extent of Mr.

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1 Findlay's disclosures (partial limited hangouts) to
 2 this Court. My question to you is can you tie,
 3 assuming the facts in a light most favorable to you
 4 in this case and assuming these facts are fully true,
 5 can you tell me which order this violates?
 6 MR. GINGOLD: Yeah. As I mentioned, this
 7 is exactly the same answer I gave with regard to
 8 Mr. Brooks.
 9 SPECIAL MASTER BALARAN: But you said all
 10 of them before. You said every order in this case
 11 with Mr. Brooks but --
 12 MR. GINGOLD: No, I did not. Excuse me.
 13 I said with regard to Mr. Brooks, the specific orders
 14 that we're dealing with here, with regard to document
 15 preservation and document production. I also said,
 16 Mr. Balaran, that there are many orders, but they are
 17 not part of this proceeding because you correctly
 18 state the nature and scope of this proceeding. My
 19 point was this, and apparently I was not very clear,
 20 but my point was this: If you are misrepresenting
 21 the status of document production and the status of
 22 protection, and in fact documents are being
 23 destroyed, which makes them effectively impossible to
 24 be produced, it is plaintiffs' position that those
 25 misrepresentations have facilitated the Secretary's

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1 violation of the Court order. And without that, the
 2 documents may have been preserved and they may have
 3 been produced, and we wouldn't be where we are today.
 4 It is plaintiffs' position that there is
 5 an affirmative responsibility on counsel once an
 6 order is entered, whether it's a preservation or it's
 7 a production of documents, that accurate information
 8 be provided to the Court and as the Court said
 9 specifically, to paraphrase the Court, they have to
 10 make appropriate inquiries and conduct the requisite
 11 due diligence, and they cannot suppress the truth.
 12 That's the type of situation that's existed in a lot
 13 of cases with regard to not just hard copy but
 14 electronic evidence, and it's the responsibility of
 15 the attorneys to make sure the evidence is preserved.
 16 As that cases have stated generally, it is the first
 17 line of responsibility to do so.
 18 We are not suggesting, and again I stated,
 19 I thought very clearly, Mr. Findlay to our knowledge,
 20 unless there is evidence that is generated to the
 21 contrary, did not instruct anyone to destroy a single
 22 document. To our knowledge, Mr. Findlay didn't
 23 instruct anyone not to produce a single document.
 24 But what we have here are discovery orders, and we
 25 have orders regarding discovery that must be

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1 implemented. They cannot be enforced if in fact
 2 material information is concealed with regard to the
 3 conduct of the parties.
 4 SPECIAL MASTER BALARAN: But the very
 5 heading, your very heading number 2 states, and I
 6 quote, "the conduct of Secretary Norton, her
 7 employees and counsel is contemptuous by reason of
 8 their continuing willful destruction of key E-mail
 9 and other electronic trust documents."
 10 MR. GINGOLD: That's correct.
 11 SPECIAL MASTER BALARAN: Okay.
 12 MR. GINGOLD: And again, I think it's very
 13 clear that what we've also stated and identified, it
 14 includes the fact that the Solicitor's office did --
 15 well, again, it's plaintiffs' understanding that the
 16 Solicitor's office did in fact willfully destroy
 17 documents, systemically destroy documents, as in fact
 18 the special master himself has found in that regard.
 19 SPECIAL MASTER BALARAN: Well, I have
 20 Mr. Findlay right now in front of me, so I really
 21 want to focus on him, if I might.
 22 But anyway, I interrupted you and I
 23 apologize.
 24 MR. GINGOLD: That's okay. You asked we
 25 whether or not counsel and I said the answer was yes,

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1 counsel. You didn't ask me whether it was
 2 Mr. Findlay, because I already said Mr. Findlay in my
 3 opinion did not destroy those documents, and I don't
 4 recall Mr. Findlay being stated as one of the people
 5 who did, and maybe we made a mistake and did it, but
 6 if you will point me out, we will strike that, okay?
 7 But I don't recall that's in there, Mr. Balaran.
 8 Now, my point is a little different. My
 9 point is, we have a situation where the E-mail
 10 destruction was a focal point of discussion with the
 11 Court, with the special master, there were orders
 12 that were put in place to ensure that this be done.
 13 There are responsibilities to ensure that once orders
 14 are entered, the lawyers must do what is reasonable
 15 and professionally responsible to make sure their
 16 client complies with the orders.
 17 Now, how in the world is it possible for
 18 any client to comply with an order if they don't even
 19 know what the document is that has to be preserved?
 20 Nobody ever told plaintiffs and to my knowledge, no
 21 one ever told the Court or the special master,
 22 because they don't even know what the definition was
 23 of the documents were they that they were supposed to
 24 preserve. How do you preserve a document if you
 25 don't know what it is, and isn't that material? And

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1 did anybody make the inquiries that the Court has
 2 said repeatedly must be made by counsel? What must
 3 be done by counsel? Is counsel allowed to sit
 4 blithely by with no evidence of cognitive process and
 5 say an order has been entered, don't destroy
 6 documents? I don't know what they are, but don't
 7 destroy them. That is not what the rules of the
 8 Court are.
 9 SPECIAL MASTER BALARAN: If they do so, is
 10 it contemptuous?
 11 MR. GINGOLD: Well, if it undermines the
 12 judicial process, if it precludes the ability to
 13 actually accomplish what the Court has ordered,
 14 plaintiffs believe it can't be other than
 15 contemptuous.
 16 SPECIAL MASTER BALARAN: So what you're
 17 saying, though, is really that it constitutes a
 18 fraud, not contemptuous, you're really saying that if
 19 they sit back and as you say, blithely do nothing,
 20 then that constitutes a fraud of some sort.
 21 MR. GINGOLD: No, that's not what I said.
 22 I've already stated and again, I'm obviously not
 23 being very clear, that if the Court's authority is
 24 undermined, if the judicial process is undermined,
 25 e.g., Webb versus District of Columbia, the Court has

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1 the inherent authority to preserve the process, to
 2 ensure that it is not further undermined.
 3 In addition, the fraud issue can exist
 4 independent of a violation of a court order or
 5 consistent with a violation of a court order. And
 6 you can have a violation of a court order without
 7 fraud. Those are two separate matters that relate to
 8 this. It is plaintiffs' understanding, unlike
 9 Mr. Smith's characterization, that what the special
 10 master was in part instructed to do was to determine
 11 the culpability of the individuals based on the
 12 finding generally by the special master that E-mail
 13 has already been destroyed. It's not to relitigate
 14 whether E-mail has been improperly destroyed or by
 15 what violation of a court order.
 16 The question as we understand it goes to
 17 the second question. It's been destroyed, let's
 18 assume that it has been adopted by the Court, and to
 19 the plaintiffs' knowledge it hasn't been altered, to
 20 that extent, what if any culpability does Mr. Findlay
 21 have in that regard. If culpability is limited to
 22 the actual physical destruction, then plaintiffs
 23 would concur that there is no culpability. If
 24 culpability is limited to instruction to destroy,
 25 plaintiffs would agree.

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1 SPECIAL MASTER BALARAN: That Mr. Findlay
 2 has no culpability.
 3 MR. GINGOLD: That's right, if in fact
 4 that's the nature and scope of culpability. It's
 5 plaintiffs' position that is not the nature and scope
 6 of culpability. Plaintiffs believe, as the Court has
 7 suggested, there are important duties and
 8 responsibilities as officers of the Court, and I
 9 think the special master has articulated more clearly
 10 than anybody in the seven years of this litigation,
 11 and among those responsibilities is to deal candidly
 12 with the Court to ensure that the judicial process
 13 isn't undermined. The biggest problem that's
 14 occurred in this case among the discovery aspect is
 15 the destruction of documents that can't be produced
 16 anymore.
 17 There is, as this special master has found
 18 and identified with extraordinary care and detail,
 19 there has never been any preservation of date or
 20 documentation, hard copy or otherwise, and in this
 21 particular case, when the counsel is fully aware of
 22 these problems, or chooses not to become aware, when
 23 it's a duty to ensure that this litigation can be
 24 prosecuted and he doesn't do it, and he misrepresents
 25 the status at the same time, in plaintiffs' position,

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1 that's not only unethical behavior that should be
 2 referred to the disciplinary panel, it is also
 3 contemptuous.
 4 Let me also point out, Mr. Balaran, that
 5 plaintiffs have frequently suggested that matters
 6 should be referred to the disciplinary panel. It's
 7 only been in one incidence that the Court has
 8 actually done it. So plaintiffs do not disagree that
 9 where there is conduct, if my statements are correct,
 10 that those attorneys should be referred for further
 11 investigation. The fact of the matter is the judge
 12 in this case, based on plaintiffs' understanding of
 13 what has occurred in this case, has generally chosen
 14 the show cause approach as opposed to the
 15 disciplinary referral approach.
 16 SPECIAL MASTER BALARAN: Okay. Please.
 17 MR. SMITH: Thank you. I know I don't
 18 have a lot of time. Mr. Gingold has suggested we're
 19 not here to relitigate the January 27, 2000 order.
 20 We obviously were not in the case on an individual
 21 capacity. I think Special Master Balaran has made
 22 clear that those orders are not set in stone and
 23 that's one of the reasons we're here today.
 24 Mr. Gingold has suggested that Mr. Findlay
 25 somehow misrepresented the status and facilitated the

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1 Secretary's overwriting. Let me try as best I can,
 2 and I am not the most articulate, but I just don't
 3 think that Spinner ever misrepresented. The
 4 statements he made, they're saying well, he could
 5 have said more, but he never said that all, ever,
 6 ever said that all backup tapes had been preserved.
 7 He never ever represented these letters that were
 8 sent to you as a catalog of all problems with backup
 9 tapes.
 10 SPECIAL MASTER BALARAN: May I ask you,
 11 let's assume he did say all. Would that be
 12 contemptuous of any of the orders that are set out
 13 here?
 14 MR. SMITH: I think that if you find that
 15 the orders cover backup tapes and somebody said all
 16 were preserved, depending on intent findings, I mean,
 17 I guess that's Mr. Brooks's issue and I'm not going
 18 to answer that for him. I would submit that it's
 19 certainly a closer call than what you have here where
 20 Spinner never said all.
 21 SPECIAL MASTER BALARAN: But would that be
 22 civil contempt, would that be criminal contempt,
 23 would that be constituting a fraud on the Court, what
 24 would that be?
 25 MR. SMITH: I'm going to get in trouble

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1 here.
 2 SPECIAL MASTER BALARAN: I'm sorry, I just
 3 need --
 4 MR. SMITH: But I think that would go to
 5 your belief in terms of the intent, and motive would
 6 probably factor into that. But here, Spinner, I just
 7 think if you're going to look at this objectively,
 8 these letters need to be seen for what they were.
 9 They were efforts to tell you about problems ASAP as
 10 they occurred, nothing more, nothing less. They were
 11 never represented to be a catalog for every problem
 12 that might exist in backup tapes in the entire
 13 system.
 14 You know, Mr. Gingold has said that he
 15 doesn't think the attorneys are insurers for their
 16 clients. But at the same time he suggests that
 17 somehow we should have, or Spinner and others should
 18 have kept this from happening. This may not be
 19 appropriate, and maybe you've already ruled the other
 20 way on this, but if I get up -- there would be an
 21 awful lot of people having contempt if that's true in
 22 an awful lot of cases.
 23 You know, we get a document production
 24 order in, in a General Motors case, and I call up the
 25 general counsel, and it's a product defect case

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1 against GMC trucks. The first thing we do is we try
 2 to figure out which offices are likely to have
 3 documents, reasonably likely to have documents
 4 related to GMC trucks. Am I supposed to say all
 5 right, well, I want you to preserve every document in
 6 a Buick factory. I want you to override the
 7 corporate policy on overwriting backup tapes for the
 8 Buick plant in Flint, Michigan. And he says well,
 9 you know, that's Buick, that's not GMC, and I say
 10 well, we don't know that every single document, that
 11 somewhere somehow some Buick guy hasn't talked about
 12 GMC trucks, and you need to override that process.
 13 And he says well, you know, I'll tell you what.
 14 Actually, we print down every document in the Buick
 15 plant, every E-mail.
 16 You know, I guess maybe -- the way you're
 17 looking at me, you're not really buying this, but I
 18 really would suggest to you that on a day-to-day
 19 basis when lawyers are getting discovery requests
 20 related to GMC parts, they are not overriding
 21 in-house counsel's decisions on which plants relate
 22 or are reasonably likely to lead to those kinds of
 23 documents. And you know, I think this goes to a
 24 situation, you know. How much can you rely on
 25 in-house counsel? Are you not allowed to rely on

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1 them and you must affirmatively do it yourself?
 2 What if I'm not the lead lawyer in the
 3 case? What if I join a case midstream after those
 4 decisions had already been made. You know, most all
 5 clients stop all backup recycling in its tracks
 6 whenever a company is ever sued. You know, and even
 7 if they should, is it so improper and so clear cut in
 8 the law that you're going to hold someone in contempt
 9 for failure to do that? I mean, if you want to
 10 establish that burden, or that standard, you know,
 11 maybe we would all be better off for it, but I really
 12 would suggest to you that on a day-to-day basis, I
 13 don't think that that's the norm.
 14 Let me just close by saying this. You
 15 know, Mr. Gingold has done a remarkable job with this
 16 case. I think he is a gifted and talented lawyer.
 17 This is a case that involves some wrongs that were
 18 done to Indians for a hundred years and speaking
 19 personally, I frankly agree with some of the things
 20 he's trying to achieve here. And I know he has
 21 clients to represent, and I know that they have been
 22 wronged, and I wish him luck, frankly, against the
 23 government. Sorry, but I do. But I'm here
 24 representing Spinner, and you know, this is going
 25 after him in his individual capacity, making

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1 allegations about civil and criminal contempt
 2 allegations that his 84-year old mom reads, his wife
 3 of almost 25 years reads, his daughter who's a senior
 4 in high school and his son who's in the ninth grade
 5 read.
 6 You know, if proceedings are going to move
 7 forward, I think that you ought to -- and I'm sure
 8 you have, but the Supreme Court has said that our
 9 system of justice jealously guards the innocent
 10 against hasty, malicious and unfounded allegations,
 11 whether it comes from government or be prompted by
 12 partisan passion, pride or enmity. I just don't
 13 think that the allegation that are involved at the
 14 table today justify further proceedings in this
 15 matter.
 16 SPECIAL MASTER BALARAN: Okay, thank you.
 17 MR. GINGOLD: May I make one last comment?
 18 SPECIAL MASTER BALARAN: Uh-huh.
 19 MR. GINGOLD: We're not trying to make new
 20 law here. We're trying to enforce the law and the
 21 obligations that have existed for many, many, many,
 22 many years, and a series of cases have said the
 23 following: Once on notice, the obligation to preserve
 24 evidence runs first to counsel, who then has a duty
 25 to advise and explain to the client its obligations

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1 to retain pertinent documents that may be relevant to
 2 litigation. Citing Telecom International Limited
 3 versus AT&T, Kansas Nebraska Natural Gas versus
 4 Marathon, Donato versus Fitzgibbons, Turner versus
 5 Hudson Transit Lines, and on and on and on. This is
 6 not a novel concept we're talking about here.
 7 All of us who've represented clients have
 8 the same concerns, whether it's at the largest banks
 9 in the country or the government, because some of us
 10 have been practiced in all these areas. The reality
 11 is this. If you do not instruct your client which
 12 particular documents to preserve, and you do not
 13 oversight that protection, and you are warned by the
 14 Court that you cannot rely on representations made by
 15 the client or by the in-house counsel, there is a
 16 clear obligation to do more.
 17 And with regard to a personal attack or
 18 invective, this was not brought as a personal attack
 19 or invective and we, plaintiffs agree complete with
 20 Mr. Smith in that regard. The fact of the matter is
 21 and the record is clear, and Mr. Findlay was the
 22 second team brought into this case, based on the fact
 23 with a warning by the Court not to rely on what the
 24 client's representations are before you make
 25 representations to the Court.

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1 So it's not good enough in this case.
 2 This is not General Motors we're talking about, which
 3 is represented by competent counsel and which
 4 understands its duties because it is held liable. We
 5 are dealing with a situation where the Secretary has
 6 asserted sovereign immunity, has asserted that this
 7 Court has no jurisdiction to control what she is
 8 doing, documents have been destroyed as the special
 9 master has found after a very careful investigation
 10 systemically, and all you get are a few letters from
 11 one of the lead counsel in this case saying a couple
 12 of documents have been destroyed. There is nothing
 13 that is more harmful and obstructing to this
 14 litigation and the integrity of the judicial process
 15 than counsel who aren't doing their job. And whether
 16 it's contemptuous, which plaintiffs believe it is, or
 17 unethical, which plaintiffs believe it is, the Court
 18 historically has chosen to go the contempt route and
 19 not the ethical route before the disciplinary panel
 20 of the U.S. District Court, which I might add,
 21 plaintiffs would prefer anyway, because it's a much
 22 more effective procedure.
 23 SPECIAL MASTER BALARAN: Okay. Thank you
 24 very much.
 25 MR. FIDELL: I would like to take a few

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1 minutes break.
 2 MR. BALARAN: That's fine.
 3 (Recess.)
 4 SPECIAL MASTER BALARAN: We're going to
 5 continue. Mr. Fidell, you're going to present the
 6 argument for Mr. Simon?
 7 MR. FIDELL: Yes, sir.
 8 SPECIAL MASTER BALARAN: Please proceed.
 9 MR. FIDELL: May it please the Court: I'm
 10 Eugene Fidell, with Feldesman, Tucker, Leifer &
 11 Fidell, representing James F. Simon. With me across
 12 the table is my colleague Matthew Freedus.
 13 I'm only going to talk for a few minutes.
 14 I would like to observe that I greatly admire the
 15 patience that you have demonstrated in this
 16 proceeding and will try to contribute to that by
 17 being brief.
 18 First, in going over the papers, I noticed
 19 a typographical error in an earlier submission we
 20 made. In the proposed order that we submitted in our
 21 opposition to the motion, the word "here" should be
 22 "hereby".
 23 SPECIAL MASTER BALARAN: Right.
 24 MR. FIDELL: There are three things that I
 25 think I would like to comment on. They are all

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1 observations that were made by Mr. Gingold. At about
 2 10:15 this morning he said, we do not believe an
 3 attorney is an insurer for his client. I think
 4 that's a correct statement and I think that statement
 5 is faithful to his effort to obtain an order to show
 6 cause for Mr. Simon.
 7 At about 11:20 he said, plaintiffs do try
 8 to comply with court orders, and I would like to in
 9 that connection submit and have made a part of the
 10 record this printout from yesterday's Indian trust
 11 web site, and I will give a copy to counsel for the
 12 plaintiffs, and I will give another one to the court
 13 reporter, and I have a few others that I can pass
 14 down.
 15 (Exhibit A marked for identification.)
 16 MR. FIDELL: It's clear that despite our
 17 best efforts and despite the fact that we have made
 18 no secret of our views on this matter starting at the
 19 first status conference that you held, I was the one
 20 who raised a concern about civility. Our efforts in
 21 this regard have been fruitless because even as of
 22 the close of business yesterday, plaintiffs' web site
 23 continues to refer to my client among others as a
 24 contemnor. I object to it, I think it violates your
 25 order, and I've already made --

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1 SPECIAL MASTER BALARAN: What do you think
 2 the appropriate sanction is?
 3 MR. FIDELL: Well, we are entitled to have
 4 the plaintiffs' motions denied in any event, but I
 5 believe this is an additional ground for denial,
 6 simply as a sanction, and to preclude them from
 7 filing other motions for orders to show cause, and to
 8 deny their other pending motions for an order to show
 9 cause as to my client. That's my view on the matter,
 10 because frankly, I think the special master's views
 11 on this were expressed unmistakably both orally and
 12 in writing, and the web site speaks for itself.
 13 That's all I have to say on the second point.
 14 The third point is that at 1:45 today
 15 Mr. Gingold said that fraud and violations of the
 16 court order, quote, are two separate matters. This
 17 is particularly pertinent to my client's case because
 18 the original basis on which, or the basis on which an
 19 order to show cause was sought as to my client was a
 20 contempt, and our response to that demonstrated that
 21 their there was no court order at the time of the
 22 only act complained of, which was my client's
 23 execution of a letter several days after the
 24 complaint was filed.
 25 More recently, the plaintiffs advanced a

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1 different argument in which, reduced to its essence,
 2 they contend that Mr. Simon served as, reading from
 3 page 2 of their bill of particulars, has served as a
 4 direct link in the chain of command between lead
 5 trial counsel and Assistant Attorney General Lois
 6 Schiffer, and he advised and assisted Ms. Schiffer in
 7 the conduct of this litigation, including the
 8 cover-up of the destruction of federal records by the
 9 Solicitor's office. And they conclude by saying that
 10 he should be held in civil contempt for aiding and
 11 abetting defendants in perpetrating a fraud upon the
 12 Court and plaintiffs.
 13 And what I'm here to say, sir, is that the
 14 plaintiffs have in fact offered no basis whatever for
 15 these allegations, none. And we have, I think, done
 16 the appropriate analysis, we have tried to tease out
 17 any assertions, if you recall -- I'm not going to
 18 redo it here, you don't need it, you have the papers
 19 -- we've tried to tease out any assertions that you
 20 could characterize as assertions of fact, and none of
 21 them would stand the slightest scrutiny and really
 22 there is nothing there.
 23 I think those are the observations that I
 24 would like to make, I would like to reserve the rest
 25 of my time, and I'm obviously available to respond to

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1 any questions you have.
 2 SPECIAL MASTER BALARAN: Thank you.
 3 Mr. Gingold.
 4 MR. FIDELL: Excuse me, I had one other
 5 question, and I will address myself to you rather
 6 than to opposing counsel, but I would invite the
 7 plaintiffs to withdraw their motions as to my client.
 8 SPECIAL MASTER BALARAN: Mr. Gingold.
 9 MR. GINGOLD: I will deal with the last
 10 suggestion first. As I said with regard to
 11 Mr. Brooks, and I would say the same thing with
 12 regard to Mr. Simon, if in fact the Solicitor's
 13 office misrepresented the status of the preservation
 14 of the E-mail and the status of the production and
 15 your client relied on it, then we would not proceed
 16 further in that regard. We have no evidence that
 17 that's the case.
 18 I have said that before, I have said that
 19 for many, many months, and counsel who have met with
 20 me in my office who represent individuals in this
 21 regard, I have said the same thing to them. So I
 22 would honor your request if you felt that was the
 23 case. I just wanted to assure you of that, and
 24 there's no doubt in my mind that we have said it
 25 repeatedly.

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1 Second, with regard to the first point,
 2 which is the insurer, I stand by that. You are not
 3 the insurer. To my knowledge, attorneys are not
 4 insurers for their clients and I think if that were
 5 the case, it would be awfully hard to get malpractice
 6 insurance, so I'm not withdrawing that statement.
 7 Thirdly, with regard to the fraud and the
 8 difference between fraud and order to show cause, I
 9 obviously wasn't very clear. In my opinion you can
 10 have fraud and not an order to show cause, and you can
 11 have an order to show cause without fraud, or you
 12 could have a fraud and an order to show cause.
 13 They're not mutually exclusive, they can be separate
 14 actions. That is exactly one of the issues that is
 15 being challenged at the United States Court of
 16 Appeals with regard to the September 17th, 2002
 17 contempt decision of this Court with regard to
 18 Secretary Norton and Assistant Secretary McCaleb.
 19 So, I stand by that as well.
 20 With regard to the civility, it was
 21 plaintiffs' understanding, and plaintiffs' counsel's
 22 understanding that the special master required that
 23 we, I think in oral agreement before the master and
 24 in briefs that are filed with the master, that
 25 notwithstanding the disagreement with the plaintiffs,

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1 that the word contemnor would not be used. And
 2 that's notwithstanding as plaintiffs pointed out,
 3 defendants' counsel during the trial, Mr. Nagel
 4 specifically referred to contemnors. Plaintiffs have
 5 not used contemnors in briefs that have been filed
 6 and I have intentionally not used that statement
 7 today. I've referred to them by name, I've referred
 8 to them as named individuals.
 9 And whether or not something is on the web
 10 site, that's a different matter because that is not a
 11 matter within what the special master was addressing.
 12 SPECIAL MASTER BALARAN: How about the
 13 word malfeasor?
 14 MR. GINGOLD: I think that's a fair
 15 question, because the United States Court of Appeals
 16 on February 23rd, 2001, explicitly stated and found
 17 that malfeasance has been engaged in by the
 18 defendants in this litigation.
 19 SPECIAL MASTER BALARAN: And I'm not
 20 taking issue with that, but didn't I specifically say
 21 that people that are implicated in this particular
 22 proceeding shall be referred to by name and title
 23 only, or as a named individual? Now, albeit that the
 24 Court of Appeals or any other court may have found
 25 what they found, I thought we set out very specific

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1 instructions. Would you agree with me that calling
 2 them malfeasors as opposed to contemnors is in
 3 violation of that order?
 4 MR. GINGOLD: No, I would not.
 5 SPECIAL MASTER BALARAN: Would you care to
 6 explain?
 7 MR. GINGOLD: If you can provide me with a
 8 copy of the instruction, I will reconsider it, but my
 9 recollection of the instruction was you did not want
 10 them to be referred to as individual contemnors, I
 11 think even as alleged contemnors after that term was
 12 used by the Court subsequently. As a matter of fact,
 13 I think we referred to alleged contemnors in a letter
 14 that was subsequently filed with you. And alleged
 15 contemnors was also referenced by counsel for the
 16 defendants in this litigation, but we didn't use that
 17 anymore either.
 18 SPECIAL MASTER BALARAN: Let me then just
 19 disabuse you, if I might. In the memorandum dated
 20 November 4, 2002 to counsel, the revises procedures
 21 and schedules for investigation into plaintiffs'
 22 motion for orders to show cause, I state on page 4,
 23 these proceedings will be different, and common
 24 attacks, spurious accusations and inappropriate
 25 tactics will not be tolerated. Named individuals

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1 will be addressed either by title and name or as a
 2 named individual. Okay?
 3 MR. GINGOLD: Well, plaintiffs vigorously
 4 disagree with your characterization of what
 5 plaintiffs have filed as spurious attacks.
 6 Plaintiffs believe the evidence is quite clear that
 7 they have engaged in conduct which this Court has
 8 described in the past as contemptuous, and
 9 plaintiffs take strong exception to your finding that
 10 what plaintiffs have filed is spurious.
 11 SPECIAL MASTER BALARAN: In fact, you
 12 misunderstood, but the point is that notwithstanding,
 13 I'm simply directing you, as I directed on November
 14 4th, that if we are going to address anything that's
 15 going to refer to anybody that's implicated in any of
 16 these proceedings, either this or the one to follow,
 17 then they be addressed with name and title or as the
 18 named individual, and that's it. I'm not going to
 19 discuss it any further.
 20 MR. GINGOLD: Well, where during this
 21 proceeding did I refer to them as malfeasors today?
 22 Could you please point it out?
 23 SPECIAL MASTER BALARAN: No, you didn't
 24 today.
 25 MR. GINGOLD: Then what are you talking

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1 about, Mr. Balaran?
 2 MR. FIDELL: Can I help?
 3 SPECIAL MASTER BALARAN: Please.
 4 MR. FIDELL: If you turn, sir, to their
 5 consolidated reply to the opposition, to the bill of
 6 particulars, that's where it is. And also, I am
 7 indebted to Ms. Hilmer for reminding me of this, in
 8 the footnote to your December 4th, 2002 letter, you
 9 observe, quote, I will assume for the last time that
 10 my direction concerning the manner in which these
 11 individuals are to be addressed was not clear and
 12 that your referral to them was an oversight.
 13 The only other observation I'd make is
 14 that my client was not a party to the proceeding in
 15 which the Court of Appeals made whatever comment they
 16 made.
 17 SPECIAL MASTER BALARAN: Okay. Let's go
 18 to something substantive for a moment. I have a
 19 question for you.
 20 MR. GINGOLD: Excuse me, Mr. Balaran,
 21 before we leave this point.
 22 SPECIAL MASTER BALARAN: Go ahead.
 23 MR. GINGOLD: As plaintiffs have pointed
 24 out, we believe civility is important, and we believe
 25 that we have actually acted that way with regard to

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1 this proceeding. To the extent that you disagree or
 2 have problems with what plaintiffs said in your
 3 letter, to my knowledge plaintiffs have not filed
 4 papers with that same language in it, without regard
 5 to plaintiffs' feeling about the propriety of those
 6 instructions. To our knowledge, you have not
 7 instructed plaintiffs to remove any information from
 8 the web site. If you had, it would have been done
 9 reluctantly.
 10 And also if in fact as I would suggest, if
 11 Mr. Simon's counsel believes that plaintiffs' counsel
 12 is in contempt or there is an ethical violation here,
 13 we believe that the same standard should be applied
 14 to us that apply to your client, and you should file
 15 a motion for an order to show cause against me
 16 personally, or further, that you make a referral to
 17 the Disciplinary Panel of the U.S. District Court.
 18 MR. FIDELL: May I be heard on that
 19 briefly?
 20 SPECIAL MASTER BALARAN: Please.
 21 MR. FIDELL: Mr. Special Master, the last
 22 thing my client will do is further contribute to the
 23 proliferation of proceedings surrounding this already
 24 overcomplicated matter.
 25 SPECIAL MASTER BALARAN: All right. Let

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1 me state, I can't dictate what you do in the rest of
 2 the litigation, that's really not my say. I have no
 3 jurisdiction over it, you can say what you like,
 4 those proceedings are regulated by other individuals.
 5 I am going to ask again, for the final time, and
 6 direct you that anything associated with these
 7 proceedings, the individuals that are implicated in
 8 these proceedings shall be referred to either by name
 9 and title or as a named individual. That's it.
 10 There will be no other colorful adjectives or no
 11 other ways they will be described, notwithstanding
 12 the fact that they may have been described as such by
 13 other tribunals or other courts or other individuals
 14 or other monitors or anything else. Okay?
 15 MR. GINGOLD: And that's including the
 16 Court itself?
 17 SPECIAL MASTER BALARAN: Including the
 18 Court itself, that's absolutely correct.
 19 Okay. I do have a question to ask you
 20 with regard to Mr. Simon. As I understand it, the
 21 accusation leveled against Mr. Simon centers around
 22 allegedly an exchange between himself and Mr. Holt;
 23 is that correct.
 24 MR. GINGOLD: No, it's not.
 25 SPECIAL MASTER BALARAN: Then I have that

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1 wrong.
 2 MR. GINGOLD: It's not centered around it;
 3 that's when it began.
 4 SPECIAL MASTER BALARAN: Okay.
 5 MR. GINGOLD: I think we pointed out that
 6 Mr. Simon, as Mr. Sloneker testified under oath, or
 7 confirmed under oath, was involved in this litigation
 8 as a deputy assistant attorney general through the
 9 time I guess toward the time towards the end of the
 10 Clinton Administration, when he and the other
 11 political appointees as they do in the normal course,
 12 left with the change in administration, so that was
 13 through the year 2000 or something like that.
 14 SPECIAL MASTER BALARAN: But what did
 15 Mr. Simon do that implicates him in contempt?
 16 MR. GINGOLD: Well, in footnote 4 of the
 17 bill of particulars, we pointed out that the actions
 18 of his subordinates, Mr. Brooks and Mr. Findlay, are
 19 actions that were undertaken under his direction and
 20 control. We do not believe that lawyers who are
 21 responsible for managing a litigation as the
 22 assistant, as the deputy assistant attorney general
 23 was in this particular case, are other than
 24 responsible for the conduct of their subordinates.
 25 SPECIAL MASTER BALARAN: So other than his

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1 oversight capacity, do you have any instances you can
 2 point to with any particularity or even not, that
 3 Mr. Simon actually committed an act that violated a
 4 court order or that somehow impugned the dignity of
 5 the Court, or that upset the proceedings to the point
 6 that it was prejudicial to yourselves?
 7 MR. GINGOLD: During the period in
 8 question of the six particular orders, I will limit
 9 my response, the answer is, other than the activities
 10 of his subordinates because of our inability to take
 11 discovery at this point in time and to find out
 12 whether or not there were instructions or directions
 13 in that regard, I would concede to you, you're
 14 absolutely right, Mr. Balaran. The fact of the
 15 matter is if in fact he was directing this and was
 16 aware of it and was permitting it, it is our position
 17 that he too would be in violation of the order.
 18 But I will also advise you because we
 19 haven't stated in here, we do not have any evidence
 20 of that, and we haven't been permitted to take
 21 discovery in that regard.
 22 SPECIAL MASTER BALARAN: Okay. But I will
 23 say that Mr. Simon's name has been teed up for a long
 24 time without any such evidence and it has been teed
 25 up only because of, in his supervisory capacity.

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1 MR. GINGOLD: No, that's not correct. He
 2 was teed up for the initial purpose because he was
 3 the one who literally represented to plaintiffs'
 4 counsel that the E-mail and electronic information
 5 would be preserved.
 6 SPECIAL MASTER BALARAN: But that was
 7 prior to any order?
 8 MR. GINGOLD: That's right, that's when he
 9 was teed up. My guess is, if he wasn't involved in
 10 this litigation, and we know he was involved in the
 11 litigation because we dealt with Mr. Simon in this
 12 litigation, but if he wasn't actively involved and he
 13 didn't make a representation to plaintiffs, then we
 14 wouldn't have drawn the conclusion that he was
 15 supervising his subordinates. The reality is, when
 16 they destroyed documents like they have been in this
 17 case, as the special master himself pointed out, and
 18 discovery has not been permitted, as the Court has
 19 pointed out, to the harm of plaintiffs as the Court
 20 noted, then in fact there can be adverse inferences
 21 that are permissible. Can those adverse inferences
 22 be excluded? The answer is absolutely yes.
 23 SPECIAL MASTER BALARAN: But don't you
 24 have a responsibility before filing something that
 25 implicates somebody, either in an individual or other

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1 capacity, to know the facts upon which you're
 2 premising that?
 3 MR. GINGOLD: Absolutely, and if we were
 4 able to take discovery, we would know the facts, Mr.
 5 Balaran, and if in fact the documents weren't
 6 destroyed, we would know the facts. You're
 7 absolutely right.
 8 SPECIAL MASTER BALARAN: I have no more
 9 questions. If you care to address anything?
 10 MR. FIDELL: Only to renew my request
 11 through you, sir, to counsel to withdraw the motion
 12 as to my client.
 13 SPECIAL MASTER BALARAN: Okay. And --
 14 MR. GINGOLD: As I have already stated, if
 15 we have an affidavit from Mr. Simon that says he was
 16 misled by or the information was concealed from him,
 17 we would be happy to withdraw that.
 18 SPECIAL MASTER BALARAN: Actually, I
 19 wasn't going to ask for an answer, I was just going
 20 to ask if you if had any other statement you would
 21 like to make.
 22 MR. GINGOLD: Nothing other than my
 23 earlier arguments, which I would incorporate, nothing
 24 further.
 25 SPECIAL MASTER BALARAN: Okay, thank you

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1 very much. I appreciate it.
 2 Would you prefer a break? Why don't we
 3 take five minutes.
 4 (Recess.)
 5 SPECIAL MASTER BALARAN: We are back on
 6 the record. Argument for Ms. Schiffer.
 7 MR. ROBINSON: Good afternoon, Special
 8 Master Balaran. I am Jeffrey Robinson, with the firm
 9 of Baach, Robinson & Lewis, here on behalf of former
 10 Assistant United States Attorney Lois Schiffer.
 11 As the special master has set out, our
 12 task here today, there seems to be really one
 13 question that is relevant to Ms. Schiffer in her
 14 personal capacity and that question is whether or not
 15 the plaintiffs have set forth with some particularity
 16 actions which Ms. Schiffer did in her personal
 17 capacity which could constitute civil contempt,
 18 criminal contempt or fraud on the Court.
 19 There is a simple answer to that and the
 20 answer is nothing. There is nothing in the motions
 21 or the bills of particulars from which one could
 22 conclude that in her personal capacity Ms. Schiffer
 23 did anything that violated any court order, much less
 24 willfully violated any court order, much less
 25 constituted a fraud on the Court.

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1 The allegations are fairly
 2 straightforward. The allegations are that as the
 3 Assistant United States Attorney for the Environment
 4 and Natural Resources Division, her name appears on
 5 four briefs which were filed which were deemed to be
 6 somehow relevant to this dispute. The allegations
 7 further are as discussed with respect to Mr. Simon,
 8 who served as her deputy, that in her capacity as
 9 Assistant United States Attorney, she had supervisory
 10 authority over the trial lawyers who handled this
 11 matter.
 12 We submit that under any standard that one
 13 could apply, that those simply cannot constitute a
 14 basis for holding someone in personal contempt. And
 15 that's what the standard is and it is important. We
 16 have spent a fair amount of time here today talking
 17 about this, and we've gotten somewhat into the nuance
 18 of who did what and who said what, and everything,
 19 but I think as part of it we might take this time to
 20 step back just a little bit and sort out what this is
 21 about.
 22 This is not about discovery sanctions
 23 against a party for the manner in which it's
 24 conducted litigation. Frankly, it's not even about
 25 discovery sanctions against individual lawyers for

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1 the way they conducted litigation. You've dealt with
 2 that. Parties can agree or disagree about how you
 3 dealt with the issue of whether there should be
 4 sanctions for the fact that certain E-mail was not
 5 preserved, but that issue had been done. We have now
 6 gone past that. We have gotten to the point where
 7 individual lawyers, some of whom were the trial team,
 8 some of them who were supervisors, some of whom were
 9 in the Office of the Solicitor should be said to have
 10 willfully, intentionally violated the orders of this
 11 Court or engaged in some scheme, some fraud designed
 12 to fundamentally undermine what the Court process was
 13 about. And there is simply nothing there to suggest
 14 that.
 15 And we talked a little bit about, some
 16 people have talked about motive and some of those
 17 things. And one can see for a moment from the
 18 perspective that you've drawn about the question
 19 before you of particularized allegations why you
 20 might be a little leery to get into something about
 21 motive. But if you step back you understand why as
 22 representing an individual lawyer who is before you
 23 here today, that is the case. Because they are
 24 trying to make you understand that in reviewing what
 25 the plaintiffs have said and in reviewing what the

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1 plaintiffs are asking you to do, to launch into a
 2 process of discovery, of depositions, of document
 3 production, against people who were doing their jobs
 4 as lawyers in the government, that one should have
 5 some sense that there is evidence, real facts there,
 6 which would lead you to conclude that they had done
 7 something beyond which you have already heard,
 8 because you have addressed the discovery vehicle.
 9 There's some talk about the ability of the
 10 Court in dealing with the fraud on the Court or the
 11 inherent authority of the Court through contempt to
 12 address problems and fraud, but again, that's
 13 inherent authority when there is no other way of
 14 getting at that conduct, that the Court will not
 15 allow itself to sit there and be victimized because
 16 there's no rule, there's no regulation, there's no
 17 procedure, but the Court sees a wrong before it.
 18 That's not the situation. There was a rule, there
 19 was a procedure, there was a proceeding, there was a
 20 finding, there were sanctions entered, to deal with
 21 any harm to the judicial process and to the Court out
 22 of the conduct that is at issue here.
 23 And as we know and as plaintiffs' counsel
 24 has demonstrated, those proceedings, including the
 25 Rule 37 sanctions, can apply to individual lawyers as

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1 individuals. It's not just something that's set up
 2 for referral to the Bar, something which I would
 3 suggest is a step beyond, which is clearly not
 4 warranted here. The Court's reluctance to do so is
 5 well advised because the Court has power in its own
 6 hands to deal with litigation conduct before it in
 7 the context of discovery, which is what we're talking
 8 about here today.
 9 So, I think that, if you step back and
 10 we're saying, is there evidence here for facts that
 11 are being set forth before you which would warrant
 12 you launching into that process against individual
 13 lawyers.
 14 And I use Ms. Schiffer as an example, and
 15 there could be no easier example because there's
 16 nothing, there is absolutely nothing that has been
 17 set forth about her conduct that would lead her to be
 18 held in personal contempt. And I reserve the balance
 19 of my time. Thank you.
 20 SPECIAL MASTER BALARAN: Thank you.
 21 Mr. Gingold.
 22 MR. GINGOLD: I take exception to counsel.
 23 The matters have not been cured and the matters have
 24 not been addressed. As a matter of fact, as the
 25 Court has explained, there is a distinction between

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1 what has been determined by Mr. Balaran with regard
 2 to the E-mail destruction and the matters being
 3 addressed here today. The former dealt with the
 4 general finding that there has been systemic E-mail
 5 destruction, but the Court explicitly noted that that
 6 did not involve contemptuous behavior. At that point
 7 it was a finding of destruction.
 8 And secondly, it did not identify the
 9 nature and scope of the culpability of the
 10 individuals who were responsible for it.
 11 In addition, the Court explicitly noted
 12 that the matters related to the contempt are
 13 exclusively cut out or removed from what the Court
 14 had done, and I might want to point out that in fact
 15 there has been no cure and it's not likely to be a
 16 cure. There are documents that have been destroyed
 17 that will never be recovered, and when there are
 18 documents that will never be recovered, it directly
 19 affects the integrity of this litigation itself.
 20 One of the principal purposes of this
 21 litigation is an accounting of all funds. To do an
 22 accounting of all funds, there must be a complete
 23 record from which the Court can make an independent
 24 judgment that the defendants discharged the duty owed
 25 by the United States to individual Indian trust

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1 beneficiaries. If the records are destroyed, the
 2 Court can't do it.
 3 As the special master knows, there has
 4 been ample testimony in deposition on this case on
 5 experts, one of whom is the former special trustee,
 6 who testified that because of the massive document
 7 destruction and inability to find documents, there
 8 can never be an accounting. That's what the trial
 9 that's going to start May 1 is about, and that's one
 10 of the reasons that the defendants themselves have
 11 proposed an alternative to an accounting that has
 12 never been done, because they can't even identify the
 13 number and scope of the trust beneficiaries
 14 themselves. They can't identify what happened to 40
 15 million acres of land. They can't identify the
 16 millions of transactions, because documents have been
 17 destroyed.
 18 And among the documents that have been
 19 destroyed are the Solicitor's documents which
 20 otherwise would have been helpful to lead to the
 21 discovery of that exact information.
 22 SPECIAL MASTER BALARAN: What did Ms.
 23 Schiffer do?
 24 MR. GINGOLD: Ms. Schiffer was the
 25 Assistant Attorney General for the Environment and

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1 Natural Resources Division, the division that was
 2 litigating the case. She was on every single brief
 3 that was filed with this Court. For the same reasons
 4 I indicated Mr. Simon is responsible, Ms. Schiffer is
 5 responsible too, but I might take more than that.
 6 Ms. Schiffer was actually leading the litigation, she
 7 was actively involved in every aspect of this
 8 litigation, and plaintiffs believe that if we were
 9 entitled to take the discovery, and the documents
 10 hadn't been destroyed with regard to the E-mail, that
 11 would identify the individuals who were involved in
 12 the particular decisions, there would be ample
 13 evidence --
 14 SPECIAL MASTER BALARAN: But what facts
 15 did you have at your disposal when you filed this
 16 against her? I understand your argument about
 17 discovery, and that if you could take advantage of
 18 it, but when you filed this, what facts did you have
 19 at the ready that you felt implicated her in a
 20 contemptuous act?
 21 MR. GINGOLD: We probably had the facts
 22 that were just as strong and powerful as the facts
 23 that were before Judge Lamberth when he referred
 24 Assistant Attorney General McCallum to the
 25 Disciplinary Panel of the U.S. District Court for the

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1 actions of his subordinates in their unethical
 2 behavior.
 3 SPECIAL MASTER BALARAN: Which are what?
 4 I don't mean to keep interrupting but I want to just
 5 hammer this.
 6 MR. GINGOLD: Well, apparently over today
 7 I haven't made myself clear. To probably the
 8 astonishment of many people, documents have been
 9 destroyed in this case, and apparently I haven't made
 10 that very clear, and that information is somehow
 11 concealed in the record. In addition, to the
 12 surprise of many people, there weren't candid
 13 representations with regard to the status of the
 14 preservation of these documents. And to the surprise
 15 of a lot more people, there were even orders that
 16 were entered in this case that prohibited that type
 17 of activity.
 18 As I indicated before and I stated very
 19 clearly, it is plaintiffs' position that when the
 20 conduct of attorneys is such that the orders are
 21 being violated, and they have an affirmative
 22 obligation, especially government lawyers as the
 23 special master himself has pointed out quite clearly,
 24 because of their special duty as lawyers for the
 25 United States Government, have the obligation to

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1 inform the Court and have the obligation as the Court
 2 said, to make reasonable inquiries.
 3 The fact of the matter is based on the
 4 understanding of plaintiffs and if in fact, and we
 5 believe it will be confirmed in discovery, Ms.
 6 Schiffer was involved in every major decision with
 7 regard to disclosures of this case and the briefs
 8 that were filed with regard to the representations.
 9 She is responsible for what has been filed in this
 10 case that this Court specifically referenced with
 11 harsh terms. I will not describe those terms because
 12 of the admonition I received from this special
 13 master, but the Court has been very specific about
 14 how he has felt this litigation has been conducted,
 15 and particularly with respect to the Environment and
 16 Natural Resources division, of which Ms. Schiffer was
 17 running and managing and directing.
 18 And as part of that very strong language
 19 that the Court has used, Ms. Schiffer was involved in
 20 every jot and tittle of the briefs with regard to
 21 what was being filed, what was being disclosed, what
 22 was being objected to and what was not being
 23 disclosed. And based on plaintiffs' understanding,
 24 as we pointed out in here, and the special master's
 25 own findings in February of 2000 with regard to the

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1 Treasury destruction, she had an obligation to make
 2 inquiries after the repeated information that was
 3 presented that there were serious questions about the
 4 preservation of documents.
 5 If in fact the special master does not
 6 believe that an individual who is directing the
 7 litigation, who has responsibilities for being candid
 8 to the Court, and who is responsible for ensuring
 9 that her subordinates are acting in accordance with
 10 her duties as an officer of the Court is not
 11 responsible and should not be held responsible, then
 12 obviously the special master can determine that no
 13 further proceedings go forward.
 14 However, this Court explicitly adopted a
 15 different position with regard to the Assistant
 16 Attorney for the Civil Division with regard to
 17 matters that were much less conspicuous than this.
 18 This has affected years of litigation. It has
 19 delayed this case so many years we don't know how
 20 many people have died in the interim and aren't
 21 getting their trust assets. That is quite different
 22 from making certain misrepresentations that were
 23 cured by the Court as a result of his reaction to
 24 what was done by Mr. McCallum's subordinates.
 25 Nevertheless, the Court explicitly referred Mr.

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1 McCallum to the Disciplinary Panel for investigation
 2 and any other lawyers who were responsible to it, and
 3 there was no evidence in the record that Mr. McCallum
 4 engaged in that activity himself.
 5 So if this special master wants to take a
 6 standard and apply a standard different from the
 7 Court, it's obviously the prerogative of the special
 8 master. We believe the Court has set the standard.
 9 SPECIAL MASTER BALARAN: Well, my question
 10 is this. First of all, I'm not making a
 11 recommendation to a disciplinary panel. In fact, I
 12 don't even know what the standard is for that. I
 13 think that really is part of the inherent authority
 14 of the Court, to feel that for whatever reasons its
 15 orders haven't been followed and feel the judicial
 16 process has been somehow impeded.
 17 I have a much more simple problem. I
 18 mean, the order here was to not only articulate with
 19 specificity, but on an individual by individual
 20 basis. It wasn't on a signature block basis. It
 21 wasn't under the large umbrella of having to, you
 22 know, share office space or cafeteria tables with
 23 somebody. You had to be part of this, you had to do
 24 something specifically. And specifically, in order
 25 to fall into the rubric of contempt, you had to

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1 violate an order. And all I'm asking is, do you know
 2 of anything that Ms. Schiffer might have done? And
 3 it's really the same question I'm asking that I asked
 4 about Mr. Simon, do you know of anything that Ms.
 5 Schiffer may have done that may implicate her as a
 6 contemnor, as you like to say it?
 7 MR. GINGOLD: I have not used that term,
 8 Mr. Balaran.
 9 SPECIAL MASTER BALARAN: No, I just did,
 10 but you know what I'm saying. Is there anything, do
 11 you know of any contemptuous act that she did?
 12 MR. GINGOLD: Well, as I've said several
 13 times, and I'll say it again, apparently I'm not
 14 making myself clear at all, but let me point this
 15 out: The defendants' counsel made that same argument
 16 during the contempt trial of Mr. Nagel, who made that
 17 same argument with regard to the statement that the
 18 Secretary in her official capacity wasn't involved,
 19 or there is no evidence that the Secretary was
 20 involved in any of this, notwithstanding her position
 21 and her responsibility to make sure certain things
 22 were done. And the Court responded --
 23 SPECIAL MASTER BALARAN: This is her
 24 individual capacity.
 25 MR. GINGOLD: The Court responded, and I

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1 will paraphrase it because I don't recall exactly
 2 what it was, criminals don't leave calling cards.
 3 That's how the Court responded. We have a situation,
 4 Mr. Balaran, where massive evidence has been
 5 destroyed. The E-mails, which clearly would have
 6 identified who was involved in which decisions, have
 7 been destroyed. And if they haven't been destroyed,
 8 Mr. Balaran, they haven't been produced either, under
 9 a privilege log or in any other capacity, and they
 10 were ordered to be produced by the special master
 11 himself.
 12 So, we have years of documents that are
 13 missing and it is conspicuous, as the Court pointed
 14 out, that it is convenient whenever the defendants
 15 need a document that they haven't produced, that it
 16 turns up when they need it to exculpate them.
 17 Plaintiffs were put in a position as a result of
 18 massive spoliation, as a result of representations
 19 that were made to the Court that documents were being
 20 preserved when they were not, with litigation that
 21 was directed by Ms. Schiffer herself, and if that
 22 isn't good enough for the special master, we
 23 understand, because you have made it very clear, but
 24 plaintiffs of course respectfully disagree.
 25 SPECIAL MASTER BALARAN: Okay. Do you

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1 wish to reply?
 2 MR. ROBINSON: There is no allegation that
 3 Ms. Schiffer destroyed any documents. There is no
 4 allegation that Ms. Schiffer made any
 5 misrepresentation to the Court. There is a single
 6 allegation, which is that she was the boss, and to
 7 the extent that there is ever a position where
 8 someone's individual capacity can go to their
 9 official capacity, this is it. There is no
 10 allegation of an ultravirus act. There is no
 11 allegation, not even real speculation that she did
 12 something outside of her role as the Assistant United
 13 States Attorney.
 14 Now, I would argue, but it's not my
 15 purview to argue it here, that there is not
 16 sufficient evidence to suggest that in her official
 17 capacity she did anything that was --
 18 SPECIAL MASTER BALARAN: We don't have
 19 that issue in front of us.
 20 MR. ROBINSON: But it is clear that in her
 21 personal capacity, is no basis for going forward with
 22 Ms. Schiffer, there is no particularization, and it
 23 would simply be a waste of resources and a diversion
 24 to continue this proceeding as to her.
 25 SPECIAL MASTER BALARAN: Okay. Thank you

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1 all very much.
 2 (Whereupon, the hearing to hear oral
 3 arguments adjourned at 2:52 p.m.)
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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA
3 - - - - -X
4 ELOUISE PEPION COBELL, :
5 et al., : Case No.
6 Plaintiffs, : 1:96CV01285
7 v. : (Judge Lamberth)
8 GALE NORTON, Secretary of :
9 the Interior, et al., :
10 Defendants. :

11 - - - - - X

12 Washington, D.C.

13 Friday, April 25, 2003

14 CONTINUATION OF ORAL ARGUMENTS

15 concerning Named Individuals' Motions to Dismiss
16 Plaintiffs' Bills of Particulars related to
17 Plaintiffs' March 20, 2002 Motion for Order to Show
18 Cause Why Interior Alleged Contemnors and their
19 Counsel Should Not be Held in Contempt for Destroying
20 E-Mail, taken before Special Master Alan Balaran, at
21 the office of DFI International, 1717 Pennsylvania
22 Avenue, N.W., Washington, D.C., at 1:00 p.m.,
23 Friday, April 25, 2003, and the proceedings being
24 taken down by Stenotype by Paul A. GASPAROTTI, and
25 transcribed under his direction.

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<p>1 APPEARANCES:</p> <p>2</p> <p>3 On behalf of the Plaintiffs:</p> <p>4 DENNIS GINGOLD, ESQ.</p> <p>5 1275 Pennsylvania Avenue, N.W.</p> <p>6 9th Floor</p> <p>7 Washington, D.C. 20004</p> <p>8 202-661-6380</p> <p>9 On behalf of the Defendants:</p> <p>10 TRACY HILMER, ESQ.</p> <p>11 Civil Division</p> <p>12 United States Department of Justice</p> <p>13 1100 L Street, N.W.</p> <p>14 Washington, D.C. 20005</p> <p>15 202-307-0474</p> <p>16 On behalf of Department of the Interior</p> <p>17 Attorney Edith Blackwell, in her personal</p> <p>18 capacity:</p> <p>19 AMY BERMAN JACKSON, ESQ.</p> <p>20 Trout & Richards, PLLC</p> <p>21 1100 Connecticut Avenue, N.W.</p> <p>22 Suite 730</p> <p>23 Washington, D.C. 20036</p> <p>24 202-463-1922</p> <p>25</p>	<p>1 PROCEEDINGS</p> <p>2 SPECIAL MASTER BALARAN: Good</p> <p>3 afternoon. My name is Alan Balaran. I was</p> <p>4 appointed in February 1999 by the Honorable Roy C.</p> <p>5 Lamberth to serve in the position of special</p> <p>6 master in the case captioned Cobell v. Norton,</p> <p>7 96-1285. The proceedings in front of us are bills</p> <p>8 of particulars for named individuals in support of</p> <p>9 plaintiffs' motion for order to show cause why</p> <p>10 Interior defendants and their counsel should not</p> <p>11 be held in civil and criminal contempt for</p> <p>12 destroying e-mail.</p> <p>13 We heard argument on the 23rd from</p> <p>14 several people and today we will be hearing</p> <p>15 arguments on behalf of Miss Blackwell and</p> <p>16 Mr. Cohen. Miss Berman, I believe you are going</p> <p>17 to be representing Miss Blackwell's interests, so</p> <p>18 please identify yourself for the court reporter.</p> <p>19 MS. BERMAN JACKSON: My name is Amy</p> <p>20 Berman Jackson. I represent Edith Blackwell.</p> <p>21 At the outset, I wanted to raise a few</p> <p>22 preliminary matters. First, Miss Blackwell and</p> <p>23 Mr. Cohen had moved to stay this hearing pending</p> <p>24 the outcome of the petition for writ of mandamus</p> <p>25 in the Court of Appeals. No opposition has been</p>
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<p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 On behalf of former Department of the</p> <p>4 Interior Assistant Solicitor Edward Cohen,</p> <p>5 in his personal capacity:</p> <p>6 ROBERT D. LUSKIN, ESQ.</p> <p>7 Patton Boggs, LLP</p> <p>8 2550 M Street, N.W.</p> <p>9 Washington, D.C. 20037-1350</p> <p>10 202-457-6000</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 filed to my knowledge and I don't believe it has</p> <p>2 been ruled upon on the record at this point, so I</p> <p>3 wanted to raise that before we began. I don't</p> <p>4 want to argue it, I just --</p> <p>5 SPECIAL MASTER BALARAN: Let me address</p> <p>6 that if I may. I have your argument and I</p> <p>7 recognize that it's unopposed in the sense that</p> <p>8 there's been nothing filed. It's my position that</p> <p>9 I'm going to hear argument just simply to put</p> <p>10 closure on all the arguments, and we can decide</p> <p>11 later whether or not it would be appropriate to</p> <p>12 stay the proceeding in its entirety.</p> <p>13 MS. BERMAN JACKSON: We are here on</p> <p>14 plaintiffs' motion for order to show cause. We do</p> <p>15 not believe we are here on our motion to dismiss.</p> <p>16 We believe the rules call for oppositions to</p> <p>17 motions, not motions to dismiss motions, and</p> <p>18 therefore we believe the standards that have been</p> <p>19 cited applicable to the considerations of</p> <p>20 plaintiffs' allegations in the complaint would be</p> <p>21 irrelevant to these proceedings.</p> <p>22 We've also in our papers disputed the</p> <p>23 notion that discovery would be available or</p> <p>24 appropriate in support of a motion for order to</p> <p>25 show cause, particularly one seeking criminal</p>

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1 sanctions. So, if at the conclusion of all these
 2 proceedings you conclude that there are certain
 3 individuals for whom there should be further
 4 proceedings, we would want to argue at that time
 5 as to whether discovery would be appropriate.
 6 Additionally, I want to say with
 7 respect to the standard, I don't want to argue
 8 that at length, something that's been argued a
 9 good bit on Wednesday, but we do agree with the
 10 position taken by Bill Briggs on behalf of Phil
 11 Brooks, that the plaintiffs have to produce some
 12 evidence, that's I believe the language that Judge
 13 Lamberth used. The Ri Ra case he cited goes all
 14 the way to saying clear and convincing evidence,
 15 but enough evidence that if it was unopposed, the
 16 Court could then find all the necessary elements
 17 of contempt by clear and convincing evidence.
 18 SPECIAL MASTER BALARAN: Do you believe
 19 that's embedded already in the standard that's
 20 been asked by sufficient particularity, the bills
 21 of particulars, et cetera?
 22 MS. BERMAN JACKSON: No. Obviously if
 23 they're acting for contempt as to a person, these
 24 at investigations have to be particularized, but
 25 in addition, they have to not only particularize

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1 this person did X, but it has to be the elements
 2 of contempt for each person. There has to be
 3 enough so that it would make sense for then the
 4 order to show cause to issue and the person to be
 5 called upon to argue to the Court that it should
 6 exercise its discretion not to hold them in
 7 contempt, but if they don't have enough to trigger
 8 the proceedings, we don't think we should have to
 9 go further.
 10 And here we don't think that you are
 11 even going to be in a situation where you have to
 12 resolve the question of what that quantum of some
 13 evidence is, because we believe the plaintiffs
 14 have not particularized their allegations with
 15 respect to Miss Blackwell, and certainly, they
 16 have not particularized the allegations against
 17 here in her personal capacity. We have read the
 18 pleading and reread the pleadings, and we feel
 19 that they simply have not cited an act or omission
 20 that was done in anything other than her official
 21 capacity.
 22 With respect to setting out the
 23 elements of contempt, we agree with the position
 24 that we believe you established on Wednesday, that
 25 there needs to be an order. You have asked a

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1 number of times, what order did this individual
 2 violate, and in many occasions the answer by the
 3 plaintiffs was well, you don't need an order;
 4 contempt can also issue based on the Court's
 5 inherent powers, and they cite the Webb case.
 6 And while we don't disagree that there
 7 are situations under which the Court can reach for
 8 its inherent powers, in our brief we cited the
 9 Chambers case, and I believe Mr. Robinson alluded
 10 to this principle on Wednesday, which is, you only
 11 reach for the inherent powers if there is no rule
 12 that's going to get you there. And here, not only
 13 was there a rule available, there was a rule
 14 applied. This Court has addressed this particular
 15 discovery dispute under Rule 37.
 16 SPECIAL MASTER BALARAN: Do you believe
 17 a special master has the right to reach into the
 18 quiver and pull out inherent authority, or do you
 19 believe the special master's authority is
 20 circumscribed by the particulars laid out in the
 21 order of reference?
 22 MS. BERMAN JACKSON: Well, I think even
 23 the plaintiff conceded on Wednesday at one point
 24 that you were right, if it wasn't a violation of
 25 those six orders, that that was the end of these

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1 proceedings. We accept that, particularly in this
 2 instance where Rule 37 has already been applied.
 3 I don't think this is an inherent powers
 4 situation.
 5 The other reason we think there has to
 6 be an order grows out of the question that you
 7 have to answer, which is, what kind of contempt
 8 are they seeking. There's only two instances
 9 where you could have civil contempt. One is
 10 coercive, the keys to the jail cell kind of
 11 contempt. And clearly they're not seeking that
 12 here. They allege in their bill of particulars
 13 that Miss Blackwell stopped working on the Cobell
 14 litigation matter in September 2001. There is
 15 nothing that they are asking the Court to force
 16 her to do.
 17 And we believe that they couldn't,
 18 because she's not responsible for the policy or
 19 even the legal decisions made by the Department of
 20 The Interior. She's a career lawyer, she is not
 21 the Solicitor, she's not a political appointee.
 22 Furthermore, we believe the
 23 compensatory contempt isn't available here because
 24 if you assume that plaintiffs have been harmed in
 25 some financial way by incurring legal fees to

<p style="text-align: right;">Page 211</p> <p>1 pursue the e-mail that they felt they were 2 entitled to, the backup tapes, that was ordered to 3 be provided to them, so they have been 4 compensated. And we have also briefed the notion 5 of whether compensation could be ordered because 6 of immunity, and I'm not going to argue it, I've 7 briefed it at least 27 times. 8 If you look at the bill of particulars, 9 all the events listed predate your July 2001 10 order. They're talking about that universe of 11 facts. Clearly this is an action seeking to 12 punish someone, lots of people, for past alleged 13 misdeeds. We have cited cases in our pleadings to 14 say that civil contempt does not exist to punish a 15 contemnor or to vindicate the court's integrity. 16 That's criminal contempt. And criminal contempt 17 as set out in 18 USC Section 401, which they cite 18 in their bill of particulars, requires an order. 19 You can't get around the need for an order. 20 Which brings us back to the question 21 that you've asked, I think in each hearing, what 22 order did this person violate? What specific 23 actions or omissions of that person violated the 24 order? We submit that since they did not answer 25 those questions specifically as to Edith Blackwell</p>	<p style="text-align: right;">Page 213</p> <p>1 contempt. It's missing. 2 SPECIAL MASTER BALARAN: Would Miss 3 Blackwell, is there a situation you can conceive 4 of where Miss Blackwell would be the guarantor, if 5 you will, of the actions of her client? 6 MS. BERMAN JACKSON: I certainly do 7 not. She is also a lawyer, number one, and she is 8 a foot soldier. She is the career government 9 employee, she is not the Secretary, she is not a 10 political appointee. She was not the Solicitor. 11 Her job was to get these orders, get these 12 requests for production, try to figure out what 13 they meant, and give her client her advice as to 14 what it should do. She did not get to make the 15 decision as to what should be done. 16 SPECIAL MASTER BALARAN: If she were a 17 decision maker, would there be a different 18 argument you would be giving me? If she were the 19 Solicitor for example, if she were a person in a 20 position of authority, would you believe that 21 would change this argument at all? 22 MS. BERMAN JACKSON: I think if you 23 have the counsel or the decision maker in an 24 agency deliberately violating a clear and specific 25 order, then I guess you could have a contempt</p>
<p style="text-align: right;">Page 212</p> <p>1 in their bill of particulars, you should recommend 2 to the Court that there should be no motion for 3 order to show cause, deny their motion. Or as you 4 put it Wednesday, since they didn't answer those 5 questions, there's no soap box on which discovery 6 can rest, there is no foundation to go forward. 7 The task today, I think, is to look at 8 the one pleading that was designed to specifically 9 address Miss Blackwell and to see, does it set out 10 the elements of contempt. It references only one 11 of the six orders, the November 9th, 1998 order. 12 The bill of particulars was supposed to put us on 13 notice, what are we going to defend against, and 14 that's what they gave us to look at. And that 15 order as you know, denied a motion for protective 16 order, directed the defendants to produce the 17 documents responsible to the third request for 18 production. Nowhere in the 50-some pages labeled 19 bill of particulars against Edith Blackwell is 20 there any allegation, much less any evidence, that 21 Edith Blackwell read that order and said I'm not 22 going to do it. Nowhere in the bill of 23 particulars is there any allegation or any 24 evidence that Edith Blackwell read that order and 25 said to anybody else, don't do it. That's</p>	<p style="text-align: right;">Page 214</p> <p>1 conversation, but to tell you the truth, given 2 Edith's position and the fact that I have only 3 represented her since the beginning of this 4 litigation, I haven't researched or thought about 5 the answers to that question. 6 SPECIAL MASTER BALARAN: Okay. 7 MS. BERMAN JACKSON: You did ask a 8 question on Wednesday, well, what if I construed 9 the November 9th order to include backup tape 10 copies of the e-mail? Would the failure to 11 preserve them then be contemptuous? And I would 12 like to answer that question. I liked Miss 13 Hilmer's answer but I'd like to answer it to, and 14 I think the answer is found in your use of the 15 word construe. It seems to me that if you have to 16 construe an order to determine if it covers 17 particular conduct, or if you have to look as you 18 said, under the umbrella of the order as opposed 19 to its plain terms, then it's not clear and 20 specific and it's not an order that could support 21 the extraordinary remedy of contempt. 22 We believe that your own opinion, on 23 page 13 you recognize that it was merely a summary 24 order, and of so, it wasn't inappropriate for the 25 Department to go ahead and request clarification,</p>

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1 given the summary nature of the order.
 2 Moreover, if we're looking at
 3 essentially criminal contempt here, mere
 4 noncompliance wouldn't be enough, you would also
 5 to have the willfulness. So my answer is no, I
 6 don't think if you construed it that way, it would
 7 be enough.
 8 I also don't think that it should be
 9 construed now to call for the preservation of
 10 backup tapes, because I don't believe anyone
 11 construed it that way at the time. The order
 12 called for documents responsive to the third
 13 request to be produced. Documents, yes, have been
 14 defined to include information stored on
 15 computers. What is that? It could be a brief or
 16 memorandum that you just haven't printed out, or
 17 you didn't print out and store, so it includes
 18 general documents, but it also includes electronic
 19 messages, e-mails. We know that, we don't dispute
 20 that.
 21 So in November 1998, when you get a
 22 request to produce e-mail that's responsive to
 23 this request, and as you know, it wasn't all
 24 e-mail, it was just e-mail responsive to that
 25 very -- I mean, the request was tailored to very

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1 particular kinds of information. The question
 2 this poses is what is the media in which you have
 3 to produce these electronic messages that exist
 4 only electronically. Well, the Department already
 5 had in place a procedure whereby they were
 6 required to print them out daily and save them.
 7 That is what the Department considered to be a
 8 record.
 9 And I would point out, because I don't
 10 think anybody has really mentioned it here, what a
 11 burden it is to print out all your e-mails every
 12 day and save them. If any of us had to do it,
 13 it's extraordinary. And not only do they do it,
 14 the point is, Blackwell is the one who's had to
 15 tell people to do it and listen to their
 16 complaints about having to do it. But we submit,
 17 given the fact that that was the media that they
 18 had available, to preserve these messages that
 19 exist nowhere other than electronically, that it
 20 was not unreasonable and surely not contemptuous
 21 for the Department of the Interior to believe that
 22 the best way to produce the material was the way
 23 in which it was retained, and not to go on and
 24 also produce duplicative backup tape media which
 25 wasn't regularly maintained, not viewed by the

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1 Department as records, not produced in other
 2 litigation, and not particularly searchable or
 3 accessible or usable.
 4 SPECIAL MASTER BALARAN: But the
 5 Department never challenged the scope of the
 6 definition in the first request for production
 7 that included these tapes. And even accepting
 8 your argument that it may have been an onerous
 9 burden on a government employee to both print, and
 10 on the government itself to maintain all the
 11 various media on which the various information is
 12 retained, there has never been a challenge to that
 13 at all.
 14 MS. BERMAN JACKSON: Well, immediately
 15 after the November order, they came back and said,
 16 well, we told you we have these backup tapes, now
 17 what do you want us to do about them. So, I think
 18 they did ask. I don't think initially -- I think
 19 initially when you're talking about the broader
 20 definition of documents, when it included e-mail,
 21 I think they thought they were producing e-mail.
 22 So I don't think until this came along, which was
 23 the first time they asked for Solicitor's office
 24 e-mail, and they knew it was sitting around on the
 25 tape -- it never -- nothing had ever been sitting

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1 around on the tape media before, it was regularly
 2 overwritten -- they said we need to tell the Court
 3 about this. They didn't say, let's just hide it
 4 in the back room.
 5 SPECIAL MASTER BALARAN: Wasn't there
 6 awareness because of the incident with Miss Bruce,
 7 that the information was retained and in fact in
 8 response to specific instructions to retain it
 9 because it was going to be used for archival
 10 purposes, that there was information embedded on
 11 it? I mean, there must have been some awareness
 12 of some sort that there was --
 13 MS. BERMAN JACKSON: I think the
 14 awareness evolved, but I think, and I also feel
 15 that these are questions to ask the defendant and
 16 not a nonparty individual. I feel that Miss
 17 Blackwell has often been called upon to be the
 18 face of the Department and I don't quite know how
 19 she got in that position. She isn't the
 20 Department, she isn't a defendant.
 21 But, I think the point is, when they
 22 were confronted with a situation in which it could
 23 conceivably be discoverable, they told the Court
 24 they had it. And I think even if you conclude
 25 nope, if you read that November 9th order, it's

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1 clear to me, backup tapes are embraced in the
 2 order, I see it, and that was a direct
 3 contravention to their discovery obligation,
 4 that's been sanctioned. And even if you conclude
 5 there was just an unreasonable interpretation that
 6 was directly in contravention to discovery orders
 7 so much that it's contemptuous, I would say to you
 8 that there's no allegation in the bill of
 9 particulars that Edith Blackwell had the power or
 10 the authority to make a decision as to how the
 11 Department of the Interior was going to comply
 12 with this discovery request.
 13 And it's true that later you studied
 14 the issue, you had experts inform you as to the
 15 very particular differences between the backup
 16 tapes and printed e-mail, and they were real
 17 enough for you to call them discoverable, but I
 18 would submit they're not real enough for the
 19 category, you know, the catalog of horrors that
 20 have been claimed befell for their destruction.
 21 And we weren't a party to the July proceedings,
 22 and I don't think we're bound by it. We're not
 23 challenging it here.
 24 The point is, I think it's fair to say
 25 that the duty to preserve those tapes was not self

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1 evident from the November order alone, and I think
 2 that's your critical question for contempt. Since
 3 they pointed to that order and that's the only one
 4 they pointed to, I don't believe they have an
 5 order, and if there's not order, I think that's
 6 the end of it.
 7 If we have to go further, then I would
 8 say that their motion fails not only for lack of
 9 an order but for the lack of allegations of acts
 10 or omissions in violation of the order. It's a
 11 long bill of particulars, I'm not going to go
 12 through it paragraph by paragraph. We did in our
 13 opposition, we identified which paragraphs don't
 14 even mention her. But I think when you boil it
 15 down, and I could be wrong because I found it
 16 difficult to boil it down, but when I boiled it
 17 down, I saw only a few allegations.
 18 The first was that she failed to
 19 disclose to the Court and to you the fact that the
 20 overwriting of these backup tapes had not ceased.
 21 They point out that she was of counsel on some
 22 pleadings, that she actually went to court
 23 sometimes, and she didn't disclose it. So that
 24 leads us obviously to the first issue, what order
 25 did that failure violate?

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1 But even if you want to get out of the
 2 order department and you say that's just generally
 3 fraudulent, which I don't think is alleged in her
 4 bill of particulars -- I don't know, maybe I'm a
 5 stickler about things like this because I used to
 6 be a prosecutor, but if you're going to charge
 7 somebody with fraud because they did not say
 8 something, or failed to review something, you must
 9 also allege that they knew it. There has to be
 10 proof that she knew and concealed, for the
 11 concealment to be fraudulent. It hasn't been
 12 shown, and it hasn't even been alleged.
 13 The second contemptuous act that they
 14 describe in the bill of particulars, and this sort
 15 of supports my contention that they're saying she
 16 didn't know about the overwriting, they say she
 17 was supposed to prepare a privilege log. If she
 18 had done it, she would have found out that these
 19 tapes had been overwritten and then she would have
 20 been able to disclose it. Well, I don't think
 21 could have known will even rise to the level of
 22 negligence, but could have known certainly, or
 23 even negligence won't get you to contempt.
 24 But more importantly, as we pointed out
 25 in our opposition, the allegation is false. A

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1 privilege log was filed with respect to the third,
 2 as well as many other requests for production.
 3 Finally, on this one I feel constrained
 4 to read. They suggest that she should be held in
 5 contempt and they say there is no evidence
 6 whatsoever that counters her, in italics, apparent
 7 role in ordering the overwriting. This is where I
 8 think you have to ask the question that you asked
 9 on Wednesday which is, went, don't you have some
 10 responsibility before you level an accusation
 11 against somebody, to have a fact to back it up?
 12 And of course you do, and you know that there is a
 13 civil rule that addresses that specifically.
 14 The plaintiffs knew that it was
 15 Mr. Cohen who authored that regrettable memorandum
 16 to branches telling them you can stop now. They
 17 know that her name was not on it, she did not
 18 author it, she did not receive it. They did not
 19 cc or bcc it to her. They know that at the
 20 meeting shortly after your order, when Glen
 21 Schumacher revealed that he had not been saving
 22 the tapes anymore, that there was shock all around
 23 the table, even on the part of Mr. Cohen.
 24 And I submit that if the best they can
 25 do is to then turn around and say well, she hasn't

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1 denied that she was involved, that first of all,
 2 that turns the burden of proof on its head. And
 3 second of all, if that's the level of fairness and
 4 truthfulness we're going to be having in these
 5 proceedings, these proceedings must end. The
 6 elements of contempt are not alleged, and I would
 7 like to reserve the rest of my time for rebuttal.
 8 SPECIAL MASTER BALARAN: Thank you.
 9 Mr. Gingold.
 10 MR. GINGOLD: A couple of points to
 11 start out.
 12 I did not concede that contempt
 13 wouldn't lie. What I think I said during the
 14 course of your questioning, Mr. Balaran, was if in
 15 fact you are right with regard to the constraints
 16 of the order, your conclusion would be correct,
 17 but plaintiffs disagree with your understanding of
 18 the facts and the law. So, I do not consider that
 19 a concession, and plaintiffs restate that we do
 20 not agree with your statement of the law or the
 21 constraints, especially in light of the Court's
 22 order that was entered and associated with this
 23 particular September 17th order of reference that
 24 eliminated all constraints with regard to
 25 plaintiffs' discovery. And I know that has been

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1 ignored in this case, we have dealt with it
 2 briefly, or maybe too much in the previous oral
 3 arguments, so my statements will suffice at that
 4 point in time.
 5 We believe this is a very serious case.
 6 As a matter of fact, we believe it's the most
 7 serious indication of attorney and party
 8 misconduct that I have seen in about 29 years of
 9 practicing law. The Justice Department itself
 10 recently decided to prosecute an investment
 11 banker, the head of the Credit Suisse Bank
 12 investment division, principally based on what was
 13 characterized in the press as a ten-second e-mail,
 14 which indicated some evidence of his involvement
 15 in covering up some criminal behavior, what they
 16 characterize as criminal behavior, which was the
 17 failure to make accurate financial disclosures.
 18 We're not suggesting that the government has to
 19 make financial disclosures on a regular basis that
 20 are accurate, because it doesn't do that. That's
 21 not the purpose of this case, however. This is a
 22 trust case.
 23 SPECIAL MASTER BALARAN: What did Miss
 24 Blackwell do vis-a-vis the e-mail backup tapes?
 25 MR. GINGOLD: I think we have stated

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1 that in 54 paragraphs, Mr. Balaran. If you'd like
 2 me to read them, I will.
 3 SPECIAL MASTER BALARAN: No, I don't.
 4 MR. GINGOLD: Because I will. There
 5 are 54 paragraphs here and I can go through them
 6 in detail.
 7 SPECIAL MASTER BALARAN: No, that's
 8 fine.
 9 MR. GINGOLD: There are 54 paragraphs
 10 in addition to a factual appendix, which is quite
 11 significant, and I think at one time Miss Berman
 12 actually characterized this as too much that was
 13 submitted. How you want to evaluate the evidence
 14 in the first instance is clearly your prerogative,
 15 Mr. Balaran, and whether or not parties agree,
 16 will actually be taken accordingly.
 17 The fact of the matter is we believe
 18 that in 54 paragraphs we have detailed the
 19 responsibilities and the conduct and the actions
 20 of Miss Blackwell that we believe are
 21 contemptuous.
 22 It's important to note as well that
 23 notwithstanding representations from counsel on
 24 Wednesday, it appears that most contempt
 25 proceedings occur for violations of discovery

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1 orders, not for bribing judges. So to the extent
 2 we're dealing with a violation of discovery order
 3 here, this is in keeping with virtually every
 4 circuit case that we have seen dealing with
 5 discovery.
 6 I also point out, document destruction
 7 and document production are associated directly
 8 with Rule 37 and orders that are related to
 9 discovery, and the courts -- as a matter of fact,
 10 not only the courts, but I believe the government
 11 itself has also referenced certain cases which
 12 deal with these type of issues. One of these
 13 cases is In Re: Edgar at 93 F.3d 256, and it deals
 14 with a situation where there was contempt and
 15 there was a failure to turn over what was to my
 16 understanding tape recording evidence. During the
 17 delivery process, privilege was asserted that was
 18 rejected, and the attorney was held in contempt
 19 for that. And on appeal the challenge was
 20 basically that because of the absence of evidence,
 21 indeed because of the absence of whatever evidence
 22 was reflected on this tape, that that would not be
 23 sufficient to draw any inference with regard to
 24 the particular substantive issues involved in the
 25 contempt citation. The Court, however, came to a

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1 somewhat different conclusion.
 2 And with regard to that particular
 3 issue, and this is again with regard to privilege,
 4 but plaintiffs believe the failure to produce
 5 evidence is akin to the destruction of evidence,
 6 because it's never produced. If there's an
 7 obligation to produce evidence under a document
 8 production order, it is supposed to be produced,
 9 it's not supposed to be destroyed, because the
 10 destruction itself violates the Court order.
 11 But the Court in Edgar made the
 12 following statement. To invoke a privilege is
 13 therefor to confess that the discussions covered
 14 the substance of potential testimony and the
 15 conduct of the litigation. And if this is not so
 16 in fact, it is nonetheless what we must assume,
 17 because no evidence in the record undermines the
 18 inferences naturally to be drawn from the outline
 19 from the September 7 meeting.
 20 The Court itself has stated in the
 21 context of the September 17th, 2002 contempt
 22 citation or contempt decision, whereby Secretary
 23 Norton and former Assistant Secretary McCaleb were
 24 held to have been engaged in contempt, and found
 25 that four counts of fraud and one count of

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1 litigation misconduct had occurred.
 2 SPECIAL MASTER BALARAN: May I ask
 3 you -- go ahead, I'm sorry.
 4 MR. GINGOLD: The Court also stated in
 5 an exchange with Mark Nagel, chief of civil
 6 division at the U.S. Attorney's office, who argued
 7 about both intent and the need for intent in
 8 fraud, that the Court was permitted to draw
 9 whatever reasonable inferences it would draw from
 10 the evidence in the case. And again, this is in
 11 the context of this case, where the document
 12 production from November 27th, 1996 has never been
 13 completed, where documents have been destroyed not
 14 only at the Interior Department and the Treasury
 15 Department, but in the field offices and in their
 16 agents as well, and that includes 37 of the 39
 17 Federal Reserve banks and branches. Indeed, the
 18 special trustee stated that in his testimony, the
 19 first special trustee, that most of the documents
 20 in this case that are relevant to this case have
 21 been destroyed.
 22 What the Court of Appeals stated on
 23 February 23rd, 2001 was the focus of this
 24 proceeding, this litigation as a result of the
 25 breaches that were found by the Court in a

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1 stipulation of breaches that were made by the
 2 parties, and that means 11 of which with regard to
 3 breaches of trust, that the fundamental duty is to
 4 provide an accounting, and in order to do that,
 5 there must be accurate records and complete
 6 records, and that to fail to do so itself is a
 7 breach of trust in violation of several things,
 8 which we don't need to go into here.
 9 The fact of the matter is, the document
 10 production orders and the discovery requests, and
 11 the debates with regard to the type of documents
 12 that exist, and that explicitly included
 13 electronic documents because as we briefly
 14 discussed on Wednesday, electronic media is not
 15 new. Those of us who have been involved in the
 16 practice of law for a long time, and indeed the
 17 Federal Rules of Evidence in a commentary in 1970
 18 point out that the electronic issues were
 19 important in 1970, and they are important today.
 20 The reality is this. We had specific
 21 discussions, as a matter of fact before the
 22 special master, with counsel for the Department of
 23 Interior, both in-house counsel and the Department
 24 of Justice, dealing with precisely what type of
 25 documents we were talking about. And in every

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1 single meeting, there was no question about it.
 2 In every single request that we made, we cited to
 3 the definition of documents. From the beginning
 4 of this litigation, we pointed out to the
 5 principal counsel for both the Department of the
 6 Interior and Department of Treasury, and that is
 7 the government counsel, that we meant to include
 8 electronic evidence. And it was confirmed what we
 9 were going to do.
 10 Was there knowledge and should have
 11 been knowledge, and is there plausible deniability
 12 that there was none? In our opinion, this is an
 13 extraordinary record. We're not talking about
 14 Sarbanes-Oxley, which deals with these issues of
 15 specificity because of the problems associated
 16 with Enron, with Arthur Andersen and the others.
 17 There is no lawyer who has represented major
 18 clients in financial matters, and we're dealing
 19 with a financial trust matter, we're dealing with
 20 trust counsel, we're dealing with evidence in
 21 e-mail that has always been considered to be
 22 likely to lead to the discovery of additional
 23 information. And as the master himself pointed
 24 out in his decision, the destruction of this
 25 e-mail has resulted in potentially irreparable

<p style="text-align: right;">Page 231</p> <p>1 harm because of the consequence of not having 2 access to that. 3 SPECIAL MASTER BALARAN: Let me stop 4 you for a second. 5 MR. GINGOLD: Okay. 6 SPECIAL MASTER BALARAN: By the very 7 terms of your motion on March 20th, you state, the 8 special master's opinion and recommendation for 9 sanctions contained findings that are material 10 this to this motion. However, by its terms the 11 master's investigation focused on one particular 12 issue, whether defendants may retain hard copies 13 of relevant e-mail in lieu of electronic copies. 14 That's the entire focus of discussion. 15 MR. GINGOLD: Your discussion or our 16 discussion? 17 SPECIAL MASTER BALARAN: Your 18 discussion. On March 20th you made two 19 allegations basically. You talk about the 20 destruction of e-mail pursuant to my July order, 21 and you also talk about the cover-up that 22 followed. 23 I guess, let me just ask you at the 24 start, do you believe that Miss Blackwell 25 destroyed or deleted or overwrote any backup</p>	<p style="text-align: right;">Page 233</p> <p>1 subject of it. Miss Perlmutter didn't implicate 2 Miss Blackwell, she was not only not the subject 3 of it, I believe Miss Blackwell actually replaced 4 Miss Perlmutter when Miss Perlmutter left. 5 We have had substantial evidence in 6 this case and declarations from Mr. Schumacher, 7 who talked about exactly what was going on and 8 when. We are talking about -- 9 SPECIAL MASTER BALARAN: But you level 10 the charge specifically at Miss Blackwell. 11 MR. GINGOLD: That's exactly right, Mr. 12 Balaran, and let me finish what I'm saying, if I 13 might. 14 There has been, if you're -- let's talk 15 about reality, Mr. Blackwell, as opposed to -- 16 SPECIAL MASTER BALARAN: I'm not Mr. 17 Blackwell. 18 MR. GINGOLD: Sorry, Mr. Blackwell -- 19 Mr. Balaran, as opposed to what we would like to 20 recreate this record to be. From the very 21 beginning of this case, the United States 22 Government and its attorneys who were involved in 23 this litigation, and Miss Blackwell made an 24 appearance, and she's been counsel on briefs, and 25 she did not withdraw her appearance until some --</p>
<p style="text-align: right;">Page 232</p> <p>1 tapes? 2 MR. GINGOLD: You're asking me whether 3 I believe it? 4 SPECIAL MASTER BALARAN: Yes. 5 MR. GINGOLD: The answer is yes. 6 SPECIAL MASTER BALARAN: Okay. Do you 7 have any evidence to that effect or are you doing 8 this on information and belief? And if you are 9 doing it on information and belief, on what 10 information and what belief? 11 MR. GINGOLD: Well, first of all, we 12 have had testimony in this case, starting with 13 Willa Perlmutter, who testified under oath before 14 Judge Lamberth that she herself deleted her 15 e-mail. We've had testimony in this case during 16 deposition from another associate solicitor, or 17 former associate who was a staff attorney in the 18 Solicitor's office, where he described in that 19 particular deposition, which of course led to the 20 entry of the anti-retaliation order in this case, 21 that in fact there was routine deletion of e-mail 22 in the Solicitor's office because it wasn't being 23 saved, and there were tapes that were being 24 destroyed, he did testify to that. He didn't 25 implicate Miss Blackwell because she wasn't the</p>	<p style="text-align: right;">Page 234</p> <p>1 for a long period of time after she made an 2 appearance in this case. She was an officer of 3 this Court throughout most of the period of time 4 in question. She was on briefs and drafted briefs 5 and was on -- and made representations standing up 6 in the courtroom on various matters. At all times 7 related to this, during the course of 8 representations made by various lawyers involved 9 in this while she was in the courtroom, 10 representations were made that no e-mail was being 11 destroyed, that the e-mail was being preserved. 12 SPECIAL MASTER BALARAN: So her 13 presence somehow implicates her, impugns her 14 integrity to the point of being contemptuous? 15 MR. GINGOLD: First of all, I'm not 16 trying to impugn her integrity over the fact that 17 she was present. 18 SPECIAL MASTER BALARAN: I'm just 19 asking you. 20 MR. GINGOLD: We filed a motion for an 21 order to show cause, Mr. Balaran. We did not file 22 a referral to the Bar Association with regard to 23 integrity. If that were the case, we would have 24 done that. 25 SPECIAL MASTER BALARAN: Anybody that</p>

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1 was in the courtroom from the Solicitor's office
 2 listening to these arguments, would you believe
 3 that they also were guilty of contemptuous
 4 conduct, simply by their presence there?
 5 MR. GINGOLD: No, not simply by their
 6 presence. Simply by their responsibilities in
 7 this litigation. As you pointed out in February
 8 of 2000, with regard to the destruction of
 9 Treasury documents, where various Treasury lawyers
 10 were involved in this, and you pointed out they
 11 had a very explicit responsibility based on their
 12 duties as officers of the court and the ethical
 13 considerations, they had an affirmative
 14 responsibility to go forward and make those
 15 disclosures.
 16 SPECIAL MASTER BALARAN: I wasn't
 17 dealing with contempt at the time.
 18 MR. GINGOLD: Oh, I see, the
 19 responsibilities extinguish when someone says it's
 20 contemptuous, but it exists only when it isn't,
 21 where there isn't an accusation of contempt. Is
 22 that what the rule is in this case, Mr. Balaran?
 23 SPECIAL MASTER BALARAN: You're not
 24 here to ask me questions. Finish your argument.
 25 MR. GINGOLD: It's a rhetorical

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1 question.
 2 SPECIAL MASTER BALARAN: Fine.
 3 MR. GINGOLD: My argument is what I
 4 just said. You quite clearly laid out the
 5 responsibilities of the lawyers who are on briefs
 6 in this case, including lawyers who are not
 7 members of this Bar. You clearly laid out the
 8 affirmative responsibility of lawyers who are only
 9 tangentially involved in this case when they had
 10 an affirmative responsibility to step forward and
 11 either inform the client they must do something,
 12 which is again, one of the things we talked about
 13 on Wednesday, is in the first instance it is the
 14 lawyer who has responsibility to preserve
 15 evidence. That is not excluded.
 16 And as a matter of fact, if in fact
 17 Judge Randolph is on a majority of opinion which
 18 says, what he suggested during oral argument
 19 yesterday, that the head of an agency can't be
 20 responsible for the action of the individuals who
 21 work for her, then if that is now the law of this
 22 circuit and the country by the way, then the
 23 responsibility has to be placed on the
 24 individuals, because otherwise, there is no
 25 accountability for conduct in litigation or with

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1 regard to a trustee in this country. And there is
 2 no case that has ever said that, Mr. Balaran.
 3 If that's what's going to be the case
 4 here, so be it, we will understand that. But
 5 until that is decided, probably by the United
 6 States Supreme Court, because that's not the law
 7 that we understand exists today, you are
 8 accountable as an officer of the court whether or
 9 not you are a government lawyer. You are
 10 accountable when you file briefs and when you file
 11 briefs, you are certifying basically to the best
 12 of your knowledge that the information is correct.
 13 And that's what you stated yourself, Mr. Balaran.
 14 SPECIAL MASTER BALARAN: Okay.
 15 MS. BERMAN JACKSON: Thank you. Yes, I
 16 would like to be heard.
 17 MR. GINGOLD: I wasn't finished.
 18 SPECIAL MASTER BALARAN: No, no, it was
 19 just an awkward pause. Please continue.
 20 MR. GINGOLD: No, I thought you had --
 21 SPECIAL MASTER BALARAN: No, I have no
 22 more questions. Were you finished?
 23 MR. GINGOLD: No, I'm not finished,
 24 Mr. Balaran.
 25 We have identified the orders in our

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1 orders to show cause. Again, we don't need to
 2 restate them. We've said the November 9th, 1998
 3 order is a particularly important order. But it
 4 was our understanding and we haven't been told
 5 otherwise, and maybe you're going to advise us
 6 after the fact today, Mr. Balaran, that this is
 7 not a motion to dismiss issue. Because I was
 8 under the impression that the Court conferred upon
 9 you the authority to investigate issues and
 10 determine culpability relative to the e-mail
 11 destruction, but --
 12 SPECIAL MASTER BALARAN: But if I made
 13 the decision that it just wasn't worthwhile, if
 14 this just didn't rise to a certain level, you
 15 know, just the economies simply weren't worth
 16 investigating if in fact you hadn't met even a
 17 prima facie case, if I make that decision, then
 18 that's what we're going to rest with.
 19 MR. GINGOLD: I didn't say you didn't
 20 make the decision, Mr. Balaran. But you did make
 21 that decision, and that's what we were resting on,
 22 and that's why we are here today to make the
 23 argument. We think 54 paragraphs of identified
 24 issues with regard to Miss Blackwell is
 25 sufficient. We feel that the fact that there has

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1 been systemic destruction of the exact type of
 2 documents you were talking about is important. We
 3 think the fact that during various times when all
 4 this destruction was going on, based on briefs
 5 that Miss Blackwell was on, and representations
 6 that were made to the Court directly with regard
 7 to these briefs is clear evidence of the fact that
 8 she was responsible for making accurate
 9 disclosures, or at the very least, engaging in due
 10 diligence to the contrary.
 11 In fact, what the Court pointed out to
 12 Mr. Brooks in response to representations by Mr.
 13 Brooks to the Court on matters similar to this
 14 particular issue was that because of the history
 15 of misrepresentations of his particular client, he
 16 had an obligation to conduct due diligence before
 17 he made that representation. And that's not me
 18 saying that, that is Judge Lamberth, and as far as
 19 we know, he's still calling the shots in this
 20 litigation.
 21 What we said in our opposition to the
 22 motion to dismiss was what exactly, or to
 23 paraphrase what he said on November 5th, 1998 with
 24 regard to how motions to dismiss are to be treated
 25 when in fact there hasn't been discovery. And

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1 this doesn't mean it's a pejorative statement with
 2 regard to the absence of discovery, it's a
 3 statement of fact with the absence of discovery,
 4 Mr. Balaran. He said again, as follows, and I'm
 5 paraphrasing him: This means that a motion to
 6 dismiss may only be granted if and only if it is
 7 clear that no relief can be granted under any set
 8 of circumstances or facts that, quote, could be
 9 proved consistent with the allegations. And it's
 10 no circumstances and no facts. Two, that all
 11 plaintiffs' allegations must be accepted as true
 12 for purposes of the motion to dismiss. And three,
 13 that all facts must be resolved, and inferences
 14 made in favor of plaintiffs in that regard.
 15 Now, you certainly are given the
 16 authority to do all of that. However, what the
 17 Court did decide with regard to the e-mail, which
 18 is specifically disassociated, that e-mail issue
 19 where sanctions were imposed from the e-mail
 20 contempt issues, so this matter has not been
 21 resolved. The Court himself distinguished the two
 22 issues, as he allocated the fees, and explained
 23 why he allocated the fees specifically in that
 24 regard.
 25 Let me point out too, this. What was

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1 also discussed yesterday in oral argument, more
 2 frequently from Judge Randolph was what is
 3 intended to be done with regard to civil contempt
 4 versus criminal contempt. And by the way,
 5 plaintiffs agree that civil contempt probably
 6 cannot lie against an official who is no longer in
 7 the government. Judge Randolph characterized the
 8 civil contempt issue in, on one part of what is a
 9 two-part test.
 10 The one part that he focused on was
 11 whether or not the individual who has been charged
 12 with contempt or held in contempt, can use his key
 13 to unlock his cell and free himself from contempt,
 14 to have some ability to deal with the particular
 15 issue. Miss Blackwell is still in the Solicitor's
 16 office as far as I know. Miss Blackwell did
 17 recuse herself, or was recused from a part of this
 18 case at some time. But it's plaintiffs' position
 19 that whether she can or cannot at this point in
 20 time help recover the e-mail that has been
 21 destroyed, we don't know. That might be something
 22 worth discovering.
 23 Let me also point out, Mr. Balaran,
 24 that when you get into a situation, if an
 25 individual can resign his position, whether from

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1 the government or otherwise, to avoid
 2 accountability, that is making new law in this
 3 country. Accountability has been stressed by this
 4 judge, Judge Lamberth, in the seven years of this
 5 litigation. Every expert who is retained by the
 6 government with regard to the breaches of trust in
 7 this particular case has stated categorically, one
 8 of the principal components that's missing in this
 9 trust management is accountability.
 10 If a Secretary can resign and remove
 11 responsibilities for actions in the past, and the
 12 new Secretary who is substituted by operation of
 13 law under Rule 25 is not responsible for the acts
 14 of the predecessor in an official capacity, that
 15 changes the law in this country. The law is clear
 16 in that regard and we have stated that many times.
 17 We have gone through a series of arguments which
 18 are essentially saying the same thing.
 19 Nobody is conceding that any documents
 20 have been destroyed, because most people are
 21 suggesting, it appears to plaintiffs' counsel,
 22 that we're dealing with redundancies. There are
 23 no redundancies here. And that's independent of
 24 the special master's own expert who reviewed
 25 select tapes to determine the nature and scope of

<p style="text-align: right;">Page 243</p> <p>1 redundancy, who concluded that there was no 2 redundancy because important information that 3 could lead to the discovery of additional evidence 4 was not contained in printed typed documents. The 5 fact that the Solicitor's office had a particular 6 mechanism for the way it does business is not an 7 excuse under civil law for not having adequate 8 protection for documents that are relevant to 9 litigation. There are cases all over the country 10 on that particular point. 11 With regard to the cost and expense of 12 that, if it's self inflicted, that's not good 13 enough. And it depends in part, and as the 14 special master himself has noted in his opinions, 15 on whether or not the plaintiffs are in need of 16 that information. And that was one of the 17 principal issues that the special master himself 18 raised in balancing the hardship of the government 19 and the burden of the government, versus the need 20 of the plaintiffs in this litigation. 21 But our position is this. Miss 22 Blackwell had a direct responsibility. She was 23 charged at one point as a principal official. 24 There are issues that documents still have not 25 been recreated, they may never be recreated, and</p>	<p style="text-align: right;">Page 245</p> <p>1 the former Assistant Secretary in the second 2 contempt trial, notwithstanding the fact that they 3 agreed to take action to begin to correct the IT 4 security difficulties, Count 5. In that regard, 5 Count 5 was permitted to remain, explicitly 6 because there wasn't compensation for the 7 plaintiffs for that particular conduct. 8 The plaintiffs took a further position 9 that was not adopted by the Court, but the 10 plaintiffs believe was a correct one. 11 As we've seen in this litigation, the 12 initial defense team in the first trial in the 13 summer of 1999, as to whether or not the United 14 States should not be held in breach of trust, it 15 was articulated as we are representing to the 16 Court, we are working on it to correct the 17 breaches of trust. The Court responded, working 18 on it doesn't correct the breaches of trust, and 19 in fact the Court ultimately determined that what 20 they were doing wasn't adequate under any set of 21 circumstances, but the most important point in 22 that regard is working on it doesn't correct the 23 problem. 24 Indeed, there was a contempt decision 25 on February 22nd, 1999 in the first contempt</p>
<p style="text-align: right;">Page 244</p> <p>1 only recently did the Interior Department retain 2 an expert to begin to determine what can be 3 recovered and how much of it will be recovered. 4 So nobody at this point knows the answer. Action 5 is being taken to do it, but it hasn't been 6 corrected. 7 Secondly and most importantly as the 8 judge pointed out, when he allocated the fees on 9 the e-mail sanctions, it explicitly distinguished 10 those fees from the e-mail contempt, in part 11 perhaps because of the responsibility placed on 12 the special master to determine individual 13 culpability, if any. However, as the judge 14 stated, various work that was done that was not 15 related to that narrow issue that had been cited 16 for sanctions, it was more properly related to the 17 contempt that has been referred to you. 18 So that component of civil contempt, 19 which gives compensation for the party who has had 20 to engage in unnecessary activities because of the 21 contempt has not been determined, so that remains 22 open. With regard to criminal contempt -- and by 23 the way, that remains open and the Court himself 24 as we briefly discussed, continued the fifth count 25 of specifications with regard to the Secretary and</p>	<p style="text-align: right;">Page 246</p> <p>1 trial. On February 24th, 1999, the special master 2 himself was conferred with the authority to try 3 and get the defendants, Secretary of the Treasury 4 and Secretary of the Interior, into compliance 5 with a particular order, the November 27, 1999 6 order, and in that particular order it 7 specifically required, in order for the Secretary 8 of the Treasury and the Secretary of Interior to 9 purge their contempt, that they provide to you a 10 plan that if executed properly would enable them 11 to come into compliance with the requirements of 12 the order. 13 So we're not just dealing -- and by the 14 way, today, to my knowledge, nobody has entered an 15 order that has purged contempt and in fact, other 16 than the Treasury, who made a representation that 17 they purged contempt for a variety of reasons that 18 are independent of this proceeding, that there was 19 no further proceeding in that regard -- 20 SPECIAL MASTER BALARAN: Let me tell 21 you, you have one minute left for argument. 22 MR. GINGOLD: All right. In that 23 particular situation where the Court laid out what 24 needed to be done, it just isn't a representation 25 that we're going to try to do something, the</p>

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1 contempt lied until it was going to be resolved.
 2 Miss Blackwell, for all purposes of
 3 this litigation, was a key player in this, was
 4 directly responsible, was making representations
 5 to the plaintiffs, to the Court and to the special
 6 master, was involved in briefs, was involved in
 7 every aspect of this, and plaintiffs are not aware
 8 of any single case, including the various
 9 electronic discovery cases that have been filed in
 10 the wake of the Enron issue, where lawyers are not
 11 responsible for those particular issues.
 12 Thank you very much, Mr. Balaran.
 13 SPECIAL MASTER BALARAN: I have your
 14 argument, thank you.
 15 MS. BERMAN JACKSON: Mr. Balaran,
 16 plaintiffs have pointed out that they have written
 17 54 paragraphs. We would submit to you that the
 18 ability to numb the paragraphs of pages of
 19 hyperbole, of pages of unnecessarily acrimonious
 20 and personalized prose does not turn that prose
 21 into particularized allegations of fact. Whether
 22 there are 54 paragraphs or 554 paragraphs is
 23 irrelevant if plaintiffs cannot and will not
 24 answer the only question to be answered today,
 25 what did Mrs. Blackwell do? They haven't.

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1 They say this is a civil contempt
 2 action. It is coercive because you could coerce
 3 her to recover the e-mail. I submit to you that
 4 that really doesn't require serious consideration.
 5 The notion that you would incarcerate a career
 6 government employee unless and until tapes that
 7 have been overwritten can be unoverwritten, simply
 8 strains the belief and isn't really worth
 9 responding to.
 10 Plaintiffs say and they have stressed
 11 consistently throughout these arguments that from
 12 the beginning of this litigation, electronic
 13 communications were included in discovery. We
 14 don't dispute that. From the beginning of this
 15 litigation, electronic communications were
 16 produced. Edith Blackwell's e-mails have been
 17 marked as exhibits, entered as exhibits by the
 18 plaintiffs. It has been produced to them. They
 19 have it.
 20 This isn't about the duty to produce
 21 e-mail in discovery. This is about whether there
 22 was also a duty to produce the backup tape media,
 23 and I would submit that if something is called a
 24 backup tape, the notion that there is some
 25 redundancy involved is certainly correct.

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1 They talked about, well, you have said
 2 that there is an adverse inference, if evidence
 3 gets destroyed, there is an adverse inference, and
 4 of course there are adverse inferences to be
 5 drawn, but there is no law that says if in a
 6 situation between two parties, one party destroys
 7 evidence, that that adverse inference then flies
 8 into a collateral proceeding involving a nonparty
 9 and contempt. The adverse inference is taken
 10 against the party on whatever matter the missing
 11 evidence was supposed to illuminate. It's not an
 12 adverse inference then available to put in the
 13 plaintiffs' back pocket to bring out any time in
 14 litigation they need something.
 15 The Court asked Mr. Gingold if he
 16 believed Edith Blackwell destroyed backup tapes.
 17 I submit that that is certainly the wrong
 18 question. I imagine there are a great number of
 19 things that counsel believes. Counsel hasn't even
 20 alleged that Edith Blackwell destroyed backup
 21 tapes. They do pepper in their 54 paragraphs the
 22 notion that she destroyed e-mail. E-mail. There
 23 is no evidence of that, no one has ever said that,
 24 and the fact they have used her e-mail as exhibits
 25 in their own behalf, I think belies that notion.

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1 I feel it is important in response to
 2 what's come out to really talk about what the
 3 facts are here, and I continue to feel that it's
 4 profoundly wrong for Edith Blackwell to even talk
 5 about the facts, because she is just one person in
 6 the Department of the Interior. But I think it's
 7 important, if he's talking about conspiracy and
 8 fraud, to just look back at what happened.
 9 In June 1998, Interior gets a document
 10 that calls directly and exclusively for attorney
 11 communications. Miss Blackwell is at a meeting
 12 immediately thereafter with a request to circulate
 13 it, and they sit around and they say well, what
 14 does this call for, what do we have to produce?
 15 Some of it is worded so poorly that you could say
 16 nothing. But let's look at it more broadly. They
 17 say well, maybe there's an office out in the field
 18 that might have something, let's bring them in on
 19 it. And they tell everyone, we might have to
 20 produce this stuff so be on alert.
 21 The government files a motion for
 22 protective order, though, because it's
 23 attorney-client communication. But that's not all
 24 they do. They knew that they now have something
 25 they have never had before, preserved backup tape

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1 media. Do they hide that from the Court? Do they
 2 lie about it? No. These fraudulent
 3 coconspirators volunteer that they have it and
 4 they tell the Court about it.
 5 At the same time, there is plenty of
 6 documents that have been introduced that show that
 7 the Solicitor's office is sending out e-mails,
 8 save your e-mail, save your e-mail, save your
 9 e-mail. Edith Blackwell has the unfortunate job
 10 of appearing on a videotape telling everybody,
 11 save your e-mail, print it out every day. She is
 12 the face of it. She doesn't like that either.
 13 She goes to meetings of the Solicitor's
 14 office. She briefs people on this duty. On
 15 November 9th the Court says comply with the
 16 discovery request. On November 10th, the
 17 Solicitor's office sends out an e-mail, the Court
 18 told us to do it, it's time to do it. Fraud?
 19 On the 13th, Mr. Cohen unfortunately
 20 sends the e-mail to Glen Schumacher. Miss
 21 Blackwell doesn't know a thing about it, and they
 22 never alleged that she did.
 23 On the 20th, the Interior Department
 24 goes back to the Court on the -- shortly after the
 25 November 9th order and they say well, what about

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1 those backup tapes that we told you about, do we
 2 really have to search them, it's really quite a
 3 burden. On May 11th, 1999, the decision comes
 4 down, yes, do it, search them.
 5 On the 12th, Edith Blackwell is at a
 6 meeting. This is the way the Solicitor's office
 7 delays. They are at a meeting the next day. At
 8 that meeting when Glen Schumacher says well, I
 9 thought you told me to stop, and everybody is
 10 surprised at the revelation, and so what do these
 11 malicious, deceitful coconspirators do? They tell
 12 you. And they send new instructions around
 13 telling everybody at headquarters and at the
 14 offices where they believe responsive material is
 15 being retained, again, don't overwrite this stuff.
 16 And if you read the Inspector General's
 17 report, Glen Schumacher says when he had problems
 18 with the field offices, he'd go to Edith and she'd
 19 call them and say no, you're really supposed to do
 20 this. I know you don't like it, I know it's
 21 burdensome, we asked the Court, that's your
 22 obligation. Nobody said ignore it, cover it up,
 23 lie about it. That's not in this record, it will
 24 never be in this record. There is no contempt
 25 here.

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1 The Court asked Mr. Findlay's lawyer
 2 yesterday, well, doesn't communication with me
 3 about all these problems indicate candor and not
 4 cover-up? And I would say yes, exactly right. We
 5 submit that while it's contrary to the plaintiffs'
 6 world view, just as Mr. Gingold said, you have to
 7 look at reality. You can't rewrite what you would
 8 like history to do. And the reality is that this
 9 litigation is and has been populated with hard
 10 working government servants of good faith, people
 11 who were working assiduously to figure out what
 12 their obligations are and how to comply with them,
 13 and Edith Blackwell is one of those people.
 14 We submit that what plaintiffs are
 15 trying to do here is to take lawyerly behavior,
 16 figuring out what the law is, figuring out what
 17 the orders of the Court require, advancing your
 18 client's position, advising your client of what
 19 the law is, and at bottom, let's face it, being on
 20 the other side of the case, and they are trying to
 21 turn that into contempt. And I submit to you that
 22 the law does not choose sides. Being on the other
 23 side, even of an important landmark case involving
 24 the rights of Native Americans vindicating
 25 critical rights of an oppressed group, even being

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1 on the other side of that is not contemptuous.
 2 And I submit that it is time for the pending
 3 collateral proceedings against 60 current and
 4 former government employees doing their jobs must
 5 come to an end. Thank you.
 6 SPECIAL MASTER BALARAN: Thank you very
 7 much. We will take a break for ten minutes.
 8 (Recess.)
 9 MR. LUSKIN: Mr. Balaran, my name is
 10 Robert Luskin, from the firm of Patton Boggs, here
 11 on behalf of Edward Cohen, formerly the Deputy
 12 Solicitor of the Department of the Interior.
 13 SPECIAL MASTER BALARAN: Thank you.
 14 MR. LUSKIN: As a preliminary matter, I
 15 would simply join Miss Jackson's remarks
 16 concerning our motion for a stay, and I will
 17 simply state it that way.
 18 SPECIAL MASTER BALARAN: Very good.
 19 MR. LUSKIN: A good bit of the
 20 discussion Wednesday and already this afternoon
 21 has been taking place at the galactic or
 22 intergalactic level, and because of considerations
 23 of due process and I also think considerations of
 24 helping you decide the issues that you have
 25 framed, requires us to approach this at a atomic

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1 or subatomic level, and that's what I would like
 2 to do today. And to do that, I would like to
 3 confine the discussion based on I think four or
 4 five basic considerations.

5 The first is, what is the offense that
 6 Mr. Cohen is alleged to have committed, and in the
 7 case of Mr. Cohen, I think singularly, the
 8 plaintiffs' bill of particulars seeks only
 9 criminal contempt against Mr. Cohen, and that has
 10 significance in a number of distinct respects.
 11 The first is, of course, that it requires that the
 12 plaintiffs identify a specific order that he has
 13 violated. Whatever may be the case with respect
 14 to fraud on the Court or the Court's inherent
 15 powers, as the master is of course well aware,
 16 there are no common law offenses, and Section
 17 401.3 of Title 18 requires that before a criminal
 18 intent may lie, that there is proof that a
 19 specific order of the Court has been violated.

20 The second is the element of
 21 willfulness because unlike civil contempt, again,
 22 it's required that there be proof that the
 23 defendant specifically intended to violate some
 24 order of the order.

25 And third obviously, because it is a

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1 criminal proceeding that's contemplated here, if
 2 an order to show cause or a referral were made,
 3 there needs to be proof beyond a reasonable doubt.
 4 And that standard of proof has to animate your
 5 consideration of whether or not plaintiffs have
 6 met their burden of coming forward with specific
 7 facts which if un rebutted, would establish the
 8 offense, because those facts must rise to the
 9 level of being capable of persuading a trier of
 10 fact that the elements of the offense have been
 11 proved not simply by clear and convincing
 12 evidence, but by proof beyond a reasonable doubt.
 13 So that needs to inform the threshold showing that
 14 you make about whether or not the plaintiffs have
 15 met their initial burden.

16 And finally, I know from listening on
 17 Wednesday and reviewing the transcript that the
 18 master contemplates at least in part the
 19 possibility of tripartite proceedings, some
 20 initial screening of the plaintiffs' bill of
 21 particulars, followed if appropriate with a period
 22 of discovery, and then some later consideration of
 23 whether at that point in the discretion of the
 24 master and thereafter in the discretion of the
 25 Court, further proceedings are necessary, or a

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1 show cause order issues.

2 That can be approached only with the
 3 greatest care when you're talking about a referral
 4 for criminal contempt, because obviously the
 5 Constitution provides for a significant due
 6 process protection with respect to the criminal
 7 process. And whatever may be the answer to the
 8 question of whether the rules of discovery apply
 9 where a party has filed a motion for an order to
 10 show cause for civil contempt, they surely do not
 11 apply with respect to criminal proceedings where
 12 the power of discovery related to a potential
 13 criminal investigation is vested solely and only
 14 in a grand jury, which is an independent body with
 15 independent authority, and is intended to
 16 neutrally weigh whether or not the evidence is
 17 sufficient for a criminal case to proceed.

18 And with all respect to Mr. Gingold, a
 19 party to an adversarial proceeding does not have
 20 that sort of constitutional independence that a
 21 grand jury has, so if you were to decided that
 22 there needed to be further proceedings, we would
 23 suggest to you that the use of either the master's
 24 powers under Rule 53, or the Rules of Civil
 25 Procedure for discovery are really inapposite to

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1 what would amount to be a discovery or
 2 investigation in aid of a potential criminal
 3 prosecution.

4 The second significant consideration
 5 which needs to focus our thinking is what is the
 6 specific conduct in which Mr. Cohen is alleged to
 7 have engaged. And parsing the plaintiffs' bill of
 8 particulars, it boils down to a memo that was
 9 written on November 13th of 1998, with which we
 10 are all familiar.

11 And I might add parenthetically that my
 12 name appears as a cc on that memorandum was
 13 because I was then acting as counsel to the
 14 Department of the Interior with respect to Carol
 15 Logan Bruce's investigation, and not otherwise.
 16 And perhaps that would forestall a show cause
 17 motion waiting for me at my office when I get back
 18 there this afternoon.

19 There are, because the notion of
 20 spoliation of evidence and willful destruction of
 21 e-mails have been thrown around relatively
 22 loosely, I think it's important to focus for one
 23 moment on what it is that that memo may well have
 24 contemplated. And that is that it clearly did not
 25 contemplate the destruction of any documents of

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1 any kind, whether electronic or paper, that then
 2 existed. It did not reference the Cobell case, it
 3 did not reference the term e-mails, and as
 4 construed by Mr. Schumacher, had the effect of
 5 meaning only that e-mails which had not at that
 6 point yet even been written or conceived, and
 7 which in accordance with Mr. Cohen's and others
 8 specific directions would be reduced to writing
 9 and printed might nevertheless be produced without
 10 what I think we've heard called in other contexts
 11 the metadata, including information about the
 12 bcc's. So that, that memo would not have the
 13 effect of concealing e-mails, it would not have
 14 the effect of destroying anything that then
 15 existed. It would not have the effect of
 16 preventing the defendants from -- plaintiffs,
 17 rather, from obtaining hard copies of the e-mails.
 18 At its most extreme, it would have the effect of
 19 preventing the availability of some of the kinds
 20 of data that you identified after you asked On
 21 Track to perform a survey in connection with this
 22 matter.
 23 SPECIAL MASTER BALARAN: You say at its
 24 most extreme, but isn't it true that when Mr.
 25 Cohen stated, you may reinstate your normal

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1 procedures for electronic document backup, he was
 2 referring to the normal process of daily backups
 3 and weekly backups? So it's really not an extreme
 4 measure, it was really going back to the
 5 status quo prior to Miss Bruce's investigation.
 6 MR. LUSKIN: That's right.
 7 SPECIAL MASTER BALARAN: Okay.
 8 MR. LUSKIN: The next, I think
 9 consideration that I think needs to guide this
 10 discussion is what order, if any, might have been
 11 applicable to that conduct. And of the six orders
 12 that the plaintiff identifies, only one of them
 13 preceded the memorandum of November 13th, and that
 14 is the Court's summary order of November 9th. And
 15 it's clear both by the terms of the order itself
 16 and the subsequent constructions and
 17 clarifications of that order by the special
 18 master, that that order did not refer directly or
 19 indirectly to the prospective obligation of the
 20 Department of the Interior to create and then to
 21 maintain backup tapes, which is the issue from the
 22 back end that we are facing now.
 23 And finally, I think the other
 24 consideration we need to confine our discussion
 25 about whether or not there is a prima facie case

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1 here, is the context in which this memorandum was
 2 issued.
 3 And, I think the first consideration is
 4 the fact as you have heard I think several times,
 5 that the Department clearly maintained and
 6 believed it was maintaining a paper record system,
 7 which in accordance with federal law and the
 8 Department's policies and regulations,
 9 contemplated that e-mails would be reduced to
 10 writing or hard copy, if you will, deleted from
 11 individuals' computers, left on backup tapes
 12 solely for the purpose of reconstruction in the
 13 event of a crash, but not maintained for archival
 14 purposes.
 15 And I certainly don't mean to suggest
 16 that an appropriate and unambiguous court order
 17 would not expand or supersede those obligations.
 18 But nevertheless, in considering whether or not
 19 individuals engaged in a deliberate effort to
 20 frustrate an order of the Court, the Department's
 21 own policy and regulation, the federal
 22 government's law and regulation, the then existing
 23 decisions of the D.C. Circuit in Carlin should be
 24 taken into account in deciding whether or not
 25 their construction of their obligation, namely

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1 that they would satisfy their obligation to
 2 preserve and produce electronic media by reducing
 3 them to hard copy and then producing them was a
 4 good faith effort, or whether alternatively, it
 5 was a deliberative effort to frustrate an order of
 6 the Court.
 7 The other contextual fact that I think
 8 you need to take into account, and these are also
 9 undisputed in these records, are Mr. Cohen's
 10 repeated efforts to insure that those obligations
 11 were satisfied, and that included the memorandum
 12 and e-mail that he authored on November 10th, the
 13 day after the Court's order of November 9th,
 14 admonishing all the attorneys and staff in the
 15 Solicitor's office of their obligations to print,
 16 preserve and produce all of their e-mails on a
 17 daily basis.
 18 And that's succeeded by two years,
 19 another similar memo by Mr. Cohen, and then
 20 preceded by several months yet another memo, all
 21 of which reiterated the obligation of the
 22 attorneys in the Solicitor's office and the staff
 23 in the Solicitor's office, that it was their
 24 obligation to preserve by printing, produce,
 25 retain, and make available as to plaintiffs all of

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1 their e-mails on a daily basis.
 2 With that in mind, it appears clear to
 3 us that Mr. Cohen's conduct as alleged by the
 4 plaintiffs does not rise to a sufficient level to
 5 warrant a criminal contempt of the Court. In the
 6 first place, we submit that there was no order of
 7 the Court that was specific, clear and
 8 unambiguous, or as other courts have characterized
 9 it, telling each individual what it is
 10 specifically that they must do or refrain from
 11 doing.
 12 SPECIAL MASTER BALARAN: But isn't the
 13 clarity that's required often contextual?
 14 MR. LUSKIN: It can be informed by
 15 context. The difficulty there, because the courts
 16 repeat over and over and over again that the order
 17 must be specific, clear and unambiguous.
 18 SPECIAL MASTER BALARAN: Right.
 19 MR. LUSKIN: So obviously it can be
 20 informed by context. But there is the risk that
 21 if you take the contextual exception too
 22 seriously, you are viciating the rule, and I
 23 would suggest here that context really does
 24 support Mr. Cohen here and does not act against
 25 him, because the context, as I indicated a minute

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1 ago, really was two significant factors. One is a
 2 statutory, regulatory and department-wide scheme
 3 that bases the preservation of e-mails and the
 4 production of them as necessary on a paper record
 5 system, and secretary of all, very clear and
 6 explicit instructions from Mr. Cohen, including
 7 contemporaneous with the issuance of this order,
 8 indeed the day after this order, that individual
 9 staff members in the Solicitor's office needed to
 10 be mindful of their obligation to preserve, print
 11 and produce any e-mails or any other documents,
 12 including documents that didn't qualify as federal
 13 records but would nevertheless contain information
 14 that was responsive to the plaintiffs' request,
 15 and make them available for production.
 16 SPECIAL MASTER BALARAN: Can I infer
 17 from Mr. Cohen's November 13th, 1998 memo that he
 18 was aware that the backup tapes could be used for
 19 archival purposes and could be used in fact to
 20 retrieve information?
 21 MR. LUSKIN: I think you can infer from
 22 the fact that the independent counsel had
 23 requested them, that it was certainly possible
 24 under some circumstances that someone would take
 25 that position.

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1 SPECIAL MASTER BALARAN: Well, it says
 2 reinstate, so he's obviously aware of the
 3 departure from procedure that was used, and I can
 4 infer, can't I, that that departure, that he was
 5 aware of the fact that departure had to do with
 6 using the backup tapes to solicit information
 7 from.
 8 MR. LUSKIN: I think that may overstate
 9 it. The magnetic records were retained in
 10 response to a grand jury subpoena at the specific
 11 request of the independent counsel. And with her
 12 specific agreement that that policy no longer
 13 needed to be followed, which was suspending the
 14 Department's ordinary and if you will, regulatory
 15 and policy practice of overwriting these backup
 16 tapes, then that requirement ended. It is a long
 17 and I think too large a step to infer from the
 18 fact that the independent counsel at first asked
 19 for it and then withdrew her request, to say that
 20 Mr. Cohen would then be aware that for purposes of
 21 the Rules of Civil Procedure, that the
 22 Department's practice of producing responsive
 23 documents through a paper record was insufficient
 24 to comply with their obligations under the law.
 25 SPECIAL MASTER BALARAN: But can I

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1 infer that he was aware at least that it was
 2 technologically possible, given the fact that the
 3 independent counsel did ask for it, that at least
 4 somebody thought that it may be possible to
 5 retrieve information and therefore suspend the
 6 normal practices?
 7 MR. LUSKIN: I think that's a fair
 8 inference.
 9 SPECIAL MASTER BALARAN: Okay. If
 10 that's the case, then if I tie that into the order
 11 that preceded it by several days, can I infer that
 12 Mr. Cohen, given his position in the Office of the
 13 Solicitor, was aware that an order for discovery
 14 was extant and that order, given the fact that the
 15 first discovery order defined documents as
 16 including all media, would have required that
 17 these backup tapes that contained information
 18 should have been retained in a manner?
 19 MR. LUSKIN: I think that's too big a
 20 stretch, and let me explain why.
 21 SPECIAL MASTER BALARAN: Okay.
 22 MR. LUSKIN: In the first place, the
 23 order itself, as you noted in your July 2001
 24 discussion, was a summary order. It simply said
 25 the request for protective order is denied.

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1 SPECIAL MASTER BALARAN: Right.
 2 MR. LUSKIN: And was in itself
 3 sufficiently opaque as to some of the material
 4 facts, including whether or not that order created
 5 an affirmative obligation on the part of the
 6 Department to review the backup tapes which they
 7 had already made, as opposed to having an ongoing
 8 requirement to create and retain them in the
 9 future, that the motion for clarification which
 10 you decided in May of the following year was an
 11 appropriate step for them to take.
 12 SPECIAL MASTER BALARAN: Let's put
 13 aside review for a second. Let's talk about
 14 retained, because it was made clear on the record
 15 at one point that these tapes cost \$5 a tape. So
 16 I'm not even talking about the obligation that may
 17 have flown from the order, the summary order to
 18 review. Wouldn't you agree with me that at least,
 19 at minimum, counsel should have been aware that
 20 there was an obligation to, because the Court
 21 hadn't carved the contours of the discovery with
 22 any clarity, out of an abundance of caution, to at
 23 least keep everything?
 24 MR. LUSKIN: I think it's perfectly
 25 clear in hindsight, and among other things from

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1 Mr. Cohen's undisputed reaction back in May when
 2 he expressed shock and surprise that this memo had
 3 been issued and that it had caused the overwriting
 4 of tapes and that therefore they were really not
 5 available in this case, that if he had it to do
 6 over again, he would have certainly preferred that
 7 those tapes had been maintained.
 8 But I think for these purposes we need
 9 to focus a little bit more narrowly than that, and
 10 that is, was the order of November 9th
 11 sufficiently clear and unambiguous that he clearly
 12 would have understood that in addition to their
 13 obligation to satisfy their discovery obligations
 14 by taking things that were on electronic media,
 15 printing them out and producing them, they in
 16 addition had a clear and unambiguous obligation in
 17 the future to continue to make and then to retain
 18 the backup tapes, because that's the duty which is
 19 alleged to have been breached here. Nothing that
 20 was extant as of November 13th was destroyed. The
 21 only question is whether or not on a prospective
 22 basis, the Department had an obligation to
 23 continue to make and retain those backup tapes.
 24 SPECIAL MASTER BALARAN: And I could
 25 agree with you if the request for documents or the

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1 definition of documents in the first request was
 2 limited to paper documents, which would certainly
 3 have conformed to the way they were doing it, but
 4 it was very clear that it was all media. And at
 5 no time after the first request was issued did
 6 anybody contest the breadth of it, to say that
 7 this is simply not feasible under the balancing
 8 act that the rules provide, as being just an
 9 onerous request, because it went forward. So
 10 wasn't everybody on notice the day the first
 11 request for production was issued, was served on
 12 defendants, that electronic media and backup tapes
 13 were part of the corpus of information that had to
 14 be retained?
 15 MR. LUSKIN: I don't think so. I think
 16 as Miss Hilmer explained on Wednesday, what I
 17 think they understood those definitions to be
 18 which as you know, were the boiler plate
 19 definitions that go on for pages at the beginning
 20 of the request, was that the term documents
 21 included items stored on electronic media. And I
 22 think they understood that to mean not that they
 23 needed to physically preserve the media
 24 themselves, but to make available the information
 25 that was stored on electronic media which might

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1 never be stored under a paper system.
 2 If the Department -- in my office, for
 3 example, where you know, the Federal Records Act
 4 doesn't apply, I probably print maybe 5 percent of
 5 the e-mails that come across my computer in the
 6 course of day. And if someone were to send a
 7 similar document request to me, my response would
 8 be, I've got an obligation to print out those
 9 e-mails which exist only in the form of electronic
 10 media, and make them available to them in response
 11 to that document request.
 12 I would not, I think, naturally infer,
 13 and certainly not naturally infer that it is an
 14 order of the Court on a summary order denying a
 15 request for protection on issues unrelated to that
 16 specific question, that I need to physically keep
 17 that hard drive around and make it available to
 18 the plaintiff for his inspection.
 19 SPECIAL MASTER BALARAN: Well, at a
 20 minimum, before the Court made a decision summary
 21 or otherwise, wouldn't you feel the obligation to
 22 at least maintain your hard drive until you have
 23 had the opportunity to bring the attention to the
 24 Court's attention and argue whether or not this
 25 was just boiler plate or was intended, or if in

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1 fact the paper documents served the exact needs?
 2 MR. LUSKIN: Well, I guess what I'm
 3 saying is that I think it was a reasonable
 4 construction of those interrogatories that the
 5 defendants would be in substantial compliance with
 6 the request made of them if they took the
 7 information that was in bits and bites and
 8 electronic or magnetic form, and printed it out on
 9 hard copy and made that available, and that absent
 10 a direction from the Court that that was not
 11 sufficient, it was a reasonable position for them
 12 to have taken.
 13 SPECIAL MASTER BALARAN: But at that
 14 point when you got that direction from the Court,
 15 it would have been too late because you had
 16 already done whatever you were going to do with
 17 your hard drive or your backup tapes. So I'm
 18 asking, I mean, if this came to your client for
 19 instance, and they came to you for advice as to
 20 what the scope of their duties were, my concern is
 21 if you waited until a court order to flesh out the
 22 specifics of it by that point, at that point
 23 whoever is on the other side of the V wouldn't
 24 have the opportunity of reviewing whatever it is
 25 they wanted, or specified.

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1 MR. LUSKIN: I understand that. And
 2 let me say two things in response. First, of
 3 course, I think everyone's collective
 4 understanding of how to respond to similar
 5 requests is evolving, in no small measure because
 6 of this and other similar cases, and I think one
 7 need look no further than the evolution of
 8 decisions from the D.C. Circuit in Carlin, and
 9 then in Armstrong, and then Magistrate Facciola,
 10 your own decision in this matter in July 2001, to
 11 see that there are reasonable views about these
 12 matters by judicial officers, which can't
 13 necessarily be reconciled.
 14 SPECIAL MASTER BALARAN: Which would
 15 take the willfulness out of it; isn't that your
 16 best argument?
 17 MR. LUSKIN: And then that leads me to
 18 the second point, which is again, as I said at the
 19 beginning, we have to come back and look at this
 20 at the atomic or subatomic legal, and that means
 21 are the elements of a criminal contempt satisfied.
 22 And I think I certainly understand your point,
 23 which is that the, you know, first request said
 24 something about documents which included
 25 electronic media. Was a reasonable construction

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1 of that to mean that the media themselves had to
 2 be saved rather than reduced? The defendants
 3 filed a request for protective order. Even though
 4 that protective order didn't specifically address
 5 this issue, in a summary order on the 9th of
 6 November, the Court denied the motion for
 7 protective order, which means in effect that their
 8 obligations under the civil rules were triggered
 9 and therefore, they should have produced or
 10 preserved the electronic media, because Rule 26
 11 says that you have to supplement them on a going
 12 forward basis. I hear and understand all that.
 13 SPECIAL MASTER BALARAN: It goes even
 14 further, though, doesn't it? Doesn't it go
 15 further where then the question is to whether or
 16 not privilege should apply, and then a year later
 17 it's questioned as a 26 balancing act as to
 18 whether or not it's too onerous. But even up that
 19 point a year later, they're still being
 20 overwritten. So yes, you have a summary order,
 21 yes, you have an order denying or at least
 22 clarifying the contours of privilege, both
 23 attorney-client, work product and deliberative
 24 process. A year later you have discussion on the
 25 relative burdens of producing and saving and

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1 retrieving e-mail backup tapes. But up to that
 2 point they are still being overwritten. That's my
 3 problem.
 4 The way you cast your argument, you
 5 make it seem that as of November 1998, that was
 6 the summary decision and after that everybody
 7 acted according to Hoyle.
 8 MR. LUSKIN: Right. But again, I'm
 9 focusing on what has been alleged with respect --
 10 I mean, it comes back to the fact that guilt is
 11 personal and individual, and while accountability
 12 may be broader, and certainly Rule 37 contemplates
 13 that the accountability of a party may be very
 14 broad indeed, and may extend to the most senior
 15 officers of a party, and may extend to counsel for
 16 a party, we need to keep circling back to what the
 17 specific issue is that's presented for us today,
 18 which is, can we establish with proof beyond a
 19 reasonable doubt based on the specific factual
 20 allegations that are made, that Mr. Cohen
 21 willfully and deliberately defied a specific
 22 unambiguous order of the Court.
 23 And while I certainly don't quarrel
 24 with what you suggest is a possible interpretation
 25 of where things stood as of November 9th, 1998, I

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1 also don't believe that you could conclude even
 2 with that in mind that what followed on November
 3 13th was a deliberate violation of a clear and
 4 unambiguous order. And that's the question we
 5 have to get home to.
 6 SPECIAL MASTER BALARAN: When did the
 7 Carol Bruce investigation end and when was that
 8 order, do you know.
 9 MR. LUSKIN: Not for some time after
 10 that. It was probably not until the summer of
 11 2000. And this was, if I recall, a decision
 12 simply by her that this wasn't worth the trouble.
 13 SPECIAL MASTER BALARAN: Right.
 14 MR. LUSKIN: And something else,
 15 although not a part of the record, obviously, but
 16 in people's thoughts about the importance of
 17 maintaining these.
 18 The second area, even if you agree that
 19 there had been, or if you construe the November
 20 9th, 1998 order as clear, specific and
 21 unambiguous, and that Mr. Cohen's conduct by
 22 circulating the memorandum from November 13th
 23 violated that order, you still have to look for
 24 evidence of willfulness, and I would suggest that
 25 the record contains facts from which his state of

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1 mind can be deduced and they certainly don't point
 2 to a deliberate violation of the court order.
 3 The first thing I think you can look to
 4 were Mr. Cohen's repeated efforts, including the
 5 memorandum he circulated four days earlier to
 6 encourage the staff members in the Department and
 7 the attorneys in the Solicitor's office to
 8 futurely comply with their obligations under the
 9 pending discovery request. As soon as that order
 10 was issued on the 9th, he recognized that the
 11 discovery obligations were ripening, if you will,
 12 and circulated a memorandum which included the
 13 specific text of the relevant requests, and
 14 admonished everybody in the Solicitor's office
 15 that they needed to be mindful of their
 16 obligations, that they needed to print any
 17 documents on a going forward basis, because after
 18 all, that's the Rule 26 hook which carries this
 19 forward in some respects, and to produce the
 20 documents which had already, which in a period of
 21 a two years, starting from seven days after this
 22 case was filed, he had been reminding the
 23 attorneys under his supervision that they were
 24 obligated to produce. That, I think, is the first
 25 fact from which you can have a window into his

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1 state of mind.
 2 The second is the undisputed record
 3 with regard to what happened on May 12th of 1999
 4 after your decision recommending a denial of the
 5 motion for clarification and protection, in which
 6 a meeting was convened to discuss the Department's
 7 obligations. I think the description in the
 8 Inspector General's report was when Mr. Schumacher
 9 indicated that the Department had been overwriting
 10 tapes so that there was in a sense, because of the
 11 rolling basis, four months that were lost,
 12 Mr. Cohen turned white as a sheet, and had to be
 13 reminded of the November 13th order.
 14 SPECIAL MASTER BALARAN: Is that in the
 15 record?
 16 MR. LUSKIN: Yes.
 17 SPECIAL MASTER BALARAN: White as a
 18 sheet?
 19 MR. LUSKIN: White as a sheet. It's in
 20 the inspector general's report. That he turned
 21 white as a sheet and had to be reminded and shown
 22 a copy of the November 13th, 1998 order, and said,
 23 I didn't want to hear about that, I didn't want to
 24 know that, I can't believe it. And there's a
 25 direction that goes out to first of all notify the

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1 Court, and second of all, to reinstate the
 2 retention of the backup tapes on a going forward
 3 basis in the Solicitor's headquarters office and
 4 those regional offices where he believes
 5 responsive documents may in the future be created.
 6 And I think both of those facts, which
 7 I think are undisputed in the record in front of
 8 us, are directly contradictory to any kind of
 9 mental state to intentionally avoid or subvert an
 10 order of the Court. And I think conversely, in
 11 order to indulge in the inference that he acted
 12 deliberately, you would have to assume that in
 13 November, on November 13th, 1998, not having any
 14 idea what e-mails may ever be written in the
 15 future, having taken affirmative steps to insure
 16 that those physical copies of those e-mails would
 17 be preserved and produced, Mr. Cohen knowingly and
 18 deliberately defied a court order solely for the
 19 purpose of obscuring the metadata that was
 20 associated with those e-mails, and when learning
 21 about it, promptly took steps to inform the Court.
 22 And it's difficult for me to
 23 understand, and I have not yet heard from the
 24 plaintiffs or anyone else, any rational theory
 25 that would support that inference, and if you

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1 can't get there, you can't get to willfulness from
 2 here.
 3 I have nothing further.
 4 SPECIAL MASTER BALARAN: Thank you.
 5 Mr. Gingold.
 6 MR. GINGOLD: Plaintiffs agree with
 7 Mr. Cohen's counsel that there are different
 8 standards with regard to criminal contempt, and
 9 plaintiffs have never suggested that the civil
 10 procedures would apply either. Due process
 11 attaches differently for criminal contempt, as it
 12 also attaches for civil contempt. Indeed, as a
 13 matter of law, plaintiffs cannot prosecute
 14 criminal contempt, it must be referred to the
 15 United States Attorney's office to determine in
 16 the first instance after the Court refers it,
 17 whether or not to proceed further. And it's the
 18 discretion of the U.S. Attorney's office whether
 19 or not to proceed with criminal contempt. It is
 20 clearly not the discretion of plaintiffs.
 21 And it is first determined by the Court
 22 if there is a reasonable basis. But the due
 23 process attaches with respect to the process, as
 24 we understand it, and again, if I'm wrong, I would
 25 like to be corrected.

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1 SPECIAL MASTER BALARAN: Can we focus
 2 for a moment on the argument that Mr. Luskin made
 3 concerning the willfulness issue? I mean, that's
 4 where I would really like to hear from you.
 5 MR. GINGOLD: Well, our understanding
 6 is that the memorandum in question was not
 7 drafted -- as a matter of fact, the November 13th,
 8 1998 memorandum, at least based on our
 9 understanding, was not an accidental memorandum,
 10 it was intended to be written. We're not aware of
 11 anything where there was a gun to the head of
 12 Mr. Cohen. We're not aware of the fact that he
 13 didn't understand the nature and quality of his
 14 act.
 15 SPECIAL MASTER BALARAN: Would you
 16 agree with me that if he intended to write the
 17 memorandum as a volitional act, is different than
 18 he intended to destroy the data that might have
 19 been imbedded in the e-mails?
 20 MR. GINGOLD: No, I would not agree
 21 with you. As a matter of fact, I think the
 22 evidence or the information, the facts in this
 23 case are quite the contrary. Indeed, at the very
 24 least, and I say at the very least because this
 25 was involved in the negotiation, and the final

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1 language of the November 27th, 1996 order. The
 2 language that was negotiated and as a matter of
 3 fact has been litigated, is whether or not the
 4 defendants had to produce all information related
 5 to, referring to or that embodies the individual
 6 Indian trust accounts of five named plaintiffs and
 7 their predecessors in interest, and the language
 8 there was "all".
 9 There was substantial litigation for
 10 a long period of time, while Mr. Cohen was Deputy
 11 Solicitor, as to whether or not all meant all, and
 12 the Court held during the course of these debates,
 13 all meant all. So for a period of time, and I
 14 would say at least since November 27th, 1996,
 15 because that particular order was negotiated over
 16 approximately a six-week period of time, with the
 17 Justice Department and the Solicitor's office
 18 actually participating in the drafting of that
 19 language with the understanding of what all meant,
 20 which is one of the reasons it is plaintiffs'
 21 understanding that the Court confirmed that all
 22 meant all.
 23 SPECIAL MASTER BALARAN: Do you think
 24 the Office of the Solicitor had an independent
 25 duty to determine the way I did, to hire somebody

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1 to find out what this metadata was that was on
 2 these backup tapes?
 3 MR. GINGOLD: You're talking about the
 4 Office of the Solicitor, I'm talking about the
 5 parties in this litigation and the individuals who
 6 represent the parties in this litigation.
 7 SPECIAL MASTER BALARAN: I guess the
 8 reason I'm asking you that is, let's assume for
 9 the moment that On Track had found out or
 10 confirmed that in fact there really was no
 11 difference, if you will, between that which was
 12 produced, that which was printed out and that
 13 which was on the backup tapes. Would you still
 14 believe that the November memorandum from
 15 Mr. Cohen constituted a contemptuous act?
 16 MR. GINGOLD: Yes I would, Mr. Balaran,
 17 because the courts in this country have explicitly
 18 distinguished the hard copy data from the
 19 electronic data. And as a matter of fact, in
 20 Armstrong, the Court explicitly stated that
 21 electronic records are separate records, they are
 22 separate records and are contemplated as separate
 23 records under federal rules. And as a matter of
 24 fact, again, since 1970, this issue has been on
 25 the table. It is not new. Any of us who have

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1 represented major financial institutions have been
 2 attuned to this issue for decades, I guarantee you
 3 that.
 4 Let me also point out, and this is
 5 extremely important, this is a trust case. This
 6 is not a government program case. And in order to
 7 do an accounting, which is why this action was
 8 brought, you must be able to provide adequate
 9 information. Trust counsel historically is
 10 counsel not only for the trustee but counsel for
 11 the trust beneficiaries. This special master
 12 himself has quite articulately explained the
 13 relationships in a May 1999 opinion or
 14 recommendation to the Court. And the special
 15 master has quite clearly articulated that.
 16 So we have a case that was filed in
 17 1996 at the time Mr. Cohen was Deputy Solicitor.
 18 Prior to us filing the case, there were a series
 19 of legal opinions issued by solicitors, and again,
 20 none of them have been withdrawn as of today and
 21 all of them were enforced as of every period of
 22 time relevant to these proceedings.
 23 The first major opinion was the Krulitz
 24 opinion in 1978, which not only established the
 25 fact that the common law principles apply with

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1 respect to the trustee delegates, in that case it
 2 was the Interior Department alone, management of
 3 the trust, the Indian trust, but beyond that,
 4 there is a separate fiduciary relationship that
 5 counsel had to the trust beneficiaries.
 6 SPECIAL MASTER BALARAN: I'm not --
 7 MR. GINGOLD: You're asking me intent,
 8 you're asking me what was reasonable to
 9 understand.
 10 SPECIAL MASTER BALARAN: Well,
 11 actually, let me ask you a more specific question.
 12 Do you believe that Mr. Cohen intended to destroy
 13 or to direct the destruction of the data embedded
 14 on the e-mail backup tapes?
 15 MR. GINGOLD: I believe --
 16 SPECIAL MASTER BALARAN: Is that your
 17 contention?
 18 MR. GINGOLD: That's a separate
 19 question.
 20 SPECIAL MASTER BALARAN: I understand,
 21 it is a separate question, and I'm asking you to
 22 answer it.
 23 MR. GINGOLD: Which one do you want me
 24 to answer first?
 25 SPECIAL MASTER BALARAN: Answer the one

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1 I just asked you. Do you believe that Mr. Cohen
 2 intended the destruction of the data embedded on
 3 the e-mail backup tapes, that is not data that
 4 would have been printed out normally in the normal
 5 course of business?
 6 MR. GINGOLD: I believe he intended to
 7 do the act that caused the destruction and when
 8 you're looking at the issues with regard to
 9 liability, whether it's civil or criminal, if you
 10 do an act, if you shoot a gun at a stop sign and
 11 you didn't intend to kill the person behind the
 12 stop sign, you intended to do that act,
 13 Mr. Balaran. He intended to issue a memorandum
 14 that restated document destruction actions.
 15 Whether he understood fully whether each data
 16 element was being destroyed is not dispositive as
 17 to whether or not he is culpable for purposes of
 18 criminal contempt.
 19 But let me also point something else
 20 out. We have had some discussion of what a
 21 federal record is. And again, part of that issue
 22 deals with the willful destruction of federal
 23 records, because the Interior Department itself
 24 incorporated in its own departmental manual those
 25 particular issues. The Justice Department has for

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1 some time identified not only what a federal
 2 record is in general, as we have talked about this
 3 before and as we stated in various briefs, so I'm
 4 not going to go through it in detail, but went on
 5 to the fact that for purposes of Interior, I
 6 believe it was back to 1997, explicitly identified
 7 what e-mail constitutes a federal record.
 8 At no time -- and again, because this
 9 was -- these issues were raised as early as June
 10 1996 with counsel for the Department, and that's
 11 the Justice Department, they were part of an
 12 ongoing active negotiation with regard to the
 13 initial order entered in this case as to what we
 14 were talking about, and that's where all records
 15 are in there. As a matter of fact, Miss
 16 Perlmuter from the Solicitor's office, who
 17 testified that she directly reported to Mr. Cohen
 18 on all these issues, was the one who participated
 19 with John Leshy in the negotiation and drafting of
 20 the order which required all records. It is
 21 impossible, after many representations were made
 22 to the Court, not only by Justice Department
 23 counsel, by Miss Perlmuter on behalf of the
 24 Solicitor's office, when they said something as of
 25 February 1997, all documents that were required by

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1 paragraph 19 would be produced. And then there
 2 was an amendment going to March.
 3 In order to produce all those
 4 documents, the Solicitor's office records as trust
 5 counsel had to be searched. And if you did any
 6 search in accordance with that order -- and I'm
 7 not saying, Mr. Balaran, that violation of that
 8 order would constitute criminal contempt here.
 9 I'm just pointing out the circumstances that lead
 10 plaintiffs to an invariable conclusion that the
 11 action taken was either in reckless disregard
 12 because of an absolute refusal to do anything
 13 associated with what was negotiated and entered,
 14 or willfully attempted to destroy the data itself.
 15 Because anyone who has had a computer,
 16 at least for the last ten years, understands
 17 what's on a computer and what isn't.
 18 SPECIAL MASTER BALARAN: Does reckless
 19 disregard get you to criminal liability?
 20 MR. GINGOLD: As a matter of fact it
 21 can, Mr. Balaran, depending on the particular
 22 circumstances. As a matter of fact, people get
 23 convicted of murder, of various degrees of murder
 24 for reckless disregard, if you have a sufficient
 25 sienta for the murder, and here you have a

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1 sufficient sienta for the destruction of
 2 documents.
 3 But whether or not Mr. Cohen is a nice
 4 guy and whether or not he intended to do well
 5 ultimately, the facts are quite compelling. The
 6 Solicitor's office, attorneys under his direction
 7 were involved in creating documents and
 8 information necessary to go forward. His own boss
 9 as a matter of fact at one time confirmed for the
 10 entire Department what the obligations are to
 11 retain records, because of the unique relationship
 12 of the Interior Secretary to the trust
 13 beneficiaries. And he pointed out explicitly,
 14 while Mr. Cohen was still there, and there have
 15 been no objections that we have ever seen that
 16 sought to minimize the importance of that, the
 17 November 28, 2000 memorandum from John Leshy, the
 18 Solicitor, he pointed out explicitly the
 19 unconditional obligation to maintain a national
 20 records system because of the trust duties, and I
 21 will quote various portions of that, if I may,
 22 Mr. Balaran.
 23 We cited portions in various briefs,
 24 including Mr. Cohen's brief, our brief with regard
 25 to Mr. Cohen, and with regard to Mr. Cohen it is

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1 found, for the master's benefit, on footnote 9,
 2 page 9. It states in pertinent part, the
 3 Department of the Interior cannot effectively
 4 execute its Indian trust responsibility without a
 5 standard nationwide method of creating, retaining
 6 and protecting trust records. And I will add as
 7 an annotation, in my experience practicing law and
 8 representing financial institutions, there is no
 9 doubt that counsel to the trust is creating trust
 10 records with regard to advising the trustee on the
 11 management and administration of the trust. The
 12 Solicitor's office is counsel to the trust.
 13 I would also like to go on, continuing
 14 with Mr. Leshy's, let's say opinion in this
 15 regard. He states in pertinent part, these same
 16 documents are in fact the records evidencing
 17 fulfillment of the Secretary of the Interior's
 18 Indian trust responsibilities and as such, the
 19 Secretary is required to maintain them in
 20 accordance with the Federal Records Act. And of
 21 course as we all know, because there has been a
 22 brief discussion of willful repeatedly, the
 23 willful destruction of federal records
 24 independently can constitute a crime.
 25 I would also go on to quote Mr. Leshy

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1 and say, he says, quote, the Secretary would be
 2 unable to carry out this accounting obligation if
 3 the trust records are inconsistent, incomplete or
 4 inaccessible. Plaintiffs submit that if you
 5 destroy records, and destroy records that cannot
 6 otherwise be replicated, at the very least you're
 7 making them inaccessible, Mr. Balaran.
 8 And at the very least, again, we're
 9 dealing with context here and why it's important
 10 to understand the context of extremely difficult
 11 litigation on all sides, that whether or not there
 12 is an understanding as to what is normally done
 13 with regard to the Solicitor's office informing or
 14 advising Fish and Wildlife, or informing the
 15 National Geologic Service, or dealing with the
 16 trust. And as the special master himself has
 17 pointed out, repeatedly while Mr. Cohen was the
 18 Solicitor, we're not -- these matters with regard
 19 to trust records have been treated with the same
 20 importance as how paper clips are preserved and
 21 protected in the Department.
 22 As the special master has noted and as
 23 the courts have noted, and not just the Court of
 24 Appeals in our case and the District Court in our
 25 case, but the United States Supreme Court most

<p style="text-align: right;">Page 291</p> <p>1 recently in White Mountain Apache, we are dealing 2 with a genuine trust duty, and the genuine trust 3 duty starts, as the Court of Appeals made it very 4 explicit in our case, affirming Judge Lamberth's 5 December 21, 1999 opinion, it starts with the 6 records. Mr. Balaran, you destroy the records, 7 you destroy the trust, because without records 8 there is no trust. 9 So our view is as follows. We believe 10 from the record that Mr. Cohen drafted a 11 memorandum with full knowledge that that 12 memorandum affected documents that must be 13 preserved in this litigation. That there was a 14 specific order, at least one that we identified, 15 the order of November 9th, which is a few days 16 prior to his November 13th memorandum, that if 17 nothing else, reconfirmed -- there may have been a 18 reason why it was a summary order, and that's 19 because this issue has been discussed and briefed 20 and argued in front of you many many times. There 21 was no reason to recapitulate everything that had 22 been done before. 23 I don't believe there was a single 24 person who was involved in this litigation, that 25 was not sensitive to the e-mail issues, and that</p>	<p style="text-align: right;">Page 293</p> <p>1 disagree with your characterization, Mr. Balaran. 2 This issue had been brought before. The question 3 was, where was the evidence of that? Prior to the 4 time you demanded that the Interior Department 5 Solicitor's office turn over those tapes, none of 6 those tapes were produced in this litigation, and 7 those tapes had been required to be produced prior 8 to that. So there was no opportunity for 9 plaintiffs to be able to do that until that period 10 of time. 11 Let me also point out, Mr. Balaran, the 12 expert that you retained, On Track was a known 13 expert. Other experts in the United States had 14 been engaged in exactly that same thing and when 15 you review Law Review articles or treatises on 16 these issues, you will see that for lengthy 17 periods of time even prior to the period of time 18 you engaged in that, dealing with discovery issues 19 with bar journals and everything else, that issue 20 was exactly the same and counsel were put on 21 notice that the records in e-mail backup tapes, 22 e-mail and other electronic media are not 23 identical to hard copy records because such things 24 as time, date, modification, bcc's and others 25 which are essential to the discovery of other</p>
<p style="text-align: right;">Page 292</p> <p>1 goes right back to June of 1996, when we made sure 2 we confirmed that. And again, nothing here is 3 unique in a financial litigation. 4 SPECIAL MASTER BALARAN: May I ask you 5 a question? This is the problem I have. In 6 Public Citizen, the Court deferred to the 7 archivist, because at the time Public Citizen was 8 unable to show that the information was not all 9 transferred when it went to paper documents. In 10 Armstrong, however, it said that the records show 11 that the two versions may be frequently only 12 cousins, perhaps distant ones. 13 But isn't it true that here the record 14 only showed that when I independently came up with 15 it in July of 2001? I mean, prior to that, there 16 would have been no need for me to go ahead and 17 contract or commission On Track to do the study if 18 as a matter of law it had been decided in this 19 jurisdiction that the two media were always 20 different. In fact, wasn't I the first person to 21 bring that to attention, and that created the 22 record? And if that's so, then how can Mr. Cohen 23 be held liable for having that information when it 24 had never been brought before? 25 MR. GINGOLD: Well, I respectfully</p>	<p style="text-align: right;">Page 294</p> <p>1 evidence, are not contained generally in the hard 2 copies, Mr. Balaran. 3 And that was -- what you did, Mr. 4 Balaran, was for the first time demand the 5 production of evidence that had been requested and 6 ordered by the Court on other matters relevant to 7 this case. But for the first time you produced, 8 you order it produced. 9 They gave you a sampling, not all of 10 it, if I recall, Mr. Balaran, and On Track went 11 through them and not only found that there was no 12 evidence that they were identical, they identified 13 the specific data elements which were on its face 14 material, and went further than that and said that 15 no documents were preserved on certain tapes that 16 they had reviewed. Which means that there was no 17 ability to even understand what had been 18 destroyed. 19 SPECIAL MASTER BALARAN: But why would 20 I have gone through that process if in fact again, 21 as a matter of law or common understanding there 22 was a distinction between the two? Because if 23 that was the case, there would have been no need 24 for Public Citizen to make the decision upholding 25 the archivist, because they simply would have had</p>

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1 to refer to law reviews and others that simply, or
 2 whatever technological journals that stated as a
 3 matter of course that the two media were
 4 different.
 5 MR. GINGOLD: Mr. Balaran, that would
 6 be great if in fact these particular issues were
 7 not vigorously and explicitly debated from the
 8 beginning of this case. I agree with you in that
 9 regard. I would also like to point out that the
 10 whole issue of the archivist was also litigated
 11 before Judge Lamberth, and these issues were
 12 specifically litigated in the context of whether
 13 or not what is identified, marked and inventoried
 14 with regard to document preservation for the
 15 ordinary destruction schedule for the government
 16 discharged the duty of the United States
 17 Government for, with respect to documents that had
 18 been destroyed in accordance with the normal
 19 schedules. And the judge said that did not
 20 discharge the duty.
 21 As a matter of fact, the judge pointed
 22 out other cases in that regard that said archival
 23 records standards are not the same standards for
 24 litigation or for trust management, that indeed
 25 what was even more important was the way the

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1 archivists set the standards for destruction is
 2 solely based on what they are informed by the
 3 agency. Consequently, if the agency did not
 4 inform the archivist that a particular record is a
 5 trust record that must be preserved outside the
 6 scope of the normal records retention schedule,
 7 the archivist will necessarily destroy them
 8 according to six years and seven months. This
 9 issue was debated and the judge said during this
 10 period of time before this particular issue was
 11 raised with Mr. Cohen, that that just isn't good
 12 enough. You cannot rely on archivist standards in
 13 this litigation.
 14 As a matter of fact, my recollection
 15 is, Mr. Balaran, the special master himself was
 16 actively involved in that, in trying to identify
 17 the adequacy of the records management in this
 18 litigation, and that among other things, further
 19 pointed out, and I'm paraphrasing, Mr. Balaran,
 20 I'm not purporting to quote you directly, further
 21 pointed out that it is actually impossible to
 22 preserve records if you don't know where they were
 23 or what they are.
 24 And in fact in this particular case,
 25 we're still not aware as of today, April 25th,

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1 2003, what records retained on the Solicitor's
 2 e-mail backup tape system are trust records and
 3 what are not trust records. And under those
 4 circumstances, it was extraordinary for the
 5 special master to be able to get those records and
 6 prove it in this litigation, but it had been
 7 proved in other situations before. This was
 8 not -- we did not make law in that regard,
 9 Mr. Balaran.
 10 MR. LUSKIN: I will be very brief,
 11 Mr. Balaran. In the first place, the issue about
 12 trust duties or trust obligations with respect to
 13 the records is truly a red herring here. The
 14 question presented by the plaintiffs' motion to
 15 show cause is whether or not Mr. Cohen violated
 16 18 U.S. Code Section 4013, which in turn requires
 17 willful. And by that, the law makes clear that it
 18 means specific intent, not general intent, a
 19 willful violation of the court order.
 20 Whatever the Department's obligations
 21 were with respect to the beneficiaries of the
 22 trust and whatever claims those trust
 23 beneficiaries might make for breach of trust are
 24 not implicated in these proceedings. The question
 25 here is whether or not Mr. Cohen violated a duty

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1 imposed by law through Title 18. And to that
 2 extent, the trust duties are not portable and
 3 can't be picked up and put down wherever in Title
 4 18 the plaintiff may wish to put them. The
 5 question is whether or not he imposed the duty, or
 6 whether he violated the duties imposed by law.
 7 And to that extent, I think your last
 8 question to Mr. Gingold was pertinent, which is,
 9 wasn't it in fact the case that the understanding
 10 of the parties with respect to the significance of
 11 this metadata was involved in this case. And
 12 certainly your decision to make those tapes
 13 available to On Track was illuminating with
 14 respect to the parties' understanding of what
 15 potential benefit that data might have. But
 16 another illumination and highly contemporaneous
 17 fact is that the issue that was posed in the
 18 Department's request for protective order filed in
 19 November of 1998, decided in 1999, with respect to
 20 the 185 tapes that were retained because of the
 21 independent counsel's investigation and were
 22 extant and were never destroyed, was not whether
 23 or not they were required to produce those tapes
 24 themselves because they contained the metadata
 25 about those e-mails, but whether or not they were

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1 going to be required to review those tapes using
 2 search terms, and print out documents that were
 3 responsive.
 4 And when the Department filed that
 5 motion for protective order saying that process is
 6 unduly burdensome, the plaintiffs did not come
 7 back and say what in the world are you talking
 8 about, we're not interested in having those things
 9 reviewed and the responsive documents printed and
 10 produced to us, we want the tapes themselves
 11 because they contain metadata. The entire dispute
 12 over the production of those tapes was carried on
 13 with the understanding that the discovery
 14 obligations of the defendants were going to be
 15 satisfied by the printing out of that data and the
 16 production of physical hard copies.
 17 And the view now that Mr. Cohen should
 18 have understood that the Court's summary order of
 19 November 9th, 1998, contemplated an ongoing
 20 obligation to create and maintain that electronic
 21 data, because that electronic data if you will,
 22 was a distant cousin to what the Department
 23 understood its obligations and practices to be is
 24 what we call in philosophy an anachronism.
 25 And finally, with respect to the order

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1 of November 27, 1996, you know, one of my favorite
 2 games at the carnival is playing Whack a Mole,
 3 where you stand there and the mole comes up and
 4 you have to hit him when he comes out of the hole.
 5 But let me just make clear that of the six orders
 6 identified by the plaintiffs as potentially having
 7 been violated by the named individuals here, and
 8 particularly Mr. Cohen, that is not one of the
 9 orders identified and I do not believe it is
 10 before you for consideration as to whether or not
 11 there was a deliberate violation of that order,
 12 even if it could have been construed to require
 13 the maintenance and retention of electronic
 14 documents.
 15 SPECIAL MASTER BALARAN: Thank you very
 16 much. Thank you all.
 17 MS. HILMER: Mr. Balaran, I believe I
 18 have 20 minutes.
 19 MR. BALARAN: Yes. Let's take a recess
 20 before that.
 21 (Recess.)
 22 SPECIAL MASTER BALARAN: Miss Hilmer,
 23 you have 20 minutes for your rebuttal.
 24 MS. HILMER: Thank you, Mr. Balaran.
 25 Tracy Hilmer, for the Department of Justice on

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1 behalf of the government.
 2 Over the course of the past several
 3 hours today and also many hours on Wednesday, you
 4 have heard argument from counsel for the named
 5 individuals and I won't repeat what they say. I
 6 agree with the substance of what they say as to
 7 each of their clients. I have not heard anything
 8 said by any of them that strikes me as requiring
 9 correction or clarification by me.
 10 In particular, though, I do want to
 11 pick up a on a couple of items that have been
 12 raised through these proceedings. I think
 13 importantly today, when you were having a
 14 discussion with Miss Jackson about the concept of
 15 the duty to preserve the tapes and when did that
 16 become evident, what I would say to you is that we
 17 are clearly here on contempt proceedings, and that
 18 certainly in order to find a civil or criminal
 19 contempt, you would have to find that that duty or
 20 that obligation was clearly and unambiguously set
 21 out in an order.
 22 Now we talked about, there was a
 23 discussion about whether the context could inform
 24 what the order meant. Surely it could. But
 25 certainly you would have to still find, I believe

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1 under the Project Basic versus Kemp case, which
 2 has been cited in the Armstrong case and is
 3 generally, I think approved of in the D.C.
 4 Circuit, it's not sufficient just that the order
 5 be clear and unambiguous on its own. The duty
 6 that it creates must be known to the person
 7 against whom contempt is being sought.
 8 And so to be sure, you did find in 2001
 9 that there was a duty to produce and save, produce
 10 from and save these backup tapes. But did they
 11 know that in 1998? Did they know it in 1996 at
 12 the time of the order that Mr. Gingold now
 13 recently brings into play in these proceedings?
 14 That is really the question.
 15 And I think very significantly, I just
 16 want to read to you a brief passage from
 17 Magistrate Judge Facciola's ruling in the McPeek
 18 case, which was against the Department of Justice,
 19 therefore, another government agency, and it came
 20 out just four days after your own July 27, 2001
 21 decision, it's an August 1st decision. And here
 22 Magistrate Judge Facciola says, there is certainly
 23 no controlling authority for the proposition that
 24 restoring all backup tapes is necessary in every
 25 case. The Federal Rules of Civil Procedure do not

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1 require such a search, and a handful of cases are
 2 idiosyncratic and provide little guidance. I
 3 mean, I think that's dispositive of the question
 4 of what people knew or should have known about
 5 preserving backup tapes.
 6 SPECIAL MASTER BALARAN: Is that
 7 restoring or retaining? I mean, aren't there two
 8 different concepts? I mean, we could argue about
 9 whether or not there is a duty to restore, but
 10 until that issue is fleshed out, wouldn't there be
 11 a duty to at least preserve what you had and then
 12 worry about later what arguments you were going to
 13 make?
 14 MS. HILMER: I can't see how there
 15 would be, I don't see how you could separate them.
 16 I mean, if you had a duty to produce from them, if
 17 you knew, if you understood or thought you had a
 18 duty to produce from the backup tapes, then
 19 consequently, you must have a duty to preserve
 20 them or at least to get some clarification about
 21 it. But if you don't think you have an obligation
 22 to produce from them, if you don't think of them
 23 as something that are a legitimate source for
 24 production under the civil rules, why would you
 25 have an obligation to even save them?

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1 SPECIAL MASTER BALARAN: Because it
 2 says in documents, it defines it. I mean when you
 3 say why, it's because it says so.
 4 MS. HILMER: But let me --
 5 SPECIAL MASTER BALARAN: I mean, would
 6 you say the same thing when it says paper
 7 documents, would you question that that was
 8 certainly part of the corpus of items that should
 9 be preserved?
 10 MS. HILMER: There is such a body of
 11 case law. And one of the reasons I quoted
 12 Magistrate Judge Facciola is precisely because he
 13 says the Federal Rules of Civil Procedure do not
 14 require such a search, okay? And at the same
 15 time, as Mr. Luskin ably argued, the National
 16 Archives, which sets record keeping standards,
 17 does not consider backup tapes worthy of archival
 18 status.
 19 SPECIAL MASTER BALARAN: But is that
 20 the standard for discovery?
 21 MS. HILMER: I think the standard for
 22 discovery is set out here in McPeck. What McPeck
 23 is telling you, what Judge Facciola is saying here
 24 is that there is no reason for thinking that
 25 backup tapes are always and forever going to be

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1 relevant or, I shouldn't say relevant, that they
 2 are going to be a proper source of discovery in
 3 every case.
 4 And let me quote another passage, which
 5 I think illustrates why he says that. And here
 6 he's really speaking about the cost benefit
 7 analysis, not so much the prospect of facing a
 8 contempt, as we are sitting here. He says,
 9 moreover, if government agencies are consistently
 10 required to pay for the restoration of backup
 11 tapes, they may be sorely tempted not to have such
 12 systems. There lies disaster. One shudders to
 13 think what would happen if the computer system at
 14 the Social Security Administration crashed and
 15 there was no backup system. While the notion that
 16 government agencies and businesses will not have
 17 backup systems if they are forced to restore them
 18 whenever they are sued may seem fanciful. Courts
 19 should not lead them into the temptation.
 20 SPECIAL MASTER BALARAN: So, was that
 21 guiding principle what was leading the Department
 22 five years earlier?
 23 MS. HILMER: In what year, I'm sorry?
 24 SPECIAL MASTER BALARAN: You're reading
 25 an opinion that came out what year?

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1 MS. HILMER: It came out in 2001.
 2 SPECIAL MASTER BALARAN: And what year
 3 did the first production request come out?
 4 MS. HILMER: You know, it's outside the
 5 scope of these proceedings, but I assume it's in
 6 1996.
 7 SPECIAL MASTER BALARAN: Right. But
 8 the definition is not outside the scope of these
 9 proceedings.
 10 MS. HILMER: Right.
 11 SPECIAL MASTER BALARAN: Because it's
 12 subsumed directly in the third request and I'm
 13 asking you if you're telling me when the first
 14 request came out in 1996 that everybody was guided
 15 by the principles that are articulated by
 16 Magistrate Facciola?
 17 MS. HILMER: That's not what I'm
 18 saying. What I'm saying is that even today, the
 19 question of whether you have to search off of
 20 backup tapes is not resolved. Magistrate Facciola
 21 says the civil rules don't address it. To my
 22 knowledge, the portion of the civil rules that he
 23 is referring to and relying upon have not changed
 24 to encompass electronic backup tapes. What I'm
 25 saying is that even in 2001, it was not clear what

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1 you had to do with regard to these backup tapes
 2 when you got sued and you were a government
 3 agency, and you had a paper record keeping system.
 4 How can you say three years earlier that that was
 5 known, that it was a duty, that it was a
 6 sufficiently clear duty that contempt could rest
 7 on it?
 8 What I want to say also with regard to
 9 the magistrate judge's decision is that he's
 10 talking about the prospect of what would happen if
 11 the government had to pay every time it got sued,
 12 which as I'm sure we're all aware, is every day,
 13 the government gets sued every day. What would
 14 happen if they had to pay for the restoration of
 15 backup tapes every time they got sued.
 16 I ask this. What would happen if the
 17 government, if there was a prospect that the
 18 government could be held in contempt for not
 19 preserving backup tapes every time it got sued? I
 20 mean, the concept here is it's not just this case
 21 and this Department, it's so much broader
 22 potentially. It's a question of whether every
 23 time the government gets sued, the government has
 24 to preserve every single backup tape that's being
 25 made every day or every week or every month for an

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1 entirely different purpose than archiving.
 2 Because Public Citizen has already said that the
 3 judiciary cannot require an electronic archival
 4 system until the agencies are ready, willing and
 5 able to do that, and able to pay for it.
 6 What I'm concerned about here is the
 7 concept that an agency risks being held in
 8 contempt even today, you know, even today, for not
 9 having saved all of its backup tapes.
 10 SPECIAL MASTER BALARAN: I'm just
 11 concerned as to whether the order was clear and
 12 specific. I mean, the broader ramifications, and
 13 I am not trying to minimize the impact it might
 14 have on the government, or minimize Magistrate
 15 Facciola's findings, but I'm really interested as
 16 to whether or not the 1998 order in November was
 17 clear and specific on its face, and put you on
 18 notice as to what your responsibility was, and
 19 therefore, I can intuit by your actions after that
 20 whether they were willfully in disregard of that,
 21 or in disregard of that at all.
 22 MS. HILMER: I understand, and I do,
 23 you know, I also heard your discussion earlier
 24 about whether the fact that these discrepancies
 25 between the paper records and the electronic

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1 records were not on a public record until you had
 2 the On Track report done. I agree with that as
 3 well. I think what I'm Siang here is that
 4 Magistrate Facciola's opinion tends to reinforce
 5 what you were saying there. In other words, even
 6 as recently as two years ago, there's a magistrate
 7 judge who deals with discovery matters day in and
 8 day out, and he's saying the Federal Rules of
 9 Civil Procedure don't require this.
 10 Certainly the plaintiffs' discovery
 11 requests cannot require the government to do more
 12 than what the Federal Rules of Civil Procedure
 13 require, and I don't think anybody ever suggested
 14 that they did, okay? So, I think that that is
 15 particularly illuminating in terms of just
 16 understanding the duty that people would have to
 17 know was associated with the order in order for
 18 the order to be clear and unambiguous. The duty
 19 is not spelled out, the duty is not spelled out in
 20 the Federal Rules of Civil Procedure, as
 21 Magistrate Judge Facciola says. And therefore, it
 22 was necessary in this case for there to be a very
 23 specific order that said yes, preserve backup
 24 tapes.
 25 SPECIAL MASTER BALARAN: Okay. The

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1 request for production says I want handwritten
 2 notes, which is not something that's normally kept
 3 in the course of business, okay? You seek a
 4 protective order that's denied summarily. Does
 5 that give you the right then to destroy those
 6 handwritten notes since, A, as a matter of course,
 7 it might be burdensome to do so under 26, and B,
 8 it's not in the course of business to do so for
 9 whatever reason, C, it's just out of the realm of
 10 what people can be expected? Does that forgive
 11 you or does that give you the right to just simply
 12 destroyed those handwritten notes?
 13 MS. HILMER: I think in that case the
 14 answer would be no. I think the problem here is
 15 that whether the backup tapes -- I mean,
 16 handwritten notes are clearly encompassed within
 17 the concept of documents that's embodied in the
 18 Federal Rules of Civil Procedure. You know, I'm
 19 not scientifically inclined, but what I want to
 20 posit is that there might be some technology that
 21 would create or preserve information in some other
 22 form, say for example, dare I say a tape recorder,
 23 some sort of tape recording mechanism on the wall
 24 of every office. And normally conversations in
 25 the office are not preserved unless they're taken

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1 down by handwritten notes or a tape recorder or
 2 some other thing. Perhaps there would be some new
 3 technology that would enable the capture of that
 4 for certain reasons. It might take a while before
 5 people realized that that would be a source of
 6 discoverable information.
 7 SPECIAL MASTER BALARAN: Like the
 8 famous 11 and a half minutes.
 9 MS. HILMER: Well, you know, I can't
 10 speak to that as I was under the age of 10 when
 11 that occurred, but I've heard about it.
 12 SPECIAL MASTER BALARAN: Me too.
 13 MS. HILMER: However, what I think is
 14 important to understand is that where technology
 15 is evolving, we're not talking about reel to reel
 16 tapes that then evolved into cassette tapes, that
 17 then evolved further to some other type of known
 18 media. We're talking about sea changes in the way
 19 people do business and the way people make sure
 20 that their business is not disrupted by problems.
 21 And I think you hit it exactly right when you
 22 noted that what we know in 2003 is not necessarily
 23 what people would have appreciated back then. And
 24 I think Magistrate Facciola's opinion is right in
 25 line with that.

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1 I wanted to also just comment that
 2 there was considerable discussion by Mr. Gingold
 3 on Wednesday about Webb versus D.C. and how, for
 4 the concept that that case somehow absolves
 5 plaintiffs of the burden to establish a clear and
 6 unambiguous order that required preservation of
 7 the backup tapes. I don't read Webb versus D.C.
 8 to say that at all. In fact, as I read Webb
 9 versus D.C., the Court of Appeals reversed Judge
 10 Lamberth for imposing a litigation ending sanction
 11 because it found that sanction unwarranted without
 12 evidence that he had considered something lesser.
 13 And I think that's appropriate here to,
 14 because there has been some discussion about what
 15 responsibility the party has for the loss of
 16 potential evidence. In Webb versus D.C., the D.C.
 17 Circuit reiterated what it had done in Shepard
 18 versus ABC, which is, a sanction for failure to
 19 preserve evidence is appropriate only when a party
 20 has consciously disregarded its obligation to do
 21 so. And that's at page 969 of the Webb decision.
 22 There is not evidence that anybody
 23 consciously disregarded a known obligation with
 24 regard to the backup tapes. There are mishaps,
 25 there is a process of realization, there is a

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1 process of working with the master --
 2 SPECIAL MASTER BALARAN: You're not
 3 saying not that there was a mishap of any sort,
 4 are you? Because a mishap suggests to me that
 5 perhaps there was an obligation and it just
 6 somehow fell through the cracks.
 7 MS. HILMER: No, there were mishaps --
 8 what I -- we referred to the mishaps following
 9 your May 11th, 1999 decision, when things occurred
 10 and there were efforts to bring that to your
 11 attention. What I'm saying is that the efforts,
 12 particularly with these backup tapes, appears to
 13 have been in all respects a good faith one, not
 14 really in any regard an attempt to destroy
 15 evidence. And that's what would have to be found
 16 to impose a serious sanction against the
 17 government here.
 18 So Mr. Gingold still bears the burden
 19 of establishing what harm he and his clients have
 20 specifically suffered from the loss of the backup
 21 tapes that may have contained information
 22 responsive to the third document request. That's
 23 what we're here about. That's what this motion is
 24 about. And I have heard him articulate
 25 generalized claims and complaints about trust

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1 records and you know, claims that he states were
 2 essential. But remember, there was a paper record
 3 keeping system, paper records were produced. And
 4 so until Mr. Gingold and his clients can come
 5 forward with something that establishes that they
 6 really have suffered harm, they are not entitled
 7 to any consideration of an adverse inference. And
 8 then if they are able to do that, the adverse
 9 inference has to be tailored appropriately.
 10 That's what Webb versus D.C. and Shepard versus
 11 ABC stand for.
 12 I only briefly want to address the fact
 13 that I think it is a serious deviation in due
 14 process for Mr. Gingold to come in here in these
 15 hearings and for the first time raise issues about
 16 orders that are not addressed anywhere, at least
 17 with any specificity, in his prior pleadings.
 18 SPECIAL MASTER BALARAN: I think I have
 19 stated my position that I'm going to limit the
 20 record to those six that are set out in the March
 21 20th motion for an order to show cause.
 22 MS. HILMER: I appreciate that. I also
 23 have concern about the fact that we're hearing
 24 about new facts only for the first time at this
 25 proceeding. The Krulitz memo I see referenced

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1 nowhere. Whatever it is, it's not here. There
 2 have been references by Mr. Gingold to a meeting
 3 with former government counsel Matt Urie in
 4 Billings, Montana. You know, it's not of record,
 5 not referenced here, and I strongly object to any
 6 consideration of that and I hope you won't.
 7 I do want to make one correction to my
 8 argument on Wednesday and that is, I did review
 9 the argument of October 27, 2000. Again, in light
 10 of our conversations, and there was some
 11 discussion about whether you needed to have
 12 preservation of both the receiving servers and the
 13 sending servers, but it appeared that you thought
 14 they were probably both the same, so it wasn't a
 15 big deal to do. So, I apologize if I was
 16 incorrect in that.
 17 SPECIAL MASTER BALARAN: Okay.
 18 MS. HILMER: I want to make just one
 19 last point before we close here today. The
 20 government joins private counsel in urging
 21 termination of these proceedings at this time.
 22 What happened here was at most an error, not
 23 anything like the conscious effort to deprive the
 24 plaintiffs of discovery. There has been no
 25 demonstration of actual harm. And they have had a

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1 year, and unlimited pages to identify the legal
 2 and factual basis for their extremely serious
 3 charges against the government and these people.
 4 They have had argument here for the better part of
 5 a day and a half and they still have not
 6 specified. We submit that the plaintiffs' motion
 7 is legally insufficient and that these people are
 8 entitled to resolution of these proceedings in
 9 their favor at this time.
 10 If there is to be further consideration
 11 of appropriate discovery sanctions between the
 12 parties, we would submit that that should occur at
 13 the appropriate time, but that certainly it should
 14 not be addressed here in the context of imposing a
 15 contempt sanction against the government or any of
 16 its employees.
 17 Thank you very much, Mr. Balaran.
 18 SPECIAL MASTER BALARAN: I would like
 19 to correct the record. It was 18 and a half
 20 minutes, not 11 and a half, which shows I really
 21 was tentative coming here, just in case whether
 22 there was any dispute to that effect. Do you?
 23 MR. GINGOLD: I will make a brief
 24 statement.
 25 First of all, just to correct the

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1 record too, as a matter of fact the United States
 2 Government has been on notice of the need to
 3 protect and preserve the data since at least 1976,
 4 in 1976, the Justice Department participated with
 5 federal banking agencies and endorsed the concept
 6 to create the National Commission for Electronic
 7 Funds Transfers. The whole purpose of that and
 8 the importance of it by the Justice Department was
 9 to insure that all electronic data be preserved
 10 because in 1976, that was a heightened issue for
 11 the Secretary of the Treasury and the Attorney
 12 General of the United States. So this is hardly a
 13 novel issue that we are dealing with here. Thank
 14 you.
 15 (Whereupon, the hearing ended at 3:35
 16 p.m.)
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