No. 06-

In the Supreme Court of the United States

ELOUISE PEPION COBELL, *ET AL.*, PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY,
DEPARTMENT OF THE INTERIOR, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding — in conflict with *Liteky v. United States*, 510 U.S. 540 (1994), and decisions of other circuits — that it could order the district judge recused and the case reassigned under 28 U.S.C. §§ 455(a) and 2106 based on its reversals of some of the district judge's rulings in this case.

PARTIES TO THE PROCEEDING

The following were the parties to the proceedings before the United States Court of Appeals for the District of Columbia Circuit:

1. Elouise Pepion Cobell

2. Penny Cleghorn

3. Thomas Maulson

4. Earl Oldperson

5. James Louis LaRose

6. Members of a class defined by the district court to include all past and present Indians (including all original allottees, their heirs, and individual Indian successors-in-interest, including executors and personal representatives) on whose behalf, as Trust beneficiaries, Trust accounts are, have been, should be, or should have been established and maintained by the United States government to hold revenues generated by the Individual Indian Trust

7. Dirk Kempthorne, Secretary, Department of the Interior, in his official capacity

8. The Assistant Secretary of the Department of the Interior for Indian Affairs (currently vacant), in his or her official capacity

9. Henry M. Paulson, Secretary, Department of the Treasury, in his official capacity

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

TABLE OF APPENDICES xi

OPINIONS BELOW 1

STATUTORY PROVISION INVOLVED 1

JURISDICTION 1

STATEMENT 1

A. The Trust. 2

B. Trust Mismanagement. 3

C. Proceedings In This Case. 6

1. Initial proceedings. 6

2. The initial trial and *Cobell VI*. 7

3. Post-*Cobell VI* proceedings. 9

4. The present proceedings. 14

Contents

Page

REASONS FOR GRANTING THE PETITION . . . 15

I. THIS CASE CALLS FOR THE COURT'S REVIEW. 15

II. THE COURT OF APPEALS' REASSIGNMENT DECISION IS ERRONEOUS AND IN CONFLICT WITH *LITEKY* AND THE APPROACH FOLLOWED IN OTHER CIRCUITS. 19

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 16

Babbitt v. Youpee, 519 U.S. 234 (1997) 2

Cobell v. Babbitt (Cobell V), 91 F.Supp.2d 1 (D.D.C. 1999) 3, 4, 5, 7, 26

Cobell v. Norton (Cobell VI), 240 F.3d 1081 (D.C. Cir. 2001) . . . . *passim*

Cobell v. Norton, 212 F.R.D. 14 (D.D.C. 2002) . . . 6

Cobell v. Norton, 206 F.R.D. 27 (D.D.C. 2002) . . . 6

Cobell v. Norton, 206 F.R.D. 324 (D.D.C. 2002) . . 6

Cobell v. Norton (Cobell VII), 226 F.Supp.2d 1 (D.D.C. 2002) 9, 10

Cobell v. Norton, 226 F.Supp.2d 175 (D.D.C. 2002) 6

Cobell v. Norton (*Cobell VIII*), 334 F.3d 1128 (D.C. Cir. 2003) 10, 24, 25-26

Cobell v. Norton, 213 F.R.D. 16 (D.D.C. 2003) . . . 6

Cobell v. Norton, 214 F.R.D. 13 (D.D.C. 2003) . . . 6

Cobell v. Norton, 2003 WL 22867626 (D.C. Cir. Dec 2, 2003) 9

Authorities

Page

Cobell v. Norton (*Cobell X*), 283 F.Supp.2d 66 (D.D.C.2003) 12

Cobell v. Norton (Cobell XI), 310 F.Supp.2d 77 (D.D.C. 2004) 11

Cobell v. Norton (Cobell XII), 391 F.3d 251 (D.C. Cir. 2004) . . . . *passim*

Cobell v. Norton (Cobell XIII), 392 F.3d 461 (D.C. Cir. 2004) 12, 13, 23, 25

Cobell v. Norton (Cobell XIV), 357 F.Supp.2d 298 (D.D.C. 2005) 13

Cobell v. Norton (*Cobell XV*), 229 F.R.D. 5 (D.D.C. 2005) 1

Cobell v. Norton (*Cobell XVI*), 394 F.Supp.2d 164 (D.D.C. 2005) 11

Cobell v. Norton (Cobell XVII), 428 F.3d 1070 (D.C. Cir. 2005) 13, 27, 28

Cobell v. Norton (*Cobell XVIII),* 455 F.3d 317 (D.C. Cir. 2006) 1, 27

Cobell v. Kempthorne (Cobell XIX), 455 F.3d 301 (D.C. Cir. 2006) 12, 27, 28

Ex parte American Steel Barrel Co., 230 U.S. 35 (1913) 20, 23

Authorities

Page

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 8

Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911) 26

Hodel v. Irving, 481 U.S. 704 (1987) 2

In re Allied-Signal Inc., 891 F.2d 967 (1st Cir. 1989), *cert. denied,* 495 U.S. 957 (1990) 19

In re Boston's Children First, 244 F.3d 164 (1st Cir. 2001) 21

In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004) 13

In re Corrugated Container Antitrust Case, 752 F.2d 137 (5th Cir.), *cert. denied,* 473 U.S. 911 (1985) 18

In re Focus Media, Inc., 378 F.3d 916 (9th Cir. 2004), *cert. denied,* 544 U.S. 968 (2005) 21

In re J.P. Linahan, Inc., 138 F.2d 650 (2d Cir. 1943) 21

In re Kempthorne, 449 F.3d 1265 (D.C. Cir. 2006) 13, 24

In re United States, 441 F.3d 44 (1st Cir.), *cert. denied,* 127 S.Ct. 288 (2006) 21

Authorities

Page

Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821 (1994) 26

Koller v. Richardson-Merrrell Inc., 737 F.2d 1038 (D.C. Cir. 1984), *vacated on other grounds*, 472 U.S. 424 (1985) 17, 18, 19

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 23

Liteky v. United States, 510 U.S. 540 (1994) . . . . .i, 18, 19, 20, 21

Little Rock School Dist. v. Pulaski County Special School Dist., 839 F.2d 1296 (8th Cir.), *cert. denied*, 488 U.S. 869 (1988) 21

McLaughlin v. Union Oil Co. of Cal., 869 F.2d 1039 (7th Cir. 1989) 21

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 8

Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co., 535 U.S. 229 (2002) . . . 23

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 8

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir.) (*en banc*), *cert. denied,* 534 U.S. 952 (2001) 18

Page

United States v. Robin, 553 F.2d 8 (2d Cir. 1977) (*en banc*) 17

Statutes and Rules

General Allotment Act, ch. 119, 24 Stat. 388 (1887) (as amended, 25 U.S.C. §§ 331 *et seq.*) 2

American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (1994) (codified as amended in scattered sections of 25 U.S.C.) 5

Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 108-108, 117 STAT. 1241 (2004) 12, 13

25 U.S.C. §§ 161-161a (2000) 2

25 U.S.C. §§ 4001- 4011 (2000) 2

28 U.S.C. § 455(a)-(b) (2000) . . . . i, 1, 14

28 U.S.C. § 1254(1) (2000) 1

28 U.S.C. § 1292(b) (2000) 7

28 U.S.C. § 2106 (2000) . . . . i, 1, 14

Fed. R. Civ. P. 23(d) . . . . i, 14

Page

Other Authorities

Bureau of Municipal Research, 63rd Cong., Report to the Joint Commission to Investigate Indian Affairs: Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs at 2 (Comm. Print 1915) 3, 4

Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-449 (1992) 4, 5

12 MOORE'S FEDERAL PRACTICE § 63.20[8][b] at 63-32.1 (3d ed. 2006) 17

Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, 120 F.R.D. 267 (1988) . . . 17

The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980*, (September 2006) 18

ABA, *Report of the Joint Commission to Evaluate the Model Code of Judicial Conduct* (Oct. 31, 2006) 21, 26, 27

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The District Of Columbia Circuit Decided July 11, 2006 . . . . 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The District Of Columbia Dated July 12, 2005 . . . . 39a

Appendix C — Order Of The United States Court Of Appeals For The District Of Columbia Circuit Denying Petition For Rehearing En Banc Filed September 26, 2006 . . . . 89a

Appendix D — Order Of The United States Court Of Appeals For The District Of Columbia Circuit Denying Petition For Rehearing Filed September 26, 2006 . . . . 91a

Petitioners, named plaintiffs Elouise Pepion Cobell, *et al.*, on behalf of themselves and a certified class of all past and present Individual Indian Trust beneficiaries, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App, *infra*, 1a-38a) is reported at 455 F.3d 317. The opinion of the district court (App., *infra*, 39a - 88a) is reported at 229 F.R.D. 5.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2006. A timely petition for rehearing was denied on September 26, 2006 (App., *infra*, 89a-92a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The removal of a sitting federal district judge on the ground of apparent judicial bias is a grave and delicate matter. And it is never more grave and delicate than where, as here, it is based on an assessment of the substantive correctness of the judge's legal decisions. A trial court's errors are subject to correction through judicial review; they should not afford a ready basis for a dissatisfied litigant to attack the judge and, by requesting the appellate court to reassign the case to a different judge, engage in "judge shopping." To allow otherwise would be a disservice to district judges, to litigants, and to judicial independence.

This issue is squarely presented here. This is a highly publicized and crucially important Indian Trust case against the federal government, involving a century-old, and continuing,

breach of trust duties and the resulting mismanagement of tens of billions of dollars belonging to approximately 500,000 of the poorest Americans. The case has historical roots extending back to the founding and development of our nation and contemporary consequences directly affecting the physical and economic well being of the Native American plaintiffs today. Judge Lamberth has presided over this case since its filing 10 years ago. Now, however, the court of appeals has removed him from the litigation because it believed its reversal of some of his rulings supported an appearance of bias. Because that decision is erroneous, conflicts with decisions of this Court and of other circuits, and threatens to impede the ultimate resolution of this decade-old lawsuit brought to redress the government's century-long breaches of trust, this Court's review is warranted.

A. The Trust.

The Trust that is the subject of this litigation – called the Individual Indian Money ("IIM") Trust – was initially established in 1887 pursuant to the General Allotment Act, ch. 119, 24 Stat. 388 (as amended, 25 U.S.C. §§ 331 *et seq*. (2000)). The United States acts as Trustee and its trust duties have been delegated principally to the Secretary of the Interior and the Secretary of the Treasury ("Trustee-Delegates"). *See, e.g.,* 25 U.S.C. §§ 161-161a, 4001- 4011 (2000). Trustee-Delegates are responsible for, *inter alia*, leases and sales of resources from Trust lands and collection, investment, and disbursement of the proceeds. The Trust assets are owned by the individual Indian beneficiaries and *are their private property*,[1] but these assets are under the complete custody and control of the United States as Trustee. *Id*.

At one time, approximately 54,000,000 acres of land were held in trust. Today, approximately 11,000,000 acres remain. No one knows how much trust revenue has been generated from the sale or lease of Trust assets and paid to the correct beneficiary in the correct amount.

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[1] *See Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987).

The Trust assets are of great value. As early as 1915, Trust assets were valued at $1 billion.[2] In addition to millions of acres of land, oil, gas, coal, timber, and other valuable natural resources held in trust, Trustee-Delegates acknowledge that at any given time, they hold approximately $400 million in 260,000 separate trust accounts. Petitioner-beneficiaries contend that the account balances, if properly stated, would amount to tens of billions of dollars more. Trustee-Delegates also now concede that annually at least $300 million is produced in lease and royalty proceeds from individual Indian Trust lands. *See* Trustee-Delegates' Fiduciary Obligations Compliance Plan at 4 (Jan. 6, 2003) (Dkt. No. 1707). The government's own contractor placed the amount of government liability in this action "somewhere between $10 billion and 40 billion."[3]

B. Trust Mismanagement.

There is no dispute that the Trust has been severely and consistently mismanaged over its entire life and that an accounting has *never* been done. *See, e.g., Cobell v. Norton (Cobell VI)*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("[t]he trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long"). Even today, "the Interior Department [does] not know the proper number of [trust] accounts" it manages, "it does not know the proper balances . . . , nor does Interior have sufficient records to determine the value of IIM accounts." *Id*. at 1089. Indeed, "'[a]lthough the United States freely gives out "balances" to plaintiffs, it admits that currently these balances cannot be supported by adequate transactional documentation.'" *Id.* (quoting *Cobell v. Babbitt (Cobell V),* 91 F.Supp.2d 1, 10 (D.D.C. 1999)). Consequently, Trustee-Delegates "regularly issue[] payments to trust beneficiaries 'in erroneous amounts –

[2] *See* Bureau of Municipal Research, 63rd Cong., Report to the Joint Commission to Investigate Indian Affairs: Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs at 2 (Comm. Print 1915) ("Joint Commission Report").

[3] *See* SRA International Risk Assessment at 5-1 (Jan. 18, 2002).

from unreconciled accounts – some of which are known to have incorrect balances.'" *Id.* (quoting *Cobell V,* 91 F.Supp.2d at 6).

The government has long been aware of its mismanagement. A 1915 congressional report described in detail the already broken trust that resulted from "fraud, corruption and institutional incompetence almost beyond the possibility of comprehension." *See* Joint Commission Report at 2. In every decade since then, reports have been issued by various government entities and private auditors identifying the many ongoing failures of the trust management and accounting system. "The General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of the IIM trust accounts over the past twenty years." *Cobell VI,* 240 F.3d at 1089.

Faced with this shameful record, "[t]ime and again Interior Department officials pledged to address these concerns. Yet, as Interior officials readily acknowledge, there has been little progress at reforming the management of IIM trust accounts." *Id.* Even today, "the federal government readily acknowledges that it is in breach of at least some of the fiduciary duties owed to IIM beneficiaries." *Id.* at 1090. Congress took notice and

> [b]eginning in 1988, .. . held oversight hearings on Interior's management of the Indian trust accounts. These hearings led to a report, *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund,* H.R.Rep. No. 102-499 (1992) [1992 WL 83494], . . . which harshly criticized the Interior Department's mishandling of the trust accounts. Consistent with prior analyses, the report found, "significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds." *Id.* at 2.

Id.

Trustee-Delegates' breaches of trust have caused and continue to cause severe hardship to Indian beneficiaries. "Interior's persistent failure to meet its obligations led the congressional investigators to conclude that top officials 'have utterly failed to grasp the human impact of its financial management.'" *Id.* (quoting *Misplaced Trust* at 5). The consequences of these breaches to the beneficiaries are dire; as the court of appeals recognized more than five years ago when it first held that the government had breached its fiduciary obligations:

> "The longer defendants delay in creating the plans necessary to render an accounting, the greater the chance that plaintiffs will never receive an actual accounting of their own trust money." . . . Given that *many plaintiffs rely upon their IIM trust accounts for their financial well-being*, the injury from delay could cause irreparable harm to plaintiffs' interests as IIM trust beneficiaries. Thus, it seems that "*the interests at stake are not merely economic interests . . . but personal interests in life and health.*"

Id. at 1097 (emphasis added) (citations omitted). Furthermore, the situation is particularly troubling and "far more inexcusable than [if it involved a] garden-variety trust" since Indian Trust beneficiaries "did not willingly relinquish pervasive control of their money to the United States. The United States imposed this trust on the Indian people." *Cobell V*, 91 F.Supp.2d at 6.

In 1994, Congress enacted the Indian Trust Fund Management Reform Act ("1994 Act"), Pub. L. No. 103-412 (1994). The 1994 Act is a "remedial statute" that recognized and codified "the federal government's preexisting trust responsibilities" and required Trustee-Delegates to bring themselves into compliance with their fiduciary duties. *Cobell VI*, 240 F.3d at 1096, 1090. Regrettably, Trustee-Delegates responded with more foot-dragging and continuing breaches of trust. *See* App., *infra*, 37a ("five years later, no remedy is in sight").

C. Proceedings In This Case.

1. Initial proceedings.

Unwilling to accept further delay, five named plaintiffs brought this action on June 10, 1996, on behalf of themselves and approximately 500,000 individual Indian Trust beneficiaries. They sought remedies commonly available to trust beneficiaries to cure the alleged breaches, including the provision of an adequate accounting, restatement of account balances, and reform of the broken trust system.

The case has proven to be both complex and voluminous. In the district court, there have been more than 3,250 filings, 60 published decisions, and 200 days of testimony in various trial proceedings. The Honorable Royce C. Lamberth has been the presiding judge in the case from its inception.

As the district court has repeatedly found, Trustee-Delegates have obstructed and delayed the proceedings in this case. For example, as early as 1999, the district court held government officials "in contempt of court for failing to comply with the court's production orders and imposed monetary sanctions." *Cobell VI*, 240 F.3d at 1093. *See also id.* (this conduct was "egregious" and "compounded" by the "contemporaneous destruction of documents"). Since then, the government has been sanctioned on numerous occasions for, *inter alia,* retaliating against witnesses, submitting false reports and sworn declarations, destroying documents, violating court orders, and filing frivolous briefs.[4]

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[4] *See, e.g., Cobell v. Norton,* 214 F.R.D. 13 (D.D.C. 2003) (sanctions for knowingly filing false declaration that the court described as "misconduct . . . that . . . was egregious and undertaken in bad faith); *Cobell v. Norton,* 212 F.R.D. 14 (D.D.C. 2002) (counsel's violation of no-contact rule in attempt to extinguish rights of juveniles and other vulnerable class members); *Cobell v. Norton,* 206 F.R.D. 27 (D.D.C. 2002) (filing frivolous motion); *Cobell v. Norton,* 206 F.R.D. 324, 324-25 (D.D.C. 2002) (filing frivolous motion regarding cover-up of evidence spoliation); *Cobell v. Norton,* 213 F.R.D. 16, 28-32 (D.D.C. 2003) (counsel's disruption of deposition with baseless objections and frivolous motion); *Cobell v. Norton,* 226 F.Supp.2d 175 (D.D.C. 2002) (show cause granted for violating anti-retaliation order).

2. The initial trial and *Cobell VI*.

In 1998, the district court divided this litigation into two phases. Phase I was designed to fix the trust system going forward and focused on reforming the management and accounting of the IIM Trust. Phase II would determine the adequacy of the historical accounting and to correct plaintiff-beneficiaries' trust account balances in conformity with the ultimate accounting. *Cobell VI*, 240 F.3d at 1093.

In 1999, following a six-week trial, the district court held that Trustee-Delegates had breached their fiduciary duties to plaintiffs, including the duty to account. *Cobell V,* 91 F.Supp.2d 1. Trustee-Delegates appealed pursuant to 28 U.S.C. § 1292(b), arguing, *inter alia*, (1) that they did not have duties remotely akin to those of a trustee; (2) that, specifically, they had no duty to account prior to enactment of the 1994 Act; (3) that they were not in breach of trust; (4) that their conduct must be judged deferentially and, in particular, that *Chevron* deference is applicable; and (5) that even if they breached their fiduciary duties, the district court had only the limited authority to identify the breaches and could not grant traditional equitable relief to ensure that Trustee-Delegates were brought into compliance with their trust obligations.

The D.C. Circuit rejected each and every one of these arguments, affirming the district court in all material respects. *Cobell VI*, 240 F.3d 1081. The court held that the United States owes "longstanding and substantial trust obligations to Indians, particularly to IIM trust beneficiaries, not the least of which is a duty to account." *Id.* at 1098. In addition, *Cobell VI* concluded that Trustee-Delegates, "[b]y failing to take reasonable steps toward the discharge of the federal government's fiduciary obligations to IIM trust beneficiaries, . . . breached their duties" including "[m]ost significantly" the duty to "provide an adequate accounting." *Id.* at 1106.

In so ruling, the court of appeals held that Trustee-Delegates are governed by traditional fiduciary duties under trust law and rejected their argument that they are subject only to the more

deferential approach typically applied to administrative agencies. *Id.* at 1100-01. The court explained that although "ordinarily we defer to an agency's interpretations of ambiguous statutes entrusted to it for administration," here "*Chevron* deference is not applicable" in light of the trust relationship between Trustee-Delegates and the beneficiaries and the "governing canon of construction requir[ing] that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Id.* (quoting *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985)); s*ee also id.* at 1103. Where, as here, "'the Secretary is obligated to act as a fiduciary . . . then his actions must not merely meet the minimal requirements of administrative law, but also must pass scrutiny under the more stringent standards demanded of a fiduciary.'" *Id.* at 1104 (citation omitted). Thus, "the Secretary 'cannot escape his role as trustee by donning the mantle of administrator' to claim that courts must defer to his expertise and delegated authority." *Id.* at 1099 (citation omitted).

Finally, the court of appeals addressed the district court's remedial power to enforce the fiduciary duties owed to the beneficiary-class. Observing that "there is little reason to believe that, absent court intervention, these duties will be discharged any time soon" (*id.* at 1105), it held that the district court possessed "broad equitable powers in ordering specific relief." *Id.* at 1108. The court explained that where "'a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order *any appropriate relief*.'" *Id.* (emphasis in original) (quoting *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 69 (1992)). Under traditional principles of equity, "'[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies,'" and merely because "this case involves decades-old Indian trust funds rather than segregated schools does not change the nature of the court's remedial powers." *Cobell VI*, 240 F.3d at 1108 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)).

Thus, "the district court has substantial ability to order that relief which is necessary to cure the appellants' legal transgressions" and "was justified in fashioning equitable relief that would ensure the vindication of plaintiffs' rights." *Id*.

3. Post-*Cobell VI* proceedings.

Since *Cobell VI*, the district court has struggled mightily to ensure Trustee-Delegates' compliance with trust duties. This effort has led to over 50 post-*Cobell VI* published decisions of the district court (and more than a hundred other unpublished rulings or orders). Of these, Trustee-Delegates have appealed nine.[5]

Of the nine appeals taken by Trustee-Delegates, one was dismissed with prejudice.[6] The remainder vividly demonstrate the wide range of issues and challenges that have confronted the district court in wrestling with various knotty and complicated legal questions that have arisen in this litigation involving (as the court of appeals itself has variously described it) "recalcitran[t]"[7] and "intransigen[t]"[8] Trustee-Delegates who commit "malfeasance"[9] that "egregiously breach[es]"[10] their trust duties and "unconscionabl[y] delay[s]"[11] the discharge of their fiduciary obligations.

Given the difficult and often unprecedented questions presented in this case, it is hardly surprising that the court of appeals has disagreed with some of the rulings of the district court. On the other hand, in a number of these appeals, the D.C. Circuit in fact has upheld the district court's basic legal reasoning

[5] Petitioner-beneficiaries have not sought to appeal any of the rulings against them – not because they agreed with the decisions but because they wanted the case to move forward expeditiously.

[6] *Cobell v. Norton*, 2003 WL 22867626 (D.C. Cir. Dec 2, 2003).

[7] *Cobell VI*, 240 F.3d at 1109

[8] *Cobell v. Norton (Cobell VII),* 226 F.Supp.2d 1, 142 (D.D.C. 2002)

[9] *Cobell VI,* 240 F.3d at 1109

[10] *Cobell v. Norton (Cobell XII)*, 391 F.3d 251, 257 (D.C. Cir. 2004).

[11] *Cobell VI*, 240 F.3d at 1096.

and vacated or reversed on procedural grounds or even on the basis of an intervening change in law or an error of the Special Master rather than of Judge Lamberth.

a. The first appeal was from a civil contempt citation against the Secretary of Interior and Assistant Secretary for Indian Affairs. *Cobell v. Norton* (*Cobell VIII*), 334 F.3d 1128 (D.C. Cir. 2003). The district court awarded sanctions in the form of attorneys' fees and expenses related to the prosecution of the civil contempt. In reversing, the D.C. Circuit held that such sanctions were neither coercive nor compensatory and thus the contempt was "functionally" criminal in nature. *Id*. at 1140. In reaching this conclusion, the court did not disagree with Judge Lamberth's factual finding that Trustee-Delegates "cannot be trusted to report in a timely manner complete and accurate information regarding the status of trust reform and their efforts to discharge their fiduciary responsibilities properly." *Cobell VII*, 226 F.Supp.2d at 159. On the contrary, the court of appeals itself criticized Trustee-Delegates for the underlying conduct, pointedly noting that the reports Trustee-Delegates issued on their reform efforts "were misleading about the progress being made in ways painstakingly identified by the district court." *Cobell VIII,* 334 F.3d at 1149.

b. Meanwhile, in 2001, it came to light that individual Indian Trust data (IITD) were subject to manipulation and corruption because of the complete lack of information technology security on Interior's computer system. Trustee-Delegates conceded shortly thereafter that "[I]nterior defendants recognize significant deficiencies in the security of information technology systems protecting individual Indian trust data. Correcting these deficiencies merits [I]nterior defendant's immediate attention." December 17, 2001 Consent Order at 4 (Dkt. No. 1063). Despite this recognition, Trustee-Delegates failed to correct these deficiencies, and vital IITD remained (and remain today) at serious risk.

After initially taking lesser steps to protect IITD, on March 15, 2004, the district court entered an injunction requiring certain

internet disconnection. *Cobell v. Norton (Cobell XI)*, 310 F.Supp.2d 77 (D.D.C. 2004). The government appealed.

In *Cobell XII*, the D.C. Circuit emphatically rejected Trustee-Delegates' fundamental legal contentions as "unpersuasive." 391 F.3d at 256-57. The court concluded that Trustee-Delegates had "ignored" *Cobell VI* and "mischaracteriz[ed]" the injunction entered by the district court. *Id*. at 257-58. In particular, it held that the district court's "jurisdiction properly extends to security of Interior's information technology systems" and that the lower court "possessed authority on remand from *Cobell VI* to issue a preliminary injunction regarding IT security." *Id.* at 253-54, 256. The court also made clear that, contrary to Trustee-Delegates' contention, the district court had substantial "discretion as a court of equity in fashioning a remedy to right a century-old wrong" and that "the narrower judicial powers appropriate under the APA do not apply" to this Indian Trust case. *Id.* at 257. *Cobell XII* thus rejected *all* of the legal challenges to the injunction. *Id.* at 258.

However, the court of appeals vacated the district court's order on narrow procedural grounds. It directed the court below to consider government declarations that had previously been rejected as formally defective and hold an evidentiary hearing that would update the record with more current information. *Id.* at 258-59.

Following a 59-day evidentiary hearing upon remand, the district court found that "[t]here is no question that these problems, in the aggregate, demonstrate that the confidentiality, integrity, and availability of IITD on Interior's IT systems are presently at substantial and imminent risk of compromise." *Cobell v. Norton* (*Cobell XVI*), 394 F.Supp.2d 164, 272 (D.D.C. 2005). Pursuant to the legal principles enunciated in *Cobell XII,* the court ordered certain Interior computers disconnected from the internet and intranet. *Id.* at 277-78.

Trustee-Delegates again appealed but did "not challenge" the "extensive findings of fact" that served as the basis of the

district court's injunction. *Cobell v. Kempthorne (Cobell XIX),* 455 F.3d 301, 308 (D.C. Cir. 2006). The D.C. Circuit agreed with the district court that "the evidence of flaws in Interior's IT security is extensive" and recognized that it would be "naïve to deny the possibility that . . . an [unauthorized] individual may indeed hack into Interior's systems and even alter IITD." *Id.* at 315. Nevertheless, the court of appeals held that the injunction was an abuse of discretion because this possibility was not substantial enough and the harm to Interior "outweighs the class members' need for an injunction." *Id.* at 317.[12]

c. Since *Cobell VI* in early 2001, Trustee-Delegates have remained in breach of their fiduciary duties. Accordingly, in September 2003, after extensive proceedings and detailed findings of fact, the district court entered a structural injunction to establish a mechanism for them to fulfill their accounting obligations. *Cobell v. Norton* (*Cobell X*), 283 F.Supp.2d 66, 287-95 (D.D.C.2003). Once again, Trustee-Delegates appealed. Subsequent to the district court's order, Congress enacted an appropriations rider providing, in pertinent part, that no federal statute or other law "shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until . . . December 31, 2004." Pub. L. No. 108-108. Based on this intervening change in law, the court of appeals vacated the historical-accounting aspects of the structural injunction. *Cobell v. Norton (Cobell XIII)*, 392 F.3d 461, 465-66 (D.C. Cir. 2004). However, noting that this appropriations measure provided Trustee-Delegates only "temporary relief from . . . engag[ing] in historical accounting for the IIM accounts," the court made clear that "obviously Pub. L. No. 108-108 will cease to bar the historical accounting provisions of the injunction" after December 31, 2004, and expressly did "not address the

[12] This decision is the subject of a separate petition for certiorari filed contemporaneously herewith.

issues that would be relevant if the district court then reissued those provisions." *Id.* at 466, 468.[13]

Thereafter, upon expiration of Pub. L. No. 108-108, the district court re-entered the same historical-accounting injunction. *Cobell v. Norton (Cobell XIV)*, 357 F.Supp.2d 298 (D.D.C. 2005). In *Cobell v. Norton (Cobell XVII)*, 428 F.3d 1070 (D.C. Cir. 2005), the D.C. Circuit vacated the historical-accounting injunction on the merits. Despite *Cobell VI*'s holding that "*Chevron* deference is not applicable" in this Indian Trust case, the appellate court ruled that the injunction was an abuse of discretion because "the district court owed substantial deference to Interior's plan" and must provide "deference to administrators." *Id.* at 1076.

d. Two other appellate proceedings addressed attempts to recuse Judge Lamberth from contempt proceedings against certain government employees and the suppression of certain reports by the Special Master looking into alleged violations of various orders by those individuals. First, in *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004), the employees sought mandamus to remove Judge Lamberth and the Special Master. The court of appeals held that Judge Lamberth's impartiality in any contempt proceedings could not reasonably be questioned and therefore denied mandamus. *Id.* at 1046. However, it granted mandamus against the Special Master because of his investigatory role in earlier phases of the case. *Id.*

Second, Trustee-Delegates sought mandamus directly from the court of appeals to suppress three reports by a Special Master who had previously resigned. *In re Kempthorne*, 449 F.3d 1265, 1266 (D.C. Cir. 2006). Although the court granted the writ, the grounds for the decision related only to the actions of the Special

[13] *Cobell XIII* also vacated, in part, the provisions of the structural injunction requiring Trustee-Delegates to take steps to comply with their trust duties other than the historical-accounting. *See* page 25 note 22, *infra.* Notably, the court of appeals rejected, and indeed expressed "puzzle[ment]" at, Trustee-Delegates' suggestion that fixing the broken trust system "represent[ed] an expansion of the lawsuit." *Id.* at 470.

Master and did not involve any rulings of – let alone errors by – Judge Lamberth.

4. The present proceedings.

The present appeal arises from the district court's order providing notice to class members pursuant to Fed. R. Civ. P. 23(d). App., *infra,* 39a-88a. While the court of appeals recognized that "Interior's trust account information has serious reliability problems," it nevertheless held that requiring a notice stating the information "may be unreliable" was not authorized by Rule 23(d). App., *infra,* 14a.

In addition, Trustee-Delegates objected to harsh language in the district court's opinion regarding their misconduct and malfeasance in the manner they have managed the trust and litigated the case. Based on such language together with the D.C. Circuit's prior reversals, Trustee-Delegates requested that the court of appeals reassign the case to a new district judge pursuant to 28 U.S.C. § 2106. In the same opinion reversing the Rule 23(d) order, the court also granted the motion to reassign based on the conclusion that an objective observer "might reasonably . . . question[]" Judge Lamberth's "impartiality." *See* 28 U.S.C. § 455(a). In basing reassignment on this appearance of partiality, the court did not determine or even suggest that Judge Lamberth was actually biased or prejudiced. *See* 28 U.S.C. § 455(b).

The court of appeals' ruling rested on the combination of two considerations. The court acknowledged that much of Judge Lamberth's "harsh – even incendiary – language" properly reflected the fact that Trustee-Delegates have "flagrantly and repeatedly breached [their] fiduciary obligations." App., *infra*, 32a. The court also recognized that it too had "referred to Interior's 'malfeasance,' 'recalcitrance,' 'unconscionable delay,' 'intransigen[ce],' and 'hopelessly inept management.'" *Id*. And it emphasized that "Interior's deplorable record deserves condemnation in the strongest terms. Words like 'ignominious' and 'incompeten[t]' (the district court's) and 'malfeasance' and 'recalcitrance' (ours) are fair and well-supported by the record."

Id. at 33a. Nonetheless, the court was concerned that some of the district court's statements went "further" and "could contribute to a reasonable observer's belief" that Judge Lamberth might appear to be partial. *Id.* at 32a, 34a.

However, the court of appeals did "not decide" whether these statements, "standing alone, required reassignment." *Id.* at 34a. Instead, it considered the aggregate of the harsh language along with what it termed "an unbroken string of [eight] reversed district court orders." *Id.* Based on "the combination of the [statements in] the July 12 order and the nature of the [reversed] district court[] actions," the court "conclude[d], reluctantly," that reasonable objective observers would not "have confidence that [Judge Lamberth's] decisions flow from the impartial application of law to fact." *Id.* at 37a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE CALLS FOR THE COURT'S REVIEW.

This case is of historical significance both in its importance and in its duration and complexity. As to the former, the litigation involves the rights of some 500,000 Native Americans to seek redress for the government's longstanding and continuing breaches of fundamental trust duties and for the resulting losses they suffered *to their own property* held in trust by the government. By the estimate of the government's own contractor, approximately $10 billion-$40 billion is at stake. Because many petitioner-beneficiaries rely on trust benefits for their subsistence, the lawsuit directly affects their '"personal interests in life and health."' *Cobell VI*, 240 F.3d at 1097 (citation omitted).

As to the latter, the litigation concerns a trust that was established in 1887. In the subsequent 120 years, the government as Trustee has *never* fulfilled its fiduciary duties to petitioners. To right that grievous violation of trust responsibilities, petitioners instituted this lawsuit in 1996. During the next 10 years, the case has been actively litigated and has proven to be both massive and arduous. And, unfortunately, the end is nowhere in sight.

Judge Lamberth has presided over the case from its inception and has a unique and invaluable mastery of all its aspects. Indeed, it is largely due to Judge Lamberth's firm management of the case that the government has made any effort at all to comply with its fiduciary duties. *See Cobell VI*, 240 F.3d at 1097 ("[w]hat little progress the government has made appears [to be] due to the litigation").

It is impossible in short compass, and on a cold record, to demonstrate Judge Lamberth's command of this litigation. Suffice it to say for present purposes that he has been deeply involved in, and is intimately familiar with, every aspect of law and fact in this complicated case. Indeed, it is not an overstatement to say that he has "lived" the case for 10 years. It is his management that has structured the proceeding. It is his discretion that has guided the case and resolved the manifold issues, large and small, that have continually arisen. It is, in ways undisturbed by appellate reversals, his legal analysis that is the foundation for the proceedings yet to come. And, of central importance, it is Judge Lamberth who has seen the multitude of witnesses at the various proceedings as well as the government's counsel and formed judgments about their veracity, character, and good faith. *See, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985). In sum, Judge Lamberth has a unique understanding of this case that is both invaluable and irreplaceable.

Now, after this extensive course of litigation, the court of appeals has ordered that Judge Lamberth be removed and the case reassigned to another judge. It based this extraordinary decision on its conclusion that, although *Judge Lamberth had no actual bias*, an objective observer would reasonably believe that he appeared not to be impartial.

It does not deprecate the importance of the appearance of impartiality in our judicial system to suggest that only the clearest and most compelling considerations could justify this reassignment. The law is well settled that "[a] judge is presumed to be impartial until the contrary is proven; a substantial burden

is imposed on the [moving party] to challenge this presumption." 12 MOORE'S FEDERAL PRACTICE § 63.20[8][b] at 63-32.1 (3d ed. 2006). And that "substantial burden" is strongly reinforced here by the further delay and expense that reassignment would cause for this litigation and the onus and inefficiency it would impose on the new judge and the judicial system. *See, e.g., United States v. Robin*, 553 F.2d 8, 11 (2d Cir. 1977) (*en banc*); *Koller v. Richardson-Merrrell Inc.*, 737 F.2d 1038, 1069 (D.C. Cir. 1984) (Richey, J., concurring), *vacated on other grounds*, 472 U.S. 424 (1985); *see also* Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, 120 F.R.D. 267 (1988).

The reassignment decision relies on the court of appeals' conclusion that the reversal of Judge Lamberth in eight appeals on a range of issues over a three-year period evinces an appearance of bias on his part. App., *infra,* 34a. The court's ruling rested on "the combination" (*id.* at 37a) of two considerations: statements made by Judge Lamberth in a single judicial opinion and the appellate reversals. Both of these factors were necessary to the court's decision; neither was sufficient by itself. Thus, the court made clear that it was "not decid[ing] whether such [statements], standing alone, require reassignment, for the [statements] do not stand alone . . . [but] follow an unbroken string of reversed district court orders." *Id.* at 34a. It was "[f]rom all of this evidence" (*id.* at 36a) that the court concluded that reassignment was warranted on the ground of an appearance of bias. Thus, the court's reassignment rises or falls on the propriety of its conclusion that the reversals supported the appearance of bias. The court's decision is both incorrect and conflicts with decisions of this Court and of other courts of appeals.[14]

[14] Although petitioners respectfully disagree with the court's conclusion that "portions of the . . . opinion go further" than legitimate criticism (App., *infra,* 32a) and support recusal and reassignment on the ground of appearance of bias, it is unnecessary for this Court to address that issue in order to reverse the reassignment decision.

Judicial recusal and reassignment present matters of great difficulty and delicacy. Removal of a judge based on the substantive correctness of his rulings threatens to strike at the heart of the judicial independence that is crucial to the federal court system and the governmental structure of checks-and-balances and separated powers. Errors are grist for the appellate mill, and great care must be taken that they not be converted into grounds for attacks on individual judges or litigation strategy for a dissatisfied party to remove the case to a more favorable judge.[15]

These concerns are neither new nor hypothetical. This Court unanimously recognized them in *Liteky v. United States*, 510 U.S. 540, 555 (1994); *id.* at 558, 560 (Kennedy, J., concurring in the judgment). "In the wrong hands, a disqualification motion is a procedural weapon to harass opponents and delay proceedings." *United States v. Microsoft Corp.*, 253 F.3d 34, 108 (D.C. Cir.) (*en banc*), *cert. denied,* 534 U.S. 952 (2001). Worse yet, it can become a weapon for "judge shopping" and opens "a 'Pandora's box' for countless baseless attacks upon a defenseless judiciary whose independence is essential to the preservation of this republic." *Koller*, 737 F.2d at 1069 (Richey, J., concurring); *see also In re Corrugated Container Antitrust Case*, 752 F.2d 137, 145 & n.26 (5th Cir.) (citing Judge Richey's opinion), *cert. denied,* 473 U.S. 911 (1985). As then-Judge Breyer stressed:

> [T]he disqualification decision must reflect *not only* the need to secure public confidence through

[15] Recently, a committee appointed by the Chief Justice and chaired by Justice Breyer issued a report that discussed the propriety of a judicial misconduct complaint filed against Judge Lamberth in connection with his role in *Cobell*. The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980*, (September 2006). The Report found that the dismissal of the complaint was appropriate, emphasizing that the "'rough and tumble' of litigation may require a strong hand to control strategic litigation behavior. Punishing this judicial conduct could inhibit other judges' efforts to apply the rule of law in an unruly case and thus encroach on the judicial independence needed to manage such litigation." *Id.* at 91.

> proceedings that appear impartial, *but also* the need to *prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic purposes, perhaps to obtain a judge more to their liking*.

In re Allied-Signal Inc., 891 F.2d 967, 970 (1st Cir. 1989) (third emphasis added), *cert. denied,* 495 U.S. 957 (1990). Finally, reassignment can "cause a waste of valuable judicial resources," especially in a "complex case" in which "the trial judge has become familiar with the facts and issues." *Koller*, 737 F.2d at 1069 (Richey, J., concurring).

The court of appeals, to its credit, was not unmindful of these considerations. App., *infra*, 30-32a. Unfortunately, however, the court's decision, although adverting to these concerns, did not in fact heed them. Because the ruling below is in error, is in conflict with *Liteky* and decisions in other circuits, and has grave consequences in removing a judge who has mastery of this complex case, this Court's review in this highly visible and important case is warranted.[16]

II. THE COURT OF APPEALS' REASSIGNMENT DECISION IS ERRONEOUS AND IN CONFLICT WITH *LITEKY* AND THE APPROACH FOLLOWED IN OTHER CIRCUITS.

As explained above, the court of appeals relied on the record of appellate reversals of Judge Lamberth in this litigation to support its holding that he be removed and the case reassigned on the ground that his impartiality might reasonably be questioned. The court never identifies evidence of bias in the decisions; rather the reversal of the decisions alone suffices. In several respects, this approach constitutes error in conflict with the precedents of this Court and other circuits that calls for this Court's intervention.

1. *Liteky* makes plain that a district judge's conduct in the

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[16] The panel's ruling already has been the subject of criticism. *See, e.g.*, Peter B. Rutledge, *A Judgment Call*, LEGAL TIMES, Aug. 7, 2006, at 58-59.

performance of his judicial function normally is not a basis for removal and reassignment on appearance grounds.

> [J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . [They] can only in the rarest circumstances evidence the degree of favoritism or antagonism required. . . . Almost invariably, they are proper grounds for appeal, not for recusal.

510 U.S. at 555. Justice Kennedy's concurrence is in accord, noting that "a high threshold is required" and that recusal "'was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise.'" *Id.* at 558, 560 (Kennedy, J., concurring) (quoting *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 44 (1913)).

These precedents are particularly applicable to reassignments that look to the substantive correctness of the district court's rulings. Such rulings – which are innumerable in any complicated and extended litigation and cover a diverse array of legal and discretionary judgments – are the very core of the judicial function. Indeed, as *Liteky* noted, they are "necessary to completion of the judge's task." 510 U.S. at 551. Furthermore, the legal system provides a specific remedy – appellate review – to correct such errors and thereby protect the complaining litigant's rights. In fact, inherent in *Liteky*'s recognition that challenged rulings "are proper grounds for appeal, not for recusal" (*id.* at 555) is the possibility that some rulings will turn out to be erroneous and therefore reversed on appeal. What is more, the Court expressly observed that "[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand" (*id.* at 551) – a situation that necessarily involves appellate reversal.[17]

[17] Recently, an ABA commission proposed revisions to the Model Code of Judicial Conduct. Although ultimately retaining the concept of "appearance of impropriety," the commission identified this as an "important . . . question" and noted the concerns expressed against the (Cont'd)

Both before and after *Liteky*, courts of appeals have declined to order reassignment based on reversals of the district judge in the case. For example, the Seventh Circuit has held that "[b]ias cannot be inferred from a mere pattern of rulings by a judicial officer . . . erroneous as that [officer's] view [of the law] might be"; rather, reassignment "requires evidence that the [judicial] officer had it 'in' for the party for reasons unrelated to the officer's view of the law." *McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1047 (7th Cir. 1989). Similarly, the Eighth Circuit has ruled that the issue on reassignment "is not whether the trial judge committed errors [as the court in fact held he did], but whether these errors create a reasonable inference that the Court has lost its impartiality." *Little Rock School Dist. v. Pulaski County Special School Dist.*, 839 F.2d 1296, 1302 (8th Cir.), *cert. denied*, 488 U.S. 869 (1988). In addition, following *Liteky*, the First Circuit recognized that the same principles apply "even when the judicial rulings in question are erroneous." *In re Boston's Children First*, 244 F.3d 164, 168 n.7 (1st Cir. 2001); s*ee also In re United* States, 441 F.3d 44, 67 (1st Cir.) (holding that *Liteky* "applies even to misjudgments"), *cert. denied,* 127 S.Ct 288 (2006). And the Ninth Circuit likewise has rejected the argument that a district judge's "error is itself evidence of bias," concluding that "[t]his argument does not support a recusal motion." *In re Focus Media, Inc.*, 378 F.3d 916, 930 (9th Cir. 2004), *cert. denied,* 544 U.S 968 (2005).[18]

(Cont'd)
provision. Of particular relevance here, it observed that "a judge may on occasion make a good-faith error of fact or law" and that "[a]n error of this kind does not violate th[e] Rule" that a judge "shall perform all duties of judicial office fairly and impartially." Rather, it is only "intentional disregard of the law . . . [that] may constitute a violation of this Rule." *See* ABA, *Report of the Joint Commission to Evaluate the Model Code of Judicial Conduct* 4, 43 (Oct. 31, 2006).

[18] In *Liteky*, the Court approvingly quoted Judge Jerome Frank's opinion for the Second Circuit in *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir. 1943). *See* 510 U.S. at 551. As Judge Frank further observed:

> When upper court judges on appeal decide that the findings

(Cont'd)

2. In addition, although the court purported to rely on the reversals as "' *evidence* of . . . bias or prejudice'" (App., *infra*, 34a (emphasis and omissions by the court)), it *never* explained how those reversals evidenced apparent bias or prejudice (rather than simply legal errors) on the part of Judge Lamberth. In fact, despite the importance of this case and the significance and sensitivity of the reassignment issue, the court gave surprisingly short shrift to this crucial point.

The crux of the court's discussion in this regard consists of a single paragraph. App., *infra*, 34a-35a. *Nowhere*, however, does the court relate its description of the prior decisions to its ultimate, and essential, conclusion that such reversals support a finding of apparent bias. Conversely, *nowhere* does the court exclude the possibility – a possibility that is presumed in the law (*see* pages 16-17, *supra*) – that Judge Lamberth made good-faith errors in rendering eight rulings out of countless decisions on disparate issues over the course of three years in this complex and vigorously contested litigation.

For example, the fact that Judge Lamberth "imposed an inappropriate evidentiary burden on Interior" (*id.*), while reversible error, is hardly a manifest indication of bias or prejudice. Likewise, that he "underestimated the harmful effects" of his subsequently reversed order (*id.*) scarcely seems to be the stuff of the extraordinary remedy of reassignment. So too, his difficulty in discerning the oft-elusive line between civil and criminal contempt constitutes no evidence of bias or prejudice; on the contrary, Judge Lamberth was held to have erroneously proceeded against respondents in *civil* contempt rather than, as a biased judge assumedly would have done, under the much more serious avenue of *criminal* contempt. *See also* page 26, *infra*.

(Cont'd)

> of a trial judge are at fault because they – correctly or incorrectly – think those findings insufficiently supported by relevant and competent evidence, that appellate decision does not brand [the trial judge] as partial and unfair.

138 F.2d at 654.

In short, while the court professed to find, without explanation, that the cited reversals supported the required conclusion for reassignment that Judge Lamberth's "hostility to Interior has become 'so extreme as to display clear inability to render fair judgment'" (App., *infra*, 36a-37a), they show no such thing. Rather, at worst, the rulings are wholly consistent with the alternative explanation that Judge Lamberth committed reversible error in a good-faith effort to determine the law and apply it to the facts in a case as a conscientious jurist valiantly attempting to discharge the "difficult task"[19] of bringing in line "hopelessly inept"[20] and "recalcitran[t]"[21] Trustee-Delegates. At the very least, if substantive legal error is to be a ground supporting reassignment, it must provide clear and persuasive evidence of bias or prejudice rather than merely a mistake of law. *See, e.g., American Steel Barrel Co.*, 230 U.S. at 44 (recusal requires "not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice").

3. Finally, this Court's precedents governing recusal and reassignment require that a reasonable and objective observer, "'*knowing all the circumstances*,'" would conclude that the judge's impartiality might reasonably be questioned. *Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co.*, 535 U.S. 229, 232 (2002) (*per curiam*) (emphasis added by the Court) (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988)). Here, contrary to the court of appeals' decision, a reasonable and objective observer fully informed about the cited reversals of Judge Lamberth could not reasonably conclude that they establish his apparent bias or prejudice.

Some of the appeals in fact substantially affirmed Judge Lamberth. Others were decided on grounds that did not involve any error in his judicial actions at all. And still others reveal nothing more than a judge who was held to have made a relative

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[19] *Cobell XII*, 391 F.3d at 257.

[20] *Cobell XIII*, 392 F.3d at 463.

[21] *Cobell VI*, 240 F.3d at 1109.

handful of errors on discrete issues, out of more than 60 published rulings rendered in 10 years, in his good-faith effort to preside over this extraordinarily difficult and unprecedented case. Judge Lamberth simply is not, and does not reasonably appear to be, biased.

The court of appeals commenced its discussion with the contempt proceeding in *Cobell VIII*. However, that fundamentally, and unfairly, skews the analysis. To begin at the beginning, *Cobell VI* was the first appeal in this case and remains the seminal and controlling decision. And the watershed ruling in *Cobell VI* constitutes a resounding victory for petitioner-beneficiaries and a clear affirmation of the analysis of the district court. In addition to the specific principles of law recognized in that decision (*see* pages 7-9, *supra*), *Cobell VI* holds that: (1) Trustee-Delegates have substantial fiduciary trust duties to petitioner-beneficiaries; (2) those fiduciary duties are judicially enforceable; (3) Trustee-Delegates are and long have been in breach of their duties; and (4) the district court, sitting in equity, has broad remedial authority to redress those breaches and require Trustee-Delegates to comply with their trust obligations. *Cobell VI* thus first established, and – notwithstanding the court of appeals' subsequent opinions – establishes today, that petitioner-beneficiaries have been grievously wronged and are entitled to effective remedies. With respect to the ultimate disposition of this case, *Cobell VI* dwarfs any and all of the later rulings of the D.C. Circuit.

Moreover, even as to the actual "reversals," the court of appeals' reasoning is seriously flawed. *In re Kempthorne,* for example, did not involve any conduct of Judge Lamberth's at all. Instead, that mandamus proceeding in the court of appeals related entirely to actions of the Special Master, not of Judge Lamberth. *See* pages 13-14, *supra*. Although cited by the D.C. Circuit in its reassignment decision, the court nowhere explains how *Kempthorne* could lend any support to a determination of Judge Lamberth's apparent bias.

Cobell XII, also cited by the court of appeals as a reversal,

in fact affirmed Judge Lamberth on the law and represents another significant victory for petitioner-beneficiaries. As explained above (*see* page 11, *supra*), the court of appeals, based on *Cobell VI*, sustained all of Judge Lamberth's legal rulings – including the central one that he "possessed authority on remand from *Cobell VI* to issue a preliminary injunction regarding IT security" (391 F.3d at 256) – that related to the dispute in this case. Furthermore, the court criticized Trustee-Delegates for "ignor[ing]" *Cobell VI* and "mischaracteriz[ing]" the district court's injunction. *Id.* at 257, 258. To be sure, the court vacated and remanded the district court's judgment, but it did so solely on the "related procedural and evidentiary" grounds (*id*. at 258) that Judge Lamberth should have considered various declarations submitted by Trustee-Delegates that he thought were formally defective and conducted "an evidentiary hearing" (*id.* at 261) to resolve the contested issues on the basis of an updated record. While vacating the district court's order, *Cobell XII* hardly constitutes a stinging rebuke of Judge Lamberth, let alone any indication whatsoever of an appearance of bias.

The historical-accounting ruling in *Cobell XIII*, although again a technical reversal, also did not rest on any error committed by Judge Lamberth. Instead, the court of appeals reversed the historical-accounting provisions of the injunction in light of an intervening congressional statute that was enacted after Judge Lamberth had entered his decree. 392 F.3d at 465-66. No judicial error, and certainly no appearance of judicial bias, is demonstrated by this ruling.[22]

Still other appeals, while concededly more substantive reversals, equally do not support an appearance of bias. *Cobell*

[22] The other part of the injunction, relating to prospectively fixing the trust system, was reversed on more substantive grounds. *See Cobell XIII,* 392 F.3d at 469-78; page 13 note 13, *supra*. Even there, however, the court of appeals rejected Trustee-Delegates' broadest assertions of legal error, emphasizing that it was "puzzled" by the government's arguments and that the trust statutes, applied under this Court's precedents, "emphatically" contradicted those arguments and "compelled" their rejection. *Id.* at 470, 471.

VIII reversed a contempt judgment on the ground that it was criminal rather than civil in nature and that, because Judge Lamberth (as well as the parties) had believed it was civil, the stringent procedures required for criminal contempt had not been followed. However, such an error on this oft-recognized vexing and much-litigated issue of contempt law hardly signifies judicial bias.[23] On the contrary, it would be the imposition of the more draconian remedy of criminal contempt that presumably would be more likely to suggest the appearance that Judge Lamberth was "out to get" Trustee-Delegates.[24]

In these circumstances, the purported string of eight straight reversals, understood in context by a reasonable and fully informed observer, falls far short of demonstrating the appearance of judicial bias. These reversals do not depict a district judge deliberately bent on ignoring the applicable law in order to advantage one party or disadvantage the other. *See ABA Report* at 44 (canon of impartiality violated by "judges who deliberately or repeatedly disregard court orders or other clear requirements of law").

This is not to deny that Judge Lamberth has been reversed in other appeals on substantive legal grounds governing this

[23] Courts have historically struggled to distinguish civil and criminal contempt. *See, e.g., Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 830 (1994) (distinction between civil and criminal contempt is "somewhat elusive"); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911) ("Contempts are neither wholly civil nor altogether criminal. And it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both") (internal quotations omitted).

[24] Furthermore, the court of appeals did not disagree with the basis in the record for the district court's order. As the district court found, Trustee-Delegates "cannot be trusted to report in a timely manner complete and accurate information regarding the status of trust reform and their efforts to discharge their fiduciary responsibilities properly." *Cobell V*, 226 F. Supp. 2d. at 159. The court of appeals likewise stated that Trustee-Delegates' "reports . . . were misleading about the progress being made in ways painstakingly detailed by the district court." *Cobell VIII*, 334 F.3d at 1149.

Indian Trust case. *See Cobell XVII; Cobell XVIII*; *Cobell XIX*. But that relative handful of reversals, out of more than 60 reported decisions he has made in this case on a wide range of issues over the course of 10 years, is nothing more than a reflection of the difficulty and complexity of this unprecedented litigation in which the government has been stubbornly recalcitrant in performing the most basic of its trust duties for more than a century, not of a judge who reasonably appears to be biased.

What is more, even these reversals must be viewed in their proper context. As the D.C. Circuit itself acknowledged in *Cobell XIX*, "some degree of confusion is understandable" over the proper meaning of the various appellate rulings in this case. 455 F.3d at 303. Indeed, the court recognized, with considerable understatement, that these precedents had used "different emphases depending on the issue before us." *Id*. In the end, the best the court could do to reconcile its precedents and provide guidance to the district court was to say that where two competing "bodies of law would lead us to different results, we must decide which of the two more appropriately governs the specific question at hand." *Id*. at 307; *see also id*. at 303-04 ("the specific question to be addressed determines which body of law becomes most prominent"). This lack of clarity and predictability of the rules of decision as determined by the appellate court strongly counsels against the equation of error by the district judge with apparent bias. *See ABA Report* at 44 (judges who "deliberately and repeatedly disregard . . . *clear* requirements of law" could violate the cannon of impartiality) (emphasis added).[25]

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[25] There are numerous issues on which the court of appeals' decisions are in tension if not outright conflict. For example, in *Cobell VI*, the court held that "*Chevron* deference is not" applicable here and that Trustee-Delegates cannot "'escape [their] role as trustee by donning the mantle of administrators' to claim that courts must defer to [their] expertise and delegated authority." 240 F.3d at 1099. *See also Cobell XII*, 391 F.3d at 257. By contrast, in *Cobell XVII*, the court of appeals (Cont'd)

At the end of the day, the cited reversals of Judge Lamberth simply do not show an appearance of judicial bias. Rather, they portray a conscientious but nonetheless possibly fallible district judge striving in good faith to adjudicate this demanding and novel – and critically important – lawsuit. In this situation, reassignment is not only wrong but both unfair to Judge Lamberth and a grave threat to a sound and independent judiciary.

(Cont'd)
concluded that the district court "owed substantial deference" to Trustee-Delegates because of their "subject-matter expertise" and reversed the lower court for not "deferring to Interior's judgment." 428 F.3d at 1076, 1077. *See also Cobell XIX*, 455 F.3d at 303. The district court's inability to harmonize these divergent statements, and indeed to anticipate accurately each time which approach the court of appeals would ultimately adopt in a given circumstance (*e.g., Cobell XVII* and *Cobell XIX* or *Cobell VI* and *Cobell XII*) is hardly the trial judge's fault and surely is not evidence of apparent bias.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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