No. 06-868

In the Supreme Court of the United States

ELOUISE PEPION COBELL, ET AL., PETITIONERS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in directing that this case be reassigned to a different district court judge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 455 F.3d 317. The opinion of the district court (Pet. App. 39a-83a) is reported at 229 F.R.D. 5.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2006. A petition for rehearing was denied on September 26, 2006 (Pet. App. 91a-92a). The petition for a writ of certiorari was filed on December 19, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of the Interior (DOI) administers approximately 260,000 Individual Indian Money

(IIM) trust accounts with balances totaling approximately $400 million. See C.A. App. 524; H.R. Rep. No. 499, 102d Cong., 2d Sess. 2 (1992); 428 F.3d 1070, 1072 (D.C. Cir. 2005). In 1994, Congress enacted the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (25 U.S.C. 4001 *et seq.*), which requires the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to" a 1938 statute dealing with investment of trust monies. § 102(a), 108 Stat. 4240 (25 U.S.C. 4011(a)). In 1996, a class of present and former IIM accountholders filed this lawsuit, asserting that the government had failed to provide a timely, adequate accounting. In 2001, the court of appeals held that the agency's performance of required accounting activities had been "unreasonably delayed" within the meaning of 5 U.S.C. 706(1). 240 F.3d 1081, 1108 (D.C. Cir. 2001).

On eight subsequent occasions, including in the decision below, the court of appeals vacated or set aside district court orders directed against DOI and senior government officials. See 334 F.3d 1128, 1137-1150 (D.C. Cir. 2003) (reversing an order of contempt against the Secretary and Assistant Secretary, and issuing a writ of mandamus to direct the removal of a "Special Master-Monitor" appointed by the district court); *In re Brooks*, 383 F.3d 1036, 1044-1046 (D.C. Cir. 2004) (granting a writ of mandamus to recuse another court-appointed special master from contempt proceedings), cert. denied, 543 U.S. 1150 (2005); 391 F.3d 251, 258-262 (D.C. Cir. 2004) (vacating an injunction requiring DOI to disconnect its computers from the internet); 392 F.3d 461, 465-478 (D.C. Cir. 2004) (vacating a structural injunction

purporting to dictate the scope and methods of DOI's accounting activities and to enforce compliance with DOI's fiduciary responsibilities); 428 F.3d at 1074-1079 (vacating the accounting portion of the same structural injunction after the district court reissued it verbatim); *In re Kempthorne*, 449 F.3d 1265, 1268-1272 (D.C. Cir. 2006) (granting a writ of mandamus to recuse a special master and to suppress tainted reports); 455 F.3d 301, 307-317 (D.C. Cir. 2006) (vacating an injunction requiring DOI to disconnect its computers from the internet, as well as from all internal networks)[1]; Pet. App. 1a, 10a-15a (vacating an injunction requiring DOI to include, in all communications with class members, a notice declaring that all trust-related information from DOI "may be unreliable"). In the last of those decisions, the court of appeals also directed that the case be reassigned to a different district court judge. See *id.* at 15a-37a.

2. The instant petition arises from the court of appeals' reassignment order. On July 12, 2005, the district court ordered DOI to include a specified notice in all written communications with class members. See Pet. App. 85a-88a. The notice stated that "[e]vidence introduced" in the instant case shows that DOI's trust-related information "may be *unreliable*," and it warned class members to "keep in mind the questionable reliability of IIM Trust information received from the [DOI] if and when they use such information to make decisions affecting their IIM Trust assets." *Id.* at 86a.

In an accompanying opinion, the district court broadly disparaged DOI and its officers and employees. *Inter alia*, the court characterized the "'modern' Interior de-

[1] The court of appeals' vacatur of that injunction is the subject of a separate petition for a writ of certiorari, which is currently pending before this Court. See No. 06-867 (filed Dec. 19, 2006).

partment" as a "dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind." Pet. App. 41a. The court stated:

> For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people.

Id. at 40a-41a. The court further asserted that "[t]he entire record in this case tells the dreary story of [DOI's] degenerate tenure as Trustee-Delegate for the Indian trust—a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy—the end of which is nowhere in sight." *Id.* at 51a.

In the concluding section of its opinion, the district court suggested various possible explanations for the

conduct of current and former DOI officials. The court stated:

> Perhaps [DOI's] past and present leaders have been evil people, deriving their pleasure from inflicting harm on society's most vulnerable. [DOI] may be consistently populated with apathetic people who just cannot muster the necessary energy or emotion to avoid complicity in the Department's grossly negligent administration of the Indian trust. Or maybe [DOI's] officials are cowardly people who dodge their responsibilities out of a childish fear of the magnitude of effort involved in reforming a degenerate system. Perhaps [DOI] as an institution is so badly broken that even the most well-intentioned initiatives are polluted and warped by the processes of implementation.

Pet. App. 80a-81a. The crucial point, the court declared, is "the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal." *Id.* at 40a.

3. The court of appeals vacated the class notice order as beyond the scope of the district court's authority. Pet. App. 10a-15a. The court of appeals noted that the district court had relied on Rule 23(d)(3) of the Federal Rules of Civil Procedure in support of its order that DOI inform all class members in every communication it has with them—even those having nothing to do with their individual Indian trust accounts—that DOI's trust-related information may be unreliable and that the recipients should keep that problem in mind when making

decisions about their accounts. See Pet. App. 4a-5a, 10a, 14a-15a. The court of appeals held, however, that "nothing in Rule 23(d)(3) supports" that order because Rule 23(d)(3) authorizes conditions on representative parties or intervenors, not defendants. Pet. App. 10a-11a. The court of appeals noted that petitioners did not defend the district court's "flawed reliance on Rule 23(d)(3)," *id.* at 11a, and it rejected petitioners' attempt to defend the order under Rule 23(d)(2), which the district court had not even cited, *id.* at 11a-15a. Petitioners do not seek review in this Court of the court of appeals' reversal of the district court's order requiring class-wide notice.

In the same ruling, the court of appeals exercised its authority under 28 U.S.C. 2106 to remand the case with instructions that it be reassigned to a different district court judge. Pet. App. 15a-37a. The court of appeals recognized that, under this Court's precedent, "recusal must be limited to truly extraordinary cases where * * * the judge's views have become 'so extreme as to display clear inability to render fair judgment.'" *Id.* at 30a-31a (quoting *Liteky* v. *United States*, 510 U.S. 540, 551 (1994)). The court further observed, however, that reassignment is "necessary if reasonable observers could believe that a judicial decision flowed from the judge's animus toward a party rather than from the judge's application of law to fact." *Id.* at 31a.

With respect to the denunciations of present and former DOI officials contained in the July 12, 2005, opinion, the court of appeals found that much of the district court's language, while "harsh" and "even incendiary," reflected an acceptable expression of the district court's views concerning DOI's performance of its trust responsibilities. Pet. App. 32a. The court of appeals also

found, however, that other aspects of the district court's opinion—particularly the district court's sweeping allegations of racism and other ill motives—were more troubling, both because those allegations "had nothing to do with the issue pending in the district court," *id.* at 33a, and because they "suggest the district court has condemned not just [DOI's] particular failures as trustee, but the Department as an institution," *id.* at 34a. The court of appeals "ha[d] little doubt that this parade of serious charges, all unconnected to the issue before the district court, could contribute to a reasonable observer's belief that [DOI] stands no chance of prevailing whatever the merits of its position." *Ibid.*

The court of appeals declined, however, to decide whether the district court's denunciations of DOI, "standing alone," would constitute a sufficient basis for reassignment. Pet. App. 34a. The court found it unnecessary to resolve that question because the district court's denunciations did not stand alone. Rather, the court of appeals explained, the district court's most recent opinion "follow[ed] an unbroken string of reversed district court orders, all directed against [DOI]." *Ibid.* The court of appeals explained:

> In two [appeals], the district court imposed an inappropriate evidentiary burden on [DOI] * * * . In three, it underestimated the harmful effects its orders would have on the government * * * . And in three others, it both assumed the mantle of a prosecutor and authorized biased investigations * * * . In four cases, we found abuses of discretion * * *, in three (the mandamus actions) we found [DOI] had a clear and indisputable right to relief * * * , and in one we found the district court had used a procedural rule to accomplish a substantive goal (this

> case). We set aside contempt citations against the Secretary and other senior [DOI] officials * * *, and twice found that the district court awarded injunctive relief without the required evidentiary hearing * * * . Ten judges of this court have heard one or more of these appeals. Not one has dissented.

Id. at 34a-35a; see *id.* at 36a ("In short, in case after case the district court granted extensive relief against [DOI], and in case after case we reversed, even under highly deferential standards of review."). The court further noted that "on several occasions the district court or its appointees exceeded the role of impartial arbiter by issuing orders without hearings and by actively participating in evidence-gathering." *Ibid.* Based on the totality of the circumstances, including the series of prior reversals and the denunciations of DOI in the district court's July 12, 2005, opinion, the court of appeals concluded that "an objective observer is left with the overall impression that the district court's professed hostility to [DOI] has become so extreme as to display clear inability to render fair judgment," and that reassignment was accordingly warranted. *Id.* at 36a-37a (citation and internal quotation marks omitted).

In closing, the court of appeals observed that its ruling "presents an opportunity for a fresh start" in resolving the issues in this long-running litigation, and the court expressed its expectation that "both parties [will] work with the new judge to resolve this case expeditiously and fairly." Pet. App. 37a, 38a.

4. The court of appeals denied petitioners' requests for rehearing and rehearing en banc. Pet. App. 89a-92a. No member of the court of appeals requested a vote on the en banc petition. *Id.* at 90a. On December 7, 2006,

the case was reassigned to the Honorable James Robertson.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Although petitioners assert (Pet. 19-21) that the decision below conflicts with rulings of this Court and other courts of appeals, they do not contend that the D.C. Circuit misstated the legal standards governing reassignment motions. Petitioners observe (Pet. 19-20) that this Court's decision in *Liteky* v. *United States*, 510 U.S. 540 (1994), "makes plain that a district judge's conduct in the performance of his judicial function normally is not a basis for removal and reassignment." The court of appeals did not dispute that principle, however, but explicitly recognized that "unfavorable rulings are '[a]lmost invariably . . . proper grounds for appeal, not for recusal.'" Pet. App. 28a (quoting *Liteky*, 510 U.S. at 555). The court of appeals further recognized that, barring improper outside communications, a judge's unfavorable opinion of a litigant does not provide a basis for reassignment unless that opinion is "so extreme as to display clear inability to render fair judgment." *Id.* at 30a (quoting *Liteky*, 510 U.S. at 551).

Although petitioners allege a conflict in the circuits (Pet. 21), the cited cases simply recognize that erroneous legal rulings will not ordinarily raise an inference of bias or provide a basis for reassignment. Because the court of appeals acknowledged that general rule, its decision is consistent with the precedents on which petitioners rely. Petitioners, moreover, cite no decision holding that erroneous legal rulings, no matter how nu-

merous or deeply flawed, can *never* be suggestive of judicial bias.

2. As the court of appeals explained, the district court's most recent opinion in this case accused "*current* Interior officials of racism." Pet. App. 32a. The district court denounced the "'modern' Interior department" as "a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglo-centrism we thought we had left behind." *Id.* at 41a. The court explicitly rejected the hypothesis that "the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history." *Id.* at 40a. It described DOI as an agency "whose 'spite' has led it to turn its 'wrath' on trust beneficiaries and engage in 'willful misconduct,' 'iniquities,' 'scandals,' 'dirty tricks,' and 'outright villainy.'" *Id.* at 33a-34a.

As the court of appeals explained, those allegations "not only bear no relationship to the issue pending before the [district] court, but also go beyond criticizing [DOI] for its serious failures as trustee and condemn the Department as an institution." Pet. App. 36a. The district court thus sweepingly branded a Department in a coordinate Branch of Government, staffed by thousands of civil servants involved in the administration of Indian affairs, as badly motivated and irredeemably tainted in the performance of one of its central missions. The D.C. Circuit correctly found that "this parade of serious charges, all unconnected to the issue before the district court, could contribute to a reasonable observer's belief

that [DOI] stands no chance of prevailing whatever the merits of its position." *Id.* at 34a. Petitioners make no effort to dispute that conclusion, which was an important basis for the court of appeals' reassignment order. Nor do petitioners explain how any litigant could properly be subjected to ongoing supervision by a judge who has condemned it in this manner. See Pet. 17 n.14.

3. Petitioners contend (Pet. 17) that "[t]he 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." Petitioners argue at some length (Pet. 23-27) that the various district court rulings that were reversed by the D.C. Circuit constitute isolated missteps rather than a pattern of overreaching suggestive of judicial bias. That argument lacks merit and provides no basis for this Court's review.

a. The court of appeals did not base its reassignment decision on the pattern of prior reversals standing alone, but on the *combination* of that pattern and the district court's July 12, 2005, denunciations of DOI as an institution. See Pet. App. 36a, 37a. Contrary to petitioners' suggestion (Pet. 17), the fact that the D.C. Circuit declined to decide whether those denunciations *alone* would have warranted reassignment does not mean that the district court's intemperate charges are irrelevant to the propriety of the reassignment order. Indeed, petitioners acknowledge that the relevant inquiry is whether "a reasonable and objective observer, *knowing all the circumstances*, would conclude that the judge's impartiality might reasonably be questioned." Pet. 23 (internal quotation marks omitted). Under that totality-of-the-circumstances approach, the combination of the district court's disparagement of DOI *and* the

court's repeated erroneous rulings created a strong appearance of bias, whether or not either of those factors standing alone would have warranted reassignment.[2]

b. As the court of appeals emphasized, the D.C. Circuit has repeatedly reversed the district court in this case "even under highly deferential standards of review." Pet. App. 36a. "In four cases, [the court of appeals] found abuses of discretion," and "in three (the mandamus actions) [the court] found [DOI] had a clear and indisputable right to relief." *Id.* at 34a-35a.

The court of appeals also properly attached particular significance to the fact that "on several occasions the district court or its appointees exceeded the role of impartial arbiter by issuing orders without hearings and by actively participating in evidence-gathering." Pet. App. 36a. Petitioners attempt to distance the district court from the conduct of the special masters it appointed. See Pet. 13-14, 24. As the court of appeals explained in prior rulings, however, the district court failed adequately to supervise its appointees and condoned the conduct that the court of appeals found unacceptable. The district court "charged [one special master] with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial

[2] Petitioners attribute to the court of appeals the "conclusion that, although *Judge Lamberth had no actual bias*, an objective observer would reasonably believe that he appeared not to be impartial." Pet. 16. Contrary to petitioners' suggestion, the court of appeals did not find that the district court lacked actual bias. The court of appeals did not purport to resolve the question of actual bias one way or the other, but simply stated that, based on the totality of the circumstances, "an objective observer is left with the overall impression that the district court's professed hostility to [DOI] has become so extreme as to display clear inability to render fair judgment." Pet. App. 36a-37a (citation and internal quotation marks omitted).

legal system." 334 F.3d 1128, 1142 (D.C. Cir. 2003). The district court defended the activities of another special master, holding that he had "engaged in no untoward conduct and demonstrated no bias or partiality," 310 F. Supp. 2d 102, 104 (D.D.C. 2004), and declaring that the government's "charges of impropriety are misdirected and more properly should have been leveled at" the government itself, *id.* at 117. When the court of appeals considered the same undisputed facts, however, it found it "difficult to imagine a more biased way of conducting and reporting upon an investigation." *In re Kempthorne*, 449 F.3d 1265, 1271 (D.C. Cir. 2006).

Thus, even if the district court's reversed legal rulings are viewed in isolation from the disparagement of DOI contained in the July 12, 2005, opinion, those rulings cannot properly be regarded as the sort of isolated good-faith mistakes that are to be expected over the course of protracted litigation.

c. In any event, the court of appeals is in the best position to determine the extent to which this series of prior reversals casts doubt on the district court's objectivity here. Ten members of the D.C. Circuit participated in one or more of the eight appeals in which orders of the district court were set aside. Pet. App. 35a. No judge dissented from any of those rulings, *ibid.*, and no judge called for a vote on petitioners' request for en banc review of the reassignment order, see *id.* at 89a-90a. For this Court to immerse itself in the complex history of this protracted litigation, all to resolve a fact-bound question in an area where the governing legal standard is undisputed, would not represent a sound use of the Court's resources.

4. Petitioners suggest (Pet. 18-19) that review by this Court is necessary "to prevent parties from too eas-

ily obtaining the disqualification of a judge." Pet. 19 (emphasis omitted) (quoting *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989), cert. denied, 495 U.S. 957 (1990)). The court of appeals took care, however, to frame its holding in terms that avoid any such risk. The court recognized that its reassignment power should be exercised "only in extraordinary circumstances." Pet. App. 28a. Relying on the "seemingly unique circumstances" of this case, including the combination of the district court's extraordinary disparagement of DOI as an institution and the pattern of prior reversals, the court "conclude[d], reluctantly, that this is one of those rare cases in which reassignment is necessary." *Id.* at 37a.

While recognizing that reassignment is seldom appropriate, the court of appeals explained that it is sometimes necessary because "reasonable observers must have confidence that judicial decisions flow from the impartial application of law to fact, not from a judge's animosity toward a party." Pet. App. 37a. The court observed that, in the rare case that meets the *Liteky* standard, reassignment is essential to preserve both the appearance and the reality of fairness. *Id.* at 31a. The court of appeals correctly held that this is such a case, and its ruling creates no danger that the reassignment power will be exercised indiscriminately in future litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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