UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOISE PEPION COBELL, et al., Plaintiffs,	
v.	Civil No. 96-1285 (RCL)
BRUCE BABBITT, Secretary of the Interior, LAWRENCE SUMMERS, Secretary of the Treasury, and KEVIN GOVER, Assistant Secretary of the Interior, Defendants.	

MEMORANDUM AND ORDER

On May 11, 1999, defendants first notified the Court's Special Master of the destruction of 162 boxes of potentially responsive records by the Department of the Treasury during the period of November 23, 1998 to January 27, 1999, as well as the previously unreported loss in 1996 of a box of Treasury records. The document destruction was authorized to begin on the very same day, November 23, 1998, that Treasury Department officials were testifying before the Court about their negligence in allowing the destruction of voluminous microfilm files that should have been preserved, and while Treasury Department and Justice Department officials were repeatedly assuring the Court that all necessary steps were being taken to preserve all relevant

documents. The document destruction was ordered halted on January 28, 1999, and reported to agency counsel, and then covered up for months. At the time the destruction was halted, the Court had just concluded a contempt trial of the Secretary of Treasury – as well as other officials. The Court found the Secretary in contempt in a ruling issued on February 22, 1999, and warned that serious consequences would befall government officials who continue to engage in misconduct in this case. Rather than coming forward forthrightly at that time and making the necessary admissions, the Treasury officials deliberately decided not to tell Justice Department officials about the destruction, arrogating totally to themselves the decision that the documents were not related to this litigation, a decision that everyone involved now admits was wrong.

On June 3, 1999, defendants filed a Report to the Special Master (subsequently denominated the "Tyler Report"). The Court decided not to derail or postpone the imminent Phase-one trial in this case, and overruled plaintiffs' efforts to fully explore these matters at the imminent trial. Instead, the Court directed the Special Master to conduct a detailed inquiry into the matter, which he has now done. The Court was deeply disturbed with the defendants' delay in reporting this document destruction to the Court and to plaintiffs, so that appropriate corrective action could be supervised by the Court. At least equally disturbing was the fact that defendants' representations

about the adequacy of the steps taken to preserve relevant documents turned out to be just as false as those false representations that led to the Court's February contempt findings.

The Clerk shall file in the record of this case the attached Recommendation and Report of the Special Master Regarding the Delayed Disclosure of the Destruction of Uncurrent Check Records Maintained by the Department of the Treasury with the Court ("Special Master Report"), which was submitted to the Court on December 3, 1999. Defendants have filed a motion requesting that the Special Master Report not be made public until the Court acts on the report. That motion is DENIED. Defendants correctly point out that under Rule 53 of the Federal Rules of Civil Procedure, the Special Master's Report does not constitute a final determination. Once the report is received by the Court and served on the parties, the parties can file objections, which must then be resolved by the Court. This procedure ensures fundamental due process, and provides no basis for sealing the report once the Special Master has completed it.

Five individuals who are discussed in the report – Assistant General Counsel Roberta McInerney, Deputy Assistant General Counsel Eleni M. Constantine, and attorneys James Regan, Randall Lewis, and Daniel Mazella – have also filed a motion seeking to have the Special Master's Report filed under seal and giving them 45 days to review and comment on the report before it is made public. Their motion is also

DENIED. It has already been almost seven months since this matter was brought to the Court's attention. The Court is unwilling to allow additional weeks – or months – to go by before this material is placed on the public record. The Court has delayed plaintiffs' discovery into these matters until the Special Master's inquiry was concluded, and the Court has not allowed plaintiffs to present any witnesses or testimony regarding this matter. Continued delay is not in the public interest.

The Court takes no action whatsoever on the report today. No action will be taken until all objections and comments are reviewed and addressed. The Special Master has indicated that each affected individual will be given an opportunity to submit comments to him, and that he will provide a Supplemental Report with his analysis of those comments. This provides each individual with a full opportunity to present their side before any action is taken by the Court.

While the Court certainly understands the motivation of the five affected individuals who have sought to keep this report under seal, the Court must express its disappointment that the United States would join their efforts.

The Clerk shall make the Special Master's Report available FORTHWITH.

SO ORDERED.

Date:

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Royce C. Lamberth
United States District Judge