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## Of Justice Sotomayor and the Jicarilla Apache Nation: Slouching Toward Intellectual Honesty and the Canons of Construction

Jeremy Stevens<sup>1</sup>

*“[O]ur treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.”<sup>2</sup>*

*“Never regard something as doing you good if it makes you betray a trust or lose your sense of shame or makes you show hatred, suspicion, ill-will or hypocrisy or a desire for things best done behind closed doors.”<sup>8</sup>*

Since 1831, the United States Supreme Court has recognized the existence of a general trust relationship between the United States and Indian tribes.<sup>4</sup> Over the past century in fact, the Court has repeatedly reaffirmed this “distinctive obligation of trust incumbent upon the Government” in its dealings with Indians.<sup>5</sup> The US Congress also has recognized the “general trust relationship” between the United States and Indian tribes; indeed, nearly “every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal Government.”<sup>6</sup> Within the framework of this “general trust relationship,” Congress has enacted scores of statues defining the contours of the United States’ fiduciary responsibilities vis-à-vis its management of Indian tribal property and other trust assets.<sup>7</sup> In assessing claims of the breach of this general trust relationship over the past thirty years,<sup>8</sup> the federal circuit and Supreme Court, once finding the existence of a trust, have imported common-law trust principles to aid “in drawing the inference that Congress intended damages to remedy a breach.”<sup>9</sup> Ostensibly, the special trust relationship extant between Indian tribes and the federal government in its best and purest form represents the federal government’s “humane and self-imposed policy . . .

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<sup>2</sup> Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

<sup>3</sup> MARCUS AURELIUS, *MEDITATIONS*, III. 7 (Gregory Hays, trans., Modern Library 2002) (ca. 175).

<sup>4</sup> See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>5</sup> See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942); see *United States v. Mitchell*, 463 U.S. 206, 225–26 (1983) (noting “the undisputed existence of a general trust relationship between the United States and the Indian people”).

<sup>6</sup> FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 5.04[4][a], at 420–21 (2005 ed.).

<sup>7</sup> See, e.g., *United States v. Mitchell*, 463 U.S. 206, 224 (1983).

<sup>8</sup> *Id.*; see generally *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); and see generally *United States v. Navajo Nation*, 537 U.S. 488 (2003); see also Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115 (1997).

<sup>9</sup> *United States v. Navajo Nation*, 556 U.S. 287 (2009) (quoting *White Mountain Apache Tribe*, 537 U.S. at 477). Note that Justice Scalia penned the majority opinion in *Navajo Nation*, then later disregarded his own writing in *Jicarilla Apache Nation*. See 131 S. Ct. 2313 (2011). See also *infra* Part II.

[of] charg[ing] itself with moral obligations of the highest responsibility and trust,”<sup>10</sup> obligations “to the fulfillment of which the national honor has been committed.”<sup>11</sup>

But a recent Supreme Court decision and outlier among breach of trust opinions threatens to insulate the federal government from liability for breaching its trust duty to tribes. It is to that decision, *United States v. Jicarilla Apache Nation*,<sup>12</sup> that this article is directed; specifically, this article is directed toward negating the Court’s judicial fiat by applying the well-established canons of construction of federal Indian law.

Part I presents an overview of the trust relationship between the federal government and American Indian tribes, including a discussion of federal management and trusteeship of Indian-owned monies. Next, Part II summarizes the *Jicarilla* breach of trust case and the Court’s 7–1 majoritarian fiat in favor of the federal government, and also summarizes Justice Sonia Sotomayor’s brave and honest dissent. Finally, Part III addresses the canons of construction in federal Indian jurisprudence and the entire Court’s disregard of the canons in *Jicarilla*, concluding with the importance of these canons and the grave consequences of sweeping them aside.

## **I. The Special Trust Relationship Between the Federal Government and Indian Tribes**

Whatever may have been the founders’ intentions in penning the Indian commerce clause,<sup>13</sup> the US Constitution contains very little express delineation of any relationship between the US government and those whose government it supplanted. The genesis of the trust relationship, then, is best understood as a judicial conjuring. In 1831, Chief Justice John Marshall characterized Indian tribes as “domestic dependent nations”<sup>14</sup> whose right to occupy their ancestral lands existed at the sufferance of the United States. “Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”<sup>15</sup> Notwithstanding the Chief Justice’s literary or philosophical effect, he made no attempt to codify the strictures of any guardian-ward relationship. Nevertheless, his statement provided the conceptual basis on which, fifty years later, the Supreme Court would uphold the Major Crimes Act.<sup>16</sup>

In *United States v. Kagama*,<sup>17</sup> the Court maintained that Indians, as “wards of the nation,” depended upon the United States “largely for their daily food” and their “political rights.”<sup>18</sup> Indeed, from the Indians’ “weakness and helplessness” arose “the duty of

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<sup>10</sup> *Seminole Nation*, 316 U.S. at 296–97.

<sup>11</sup> *Heckman v. United States*, 224 U.S. 413, 437 (1912).

<sup>12</sup> 131 S. Ct. 2313 (2011).

<sup>13</sup> U.S. CONST. art. I, § 8, cl. 3 (granting Congress the authority to “regulate Commerce . . . with the Indian tribes”).

<sup>14</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

<sup>15</sup> *Id.*

<sup>16</sup> Originally enacted in 1885, the Major Crimes Act has been amended numerous times and now places federal jurisdiction specifically over thirteen major crimes when committed by an Indian against another Indian in Indian country. 18 U.S.C. § 1153.

<sup>17</sup> 118 U.S. 375 (1886).

<sup>18</sup> *Id.* at 383–84.

protection”<sup>19</sup> incumbent upon the federal government. Yet this “duty of protection,” this trust responsibility, was not only to be used as a shield protecting the Indians from various ills (the states and themselves, for example), but it would similarly be used as a sword for the US government. It comes as no surprise, then, that seventeen years later in *Lone Wolf v. Hitchcock*<sup>20</sup> the Court upheld a statute that distributed Kiowa tribal lands in modern-day Oklahoma in violation of an 1867 treaty that required three-fourths of the reservation’s adult males to validate any cession of tribal land,<sup>21</sup> and did so pursuant to its trust responsibility. Congress had paramount authority over Indian property, began the Court; and casting aside prior decisions that supported Indian occupation of tribal lands, the Court held that Congress’s power was in fact plenary over the sum of Indian affairs.<sup>22</sup> Congress thus had the *right* to effect by fiat “mere change[s] in the form of investment of Indian tribal property.”<sup>23</sup> Whereas once the Kiowa had occupied and held lands long sacred to them, because the US Congress believed it consistent with its plenary authority over Indians and its trust responsibility to them, the Kiowa now had money.<sup>24</sup>

The idea of federal management/trusteeship of Indian-owned funds<sup>25</sup> began with congressional enactments in the early nineteenth century, which directed the government to hold and manage Indian tribal funds in trust.<sup>26</sup> As a result, the United States has come to manage nearly \$3 billion in tribal funds, collecting and maintaining annually some \$380 million on behalf of tribes.<sup>27</sup> Today, scores of statutes outline the “Federal Government’s obligations as trustee in managing Indian trust funds;”<sup>28</sup> and Congress has set forth a “nonexhaustive list of the Secretary of the Interior’s trust responsibilities,”<sup>29</sup> among them, an array of accounting, auditing, disclosure, and general management obligations.<sup>30</sup> Regarding these obligations, the Court held in 1942 that where a treaty required the federal government to pay tribal members, the

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<sup>19</sup> *Id.* at 384.

<sup>20</sup> 187 U.S. 553 (1903).

<sup>21</sup> *Id.* at 554 (referencing Treaty with the Kiowa and Comanche, U.S.-Confederated Tribes of Kiowa and Comanche Indians, art. XII, Oct. 21, 1867, 15 Stat. 581).

<sup>22</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 353, 565 (1903).

<sup>23</sup> *Id.* at 568.

<sup>24</sup> The federal government entered into an agreement (arguably induced by fraud) to pay the tribes \$ 2 million to allot 2 million acres of the reservation for settlement by non-Indians. The federal government valued the land at one dollar per acre because it found that such an arrangement served its trust responsibility to the Kiowa Tribe. *Id.* at 555–56.

<sup>25</sup> Trust fund monies are “comprised mainly of money received through the sale or lease of trust lands and include timber stumpage, oil and gas royalties, and agriculture fees,” as well as “judgment funds awarded to tribes.” H.R. REP. NO. 103-778, at 10 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3467, 3468.

<sup>26</sup> *See, e.g.*, Act of Jan. 9, 1837, 5 Stat. 135. *See also* MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS’ MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. REP. NO. 102-449, at 6 (1992).

<sup>27</sup> FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 5.03[3][b] at 407(2005 ed.). *See supra* note 25.

<sup>28</sup> *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2334 (2011) (Sotomayor J., dissenting).

<sup>29</sup> *Id.* at 2335.

<sup>30</sup> *See* 25 U.S.C. § 162a(d).

government was more than a “mere contracting party” and was to “be judged by the most exacting fiduciary standards.”<sup>31</sup>

Called upon to address breach of trust obligations based on timber management statutes,<sup>32</sup> in *United States v. Mitchell*<sup>33</sup> (*Mitchell II*) the Court held that actual control over tribal resources by the federal government gives rise to a breach of trust claim.<sup>34</sup> When the government “assumes . . . elaborate control over forests and property belonging to Indians[, a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).”<sup>35</sup> When this trust relationship exists, continued the Court, “it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.”<sup>36</sup> Thus, a statute creates a right capable of grounding a claim for breach of trust duties only if the statute “can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.”<sup>37</sup> Sufficient to support liability for a breach of trust claim is that the statute creating the right “be reasonably amenable to the reading that it mandates a right of recovery in damages.”<sup>38</sup> A damages remedy is proper when it would “[further] the purposes of the statutes and regulations” that impose the responsibility.<sup>39</sup>

The threshold inquiry, then, in assessing whether a tribe may state an actionable breach of trust claim is whether the tribe can “identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed

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<sup>31</sup> See *Seminole Nation v. United States*, 316 U.S. 286, 296–97. The federal government in *Seminole Nation* was obliged to pay each tribal member. Instead, the federal government had been paying the tribal government that was known to be misappropriating the individual members’ money.

<sup>32</sup> *E.g.* 25 U.S.C. §§ 406–407, 466.

<sup>33</sup> *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). In *Mitchell II*, the Court addressed breach of trust claims of 1,400 Quinault Indians who, defeated by the Supreme Court just three years earlier in *United States v. Mitchell* (445 U.S. 535 (1980) (*Mitchell I*)), sought money damages for the mismanagement of timber on reservation lands held in trust. The aggrieved 1,400 claimed breach based upon sundry timber management statutes and regulations imposed by the Department of the Interior. *Mitchell II*, 463 U.S. at 225. Concerning *Mitchell II* and other trust cases herein cited or addressed, the Indian Tucker Act, 28 U.S.C. § 1505, grants Indian tribes access to federal courts if some other statute or common law doctrine creates a substantive right enforceable against the United States. As for a federal waiver of sovereign immunity, “a waiver is readily apparent in claims founded upon ‘any express or implied contract with the United States.’” *Mitchell II*, 463 U.S. at 215 (quoting 28 U.S.C. § 1491). This waiver applies categorically to claims founded upon “executive regulations[, . . .] claims found upon contracts and claims founded upon other specified sources of law.” *Mitchell II*, 463 U.S. at 216.

<sup>34</sup> See *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1375 (Fed. Cir. 2001) (The “language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship.”); see also Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 804 (1992) (“As long as the Government . . . has actual control over the management of a resource, the exercise of this control can create a trust claim”).

<sup>35</sup> *Mitchell II*, 463 U.S. at 225.

<sup>36</sup> *Id.* at 226.

<sup>37</sup> *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (quoting *Mitchell II*, 463 U.S. at 217, 218).

<sup>38</sup> *Id.* at 473.

<sup>39</sup> *Mitchell II*, 463 U.S. at 226-27.

faithfully to perform those duties.”<sup>40</sup> The tribe need not justify each of any claimed trust responsibility by pointing to a specific statute; instead, if a relevant statutory framework “bears the hallmarks of a conventional fiduciary relationship,” the Court consistently looks to common law general trust principles to flesh out the government’s fiduciary obligation.<sup>41</sup> If the tribe meets this threshold, a reviewing court must then assess whether the relevant substantive source of law “can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties . . . impose[d].”<sup>42</sup> Further, the “existence of a general trust relationship between the United States and the Indian people” can “reinforce” the imposition of fiduciary duties,<sup>43</sup> but the general trust relationship *alone* is insufficient to support the imposition of fiduciary duties. Accordingly, analyzing whether a federal court will find a breach of trust “must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.”<sup>44</sup> And the relevant substantive source of law need not *expressly* guarantee an injured tribe the right to common law damages; indeed, the Court has made clear while weaving the tapestry of its seminal breach of trust opinions that any such right to damages may also be *implied* by a relevant statutory framework.<sup>45</sup>

## II. *United States v. Jicarilla Apache Nation*

The United States holds about 900,000 acres of reservation land in trust for the people of the Jicarilla Apache Nation, land rich with timber, gravel, oil, and gas resources, “developed pursuant to statutes administered by the Department of the Interior.”<sup>46</sup> Funds derived from these natural resources the government holds in trust for the Jicarilla.<sup>47</sup> In 2002, the Jicarilla Apache Nation sued the United States for an alleged breach of fiduciary duties concerning its management of the tribe’s trust land.<sup>48</sup> The phase of that litigation relevant to *Jicarilla Apache Nation* involves the government’s accounting, management, and investment of these trust funds from 1972 to 1992.<sup>49</sup>

<sup>40</sup> *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (citing *Mitchell II*, 463 U.S. at 216–17, 219).

<sup>41</sup> *United States v. Navajo Nation*, 556 U.S. 287 (2009) (quotation marks omitted) (citing *White Mountain Apache Tribe*, 537 U.S. at 473). *See White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (construing the government’s duties by reference to “elementary trust law”); *see also* *Seminole Nation v. United States*, 316 U.S. 286, 296 (relying on general trust principles to conclude that the government had common law trust fiduciary duties to prevent misappropriation of tribal funds); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (stating that although the “general ‘contours’ of the government’s obligations” are defined by statute, the “interstices must be filled in through reference to general trust law” (citing *Mitchell II*, 463 U.S. at 224)).

<sup>42</sup> *Mitchell II*, 463 U.S. at 219.

<sup>43</sup> *Id.* at 225.

<sup>44</sup> *Navajo Nation*, 537 U.S. at 490.

<sup>45</sup> *Mitchell II*, 463 U.S. at 217 n.16 (quotation marks omitted). *See also Navajo Nation*, 537 U.S. at 506 (“Those prescriptions need not . . . expressly provide for money damages; the availability of such damages may be inferred”).

<sup>46</sup> *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2318 (2011).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2318–19. The tribe’s claims arise under 25 U.S.C. §§ 161, 161a, 161b, 162a, and the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001– 61, which recognizes and codifies the existing and relevant trust relationship. These statutes expressly refer to the United States as “trustee of the various Indian tribes,” *id.* § 161, and to the accounts here at issue as “tribal trust funds.” *Id.* § 162a. The statutes also recognize the United States’ control over the management and investment of

Over the course of more than five years worth of alternative dispute resolution, the tribe identified 226 documents—memoranda concerning trust administration exchanged between attorneys within the Department of the Interior (DOI), Office of the Solicitor, various agency personnel within the DOI including the Bureau of Indian Affairs (BIA), the Department of the Treasury, and even the government’s “accounting firm”<sup>50</sup>—that had been withheld by the government on the basis of the attorney-client privilege and attorney work-product protections. At the tribe’s request, in 2008 the case was restored to the active litigation docket.<sup>51</sup> The Court of Federal Claims (CFC) divided the case into various phases for trial and “set a discovery schedule.”<sup>52</sup> During the discovery process of the first phase of litigation—the phase dealing with management of the Jicarilla Apache Nation’s trust accounts from 1972 to 1992—the government refused to provide these 226 documents.<sup>53</sup> Responding to the tribe’s motion to compel the government to produce the documents, the government produced seventy-one and withheld 155, resolute in its assertion of the attorney-client privilege and attorney work-product protections.<sup>54</sup> After reviewing *in camera* the remaining 155 documents, the CFC granted in part the tribe’s motion to compel discovery, but allowed the government to withhold those documents that the CFC found to be attorney work product.<sup>55</sup> The government then petitioned the Court of Appeals for the Federal Circuit “for a writ of mandamus directing the CFC to vacate its production order.”<sup>56</sup> The Court of Appeals, though, sided with the CFC, holding that

the United States cannot deny an Indian tribe’s request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications.<sup>57</sup>

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the tribal trust funds and acknowledge the “[t]rust responsibilities of the Secretary of the Interior,” explicitly stating that they “shall include (but are not limited to)” providing “adequate systems for accounting for and reporting trust fund balances.” *Id.* § 162a(d). Because these statutory “prescription[s] bear] the hallmarks of a conventional fiduciary relationship,” *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009), it seems readily apparent that the trust relationship present in *Mitchell II* is similarly present here. Yet the Court did not address this issue head on and made no categorical statement either for or against the existence of a trust relationship in this case. It seems reasonable to presume that the Court accepted the existence of a trust relationship concerning the statutes here at issue; nevertheless, in light of the question the Court was here called upon to answer and in light of its answer to that question, whether or not a trust relationship actually exists is irrelevant. And though I have presented an outline of what in fact creates the trust relationship in *supra* Part I, the remainder of this article and my analysis has very little if anything to do with finding or not finding the existence of a trust relationship. Much has been written on the subject and I likely have little to add.

<sup>50</sup> *Jicarilla Apache Nation*, 131 S. Ct. at 2319.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 2320.

<sup>57</sup> *In re United States*, 590 F.3d 1305, 1313 (Fed. Cir. 2009).

Because the government “had not alleged that the legal advice in this case related to such conflicting interests,” the CFC did not discuss how the fiduciary exception might apply in that situation.<sup>58</sup> The government then filed a petition for a writ of certiorari to the Supreme Court, and the Court granted it to answer “[w]hether the attorney-client privilege entitle[d] the United States to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe.”<sup>59</sup> On January 7, 2011, the Supreme Court granted the government’s petition for certiorari<sup>60</sup> and heard oral arguments on April 22, 2011. Less than two months later on June 13, the Court issued Justice Alito’s 7–1 majority opinion, finding for the government.<sup>61</sup>

### a. Justice Alito’s 7–1 Majority Opinion

“The attorney-client privilege,” began Justice Alito, “ranks among the oldest and most established evidentiary privileges known to our law. The common law, however, has recognized an exception to the privilege when a trustee obtains legal advice related to the exercise of fiduciary duties.”<sup>62</sup> But the common law—its constraints and strictures on the nature of a trusteeship—is but an “analogy” that “cannot be taken too far.”<sup>63</sup> Indeed the “trust obligations of the United States to the Indian tribes,” wrote Justice Alito, “are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.”<sup>64</sup>

Despite the fact that “trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law,” Justice Alito began with Rule 501 of the *Federal Rules of Evidence*, which states that evidentiary privileges “shall be governed by the principles of the common law . . . in the light of reason and

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<sup>58</sup> *Jicarilla Apache Nation*, 131 S. Ct. at 2320. Under long-established common law principles, a trust beneficiary is entitled to “such information as is reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust.” RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. a(2) (2007). Under the fiduciary exception to the attorney-client privilege, this includes legal advice provided to the trustee about management of the trust. Note that Congress has “[p]lenary authority” over the sum of Indian affairs, *Lone Wolf v. Hitchcock*, 187 U.S. at 553, 565 (1903), and has never explicitly exempted the government from these principles.

<sup>59</sup> Petition for a Writ of Certiorari at 1, *United States v. Jicarilla Apache Nation*, 2010 WL 3641207 (Sept. 20, 2010) (No. 10-382).

<sup>60</sup> *United States v. Jicarilla Apache Nation*, 131 S. Ct. 856 (2011) (No. 10-382) (granting cert.).

<sup>61</sup> 7–1. Justice Sotomayor dissented; Justice Kagan took no part in the case. *Jicarilla Apache Nation*, 131 S. Ct. at 2313.

<sup>62</sup> *Jicarilla Apache Nation*, 131 S. Ct. at 2318.

<sup>63</sup> *Id.*

<sup>64</sup> *Id. But cf.* *United States v. Navajo Nation*, 556 U.S. 287, 290–91 (2009) (stating that once a tribe has identified a “substantive source of law that establishes specific fiduciary or other duties . . . principles of trust law might be relevant in drawing the inference that Congress intended damages to remedy a breach”) (quotation marks omitted); and *United States v. White Mountain Apache Tribe*, 537 U.S. at 474–76 (2003) (stating that a “fair inference that the Government is subject to duties as a trustee and liable in damages for breach” supports the importation “of the fundamental common-law dut[y] on the part of a trustee . . . to preserve and maintain trust assets”).

experience.”<sup>65</sup> Justice Alito then referenced two common law criteria, imported from English courts, “justifying the fiduciary exception.”<sup>66</sup> First, because a trustee has the fiduciary obligation to act in the best interest of the trust’s beneficiary, the trust’s beneficiary is the “real client”<sup>67</sup> of any attorney who advises the trustee regarding trust-related matters; accordingly, the attorney-client privilege belongs more properly to the beneficiary than to the trustee. Second, a trustee’s “fiduciary duty to furnish trust-related information”<sup>68</sup> to the beneficiary outweighs the trustee’s interest in the attorney-client privilege. More information helps a trust’s beneficiary to monitor the trustee’s management of the trust and disclosure, and is therefore a “weightier public policy than the preservation of confidential attorney-client communications.”<sup>69</sup> But the government, noted the Court, “of course, is not a private trustee.”<sup>70</sup>

Whereas the strictures of a common-law trusteeship exist between two private parties, the general trust relationship extant between Indian tribes and the federal government is a “sovereign function subject to the plenary authority of Congress.”<sup>71</sup> It was therefore error for the Court of Appeals to analogize the government to a private trustee in finding for the tribes.<sup>72</sup> The government “consents to be liable to private ‘parties and may yield this consent upon such terms and under such restrictions as it may think just.’”<sup>73</sup> The organization and management of any general trust between the government and Indian tribes is subject to the plenary authority of Congress, waxed the Court, and because the “Indian trust relationship represents an exercise of that authority,”<sup>74</sup> the government’s interest in the trust relationship is “vested in it as a sovereign.”<sup>75</sup> Accordingly, the maintenance and the strictures of any trust relationship extant due to the plenary authority of Congress is distinctly an interest of the United States,<sup>76</sup> and the government assumes trust responsibilities “only to the extent it expressly accepts those responsibilities by statute.”<sup>77</sup> Thus, the Court held that in order to access privileged information from the government against the government’s wishes, the Jicarilla must “point to a right conferred by statute or regulation” in order to do so.<sup>78</sup> Notwithstanding the categorical non-relevance of a common law trustee’s duties to a beneficiary, the Court then, after making this pronouncement, did not perform any rigorous statutory analysis in order to assess whether the tribe can “point to a right

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<sup>65</sup> *Jicarilla Apache Nation*, 131 S. Ct. at 2320 (quoting FED. R. EVID. 501).

<sup>66</sup> *Id.* at 2326.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 2322.

<sup>69</sup> *Id.* at 2322 (quoting *Riggs Nat’l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 714 (Del. Ch. 1976)).

<sup>70</sup> *Id.* at 2323.

<sup>71</sup> *Id.*

<sup>72</sup> *In re United States*, 590 F.3d 1305, 1313 (Fed. Cir. 2009).

<sup>73</sup> *Jicarilla Apache Nation*, 131 S. Ct. at 2323 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 283 (1855)).

<sup>74</sup> *Id.* at 2324.

<sup>75</sup> *Id.* (quoting *United States v. Minnesota*, 270 U.S. 181, 194 (1926)).

<sup>76</sup> *Id.* (citing *Heckman v. United States*, 224 U.S. 413, 437 (1912)).

<sup>77</sup> *Id.* at 2325. *See also* case cited *supra* note 63.

<sup>78</sup> *Jicarilla Apache Nation*, 131 S. Ct. at 2325.

conferred by statute or regulation.”<sup>79</sup> After essentially pronouncing the issue outside the realm of the common law, the Court nevertheless weighed the two common law features that justify the fiduciary exception, and found each wanting.<sup>80</sup>

As noted earlier, the two features of the common law that justify the fiduciary exception to the attorney-client privilege are the beneficiary’s status as the concerned attorney’s real client and the trustee’s duty to disclose information about the trust.<sup>81</sup> Citing the “leading American case on the fiduciary exception,”<sup>82</sup> the Court observed that “Courts look to the source of funds as a strong indicator of precisely who the real clients were and a significant factor in determining who ought to have access to the legal advice.”<sup>83</sup> Because the attorneys here at issue were paid out of congressional appropriations at no expense to the tribe, the “payment structure confirms” the Court’s view “that the Government seeks legal advice in its sovereign capacity.”<sup>84</sup>

As for a fiduciary’s duty to disclose to a beneficiary all information related to trust management, the Court cursorily addressed the relevant statutes—that the Secretary must supply the trustees with, *inter alia*, “periodic statements of their account performance”<sup>85</sup>—and concluded that common-law theory of a fiduciary’s duty to disclose is not to be used to illuminate whether the relevant statutes can fairly be interpreted as mandating compensation for damages because the “common law of trusts does not override the specific trust-creating statute and regulations that apply here. Those provisions define the Government’s disclosure obligation to the Tribe.”<sup>86</sup> The statutes do not say that the government assumes the common-law duty to disclose information related to the administration of Indian trusts and which is protected by the attorney-client privilege: thus, the Court declined to read a “catchall provision” that would impose it.<sup>87</sup>

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<sup>79</sup> *Id.* *Cherokee Nation, Mitchell II, White Mountain Apache, and Navajo Nation* taken together create the framework explained at the end of *supra* Part I: first, identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the government has failed faithfully to perform those duties; then assess whether the relevant substantive source of law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties imposed. Recognize all the while and be guided by “principles of trust law [that] might be relevant in drawing the inference that Congress intended damages to remedy a breach.” *United States v. Navajo Nation*, 556 U.S. 287, 290–91 (2009). But here the Court conflates the analysis by first taking the trust relationship extant and relevant here out of the realm of the common law trusteeship of which Justice Scalia wrote in *Navajo Nation*, because the United States’ duties to the Indian tribes are “governed by statute rather than the common law.” *Jicarilla Apache Nation*, 131 S. Ct. at 2320. But the established cases noted in this footnote do not present a zero sum equation: instead, the common law is to guide the determination of whether the relevant substantive source of law can fairly be interpreted as mandating compensation for damages. Justice Sotomayor addresses this very conflation in her dissent, discussed *infra* Part IIb.

<sup>80</sup> See *Jicarilla Apache Nation*, 131 S. Ct. at 2326.

<sup>81</sup> See *id.*

<sup>82</sup> *Riggs Nat’l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976).

<sup>83</sup> *Jicarilla Apache Nation*, 131 S. Ct. at 2326 (citing *Riggs Nat’l Bank*, 355 A.2d at 712).

<sup>84</sup> *Jicarilla Apache Nation*, 131 S. Ct. at 2326.

<sup>85</sup> *Id.* at 2329 (quoting the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 162a(d)(5)).

<sup>86</sup> *Id.* at 2329–30.

<sup>87</sup> *Id.* at 2330. This is another of the Court’s intellectual sleights of hand: the Court decided that the common law duty to disclose did not apply to the government because the government does not have the “same common-law disclosure obligations as a private trustee,” and declined to include a “catchall

Whereas past Courts were to be guided by the common law rubric of trust management once a statutory framework created a fiduciary duty on the part of the United States to the tribes,<sup>88</sup> here and now, this Court would not consider common law trust principles in assessing the government's liability because the relevant statutory framework<sup>89</sup> does not specifically say that these principles apply.

## b. Justice Sotomayor's Dissent

Justice Sotomayor called the Court's chicanery for what it is and argued for *stare decisis*.<sup>90</sup> Whereas the majority held that the common law has no application to the current context, Justice Sotomayor repeated the established maxim<sup>91</sup> that once a statutory scheme "establishes a conventional fiduciary relationship, the Government's duties include fiduciary obligations derived from common-law trust principles."<sup>92</sup>

Citing the framework established by the Court's own opinions in its seminal trust decisions, Sotomayor wrote that the statutes here at issue "give the United States full responsibility to manage Indian trust fund accounts for the benefit of the Indians."<sup>93</sup> Under the relevant statutory regime then, "the Government has extensive managerial control over Indian trust funds, exercises considerable discretion with respect to their investment, and has assumed significant responsibilities to account to the tribal beneficiaries."<sup>94</sup> In deference to precedent, having found a trust relationship between the United States and the tribe, Sotomayor imported principles of common-law trust management to assess the government's reliance on the attorney-client privilege to withhold the 155 documents that related to trust management.

Beginning with FRE 501, Sotomayor notes that the attorney-client privilege is "a limited exception to the usual rules of evidence requiring full disclosure of relevant information."<sup>95</sup> When a trustee obtains "legal advice relating to his administration of the trust, and not in anticipation of adversarial legal proceedings against him, the beneficiaries of the trust ha[ve] the right to the production of that advice."<sup>96</sup> And

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provision" to "impose general obligations. *Jicarilla Apache Nation*, 131 S. Ct. at 2329–30. But the appropriate framework, if relevant statutes establish specific fiduciary duties, is to import the common law to guide the determination of whether the relevant substantive source of law can fairly be interpreted as mandating compensation for damages. *See supra* note 79. The Court thus rejects established breach of trust doctrine in favor of judicial fiat, but fails to state with any clarity whether (a) the Court is revising the existing framework, or (b) what any revised framework ought to look like. But such considerations are beyond the scope of this article.

<sup>88</sup> *See supra* note 79.

<sup>89</sup> *See supra* note 49.

<sup>90</sup> *Jicarilla Apache Nation*, 131 S. Ct. at 2331–43.

<sup>91</sup> *See supra* note 79.

<sup>92</sup> *Jicarilla Apache Nation*, 131 S. Ct. at 2331 (Sotomayor, J., dissenting). There is very little to say about Justice Sotomayor's dissent that she herself did not say. Indeed, I can locate no intellectual errors that need explanation or remedy; accordingly, I will only provide an overview of her dissent and an analysis of the canons of construction with regard to the issue at hand.

<sup>93</sup> *Id.* at 2335 (quoting *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II*)).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 2332.

<sup>96</sup> *Id.* (quoting *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007)).

justifying this common-law fiduciary exception to the attorney-client privilege are two rationales, each of which the majority, even for its refusal to import common-law trust principles, addressed and found wanting. Justice Sotomayor also addressed each in turn, and found each compelling.

As a fiduciary for the tribal trust—in this case, the approximately 900,000 acres of land—the government’s management of the trust must be judged by the “most exacting fiduciary standards.”<sup>97</sup> Among the most fundamental of fiduciary obligations of a trustee is “to administer the trust solely in the interest of the beneficiaries.”<sup>98</sup> The government is therefore legally required “to administer the trust solely in the interest of the beneficiaries,” and its conduct vis-à-vis its trust obligation cannot be anything distinct from its responsibilities as a fiduciary.<sup>99</sup> Consequently, while the majority argued that the government’s interest in the trust relationship is “vested in it as a sovereign,”<sup>100</sup> in reality, waxed Sotomayor, “any uniquely sovereign interest the Government may have in other contexts of its trust relationship with Indian tribes does not exist in the specific context of Indian trust fund administration.”<sup>101</sup> Therefore, the interests of the government in seeking advice for purposes of the fiduciary exception are entirely aligned with the interests of the nation. The real client served by the documents exchanged by attorney and trustee was therefore the beneficiary of the trust: the tribe.

Regarding a trustee’s duty to disclose all relevant matters to the beneficiary, Sotomayor recognized the policy behind the duty: that “preserving the full disclosure necessary in the trustee-beneficiary relationship is . . . ultimately more important than the protection of the trustees’ confidence in the attorney for the trust.”<sup>102</sup> Because the relevant statutes required the government to act as a conventional fiduciary, the common-law duty a fiduciary possesses of keeping the trust’s beneficiary informed of matters “relating to trust administration included the concomitant duty to disclose attorney-client communications relating to trust fund management.”<sup>103</sup> Each justification for the fiduciary exception to the attorney-client privilege in this instance therefore supports disclosing the 155 withheld documents.

Having found that the fiduciary exception to the attorney-client privilege applied to the facts at issue, Sotomayor then addressed the majority’s chief legal error. While the majority maintained that the government “assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute,”<sup>104</sup> Sotomayor stated the obvious:

We have never held that all of the Government’s trust responsibilities to Indians must be set forth expressly in a specific statute or regulation. To

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<sup>97</sup> *Id.* at 2336 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942)).

<sup>98</sup> *Id.* (quoting AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 170 (4th ed. 1987)).

<sup>99</sup> *Id.* at 2324, 2336.

<sup>100</sup> *Id.* at 2324.

<sup>101</sup> *Id.* at 2337.

<sup>102</sup> *Id.* at 2338 (quoting *Riggs Nat’l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 714 (Del. Ch. 1976)).

<sup>103</sup> *Id.* at 2339.

<sup>104</sup> *Id.* at 2325.

the contrary, where, as here, the statutory framework establishes that the relationship between the Government and an Indian tribe bears the hallmarks of a conventional fiduciary relationship, . . . we have consistently looked to general trust principles to flesh out the Government's fiduciary obligations. . . . Accordingly, although the general contours of the government's obligations' are defined by statute, the interstices must be filled in through reference to general trust law.<sup>105</sup>

Indeed, the very text of the relevant statutes supports this determination. Section 162a(d) of the American Indian Trust Fund Management Reform Act of 1994 sets forth eight "trust responsibilities of the United States,"<sup>106</sup> and states that the Secretary of the Interior's "proper discharge of the trust responsibilities of the United States shall include (but are not limited to)" those eight specified duties. By expressly including the parenthetical language, argues Justice Sotomayor, "Congress recognized that the Government has pre-existing trust responsibilities that arise out of the broader statutory scheme governing the management of Indian trust funds. . . . That conclusion accords with common sense as not even the Government argues that it had no disclosure obligations with respect to Indian trust funds prior to the enactment of the 1994 Act."<sup>107</sup>

Yet perhaps most prescient and haunting of Sotomayor's various critiques is her prognostication that the Court's majority opinion may very well serve to reject "the use of common-law principles to inform the scope of the Government's fiduciary obligations to Indian tribes."<sup>108</sup> What lies down that road is greater than the diminution of tribal sovereignty; what lies down that road is the Supreme Court's systematic countenancing of the federal government's duplicitous, self-serving, and disingenuous application of statutes ultimately intended to inure to the benefit of Indians. Indeed, to combat just such a possibility, courts past fashioned the canons of construction.

### **III. Applying the Canons of Construction of Federal Indian Law**

In order to address the disadvantaged state at which the treaty-making process placed tribes and to more satisfactorily affect the federal trust responsibility, the Supreme Court has fashioned the canons of construction.<sup>109</sup> The canons originally applied only to the interpretation of United States-Indian treaties, but over time the Court has extended the canons to federal regulations, so long as the regulation was passed for the benefit of a tribe.<sup>110</sup> Chief among the canons is the rule of sympathetic construction. Under this rule, "statutes passed for the benefit of the dependent Indian

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<sup>105</sup> *Id.* at 2339, 2340 (citing *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009), and *Cobell v. Norton*, 240 F.3d 1081, 1101 (2001)).

<sup>106</sup> 25 U.S.C. § 162a(d).

<sup>107</sup> *Jicarilla Apache Nation*, 131 S. Ct. at 2341 (Sotomayor J., dissenting).

<sup>108</sup> *Id.* at 2342

<sup>109</sup> See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 2.02 (2005 ed.).

<sup>110</sup> *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (stating that when "we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit'" (quoting *Montana v. Blackfoot Tribe*, 471 U.S. 759, 766 (1985))).

tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.”<sup>111</sup>

Yet for all her intellectual honesty, Justice Sotomayor’s lone dissenting voice and the Court’s 7–1 majoritarian fiat each fail to mention even the whisper of the canons. Justice Sotomayor was chiefly motivated by *following* precedent, not by *re-establishing* precedent. She therefore took aim at the Court’s intellectual prestidigitations vis-à-vis the importation of common-law principles of trust management; and because none of the seminal trust opinions<sup>112</sup> mentions the application—let alone the existence—of the canons, within the framework of precedent violated here by the Court, the canons were irrelevant to her dissent.<sup>113</sup>

But the canons are not irrelevant—in fact the canons should be the lynchpin of the Court’s analysis. After all, the canons are “rooted in the unique trust relationship between the United States and the Indians,”<sup>114</sup> and the Trust Fund Management Reform Act sets forth procedures so that, *inter alia*, “the best interests of the Indians will be promoted.”<sup>115</sup> Accordingly, the initial inquiry in determining the applicability of the canons—that the relevant federal regulation must be passed for the benefit of Indians in order for the canons to apply—is an inquiry easily and satisfactorily answered by the tribe.

But in order to apply the rule of sympathetic construction, the concerned regulations passed for the benefit of the tribe must also be ambiguous. Are they? This is a troublesome inquiry because at issue in *Jicarilla* is not whether a specific statute or “expression” is ambiguous but whether the common-law itself is: (a) applicable to the government’s trusteeship of the tribe’s 900,000 acres of resource-rich land, and (b) if relevant, whether the fiduciary exception to the attorney-client privilege applies.

Justice Sotomayor effectively answered these questions while complying with the Court’s precedent, but the Court has also held in the past that “[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.”<sup>116</sup> Thus, notwithstanding the fact that there is no single specific statutory ambiguity at issue in *Jicarilla*, this discrete issue of “federal law”—the applicability of the fiduciary exception to the federal trust responsibility—is capable of differing interpretations.<sup>117</sup> The Court of Federal Claims, the Court of Appeals, and Justice Sotomayor disagree with seven current members of the Supreme Court of the United States; each is presumptively reasonable, and what they disagree about is not a question of constitutional law. If this

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<sup>111</sup> Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 89 (1918).

<sup>112</sup> See *supra* note 79.

<sup>113</sup> The logical inquiry which, alas, is beyond the scope of this article is just how, *how really*, does the Court decide to apply the canons of construction to its determination of questions of federal Indian law.

<sup>114</sup> County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).

<sup>115</sup> 25 U.S.C. § 161.

<sup>116</sup> White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980).

<sup>117</sup> Black’s Law Dictionary defines “ambiguity” as “An uncertainty of meaning or intention, as in a contractual term or statutory provision.” BLACK’S LAW DICTIONARY 93 (9th ed. 2009).

had been the case and the issue here were one of constitutional import, the Supreme Court would of course have final say notwithstanding any potential ambiguity.<sup>118</sup> But here the Court addressed an issue concerning the government's trust responsibility, a rubric of judicial conjuring. It was precisely to more satisfactorily affect this responsibility that the applicability of the canons (also a judicial conjuring<sup>119</sup>) were extended to statutes from treaties.<sup>120</sup> Thus, the canons' prerequisite that there exist an ambiguity is also a threshold easily satisfied. Accordingly, applying the canons to the question of whether the act imports the common-law's fiduciary exception to the attorney-client privilege buttresses Justice Sotomayor's conclusion, and further dilutes the integrity of the majority's 7–1 opinion.

For its part, it may very well be that the majority did not mention the canons for two reasons: first, none of the seminal trust opinions included the canons in their analyses; and second, applying the canons to the question at issue here leads inexorably to a ruling against the government and for the tribes, thus posing “significant and damaging consequences for the government . . . [in] over 90 pending trust cases brought by Indian tribes in which the question [here] presented could arise.”<sup>121</sup> It may very well be that as Justice Sotomayor opines, *this* Court's “disregard of . . . [its] settled precedent that looks to common-law trust principles to define the scope of the Government's fiduciary obligations to Indian tribes”<sup>122</sup> will reinvigorate the position of “reject[ing] the use of common-law principles to inform the scope of the Government's fiduciary obligations to Indian tribes.”<sup>123</sup> Down that road awaits ruin and a desire for things “done behind closed doors.”<sup>124</sup> Yet to combat just such an unhappy eventuality, courts past have fashioned the canons of construction and extended their application to federal statutes and regulations meant to inure to the benefit of Indians. Indeed, applying the canons of construction to illuminate the government's trust responsibility comports with “traditional notions of sovereignty and . . . the federal policy of encouraging tribal independence.”<sup>125</sup> Would that the Court were true to its own pronouncements; would that Justice Sotomayor's intellectual honesty were the rule and not the exception. The ability of Indian tribes to keep the government accountable for honoring its trust responsibilities to them may very well depend upon it.

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<sup>118</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>119</sup> See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 2.02 (2005 ed.).

<sup>120</sup> See *id.* See also *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918) (applying the canons of construction to liberally construe an ambiguous provision of a statute carving out reservation land use); *Bryan v. Itasca County*, 426 U.S. 373, 392–93 (1976) (resolving ambiguity in PL-280, a statute that was not necessarily passed for the benefit of Indians, in favor of Indians); *Connecticut v. U.S. Dep't of the Interior*, 228 F.3d 82, 92–93 (2d Cir. 2000) (applying the canons even when a tribe has become wealthy and powerful).

<sup>121</sup> *Petition for a Writ of Certiorari at 9, United States v. Jicarilla Apache Nation*, 2010 WL 3641207 (Sept. 20, 2010) (No. 10-382). In these pending cases, the government's economic liability—and that which the tribes have to gain and may very well be their due—is tremendous.

<sup>122</sup> *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2331–32 (Sotomayor J. dissenting).

<sup>123</sup> *Id.* at 2342.

<sup>124</sup> MARCUS AURELIUS, *MEDITATIONS*, III. 7 (Gregory Hays, trans., Modern Library 2002) (ca. 175).

<sup>125</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44 (1980).