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United States v. Jicarilla Apache Nation: Why the Supreme Court's Refusal to Apply the Fiduciary Exception to Attorney-Client Privilege Stands to Diminish the Federal-Tribal Trust Relationship

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UNITED STATES V. JICARILLA APACHE NATION: WHY THE SUPREME COURT'S REFUSAL TO APPLY THE FIDUCIARY EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE STANDS TO DIMINISH THE FEDERAL-TRIBAL TRUST RELATIONSHIP

Daniel W. Hart[*]

Introduction

The United States holds an enormous amount of land and natural resources in trust for Native Americans, with the Department of Interior managing almost $2.9 billion in tribal trust funds.[1] Sadly, the United States has not always managed those funds with the utmost transparency and efficiency.[2] As a result, tribes have challenged the United States through trust mismanagement suits, seeking redress for breach of its fiduciary duty as trustee. The source of contention in these suits, including one upon which the Supreme Court has waffled, is the extent of the fiduciary duty that the United States owes to tribes.

In *United States v. Jicarilla Apache Nation,*[3] the Supreme Court held that the United States could use the attorney-client privilege to prevent tribes from discovering documents relating to legal advice sought by the Department of Interior and other agencies concerning management of tribal funds.[4] This holding stemmed from the Supreme Court's flawed reasoning that a sufficient, true tribal trust relationship, at least in this context, does not exist, meaning that the United States is under no fiduciary obligation to disclose the requested documents.

This article examines the application of the fiduciary exception to the attorney-client privilege in tribal trust mismanagement cases, with particular emphasis on the fiduciary duties of the United States as trustee of tribal funds, to assert that: (1) there is a true trust relationship between the United States and tribes; (2) that supports a duty to disclose information concerning management of Indian trusts; and (3) is nevertheless capable of

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1. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 407 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN].

2. *See* Cobell v. Norton, 240 F.3d 1081, 1090 (D.C. Cir. 2001) (citing MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. REP. NO. 102-499 (1992)).

3. United States v. Jicarilla Apache Nation (*Jicarilla III*), 131 S. Ct. 2313 (2011).

4. *Id.* at 2318.

accommodating a workable, narrow application of the fiduciary exception to attorney-client privilege given acknowledged U.S. interests and its position as sovereign. To further these assertions, Part I of this article provides a brief overview of general trust doctrine and tribal trust doctrine, followed by an overview of attorney-client privilege and the fiduciary exception in both the private and tribal trust context. Part II summarizes the Court of Federal Claim's opinion, the Federal Court of Appeals' opinion, and the Supreme Court's opinion, which Part III then explores to suggest that the United States, as trustee of Indian assets, should be held to the standards of a typical trustee acting in a fiduciary capacity. The conclusion emphasizes the spiraling effect that this seemingly innocuous decision has on the trust relationship, both legally and metaphorically, between the United States and Native American tribes.

I. Background

A. General Trust Doctrine

One of the Supreme Court's main contentions in *Jicarilla III* is that the government is not like a private trustee, and therefore not subject to the fiduciary duties of a typical trustee under the common law of trusts.

As the Restatement defines it, a trust is essentially a fiduciary relationship between the trustee and beneficiaries.[5] According to the Restatement Third of Trusts and the Uniform Trust Code (UTC), the general rule is that a trustee, investing the trust corpus for the benefit of beneficiaries, has an obligation to act with reasonable skill and prudence.[6] The precise definition of "prudent" can sometimes be a mystery. Most states have adopted the Uniform Prudent Investor Act (UPIA),[7] which defines how a trustee should conduct himself: "[a] trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust."[8]

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5. RESTATEMENT (THIRD) OF TRUSTS § 2 (2001).

6. GEORGE G. BOGERT ET AL., BOGERT TRUSTS AND TRUSTEES § 706 (rev. 2d & 3d eds., 2011) [hereinafter BOGERT]; *see also* UNIF. TRUST CODE § 804, 7C U.L.A. 601 (2000) ("[T]rustee shall administer the trust as a prudent person would . . . ."); RESTATEMENT (THIRD) OF TRUSTS § 77 ("The trustee has a duty to administer the trust as a prudent person would . . . .").

7. BOGERT, *supra* note 6, § 706; *see also* UNIF. PRUDENT INVESTOR ACT § 2, 7B U.L.A. 588-90 (1994).

8. UNIF. PRUDENT INVESTOR ACT § 2(a).

A trustee also has a duty of loyalty to beneficiaries. He must "administer the trust solely in the interest of the beneficiaries"[9] and "communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter."[10] When a trustee fails to live up to these required standards, that trustee is liable to the beneficiaries to the extent that he failed to perform his obligations.[11]

It is often unclear, however, what specific standards and obligations apply to the trustee in managing the trust. In *Jicarilla III*, the obligation in question was whether the government had a duty to disclose legal communications between the government and its attorneys concerning trust management.[12] According to the Restatement, a trustee has a duty to keep beneficiaries "reasonably informed . . . about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests."[13] The question, then, is whether this statement requires disclosure of the legal communications between a trustee and his attorney when the subject of those communications is trust management. In a comment to the Restatement, the authors note that communications between a trustee and his attorney that relate to anticipated litigation or personal protection are not subject to the duty to disclose.[14] However, the comment distinguishes communications that concern the trustee and his *administration* of the trust, noting that they are subject to "the general principle entitling a beneficiary to information that is reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary's rights under the trust."[15]

B. Tribal Trusts: Administration, Jurisdiction and Duties

1. Organization and Jurisdiction to Hear Claims by Tribes

Trust management of tribal trust funds falls within the purview of the U.S. Department of Interior (DOI), specifically with the Secretary of the

9. RESTATEMENT (THIRD) OF TRUSTS § 78(1).

10. *Id.* § 78(3); *see also* UNIF. TRUST CODE § 802 ("Duty of Loyalty").

11. BOGERT, *supra* note 6, § 706.

12. *Jicarilla III*, 131 S. Ct. 2313, 2318 (2011).

13. RESTATEMENT (THIRD) OF TRUSTS § 82(1)(c); *see also* UNIF. TRUST CODE § 813 (requiring a trustee to "keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests").

14. RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. f.

15. *Id.*

Interior.[16] The DOI manages tribal trust funds, which originate from revenue generated from the sale of tribal property that is deposited into the U.S. Treasury Department.[17] Direct administration of the trust is delegated to the Bureau of Indian Affairs (BIA).[18] Suits against the DOI must be brought in the Court of Federal Claims (CFC). The CFC has authority to hear all tribal claims against the government, deriving its authority from two main statutes: 28 U.S.C. § 1491 (the Tucker Act)[19] and 28 U.S.C. § 1505 (the Indian Tucker Act).[20] Together, these two statutes give the CFC authority to hear claims by Native Americans against the United States when those claims are founded on the "Constitution, laws, or treaties of the United States."[21]

Since the adoption of the Indian Tucker Act, there has been heated debate about whether the statute is sufficient to allow compensation. In a recent case, the Supreme Court reiterated that the Indian Tucker Act does not create substantive rights, but merely "waive[s] sovereign immunity for claims premised on other sources of law."[22] The source of law that the claimant relies on, i.e., a treaty, statute, or executive order, "triggers liability only if it 'can fairly be interpreted as mandating compensation by the Federal Government.'"[23] A tribe's best bet is to find a more specific statute, as opposed to one that defines broad duties. As the following section explains, with a particular emphasis on those cases dealing with tribal trusts, case law has evolved in terms of what is required of a statute entitling a claimant to compensation.

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16. COHEN, *supra* note 1, at 403; *see also Interior Organizational Chart*, U.S. DEP'T OF INTERIOR, http://www.doi.gov/whoweare/orgchart.cfm (last visited Mar. 5, 2012) (flow chart of the organization of the Department of Interior).

17. COHEN, *supra* note 1, at 407 (citing REPORT ON THE AMERICAN INDIAN TRUST FUND MANAGEMENT REFORM ACT OF 1994, H.R. REP. NO. 103-778 (1994)) ("Trust fund accounts are comprised mainly of money received through the sale or lease of trust lands and include timber stumpage, oil and gas royalties, and agriculture feeds.").

18. *Id.* at 403-04.

19. 28 U.S.C. § 1491 (2006).

20. 28 U.S.C. § 1505 ("The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.").

21. *Id.*; *see also* 28 U.S.C. § 1491.

22. United States v. Navajo Nation (*Navajo II*), 556 U.S. 287, 290 (2009).

23. *Id.* (quoting United States v. Testan, 424 U.S. 392, 400 (1976)).

2. Tribal Trust Duties

Two of the most important Supreme Court tribal trust cases are *Mitchell I*[24] and *Mitchell II*,[25] which ultimately defined the characterization of the trust relationship between the government and Native Americans. In *Mitchell I*, the Quinalt Tribe sued the United States for the "alleged mismanagement of timber resources found on [its] Reservation."[26] The Tribe's statutory authority was the General Allotment Act (GAA), which allotted all of the Reservation's land in trust to individual Indians.[27] The Tribe's principal argument was that the government had "breached a fiduciary duty owed to [it] by the United States as trustee of the allotted lands under the [GAA]."[28] The issue before the Court was whether the GAA provided a sufficient statutory basis for the Tribe's claim, and whether the GAA established the kind of trust relationship between the government and the Tribe that would obligate the United States to act with full fiduciary duties.

The Court analyzed the history of the Act, finding that it "plainly indicates" that Congress intended the trust created by it to be of "limited scope."[29] The legislative history reflected Congress's intention that title to the allotted land "remain in the United States," but that Indian allottees would be responsible for managing it.[30] The primary reason behind keeping title with the United States, the Court reasoned, was that Congress feared that if the Tribe had title to the land, it would be subject to state taxes.[31] Thus, the Court held the GAA created only a *limited trust*, which imposed no timber management fiduciary obligations.[32]

In *Mitchell II*, the Tribe returned for a second round with the Supreme Court. Realizing from *Mitchell I* that it needed to cite a statute that set forth specific trust obligations, the Tribe came equipped with better statutory ammunition. The claim was the same as in *Mitchell I*: that the government had breached a fiduciary duty. This time, however, the Tribe relied on 25 U.S.C. §§ 405-407, which gives the Secretary of Interior "broad statutory

24. United States v. Mitchell (*Mitchell I*), 445 U.S. 535 (1980).
25. United States v. Mitchell (*Mitchell II*), 463 U.S. 206 (1983).
26. *Mitchell I*, 445 U.S. at 537.
27. *Id.*
28. *Id.*
29. *Id.* at 543.
30. *Id.*
31. *Id.*
32. *Id.* at 545.

authority over the sale of timber on reservations."[33] The issue was once again whether the statutes entitled the Tribe to compensation based on a theory of mismanagement of trust.

The Court considered the statutes and concluded that they detailed the timber management responsibilities of the government.[34] The regulations were not broad and general like the language of the GAA at issue in *Mitchell I*, but instead precisely defined the specific responsibilities that the government held in harvesting and selling timber for the benefit of Native Americans.[35] The Court held that the statutes "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities,"[36] and noted "[o]ur construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people."[37] That the government had assumed "elaborate control" over Indian property gave rise to a fiduciary relationship.[38] The Court found "[a]ll of the necessary elements of a common law trust [] present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)."[39]

The *Mitchell* cases provide insight into what kind of trusts specific statutes create.[40] More specifically, they define what weight will be given to the statutory authority relied on by the claimant in determining whether a fiduciary duty exists. If the statutes in question are broad and incapable of being tied to a specific duty, then they most likely only create a limited trust

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33. *Mitchell II*, 463 U.S. 206, 209 (1983).

34. *Id.* at 222.

35. *Id.* (quoting White Mountain Apache v. Bracker, 448 U.S. 136, 147 (1980)) ("The [DOI] — through the [BIA] — 'exercises literally daily supervision over the harvesting and management of tribal timber.'").

36. *Id.* at 224.

37. *Id.* at 225.

38. *Id.*

39. *Id.* The significance of this language is that it seems to indicate that there is a possibility that the common law can play a role in tribal trust cases when the statute the plaintiff is basing his claim on is at issue. In *Jicarilla III*, the Court disclaims any use of the common law when interpreting federal statutes, but this is a blatant example of the Court doing just that — analogizing to the common law to imply a fiduciary duty.

40. *See generally* United States v. Navajo Nation (*Navajo I*), 537 U.S. 488 (2003) (holding that the Indian Mineral Leasing Act of 1938 was insufficient to create a fiduciary obligation that would entitle the Tribe to compensation); United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) (holding that a statute stating that the government holds certain reservation buildings in trust creates a fiduciary duty upon government to maintain that property, and that the Tribe was entitled to sue for damages for failing to maintain it).

with no fiduciary duties. However, if the statutes are more specific, defining the government's role as trustee in a more concrete way, a court might interpret them as creating a full fiduciary relationship, both express and implied, between a tribe and the government.[41]

In *Jicarilla*, the Tribe sued under the Indian Trust Fund Management Reform Act of 1994 (TFMRA), which is codified at 25 U.S.C. § 162a(d).[42] The law was passed in an effort to recognize "preexisting trust responsibilities" of the government and to "identif[y] some of the Interior Secretary's duties to ensure 'proper discharge of the trust responsibilities of the United States.'"[43] Section 162a(d) lists some of the trust responsibilities of the Secretary of the Interior, such as "providing adequate systems for accounting" and supplying beneficiaries with account balance statements.[44] Nowhere in the statute, though, is there a specific duty to disclose communications between a trustee and his attorney when those communications concern the management of the trust, nor any requirement to disclose information that reasonably relates to the management of the trust like the duty found in the Restatement (Third) of Trusts and the UTC.[45]

The statute says that the Secretary's duties "shall include (but are not limited to)" the responsibilities listed.[46] Exactly what else could be required remains to be seen. Preeminent scholar Felix Cohen says the listed duties supplement the common law,[47] but the question remains open for debate. The Supreme Court in *Jicarilla* said the common law could not be drawn upon to require other duties, such as a duty to disclose legal communications between a trustee and his attorney, i.e., the fiduciary exception to the attorney-client privilege. To examine how the Court reached that conclusion, and why its conclusion was flawed, the background on the attorney-client privilege and fiduciary exception to that privilege must be discussed.

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41. COHEN, *supra* note 1, at 430-31 ("[L]anguage authorizing an agency to manage resources, when coupled with actual control over those resources, will be sufficient to create a claim even though the word 'trust' is not mentioned in the applicable statute or regulation, or even though the statutes at issue are not comprehensive.").

42. *Jicarilla III*, 131 S. Ct. 2313, 2329 (2011).

43. Cobell v. Norton, 240 F.3d 1081, 1090 (D.C. Cir. 2001) (emphasis omitted).

44. 25 U.S.C. § 162a(d) (2006).

45. RESTATEMENT (THIRD) OF TRUSTS § 78(1) (2001).

46. 25 U.S.C. § 162a(d).

47. COHEN, *supra* note 1, at 410; *see also Cobell*, 240 F.3d at 1090.

C. Attorney-Client Privilege and Fiduciary Exception

The attorney-client privilege is entirely a product of the common law, not codified in any statute. It is an evidentiary privilege, consisting of: "(1) a communication (2) made between privileged parties (3) in confidence (4) for the purposes of providing legal assistance for the client."[48] The rationale behind the privilege is that it encourages a client to fully disclose all material facts to his attorney without the fear of a third party later having access to sensitive information, thus allowing an attorney to give knowledgeable, educated advice.[49] It is one of "the oldest of the privileges for confidential communications known to the common law."[50] The privilege may lose its bite, however, when "the party asserting the privilege owes a fiduciary obligation to the party seeking disclosure of confidential communications."[51] Thus, the privilege is not absolute.

The fiduciary exception to the attorney-client privilege was first recognized in U.S. courts in *Garner v. Wolfingbarger*[52] in a class action suit brought by shareholders.[53] In *Garner*, shareholders brought suit against a corporation, alleging violations of certain Acts, and seeking to recover the purchase price of the stock they held in the corporation.[54] During discovery, Plaintiffs sought disclosure of certain communications between the corporation and its attorney concerning the legality of the issuance and sale of corporation stock, which the corporation refused to disclose.[55] On appeal, the Fifth Circuit held that because the corporation acts for the benefit of shareholders, and because there is a mutuality of interest, the attorney-client privilege is not absolute, but that shareholders must show good cause for why the corporation should not be allowed to claim the privilege.[56] Some of the factors that a court will take into consideration when determining good cause are "whether the party seeking the information asserts a colorable claim, whether the information sought is not

48. RESTATEMENT (THIRD) OF LAW GOVERNING LAW: ATTORNEY-CLIENT PRIVILEGE § 68 (2000).

49. *See id.* cmt. c.

50. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

51. Patricia C. Kussmann, Annotation, *Construction and Application of Fiduciary Exception to Attorney-Client Privilege*, 47 A.L.R. 6TH 255, § 1 (2009).

52. 430 F.2d 1093, 1103-04 (5th Cir. 1970).

53. *Jicarilla III*, 131 S. Ct. 2313, 2321 (2011) (citing *Garner*, 430 F.2d at 1103-04 (5th Cir. 1970)).

54. *Garner*, 430 F.2d at 1095.

55. *Id.* at 1096.

56. *Id.* at 1103-04.

available elsewhere, whether the information sought is related to past or present actions, and whether the information sought may risk a revelation of trade secrets or other confidential information."[57] In the modern context, some courts still require a party to show "good cause" in order to invoke the fiduciary exception in shareholder suits, even though it has already been established that a fiduciary relationship exists.[58]

Six years after *Garner*, in *Riggs National Bank of Washington, D.C. v. Zimmer*,[59] the Delaware Chancery Court applied the fiduciary exception to a trust case.[60] The beneficiaries of a trust brought suit against the trustee in order to "reimburse the estate for alleged breaches of the trust in regard to certain tax matters."[61] The trustee refused to disclose communications between himself and his attorney pertaining to legal advice sought by the trustee regarding tax matters that directly affected the trust.[62] Adopting common law principles, the court held the trustee had to produce documents relating to advice he sought from his attorney concerning management of the trust.[63] The court elucidated two main reasons for applying the fiduciary exception: (1) the beneficiaries of the trust were the "real clients," not the trustee, as they were ultimately the persons who would benefit from the legal advice;[64] and (2) "the trustees have substantive fiduciary duties to the beneficiaries."[65] Thus, once the "real client" is determined, and the existence of a fiduciary relationship is found, the fiduciary exception can be invoked to require disclosure of the otherwise privileged communications. The Second, Fifth, Sixth, Ninth, and D.C. Circuits recognize "some form" of the fiduciary exception to attorney-client privilege.[66] Whether the exception should apply to tribal trusts was the main issue raised by the court's decision in *Jicarilla*.

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57. Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412, 422 (N.D. Ill. 2006) (quoting J.H. Chapman Grp., Ltd. v. Chapman, No. 95 C 7716, 1996 WL 238863 (N.D. Ill. May. 2, 1996)).

58. *See* Kussmann, *supra* note 51, § 68.

59. 355 A.2d 709 (Del. Ch. 1976).

60. *See generally id.*

61. *Id.* at 710.

62. *Id.*

63. *See id.*

64. *Id.* at 711.

65. *Id.* at 712.

66. *In re* United States (*Jicarilla II*), 590 F.3d 1305, 1312 (Fed Cir. 2009), *rev'd*, 131 S. Ct. 2313 (2011).

II. United States v. Jicarilla Apache Nation

A. The Court of Federal Claims

The Jicarilla Apache Nation (the Tribe) brought suit in the CFC against the United States for the alleged mismanagement of the Tribe's trust assets and funds.[67] The Tribe owns 900,000 acres in New Mexico that contain timber, gravel, and oil and gas resources.[68] The proceeds from the resources are held in trust by the United States.[69] The Tribe alleged that the United States mismanaged the trust and sought an accounting of the assets as well as $300 million in damages.[70]

After alternative dispute resolution failed, the case was returned to the docket and the trial was bifurcated, with the first phase set to decide the Tribe's fiscal claims.[71] During the discovery process, a dispute arose when the government invoked attorney-client privilege and refused to produce 155 non-trust related documents.[72] The United States filed a motion for a protective order, and the Tribe subsequently filed a motion to compel.[73] The CFC reviewed the documents *in camera*, organizing them into five categories:

> (i) requests for legal advice from personnel in various Interior agencies to Interior's Office of the Solicitor . . . either directly or indirectly . . .; (ii) legal advice provided by the Solicitor's Office or other government legal offices . . .; (iii) documents created by or provided to the accounting firm of Arthur Anderson LLP under a series of contracts between that firm and [the] Interior; (iv) documents generated by Interior personnel, including members of the Solicitor's Office, regarding pending or anticipated litigation involving other tribes; and (v) other miscellaneous documents or drafts . . . .[74]

After discussing the organization of the documents, the CFC began its analysis of the trust relationship between the United States and Native Americans.

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67. Jicarilla Apache Nation v. United States (*Jicarilla I*), 88 Fed. Cl. 1, 3 (2009).

68. Brief for Petitioner at 2, United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011) (No. 10-382), 2011 WL 661710, at *2.

69. *Id.*

70. *Id.* at 3.

71. *Jicarilla I*, 88 Fed. Cl. at 3.

72. *Id.* at 4.

73. *Id.*

74. *Id.* at 6.

Throughout history, the CFC reiterated, there has been a trust relationship between the United States and Indians.[75] While that relationship is typically codified in statutes that usually "serve to delimit . . . the government's obligations, it has . . . historically been measured and evaluated using principles typically applied to the common law fiduciary relationships."[76] The CFC noted that a "'fiduciary exception' to the attorney-client privilege is 'well established in [the] federal jurisprudence' of many circuits."[77] In fact, "seven circuits (the Second, Fourth, Fifth, Sixth, Ninth, Eleventh, and D.C.) have adopted some version of the fiduciary exception to the attorney client privilege."[78]

The CFC also noted that the fiduciary exception has been applied in tribal trust cases.[79] The courts that have applied the exception do so based on the reasoning that there really is no privilege because the advice sought by the trustee is for the beneficiary, so the privilege never existed in the first place.[80] A trustee cannot shield communications with his attorney when they relate to management; only when the communications relate to non-trust matters or personal interests may the privilege be claimed.[81]

The United States argued that the fiduciary exception was not a concept that could be applied in tribal trust cases, but the CFC dismissed the argument, finding no reason why "basic trust principles" could not be "transfer[red] to the Indian trust context."[82] According to Rule 501 of the Federal Rules of Evidence, evidentiary privilege questions are to be decided by the courts, through principles of the common law.[83] Since the Federal Rules of Evidence allow a court to decide questions of privilege through application of the common law, it was within the court's discretion to find the government had a common law fiduciary duty to disclose the communications.

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75. *Id.* at 5-6.

76. *Id.* at 6.

77. *Id.* at 10 (quoting Geissal v. Moore Med. Corp., 192 F.R.D. 620, 624 (E.D. Mo. 2000)).

78. *Id.* at 11.

79. *Id.*

80. *Id.* at 10.

81. *Id.*

82. *Id.* at 11-12.

83. FED. R. EVID. 501.

While the United States argued its trust relationship with the Tribe was distinct from a private trustee, the court was less than sympathetic.[84] Ultimately, the court concluded the fiduciary exception to the attorney-client privilege could be applied to: documents in category (i) because they related to the "administration of tribal trusts;"[85] most documents in category (ii) because they "relate generally to trust administration;"[86] some documents in category (iii) that the court found were not prepared in anticipation of litigation, and therefore not subject to the work product rule;[87] some documents in category (iv) that were not work-product;[88] and lastly, a few documents in category (v) because they were also not work-product and related to trust management.[89] The United States subsequently filed for writ of mandamus to order the CFC to vacate its order directing the government to produce the documents.[90]

B. The United States Court of Appeals, Federal Circuit

The issue in the Court of Appeals for the Federal Circuit was limited to whether the fiduciary exception to the attorney-client privilege could be applied to tribal trust cases. The United States presented four main arguments: (1) the fiduciary exception does not apply because the "United States has competing interests to consider;" (2) the legal advice sought by the United States was not paid for out of the trust corpus, so the attorney-client privilege protects those communications; (3) if the exception were to be applied, the United States would be unable to seek confidential legal advice; and (4) the United States has no "fiduciary duty to disclose information to beneficiaries."[91]

First, the court looked at the early American cases that dealt with the fiduciary exception, as well as some recent application of the exception in the ERISA context.[92] The court found not a single federal court of appeals had rejected the fiduciary exception entirely,[93] and while no federal court of

84. *See Jicarilla I*, 88 Fed. Cl. at 3-4. "The fiduciary relationship between the federal government and Indian tribes took form long ago, arising first under treaties and then under statutes." *Id.* at 5.

85. *Id.* at 14.

86. *Id.*

87. *Id.* at 16-18.

88. *Id.* at 18.

89. *Id.* at 19.

90. *Jicarilla II*, 590 F.3d 1305, 1308 (Fed. Cir. 2009), *rev'd*, 131 S. Ct. 2313 (2011).

91. *Id.* at 1309.

92. *Id.* at 1310-13.

93. *Id.* at 1312.

appeals had addressed the fiduciary exception in a tribal trust case, federal trial courts had.[94] The courts that had applied the fiduciary exception did so for two reasons: (1) a "fiduciary is not the attorney's exclusive client, but acts as a proxy for the beneficiary;" and (2) the "fiduciary has a duty to disclose all information related to trust management to the beneficiary."[95] Drawing on the factors set forth in *Riggs*, the court identified the Tribe as the "real client" of the attorney.[96] Thus, when the Interior Department sought advice from attorneys concerning management of the Tribe's trust, the attorney's "real client" was the Tribe, not the Interior Department.

The court held the United States-tribal relationship was "sufficiently similar to a private trust to justify applying the fiduciary exception."[97] The statutes, like 25 U.S.C. § 162a(d), that the trial court relied on, created a fiduciary relationship.[98] While certain statutes create specific duties, those duties are not exhaustive. Principles of the common law "should generally apply to the United States when it acts as trustee over tribal assets."[99] The common law principle on which the court primarily relied was the general duty of a trustee to disclose to beneficiaries information that directly relates to the administration of the trust.[100] The fiduciary exception, then, manifests a trustee's general duty to disclose, which the court found completely applicable in the tribal trust context.[101] The government's argument, that 25 U.S.C. § 162a(d) marks the boundary of what the government as trustee must disclose, was flawed because the statute specifically stated that the government's duties *were not limited to the duties listed.*[102]

The last issue the court discussed was the government's argument, that an application of the fiduciary exception is not feasible because of the burden of identifying competing interests. The primary authority relied on by the United States was *Nevada v. United States.*[103] In *Nevada*, the

94. *Id.* at 1312-13.

95. *Id.* at 1312.

96. *Id.* at 1313.

97. *Id.*

98. *Id.* at 1314. The court brought the following statutes to attention: "25 U.S.C. § 162(a) [sic] (2006) (trust investment); § 450j (contract administration); § 458cc (funding agreements); § 3120 (forest resources); § 3303 (education); § 3701 (agricultural resources); § 4021 (trust fund management); §§ 4041-43 (special trustee)." *Id.*

99. *Id.*

100. *See* RESTATEMENT (THIRD) OF TRUSTS § 2(a) (2001).

101. *Jicarilla II*, 590 F.3d at 1317.

102. 25 U.S.C. § 162a(d) (2006); *see also Jicarilla II*, 590 F.3d at 1313-14.

103. *Jicarilla II*, 590 F.3d at 1314.

Supreme Court held "the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent."[104] Essentially, the argument is that the government acts as trustee for many tribes, not just one, thus representing many interests. The government, therefore, is often forced to balance those competing interests. Thus, communications may concern more than one tribe, which differs somewhat from the typical private trust context.

The government failed to explicitly identify a competing interest.[105] The court dismissed the government's arguments, and pointed to the fact that the documents at issue only related to trust accounts, not the management of natural resources where conflicting statutes might arise, like in *Nevada*.[106]

The appeals court held that a trust relationship existed between the Tribe and the United States and found a general trust relationship was present with full fiduciary duties flowing from that relationship.[107] The United States subsequently applied for certiorari to the Supreme Court of the United States, which was granted.[108]

C. The Supreme Court's Decision

In an opinion written by Justice Alito, the Supreme Court categorically rejected the holdings of the Court of Federal Claims and Court of Appeals for the Federal Circuit. With the exception of a dissenting opinion by Justice Sotomayor, the Court dismissed all the Tribe's arguments that the United States' trust duties are governed by statute *and* common law principles. Unlike the decisions below, the Court refused to analogize the government's trust responsibilities to a private trustee,[109] and firmly held that "[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law."[110]

The Court began by first emphasizing how the trust relationship between the United States and the Tribe is not akin to a private trust.[111] In fact, only 25 U.S.C. § 162a(d) defines the disclosure responsibilities of the United

104. Nevada v. United States, 463 U.S. 110, 128 (1983).
105. *Jicarilla II*, 590 F.3d at 1315.
106. *Id.*
107. *See id.* at 1314-15.
108. *Id.* at 1315 (Fed. Cir. 2009), *cert. granted*, 131 S. Ct. 856 (2011).
109. *Jicarilla III*, 131 S. Ct. 2313, 2318 (2011).
110. *Id.*
111. *Id.* at 2323.

States,[112] and although statutes that define the government's obligations to the Tribe may indicate a trust exists, those statutes mark the end of the government's duties.[113] The Court reiterated the mere presence of the word "trust" in a statute does not create full fiduciary obligations governed by the common law.[114]

In analyzing Jicarilla's trust relationship with the United States, the Court looked to the *Mitchell* cases and reaffirmed that Congress can create limited or bare trusts if it wishes.[115] Justice Alito compared 25 U.S.C. § 162a(d) to the General Allotment Act at issue in *Mitchell I*, finding that it merely created a limited trust, devoid of congressional intent to obligate the government to full fiduciary duties.[116]

Title 25 U.S.C. § 162a(d) lists the trust duties of the Secretary of Interior.[117] The statute specifically states, "The Secretary's proper discharge of the trust responsibilities of the United States shall include (*but are not limited to*) the following."[118] While the Tribe contended this part of the statute created a hole through which common law principles, specifically the fiduciary exception, could be inserted, the Court disagreed.[119] Instead, the Court found "[r]eading the statute to incorporate the full duties of a private, common-law fiduciary would vitiate Congress' specification of narrowly defined disclosure obligations."[120] Thus, the Court closed the door on any type of argument as to what may or may not be required in terms of trust obligations in relation to the "but are not limited to" section of § 162a(d).[121]

The Court went on to explain that the United States has a distinct interest in the management of Indian tribes.[122] The United States enforces statutes relating to Indian trusts through its role as sovereign, but not as a common

112. 25 U.S.C. § 162a(d) (2006); *Jicarilla III*, 131 S. Ct. at 2329-30.

113. *See Jicarilla III*, 131 S. Ct. at 2323.

114. *Id.*

115. *Id.* (citing *Mitchell II*, 463 U.S. 206, 224 (1983); *Mitchell I*, 445 U.S. 535, 542 (1980)).

116. *See id.* at 2325; *Mitchell I*, 445 U.S. at 544. The Court says it will only "apply common-law principles where Congress had indicated it is appropriate to do so." *Jicarilla III*, 131 S. Ct. at 2325.

117. 25 U.S.C. § 162a(d).

118. *Id.* (emphasis added).

119. *See Jicarilla III*, 131 S. Ct. at 2330.

120. *Id.*

121. 25 U.S.C. § 162a(d).

122. *Jicarilla III*, 131 S. Ct. at 2324.

law trustee.[123] The "organization and management of the trust is a sovereign function subject to the plenary authority of Congress." The Court stated a tribe "must point to a right conferred by statute or regulation in order to obtain otherwise privileged information from the government against its wishes."[124] Stated otherwise, the Court declined to force the government to disclose the documents unless the tribe could identify a statute that specifically says it must.

To bolster its argument that the government acts in a sovereign capacity, the Court pointed to the fact that congressional funds paid for the legal advice. Thus, the government is the "real client," not the tribe, according to Justice Alito.[125] The Court contended that the government's management of tribal trusts is, in part, a "'moral obligation,'"[126] meaning there is an absence of the typical characteristics of a private trust, like a fiduciary duty. Unlike a private trustee, the government obtains legal advice not simply for the benefit of the tribe, but rather to fulfill "its sovereign interests in the execution of federal law."[127] In essence, the Court is saying that in a typical private trust, the trustee's only role is in facilitating the interests of the beneficiary.[128] The government's job, however, as sovereign, is to execute federal law, and by executing federal law, the government manages tribal trusts. Consequently, the government does not seek legal advice to benefit the tribe, but rather to facilitate its sovereign duty to execute the law. If one accepts this reasoning, then the attorney-client privilege lies with the government and its attorneys, not with the attorneys and the tribe.

The Court concluded that if the fiduciary exception were allowed, identifying conflict of interests in each communication for purposes of whether to apply attorney-client privilege would be much too burdensome, and "[the government's] ability to receive confidential legal advice would be substantially compromised."[129]

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123. *Id.* "The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id.* at 2325.

124. *Id.* at 2325.

125. *Id.* at 2326.

126. *Id.* (quoting Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942)).

127. *Id.* at 2327-28.

128. *See* RESTATEMENT (THIRD) OF TRUSTS § 78 (2001) ("[A] TRUSTEE HAS A DUTY TO ADMINISTER THE TRUST SOLELY IN THE INTEREST OF THE BENEFICIARIES . . . .").

129. *Jicarilla III*, 131 S. Ct. at 2328.

III. Analysis

A. The United States and Native Americans Have a Trust Relationship

In its decision, the Supreme Court accepts that a general trust relationship exists between the government and Native Americans.[130] In the same breath, however, the Court holds that the relationship only exists when it is convenient. In finding that *Jicarilla* could not apply the fiduciary exception, the Court essentially held that the U.S.-tribal trust relationship does not require strict fiduciary standards. This, of course, is not consistent with a typical trust relationship.

As Justice Sotomayor notes in her dissent, "[s]ince 1831, this Court has recognized the existence of a general trust relationship between the United States and Indian tribes."[131] Statutes like 25 U.S.C. § 162a(d) and the timber management statutes at issue in *Mitchell II* reaffirm that the United States is a statutorily obligated trustee of Indian land and resources, not merely a trustee in name only.[132] "Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government."[133] Given the magnitude of resources the United States holds in trust for Indians, and given that Native Americans rely on the government to prudently manage those resources, it is difficult to accept that the government is in such a "special" position to pick and choose when a true trust relationship exists.

The attorney-client privilege is a product of the common law, not codified in statute, but the Court says the government can invoke it. However, Jicarilla cannot claim the fiduciary exception because there is not a statute on point saying it can. If the government can use the common law, tribes should be permitted to as well.

B. The United States Has Not Only Statutory but Common Law Fiduciary Obligations to Native Americans

In the majority opinion of *Jicarilla*, the Court held that common law principles could not be invoked to require a fiduciary duty to disclose the

130. *Id.* at 2323.

131. *Id.* at 2334 (Sotomayor, J., dissenting); *see* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

132. *See Mitchell II*, 463 U.S. 206, 225 (1983) (finding construction of the timber management statutes "reinforced by the undisputed existence of a general trust relationship between the United States and Indian people").

133. COHEN, *supra* note 1, at 420-21.

communications at issue.[134] However, the majority fails to recognize prior decisions that looked to the common law.[135] For example, in *Mitchell II*, the Supreme Court held that certain timber management statutes created a fiduciary relationship between the United States and the Tribe.[136] Finding that a fiduciary relationship arises when "the Government assumes . . . elaborate control over" Indian property, the Court found all of the "elements of a common-law trust [were] present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)."[137] Thus, the Court found it was well within its power to find that the government was subject to the obligations that attach to a trustee acting in a fiduciary capacity.

The facts in this case are similar. There is a trustee (the United States), a beneficiary (the Jicarilla Tribe), and a trust corpus (assets from 900,000 acres of land). The majority opinion, however, likens the facts of this case to *Mitchell I*, finding that 25 U.S.C. § 162a(d) is similar to the GAA at issue in *Mitchell I*, in that the statute is devoid of congressional intent to obligate the government to full fiduciary duties.[138] The Court's reasoning is flawed. If a statute, like the one at issue in *Mitchell II* and in this case, is specific and defines the government's role as a trustee, a court is free to interpret the statute as creating a full fiduciary relationship.[139] This is especially true when there is a statute like 25 U.S.C. § 162a(d) that contains language by which common law principles can be inferred. *Mitchell II* has never been overruled, and should have been the controlling law in this case.

Similar to *Mitchell II*, in *White Mountain Apache*, the Court found that since the government held in trust certain Reservation property, "elementary trust law . . . confirms the commonsense assumption that a fiduciary actually administering the trust property may not allow it to fall into ruin . . . ."[140] Just like the fiduciary duty that attaches to a private trustee who controls how the trust corpus is managed, the same fiduciary duty attaches to the government when it assumes similar control over tribal assets, even if that duty is a product of the common law.

In *Jicarilla*, 25 U.S.C. § 162a(d) points to a fiduciary relationship between the United States and the Tribe. The title of § 162a(d), "Trust

134. *Jicarilla III*, 131 S. Ct. at 2323-28.
135. *Id.* at 2331-32 (Sotomayor, J., dissenting).
136. *Mitchell II*, 463 U.S. at 228.
137. *Id.* at 225.
138. *Jicarilla III*, 131 S. Ct. at 2325.
139. *Mitchell II*, 463 U.S. at 225.
140. United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003).

responsibilities of Secretary of Interior," indicates on its face that the government is tasked with certain control over the management of the trust. And "while the presence of the word 'trust'" is not always determinative in the analysis, it "will be given great weight."[141] When the United States assumes a role as trustee of Native American funds, it also assumes common law fiduciary obligations.

There is no statute that says the United States must disclose attorney-client communications regarding the management of a tribe's trust. But if one accepts that there is a true fiduciary relationship between the United States and the tribe, there would be no need for one, and moreover, there would be no reason why general trust principles could not be applied to fill in the gap left by 25 U.S.C. § 162a(d) to infer other duties of disclosure. "The general 'contours' of the government's [fiduciary] obligations may be defined by statute, but the interstices must be filled in through reference to general trust law."[142]

In addition, there is no evidentiary reason why the common law fiduciary exception to the attorney-client privilege could not be applied. Federal Rule of Evidence 501 states explicitly that the rules governing evidentiary privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[143]

As mentioned earlier, there is a certain amount of injustice in allowing the United States to claim a common law privilege absent statutory authority, yet flatly denying tribes the right to claim the fiduciary exception to that privilege simply because there is no statute that explicitly says they can. As *Jicarilla* noted in its brief, pointing to *United States v. Mett*, "the government itself has invoked the exception in litigation involving private fiduciaries."[144] In a recent case, for example, the Fourth Circuit held that the Secretary of Labor could invoke the fiduciary exception to overcome a claim of attorney-client privilege by employee benefit plans accused of mismanaging ERISA funds.[145]

To say the government may invoke the exception, albeit only in certain circumstances, but the tribe cannot, is patently unfair. A trust, at its very

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141. COHEN, *supra* note 1, at 429-30.

142. Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001).

143. FED. R. EVID. 501.

144. Brief for Respondent at 7, United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011) (No. 10-382), 2011 WL 1089622, at *7 (citing United States v. Mett, 178 F.3d 1058, 1061, 1064 n.9 (9th Cir. 1999)).

145. *See* Solis v. Food Emp'rs Labor Relations Ass'n, 644 F.3d 221, 224 (4th Cir. 2011).

core, is a relationship between the trustee and the beneficiaries. It is a two-way street, with information, obligations, and power flowing both ways between the beneficiary and the trustee. If the government can invoke the attorney-client privilege absent a statutory basis, but Jicarilla cannot invoke the fiduciary exception to the privilege because there is no statute that says it can, then the trust relationship starts to resemble a one-way street. A trust that has power flowing *only* one way, with one side making all the decisions, begins to take the form of a dry or passive trust — in other words, no trust at all.

On its face, this opinion may appear to apply only to a simple issue of evidentiary privilege. Considered more closely, this case illustrates how the Supreme Court has once again chipped away at the U.S.-tribal trust relationship. The implication of the Court's holding is that the government, as trustee, has no real duties and little accountability when viewed through the language of 25 U.S.C. § 162a(d). To hold that the government's fiduciary duties are limited by statute is to effectively render tribes powerless in obtaining redress for trust mismanagement. It also effectively renders the language of § 162a(d) useless because it says that the government's duties "are not limited to" those listed. Once again, the Court's holding reinforces that the trust relationship is a one-way street. This, however, is not acceptable if a true tribal trust relationship is to exist. There must be some middle ground.

Three general principles are embedded in trust law: (1) the trustee owes the beneficiary a duty of loyalty; (2) the trustee must act as a prudent investor; and (3) the trustee must provide the beneficiary with a certain degree of access to trust management information.[146] These three principles are universal, regardless of whether they are being applied in the private trust context or the tribal trust context. It would be difficult to imagine a trustee, in any context, who would not at least be subject to these three obligations. In the U.S.-tribal trust context, these three doctrines are not codified in statute, but it would be contrary to general trust law to say that they are not implied.

When the government assumes responsibility for the management of tribal assets, it also assumes an obligation to act as a loyal, prudent investor. As trustee, the government additionally assumes a general, fiduciary obligation to provide beneficiaries of the trust corpus with a certain degree of access to information that pertains to the management of the tribal trust. While these obligations are statutorily absent, they must not be disregarded.

146. *See supra* notes 7-15 and accompanying text.

The language of 25 U.S.C. § 162a(d) specifically "recognize[s] that the Government has pre-existing trust responsibilities that arise out of the broader statutory scheme governing the management of Indian trust funds."[147] Congress placed the "but are not limited to" language into the statute in order to recognize that certain trust principles, while not expressly listed, are inherent in the U.S.-tribal trust relationship.[148] Any other reading of the statutory language would be invalid. The statute clearly gives courts the ability to infer certain trust obligations, and to do so, if needed, on a case-by-case basis. In relation to the third principle mentioned above, the statute allows a court to "flesh out the Government's disclosure obligations under the broader statutory regime, consistent with its role as a conventional fiduciary . . . ."[149]

Through its holding, the Supreme Court refused to interpret the language of § 162a(d), and effectively disregarded it entirely. The majority opinion recognizes that § 162a(d) "delineates 'trust responsibilities of the United States,'" but reiterates that the common law does not override the government's disclosure obligations.[150] However, the Court also says "common-law principles are relevant only when applied to a 'specific, applicable, trust-creating statute or regulation.'"[151]

The Court's reasoning that common law principles could not be applied to the trust-creating statute is flawed. First, § 162a(d) is certainly a trust-creating statute because it specifically defines the duties of the government in managing tribal trust assets. Second, since the statute is trust creating, the Court is free to apply common law principles. As the Court stated, common law principles can be applied to a statute that creates a trust and defines the responsibilities of the government in managing that trust.[152] Instead, the Court dismisses its own initial analysis and concludes, "the common law of trusts *does not* override the specific trust-creating statute and regulations that apply here."[153]

This is all-or-nothing approach is simply unnecessary. An application of common law trust principles would not override the specific disclosure obligations set forth in the statute. It would merely supplement the statute. Title 25 U.S.C. § 162a(d) is a way by which a court can infer additional

147. *Jicarilla III*, 131 S. Ct. 2313, 2341 (2011) (Sotomayor, J., dissenting).
148. 25 U.S.C. § 162a(d) (2006).
149. *Jicarilla III*, 131 S. Ct. at 2341 (Sotomayor, J., dissenting).
150. *Id.* at 2329-30 (majority opinion).
151. *Id.* at 2329 (quoting United States v. Navajo Nation, 556 U.S. 287, 302 (2009)).
152. *Id.* at 2329-30.
153. *Id.* (emphasis added).

obligations of the government, not override what is already stated in the statute. The Court could have easily adopted a theory of analysis that would allow courts in the future to make a case-by-case determination, with the aid of general trust principles. In the interest of fairness, tribes should not have a trust relationship initially forced upon them, only later to have it disavowed when convenient for the government.

C. A Workable, Narrow Application of the Fiduciary Exception to Attorney-Client Privilege Can Coexist with U.S. Interests and Its Position as Sovereign

In the CFC proceeding, the United States did not assert any specific conflict of interest, yet the Supreme Court held that conflicts of interest were but another reason why the fiduciary exception should not be applied. In the Court's view, an identification of all the competing interests would be "much too burdensome." In reality, however, an identification of conflicting interests would not be more difficult than issues of privilege that the Court must already consider. Like the CFC did when it reviewed the documents *in camera*, courts in the future could do the same. As Justice Sotomayor points out in her dissent, typical "privilege determinations" are already made on a case-by-case basis.[154] Thus, courts would not really be taking an additional step in the privilege determination process. If a conflict of interest exists, the government would have to argue it just as they would any other privilege issue. The Court, then, would take its argument into consideration, eventually making a privilege determination.

But flatly denying a tribe the right to see how their trust was being managed based on the assertion that there *might be* a conflict of interest makes it far too easy to evade accountability. After all, "the existence of competing interests is not unique to the Government as trustee."[155] Private trustees, with obligations to multiple beneficiaries, are often confronted with competing interests, yet cannot deny a beneficiary information simply because it might create a conflict of interest issue. Thus, characterizing the United States as unique in light of its obligations to many tribes is not a valid argument that would justify withholding information. Just like private trustees, the government must balance competing interests, and a court must make a case-by-case determination of each interest, not apply an all-or-nothing rule that denies a tribe access to information.

154. *Id.* at 2338 (Sotomayor, J., dissenting).
155. *Id.* at 2337-38.

The Supreme Court went to great lengths to distinguish the government's role from that of a private trustee. As a sovereign entity, Justice Alito explained, the United States is carrying out its own distinct interests.[156] While this is true, it in no way diminishes the relationship between the United States and Native Americans. Like the government, Native Americans also have a distinct interest in ensuring that their assets are properly managed. In theory, one would think a distinct interest of a sovereign, such as the United States, would be to promote fair and democratic justice to a historically mistreated people.

In discussing the government's relationship with Native Americans, the Court in *Seminole Nation v. United States* recognized that there is a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[157] That "distinctive obligation" should actually elevate the United States to a higher duty than a private trustee, or at least put it in a comparable position. "The standard of duty as trustee for Indians is not mere reasonableness, but the highest of fiduciary standards."[158] The government, then, if it wishes to retain a trust relationship with Native Americans, in a legal and metaphorical sense, must adhere to fiduciary standards in the future.

IV. Conclusion

The effect of the *Jicarilla* case is not merely that the fiduciary exception to attorney-client privilege does not apply in the tribal trust context; it also represents a general trend toward the degradation of the U.S.-tribal trust relationship as a whole. The United States has assumed the role of trustee of tribal assets, and it should thus be subject to the fiduciary obligations that result when such power is exercised. There is no doubt that a trust relationship exists between the United States and Native Americans. The government must accept that general trust principles, not codified in statute, but embedded in general trust doctrine and the common law, govern how it acts in managing Indian funds.

To deny a tribe access to information is to deny a tribe of its legal right to hold the government, as trustee, to the fiduciary standards that all trustees must uphold. The government's duties should not be limited by statute, but rather supplemented, in the interest of fairness, by general trust doctrine. If

156. *Id.* at 2324 (majority opinion).

157. 316 U.S. 286, 296 (1942).

158. American Indians Residing on the Maricopa-Ak Chin Reservation v. United States, 667 F.2d 980, 990 (Ct. Cl. 1981).

the United States continues to limit its own trust duties for the sake of convenience and legal advantage, the tribal trust stands in grave danger of becoming no trust at all.