SUPREME COURT OF THE UNITED STATES

No. 01–1067

UNITED STATES, PETITIONER *v.* WHITE MOUNTAIN APACHE TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[March 4, 2003]

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

The majority's conclusion that the Court of Federal Claims has jurisdiction over this matter finds support in neither the text of the 1960 Act, see Pub. L. 86–392, 74 Stat. 8, nor our case law. As the Court has repeatedly held, the test to determine if Congress has conferred a substantive right enforceable against the Government in a suit for money damages is whether an Act "can fairly be *interpreted* as mandating compensation by the Federal Government for the damage sustained." *United States* v. *Testan*, 424 U. S. 392, 400 (1976) (quoting *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967)) (emphasis added). Instead of faithfully applying this test, however, the Court engages in a new inquiry, asking whether common-law trust principles permit a "fair inference" that money damages are available, that finds no support in existing law. *Ante*, at 6. But even under the majority's newly devised approach, there is no basis for finding that Congress intended to create anything other than a "bare trust," which we have found insufficient to confer jurisdiction on the Court of Federal Claims in *United States* v. *Mitchell*, 445 U. S. 535 (1980) *(Mitchell I)*. Because the 1960 Act "can[not] fairly be interpreted as mandating compensation by the Federal

Government for damage sustained" by the White Mountain Apache Tribe (Tribe), *Testan*, *supra,* at 400, I respectfully dissent.

I

In *United States* v. *Testan, supra,* at 400, the Court stated that a "grant of a right of action [for money damages against the United States] must be made with specificity." Accord, *Army and Air Force Exchange Service* v. *Sheehan,* 456 U. S. 728, 739 (1982) (stating that, under the Tucker Act, "jurisdiction over respondent's complaint cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages"). The majority agrees that the 1960 Act does not specifically authorize the award of money damages; indeed, the Act does not even "spea[k] in terms of money damages or of a money claim against the United States." *Gnotta* v. *United States*, 415 F. 2d 1271, 1278 (CA8 1969) (Blackmun, J.). Instead, the Court holds that the use of the word "trust" in the 1960 Act creates a "fair inference" that there is a cause of action for money damages in favor of the Tribe. *Ante*, at 7.

But the Court made clear in *Mitchell I* that the existence of a trust relationship does not itself create a claim for money damages. The General Allotment Act, the statute at issue in *Mitchell I*, expressly placed responsibility on the United States to hold lands "in trust for the sole use and benefit of the Indian . . . ." 445 U. S., at 541 (quoting 24 Stat. 389, as amended, 25 U. S. C. §348). Despite this language, the Court concluded that the congressional intent necessary to render the United States liable for money damages was lacking. The Court reasoned that the General Allotment Act created only a "bare trust" because Congress did "not *unambiguously* provide

that the United States ha[d] undertaken full fiduciary responsibilities as to the management of allotted lands."[1] 445 U. S., at 542.

The statute under review here provides no more evidence of congressional intent to authorize a suit for money damages than the General Allotment Act did in *Mitchell I*. The Tribe itself acknowledges that the 1960 Act is "silen[t]" not only with respect to money damages, but also with regard to any underlying "maintenance and protection duties" that can fairly be construed as creating a fiduciary relationship. Brief for Respondent 11; see also 249 F. 3d 1364, 1377 (CA Fed. 2001) ("It is undisputed that the 1960 Act does not explicitly define the government's obligations"). Indeed, unlike the statutes and regulations at issue in *United States* v. *Mitchell*, 463 U. S. 206 (1983) *(Mitchell II),* the 1960 Act does not "establish . . . 'comprehensive' responsibilities of the Federal Government in managing the" Fort Apache property. *Id.,* at 222. Because there is nothing in the statute that "clearly establish[es] fiduciary obligations of the Government in the management and operation of Indian lands," the 1960 Act creates only a "bare trust." *Id.,* at 226.

In addition, unlike the statutes and regulations at issue

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[1] The Court of Claims has observed that the relationship between the United States and Indians is not governed by ordinary trust principles: "The general relationship between the United States and the Indian tribes is not comparable to a private trust relationship. When the source of substantive law intended and recognized only the general, or bare, trust relationship, fiduciary obligations applicable to private trustees are not imposed on the United States. Rather, the general relationship between Indian tribes and [the United States] traditionally has been understood to be in the nature of a guardian-ward relationship. A guardianship is not a trust. The duties of a trustee are more intensive than the duties of some other fiduciaries." *Cherokee Nation of Oklahoma* v. *United States*, 21 Cl. Ct. 565, 573 (1990) (citations and internal quotation marks omitted).

in *Mitchell I* and *Mitchell II*, "[n]othing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust." 249 F. 3d, at 1384 (Mayer, C. J., dissenting); see also *id.,* at 1375 ("It is undisputed that the 1960 Act contains no . . . requirement" for the United States "to manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans"). The 1960 Act authorizes the "Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." 74 Stat. 8. The Government's use of the land does not have to inure to the benefit of the Indians. Nor is there any requirement that the United States cede control over the property now or in the future. Thus, if anything, there is less evidence of a fiduciary relationship in the 1960 Act than there was in the General Allotment Act at issue in *Mitchell I*.

If Congress intended to create a compensable trust relationship between the United States and the Tribe with respect to the Fort Apache property, it provided no indication to this effect in the text of the 1960 Act. Accordingly, I would hold that the 1960 Act created only a "bare trust" between the United States and the Tribe.

II

In concluding otherwise, the majority gives far too much weight to the Government's factual "control" over the Fort Apache property, which is all that distinguishes this case from *Mitchell I*. The majority holds that the United States "has obtained control at least as plenary as its authority over the timber in *Mitchell II*." *Ante*, at 8. This analysis, however, "misconstrues . . . *Mitchell II* by focusing on the extent rather than the nature of control necessary to establish a fiduciary relationship." 46 Fed. Cl. 20, 27

(1999). The "timber management *statutes* . . . and the *regulations* promulgated thereunder," *Mitchell II*, 463 U. S., at 222 (emphasis added), are what led the Court to conclude that there was "pervasive federal control" in the "area of timber sales and timber management," *id.*, at 225, n. 29. But, until now, the Court has never held the United States liable for money damages under the Tucker Act or Indian Tucker Act based on notions of factual control that have no foundation in the actual text of the relevant statutes.

Respondent argues that *Mitchell II* raised control to talismanic significance in our Indian Tucker Act jurisprudence. To be sure, the Court did state:

> "[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and properties belonging to the Indians. . . . '[W]here the Federal Government takes on or has control or supervision over tribal monies or properties. . . (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.'" *Id.,* at 225 (quoting *Navajo Tribe* v. *United States*, 224 Ct. Cl. 171, 183, 624 F. 2d 981, 987 (1980)).

However, this case does not involve the level of "*elaborate* control over" the Tribe's property that the Court found sufficient to create a compensable trust duty in *Mitchell II*. *Mitchell II* involved a "comprehensive" regulatory scheme that "addressed virtually every aspect of forest management," and under which the United States assumed "*full* responsibility to manage Indian resources and land for the benefit of the Indians." 463 U. S., at 220, 222, 224 (emphasis added). Here, by contrast, there are no management duties set forth in any "fundamental document," and thus the United States has the barest degree of control

over the Tribe's property. And, unlike *Mitchell II*, the bare control that *is* exercised by the United States over the property does not inure to the benefit of the Indians. *Supra,* at 4. In my view, this is more than sufficient to distinguish this case from *Mitchell II*.

Moreover, even assuming that *Mitchell II* can be read to support the proposition that mere factual control over property is sufficient to create compensable trust duties (which it cannot), the Court has never provided any guidance on the nature and scope of such duties. And, in any event, the Court has never before held that "control" alone can give rise to, as the majority puts it, the specific duty to "preserve the property." *Ante*, at 8. Indeed, had Congress wished to create such a duty, it could have done so expressly in the 1960 Act. Its failure to follow that course strongly suggests that Congress did not intend to create a compensable trust relationship between the United States and the Tribe.

In addition, the Court's focus on control has now rendered the inquiry open-ended, with questions of jurisdiction determined by murky principles of the common law of trusts,[2] and a parcel-by-parcel determination whether

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[2] Even assuming the common law of trusts is relevant to determining whether a claim of money damages exists against the United States, it is well established that a trustee is not ultimately liable for the costs of upkeep and maintenance of the trust property. See Restatement (Second) of Trusts §244 (1957) ("The trustee is entitled to indemnity out of the trust estate for expenses properly incurred by him in the administration of the trust"); 3A A. Scott, W. Fratcher, The Law of Trusts §244, p. 325 (4th ed. 1988) ("[The trustee] is entitled to indemnity for liabilities properly incurred for the payment of taxes, for repairs, for improvements . . ."). Besides making the bald assertion that money damages "naturally follo[w]" from the existence of a trust duty, *ante*, at 8 (internal quotation marks omitted), the Court makes no attempt to explain how a damages remedy lies against the United States when the same remedy would not be available against a private trustee.

"portions of the property were under United States control," 249 F. 3d, at 1383. Such an approach provides little certainty to guide Congress in fashioning legislation that insulates the United States from damages for breach of trust. Instead, to the ultimate detriment of the Tribe, Congress might refrain from creating trust relationships out of apprehension that the use of the word "trust" will subject the United States to liability for money damages.

* * *

The Court today fashions a new test to determine whether Congress has conferred a substantive right enforceable against the United States in a suit for money damages. In doing so, the Court radically alters the relevant inquiry from one focused on the actual fiduciary duties created by statute or regulation to one divining fiduciary duties out of the use of the word "trust" and notions of factual control. See *ante*, at 7–8. Because I find no basis for this approach in our case law or in the language of the Indian Tucker Act, I respectfully dissent.