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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 10-382

JICARILLA APACHE NATION :

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Washington, D.C.

Wednesday, April 20, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

PRATIK A. SHAH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

STEVEN D. GORDON, ESQ., Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument today in case 10-382, United States v. Jicarilla Apache Nation.

Mr. Shah.

ORAL ARGUMENT OF PRATIK A. SHAH

ON BEHALF OF THE PETITIONER

MR. SHAH: Mr. Chief Justice, and may it please the Court:

Relying on common law trust principles applicable to private fiduciaries, the Federal Circuit imposed on the United States a duty to disclose attorney-client privileged communications to an Indian tribe. That abrogation of the privilege should be reversed for at least three reasons.

First, reflecting the sovereign nature of the United States function, the Indian trust context lacks the factors essential to recognition of a private trust fiduciary exception. Unlike in a private trust, government attorneys and other Federal officials owe an exclusive duty of loyalty to the United States, not to the beneficiary. The government pays the cost of trust administration out of appropriated funds, not out of the trust corpus. The government, not the trust, owns the

1 resulting record, and the release of such governmental
2 record, including to a tribe or individual Indian, is
3 governed by specific statutes and regulations as well as
4 the Freedom of Information Act, not the common law.

5 Second, the decision below conflicts with
6 this Court's precedents that distinguish the United
7 States from a private trustee and that reject
8 enforcement of duties governing the administration of
9 Indian property that are not set forth by specific
10 statute or regulation.

11 The fiduciary exception to the
12 attorney-client privilege is premised on a private
13 trustee's general common law duty to disclose trust
14 information, but no statute or regulation imposes such a
15 duty on the United States.

16 JUSTICE SOTOMAYOR: Counsel, all of the
17 statutes relating to these funds use the word "trust."
18 Not one statute defines trust and says in any way this
19 is not a fiduciary relationship. To the contrary, in
20 fact, most of the statutes require what would be
21 consistent with fiduciary obligations, and at least one
22 of them that you rely on says "but not limited to."

23 So the issue before us doesn't involve a
24 competing sovereign interest by the U.S. You've
25 conceded that in your cert petition. The circuit below

1 said this is not a case where there is an independent
2 sovereign issue governing the U.S. activities. Just
3 explain to me what's the rationale that would permit a
4 trustee of a trust fund to withhold from the beneficiary
5 the kinds of documents that relate to the management of
6 the fund? If the funds exist for the benefit of the
7 Indian tribe, why aren't they entitled to management
8 documents?

9 MR. SHAH: Okay --

10 JUSTICE SOTOMAYOR: That's the part that
11 doesn't make -- that you're not explaining.

12 JUSTICE GINSBURG: Mr. Shah, you might want
13 to make your third point. You said you had three points
14 preliminarily, so why don't you make your third point
15 and then respond to the question.

16 MR. SHAH: Sure, Your Honor. The third
17 point is that the Federal Circuit's decision poses
18 serious practical problems for the government because
19 the general common law duty to disclose which undergirds
20 the fiduciary exception extends to all trust information
21 without regard to the existence of litigation; excepting
22 it implies a broad and burdensome disclosure obligation.
23 For example, there are over 300,000 individual account
24 holders, individual Indian account holders on top of the
25 tribal, tribal account holders. If this Court were to

1 accept the fiduciary exception and thereby ratify the
2 underlying rationale, presumably then any one of those
3 or all of those 300-plus thousand individual account
4 holders could simply call up the Interior Department and
5 request all related trust records outside of the
6 existing statutory and regulatory regime.

7 Now, Justice Sotomayor, let me turn back to
8 your set of questions, and let me start with the first
9 point that you made, which is the statutes here use the
10 term trust; why doesn't that connote some sort of broad
11 fiduciary relationship? This Court has made clear in
12 its precedents, and it dates back to the Mitchell 1, the
13 first decision in Mitchell case, where Congress's use of
14 the term "trust," the Court said, does not imply the
15 full gamut of common law fiduciary obligations.

16 The dissent made precisely -- the dissent in
17 Mitchell made precisely the argument that you're
18 sketching out here, which is when Congress uses a term
19 like trust, we would naturally assume that it implies
20 fiduciary obligations. The majority in Mitchell
21 rejected that notion, and in fact in Mitchell 2 in the
22 Navajo Nation decisions, the Court has continued to
23 reject that proposition. But more -- more than as a
24 matter of precedent I think that makes --

25 JUSTICE SOTOMAYOR: But in both -- in all of

1 those cases, counsel, it was a limitation related to
2 competing interests, meaning it was recognizing that
3 there are potentially moments in which an attorney is
4 acting both in the interest of the government and in the
5 interest of the tribe.

6 MR. SHAH: Justice Sotomayor, with respect,
7 there is no competing interest that I'm aware of that
8 were mentioned in -- in the Mitchell decisions, Mitchell
9 1, Mitchell 2, or even the Navajo Nation decision.
10 Those were simply -- in Mitchell 1 it was the Indian
11 General Allotment Act, which said that the United States
12 "shall hold in trust" land for the benefit of the
13 Indians. The argument made by the tribe in that case
14 and by the dissenters in the Court was when the Court
15 said you shall hold the land in trust, that implies
16 certain management and other responsibilities for
17 resources related to that land. This Court said no,
18 when Congress uses the term "trust" in the Indian
19 context, that there must be specific statutory
20 regulatory duties that the Court sets out. Let me
21 explain --

22 JUSTICE SOTOMAYOR: But that was a
23 jurisdictional question, not a question with respect
24 to -- to the -- to the obligation. You're not seriously
25 suggesting that if you're a trustee of an Indian fund

1 that you can breach your fiduciary duty by simply not
2 exercising care in your investment strategies. So some
3 form of -- of duty exists.

4 MR. SHAH: Sure, and let me --

5 JUSTICE SOTOMAYOR: -- from the common law,
6 and the common law has to define that.

7 MR. SHAH: Well, Your Honor, I agree
8 everything up to the point when you said we go to the
9 common law. Of course there would be in this context
10 some enforceable duties with respect to investment of
11 the funds held in trust, and that's because the relevant
12 statutes, section 161a and 162a, set forth specific
13 investment duties that the government must comply with.
14 Now, as to your other point, that Mitchell 1 and the
15 Navajo Nation --

16 JUSTICE SOTOMAYOR: And so why would, if it
17 imposes those duties, protect you from disclosing items
18 that might -- attorney confidences that go to that very
19 act, the very act of investing in the way, even under
20 your definition, that the trust requires you to?

21 MR. SHAH: A couple responses, Your Honor.
22 The -- the two statutes that you're talking about, 161a
23 and 162a, set forth specific investment duties. They
24 don't say anything about disclosure. The 1994 Act does
25 set forth some disclosure obligations, but they are

1 extremely discrete. There are essentially two
2 disclosure obligations that all of these statutes
3 together impose. The -- the United States must provide
4 an account statement, a quarterly account statement; and
5 the United States must provide the -- the Indian tribes
6 and individual Indians an annual audit. That is the
7 extent of disclosure obligations that Congress has set
8 forth and that the Interior Department by regulation has
9 implemented.

10 Now, to the -- to the extent that your
11 question suggests that the tribes may need more in order
12 to enforce those enforcement duties, I think the -- the
13 account statements and the annual audit goes a long way
14 towards suggesting that if there is a problem, then the
15 tribe may want to try to enforce those duties.

16 The other point I would make is, although
17 the legally enforceable duties under this Court's
18 decisions in Mitchell and Navajo Nation are those set
19 forth by statute and regulation, that doesn't mean the
20 Interior Department doesn't have discretion to provide
21 more information. And in fact, in practice, the
22 Interior Department does provide a much broader swath of
23 information to the Indian tribes regarding these
24 accounts than the two discrete pieces of information
25 that the statutes set forth.

1 JUSTICE ALITO: Do you agree that the -- do
2 you agree that the fiduciary exception is well
3 established as a general matter?

4 MR. SHAH: Your Honor, the United States
5 does not contest the existence of a fiduciary exception
6 in certain private trust contexts where the criteria for
7 that exception are satisfied. So the answer is no, we
8 don't, we don't dispute the existence in certain
9 contexts under certain circumstances of a fiduciary
10 exception.

11 JUSTICE ALITO: So if this cause arose in a
12 different context with a different trustee, the position
13 of the United States would be that under Rule 501 of the
14 Federal Rules of Evidence there is a fiduciary exception
15 to the attorney-client privilege?

16 MR. SHAH: Yes, Your Honor. It would depend
17 on the circumstances. For example, if it were a private
18 trust and the factors that -- in which the courts, the
19 old English cases, for example, have recognized where
20 the fiduciary exception applies, that is the information
21 is sought solely for the benefit of the beneficiary, the
22 expenses for that legal advice are paid out of the trust
23 corpus, and as a result of that, the resulting legal
24 advice and the resulting records belong to the trust
25 corpus. All of those things give right, as the old

1 English cases say, give right to a common law right of
2 access for the beneficiary to access those.

3 JUSTICE GINSBURG: Mr. Shah, you don't have
4 to take a position on that, because you don't represent
5 a private trustee. And the government can accept
6 arguendo that there would be such a relationship, but I
7 don't think you have to defend it.

8 MR. SHAH: Absolutely, the Court need not
9 decide that question in order to reach the question.
10 The Court can assume it arguendo and then go forward. I
11 think the critical point here is, though, that all of
12 the factors that underlie that -- that exception in the
13 private trustee concept are absent here. Here the
14 government is acting out of its own interest. It is
15 paying for the legal advice out of congressional
16 appropriations. The government owns the records at
17 issue by virtue of the Federal Records Act, by virtue of
18 Interior Department regulations, which are cited in the
19 back of our brief make very clear that the government
20 owns these records, and because they are governmental
21 records their disclosure is not governed by the common
22 law. There is a highly --

23 JUSTICE ALITO: The thrust of what -- my
24 understanding of the thrust of what Justice Sotomayor
25 was asking is something like the following: It's easy

1 to understand how there can be competing government
2 interests when you're talking about some, the management
3 of lands, things of that nature. But when you're just
4 talking about managing funds, what competing interests
5 can there be in practical terms? If you assume arguendo
6 that this exception applies to a private trustee, why
7 should it not apply to the government in practical
8 terms?

9 MR. SHAH: Sure. Let me provide two
10 responses, Justice Alito. First, I think as a formal
11 position I don't think our position turns, as a formal
12 matter, on the existence of a specific competing duty.
13 I think such a rule would overlook the ways in which the
14 U.S. inherently, United States inherently differs from a
15 private trustee. And I think that's especially true in
16 the light of the complex multifaceted ways in which the
17 government interacts with Indians and Indian tribes.
18 Those sovereign obligations extend to law -- providing
19 law enforcement, educational duties, health services.
20 One subset of those duties are the type of trust
21 responsibilities at issue in this case.

22 Now, to be more concrete, I think, even
23 putting aside that larger framework which may create
24 tensions between the United States and with -- and the
25 Indian tribes in certain circumstances, I think even in

1 the trust fund, purely in the trust fund context that
2 we're talking about, there could be at least tensions
3 that arise.

4 For example, the D.C. Circuit in the Cobell
5 case when it talked about the accounting obligation that
6 it imposed on the government, it made clear that it's
7 not the same accounting obligation that would apply at
8 common law. And the reason the D.C. Circuit gave was
9 because the United States would be taking that --
10 performing that obligation at the expense of taxpayers.
11 There are budgetary constraints that the United States
12 must take into consideration as a sovereign. Maybe
13 that's not a specific competing obligation in the formal
14 sense, but I think it's -- it's a factor that
15 distinguishes the United States from a private
16 fiduciary.

17 Also, there are -- for example in our brief
18 we discuss one of, just as an example, one of the
19 documents at issue in this case, which involves a
20 judgment by a tribal court seeking to attach funds from
21 an individual Indian money account. The United States
22 acts as a trustee with respect to that individual --
23 Indian account. It may be the case that the United
24 States consistent with its fiduciary obligations in that
25 sense could simply pay out the judgment, but I think

1 there would be room for the United States to take a
2 closer look at the judgment, to make sure that it
3 complies with, for example, the Indian Civil Rights Act
4 or basic due process --

5 JUSTICE BREYER: Suppose we have the Union
6 Trust Company, a private company that has 5,000 trust
7 accounts. One day the president of the company says to
8 the lawyer: Mr. Smith's account is in a special
9 situation. Will you please look into what we should do
10 for him as trustee? There's no implication for any
11 other account. There's no threat of litigation. I just
12 want to know what we're supposed to do. Now, I take it
13 the document that is subsequently written would be open
14 for Mr. Smith to get; is that right?

15 MR. SHAH: Yes, Your Honor. We do not --

16 JUSTICE BREYER: Yes, okay. Now, why should
17 the government be treated differently were the situation
18 identical to what I just proposed?

19 MR. SHAH: I think the response is, Your
20 Honor, is that the situation will never be identical to
21 the hypothetical you posed because the government
22 inherently differs, and let me set out --

23 JUSTICE SOTOMAYOR: But this argument,
24 frankly, would be -- we wouldn't have any need for 501,
25 because if as an evidentiary rule the government is

1 always different, then there is no situation in which
2 fiduciary duties in common law would ever exist.

3 MR. SHAH: To be clear, Justice Sotomayor,
4 the government is not arguing that no common law
5 exception to the attorney-client privilege can apply to
6 the government or that Federal Rule 501, Federal Rule of
7 Evidence 501 is otherwise inapplicable. We're making a
8 much more limited argument that this particular common
9 law fiduciary exception is not applicable to the
10 government, and that is because the premise of that
11 fiduciary exception does not apply.

12 JUSTICE SOTOMAYOR: Is there -- is there any
13 greater value to a fiduciary duty than to manage the
14 account for the benefit of the beneficiary? That's the
15 very essence of what a trust means, and so I'm having a
16 hard time understanding not a competing interest
17 situation where you're addressing a different statutory
18 requirement, but merely -- and that's what this case was
19 presented as, merely the management of the trust. So
20 what you're, it seems to me, you're arguing is there is
21 no duty. You're saying it's all defined by statute
22 only, but you're rendering -- there's no need to use the
23 word "trust" because it wouldn't be a trust.

24 MR. SHAH: Well, Your Honor, I don't think
25 that those two things are inconsistent. The fact that

1 we don't look to the common law to fill in all of the
2 duties doesn't mean that the government doesn't have
3 duties in this context. It has very specific duties, to
4 invest the funds properly, to invest the funds as set
5 forth in the statutes. What this Court has said could
6 not be done is to look at the general common law to
7 create obligations on the government.

8 JUSTICE BREYER: I would like to get an
9 answer to my question.

10 MR. SHAH: Sure.

11 JUSTICE BREYER: My question, to go back to
12 it, was imagine that the government has a thousand trust
13 accounts for a thousand tribes.

14 MR. SHAH: Okay.

15 JUSTICE BREYER: And imagine that several of
16 them consist of nothing more than \$500,000 in cash.

17 MR. SHAH: Okay.

18 JUSTICE BREYER: And one day the Secretary
19 of the Interior says to a lawyer: I fear there is kind
20 of a difficult fiduciary problem arising into account
21 number 302, which is owned by such and such tribe.
22 There is no threat of litigation. As far as I can tell,
23 the answer to this will have no implication for anything
24 else in the government. Will you please look at it and
25 give me a memo what to do?

1 Now, why should that memo not be given to
2 the lawyer for the tribe if in the identical case of the
3 Union Trust Company you would give the lawyer -- the
4 memo to the beneficiary?

5 MR. SHAH: A couple of reasons, Your Honor.
6 First, as this Court recognized, starting back in 1912
7 in the Heckman case, and reiterated in the Candelaria
8 and Minnesota cases after that, is that the United
9 States is not acting simply out of the beneficiary's
10 interests.

11 So in the hypothetical, the original
12 hypothetical that you posed in the corporation or the
13 bank that was acting as a trustee, there the trustee is
14 simply acting out of its fiduciary obligation solely to
15 benefit the beneficiary. That is not how the
16 governments work. As this Court made clear, the
17 government is acting not out of the beneficiary's
18 interests, it is acting out of its own sovereign
19 interest in managing the statutes and regulations that
20 govern the administration of Indian property. That's a
21 fundamental difference.

22 JUSTICE BREYER: You're saying, one, we're
23 not really a trustee totally?

24 MR. SHAH: Yes.

25 JUSTICE BREYER: Okay. Now, if we

1 treated -- the courts treated you as a trustee really
2 and totally --

3 MR. SHAH: Sure.

4 JUSTICE BREYER: -- in this very limited
5 situation I described, what harm would befall the
6 government?

7 MR. SHAH: Well, Your Honor, we would still
8 win, and here's why. The factors that -- even assuming
9 a common law trustee, the fiduciary exception doesn't
10 apply automatically at all common law trustees. There's
11 several things that underlie that fiduciary exception.

12 One, the -- the -- the advice sought is
13 typically paid for out of the trust corpus, and as a
14 result of that fact, the trust itself owns the records.
15 Those are the principal two factors that the cases
16 recognizing a fiduciary exception rely upon to create a
17 common law right of access of the beneficiary to such
18 records.

19 None of those factors are present here. The
20 government pays for these -- for -- for the cost of
21 administration, including legal advice, out of
22 congressionally appropriated funds. The records
23 resulting from that advice belonged to the government.
24 The government owns those records, both as a matter of
25 statute and regulation. And the disclosure of those

1 records is subject to a highly reticulated regime.
2 There are statutes, there is regulations, there is the
3 Freedom of Information Act. All of that would be
4 bypassed if this Court were to accept the fiduciary
5 exception in this context.

6 JUSTICE GINSBURG: Mr. Shah --

7 JUSTICE KENNEDY: Other than the time and
8 expense of going through voluminous records, which is
9 obvious, is there any other harm to the government in
10 being required to show that there's a competing interest
11 that makes disclosure unnecessary or improper?

12 MR. SHAH: Yes, Your Honor. As I said to
13 Justice Alito, it may not always be that the government
14 can point to a specific competing interest in the sense
15 that Justice Sotomayor is talking about, a competing
16 statutory interest. But there are inherently these
17 tensions, budgetary concerns, other ways in which the
18 United States interacts with Indian affairs.

19 JUSTICE GINSBURG: Is one -- is one of them
20 shielding government actors? I mean, from what you said
21 so far, on the one hand you recognize that it is what we
22 call a guardian, the guardian-ward relationship between
23 the United States and the tribe. But what you seem to
24 be suggesting is that the government has a dual focus,
25 and one is its guardianship relation to the tribe, but

1 the other is these are government actors and the
2 government is also interested in shielding its actors.

3 Is that -- is that it or is it a more
4 nebulous interest?

5 MR. SHAH: Well, Your Honor, I think it
6 could be more nebulous -- but -- but there -- I think
7 there is a real chilling concern. And I think this
8 dovetails into Justice Kennedy's question, that the
9 Interior Department, in order to properly administer, to
10 carry out the statutory and regulatory duties, it often
11 needs to seek the legal advice of -- of the lawyers in
12 the Interior office or in the Department of Justice. In
13 order to avoid the chilling the full and frank seeking
14 of rendering of legal advice, the same purposes --

15 JUSTICE SCALIA: Well, this is just the
16 general purpose behind the exception to 301, right,
17 the -- the exception for providing attorney's advice.
18 The ordinary private litigant doesn't have to show, when
19 he refuses to turn over attorney advice, that there's
20 some conflict which would make it harmful for him to
21 turn that over, does he?

22 MR. SHAH: Not as a general matter, Your
23 Honor. If -- if -- if we were in the private trustee
24 context and a court were to decide that the fiduciary
25 exception applied --

1 JUSTICE SCALIA: Not in the trustee context.
2 I'm just talking about the normal operation.

3 MR. SHAH: Oh, absolutely, Your Honor. The
4 justifications are general in nature and there isn't an
5 obligation to --

6 JUSTICE SCALIA: And -- and so, once you
7 establish that this isn't the normal trust complex, we
8 apply the normal Rule 301 law, and -- and that does not
9 require the person who declines to turn over the
10 information to show why it would really hurt him to turn
11 it over, right?

12 MR. SHAH: I think that's exactly correct,
13 Justice Scalia.

14 JUSTICE GINSBURG: How many -- how many of
15 these mismanagement suits are there? Do you have any
16 estimate?

17 MR. SHAH: Yes. Currently there are about
18 90 such pending suits, counting all of the district
19 courts as well as the Court of Federal Claims. And --
20 and -- and of course, this issue could arise in any of
21 those cases.

22 Let me get back to one of Justice
23 Sotomayor's questions, the -- the initial question about
24 the fact that the Congress has used the term "trust." I
25 think as a matter of precedent, both the Mitchell

1 decisions and the Navajo Nation decisions, I think those
2 are binding, controlling precedent, and the Court should
3 not deviate from those precedents that say a statute or
4 regulation must define the duty. But beyond the binding
5 nature of those precedents, I think they make sense from
6 first principles as well, and let me try to explain why.

7 The -- the -- the term "trust" has been used
8 by both Congress and the courts in a variety of ways,
9 often in a variety of imprecise ways, when it comes to
10 the relationship between the United States and Indians
11 and Indian tribes. Courts and Congress have used the
12 term when it comes to providing law enforcement, when it
13 comes to providing educational services, health
14 services, none of which are really the type of private
15 common law trust that we know.

16 And even in scenarios where there is a
17 discrete property interest that might bring us closer to
18 the common law context, this Court has used -- this
19 Court and Congress has recognized that "trust" can mean
20 a lot of different things. It can mean the type of bare
21 trust that was at issue in Mitchell 1, the Indian
22 General Allotment Act, when the trust was really simply
23 to avoid alienation of the land. It may mean specific
24 investment duties, as we have here.

25 But the point is that there is no "one size

1 fits all" trust terminology, and so that's why it makes
2 sense for this Court to require Congress to set forth
3 the specific duties and statutes, and the Interior
4 Department to set forth specific duties and regulations
5 before it implies such a sweeping obligation on the
6 United States.

7 I think it also flows from a more general
8 principle of a reluctance to hold the United States to
9 common law duties when there's an existing statutory and
10 regulatory regime. I think for all of those reasons,
11 not only as a matter of precedent, but as -- as a matter
12 of principle, I think the -- the -- the fiduciary
13 exception would -- would not apply here.

14 JUSTICE KENNEDY: I hadn't thought about
15 your argument until this -- until you made it this
16 morning, that if there -- if -- if the tribe is correct
17 that it owns these documents and gets -- can get them
18 anytime, but the -- the -- the trial court here divided
19 the documents into five categories.

20 MR. SHAH: Yes, Your Honor.

21 JUSTICE KENNEDY: As to some of those
22 categories it -- it denied -- it denied production.

23 MR. SHAH: Yes, Your Honor, but those --

24 JUSTICE KENNEDY: And I take it did that in
25 the context of recognizing the attorney-client

1 privilege, including work product, which were the
2 accountant's records.

3 MR. SHAH: Right. As I understand it,
4 you're right, Justice Kennedy, that most of the
5 documents that the -- the trial court said the
6 government didn't have to produce were, as you stated,
7 attorney work product privileges -- privileged
8 documents, and those the trial -- the trial court said
9 that no fiduciary exception would apply to the attorney
10 work product privilege. And it was on that basis that
11 it allowed the government to withhold the documents.

12 If there are no further questions, I would
13 like to reserve the remainder of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Shah.

15 MR. SHAH: Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Mr. Gordon.

17 ORAL ARGUMENT OF STEVEN D. GORDON

18 ON BEHALF OF THE RESPONDENT

19 MR. GORDON: Mr. Chief Justice, and may it
20 please the Court:

21 The Jicarilla Apache Nation has sued the
22 government for mismanaging millions of dollars of its
23 trust monies. No trustee in this situation, including
24 the government, is entitled to withhold the legal advice
25 that it has received about managing the beneficiary's

1 money. The beneficiary is entitled to see that legal
2 advice, so that it can determine whether the trustee
3 followed the advice.

4 CHIEF JUSTICE ROBERTS: It's -- you don't
5 doubt that in this context sovereign commands would
6 trump trustee obligations, do you? In other words, if
7 Congress --

8 MR. GORDON: I -- I -- I do not -- I do not,
9 Mr. Chief Justice.

10 CHIEF JUSTICE ROBERTS: Okay.

11 MR. GORDON: The -- the notion of -- the
12 issue here is an issue of evidence, and it is controlled
13 by Federal Rule 501, which specifies that Federal courts
14 that resolve claims of privilege based on common law
15 principles. Under the common law, a trustee cannot
16 assert the attorney-client privilege to withhold from a
17 fiduciary legal advice about management of the trust.

18 That, I submit, is the end of the analysis.

19 JUSTICE ALITO: Well, what do you make of
20 the fact that the Uniform Trust Code reserves decision
21 on the question whether there is a fiduciary exception
22 to the attorney-client privilege? That seems to suggest
23 that as a general matter, this is not as
24 well-established as you seem to argue.

25 MR. GORDON: Your Honor, there are very --

1 there are a handful of States that have not recognized
2 the fiduciary exception, but there is no Federal circuit
3 that has refused to recognize it. Indeed, all of the
4 Federal circuits that have considered it have adopted
5 it, and it is recognized in both, as we stated in our
6 brief, the Restatement of Trusts and the Restatement of
7 the law Governing Lawyers.

8 JUSTICE GINSBURG: Mr. Gordon --

9 JUSTICE SCALIA: Has it ever been applied,
10 to your knowledge, where -- where it was not the case
11 that the trust paid for the attorney's advice out of the
12 trust funds and where the trust did -- where -- where
13 the trust owned the papers that consisted of the
14 attorney's advice? Is there any case where those two
15 conditions or either one of them did not exist where
16 the -- the trust was required to turn over the
17 attorney's advice?

18 MR. GORDON: Justice Scalia, I -- I cannot
19 cite a specific case --

20 JUSTICE SCALIA: Yes, but, see, that's the
21 argument of the government, that the exception, the
22 trust exception to the extent that it exists, was based
23 principally upon the fact that these papers belonged to
24 the trust and that the attorney's advice had been paid
25 for by the trust, so of course the trustee is entitled

1 to get it.

2 MR. GORDON: But that's not correct, if --
3 if I may, Mr. Justice. If you look at the seminal
4 American decision, the Riggs Bank decision that's cited
5 in both briefs, they talk about the rationales and they
6 said that the first rationale is that the trustee acts
7 as a proxy for the beneficiary in obtaining the advice.

8 The second rationale is that the trustee has
9 a general duty to disclose relevant information to the
10 beneficiary. The Court mentioned that one factor that
11 it would look at was who had paid for the legal advice,
12 but it did not suggest that that was determinative, and
13 indeed subsequent case law has made clear that it is
14 not, and the Restatement says explicitly that who paid
15 is not the controlling factor.

16 JUSTICE SCALIA: But you don't have a single
17 case?

18 MR. GORDON: Not that I can cite right now.
19 But it would be --

20 JUSTICE GINSBURG: I thought Riggs -- you
21 said Riggs was a case where the trust fund paid the
22 lawyer, and the Court distinguished cases where that
23 wasn't so, where the trustee was paying the lawyer for
24 the trustee's own protection, and the Court went out of
25 its way to say we are dealing with a case where the

1 lawyer is paid out of trust funds. In Riggs, the --
2 case, right?

3 MR. GORDON: Yes, Your Honor. But the issue
4 -- this is, I submit, letting the tail wag the dog.
5 What we are talking about is money that belongs to the
6 beneficiary. We're talking about money. We're not
7 talking about a bare trust. We're talking about a
8 full-fledged trust under Mitchell 2. Indeed, this Court
9 in Mitchell 2 said that trusts involving the management
10 of Indian money were full-fledged trusts. And in that
11 situation for the government to say that, while any
12 private fiduciary would be obliged to show to the
13 beneficiary the legal advice it's received when there's
14 an issue about whether it's fulfilled its fiduciary
15 duties, it's different because we've spent our
16 hard-earned money on these lawyers and we own the
17 records in issue. I mean, that doesn't make sense.

18 And basically as a matter of discovery,
19 which is where we are right now, the posture of the
20 case, whenever you seek discovery, in virtually all of
21 those circumstances the documents in issue are going to
22 belong to the opposing party.

23 CHIEF JUSTICE ROBERTS: Counsel, the
24 attorney-client privilege is policy-based and I'm
25 concerned about the policy implications of your

1 position. Our system has concluded that it works best
2 if people have candid advice from their lawyers, and my
3 concern here is if you're a lawyer -- you are a lawyer
4 -- and -- and you're asked for your advice by a
5 trustee --

6 MR. GORDON: Right.

7 CHIEF JUSTICE ROBERTS: -- and if you know
8 that that is going to be shared with the beneficiary,
9 you're going to give bland, mushy, hedging advice rather
10 than direct and candid advice to the trustee, because
11 it's going to be shared more widely beyond the trustee.
12 And that's -- that hurts not only the trustee, but also
13 the beneficiaries, whose trustee does not have candid
14 legal advice.

15 MR. GORDON: My response to that would be
16 twofold, Your Honor. The first is that that same
17 argument can be made for any private fiduciary, yet the
18 courts have felt that the more important relationship is
19 the relationship between the trustee and the
20 beneficiary, that that trumps the need for or the
21 desirability for private discussions between the --

22 CHIEF JUSTICE ROBERTS: So how does -- I
23 appreciate the point, but how does a trustee get candid
24 legal advice? In every case, isn't the -- the lawyer --
25 concerning his dealings with the beneficiary, with the

1 trust: I don't know if I have to do this or I have to
2 do this.

3 MR. GORDON: Right.

4 CHIEF JUSTICE ROBERTS: And it seems to me
5 if the -- if the information is always going to be
6 shared with the beneficiary, the trustee is always going
7 to get hedged advice.

8 MR. GORDON: Well, if it's never shared,
9 Your Honor, then it leaves it at the option of the
10 trustee to selectively waive the privilege when it's to
11 its advantage in a breach of trust suit.

12 JUSTICE SCALIA: No. Why can't the trustee
13 say: I'm going to hire my own lawyer? I'm not going to
14 pay this lawyer out of trust funds, so it will be my
15 lawyer, and his advice is only to me and serving my
16 interests? Why wouldn't -- why wouldn't that suffice?

17 MR. GORDON: I think the issue, Your Honor,
18 is whether that, in fact, is what the trustee is
19 seeking. If the trustee is seeking advice about
20 personal liability, then I certainly agree that the
21 trustee could do that. If the trustee instead is
22 seeking advice, regardless of who pays for it, but is
23 seeking legal advice about how the trustee should manage
24 money belonging to the beneficiary --

25 CHIEF JUSTICE ROBERTS: Well, that's always

1 a question of liability. If he messes up and doesn't
2 manage it the way he's supposed to, he will be liable.
3 So the distinction you draw doesn't seem to me to be a
4 workable one.

5 MR. GORDON: Well, Your Honor, I -- I submit
6 that the whole issue is if there is a suit for breach of
7 trust, which is the precondition for all of this,
8 whether in that circumstance the trustee is obliged to
9 produce the legal advice that it has received so the
10 beneficiary can be --

11 JUSTICE SCALIA: The trustee cannot hire his
12 own lawyer, you're saying. So long as he's a trustee,
13 he cannot hire his own lawyer to get advice on how to
14 manage the trust in a way that will avoid his liability.
15 He just can't do it, right? Trustees can't --

16 MR. GORDON: Yes, Your Honor, that's the
17 position. And that puts the government in no different
18 position than private beneficiaries or ERISA
19 beneficiaries or any other sorts of beneficiaries.

20 JUSTICE KENNEDY: What's your best case that
21 you have on that in the private trustee context? I had
22 thought your answer was going to be that in that case,
23 the fact that the payment is made by the trustee out of
24 the trustee's own funds and not out of the trust funds
25 might be dispositive and might give him the privilege.

1 But you -- you seem to say, in answer to the questions
2 from the Court, that, other than this distinction you
3 make between what the personal liability is and how he
4 ought to manage the trust, which I think is a murky
5 distinction, that the documents have to be disclosed.
6 What's your best case for that?

7 MR. GORDON: Justice Kennedy, let me respond
8 to that. And I agree that who is paying for it -- if
9 the trustee is paying for it out of his own or her own
10 pocket, that is a factor that certainly should be looked
11 at and would be entitled to -- to some weight in terms
12 of what the purpose of the advice was for; but
13 ultimately the issue is whether the trustee is seeking
14 to protect personal interests, protect against a claim
15 of liability, for example, or whether is -- the trustee
16 is looking for advice about how to manage the
17 beneficiary's money.

18 CHIEF JUSTICE ROBERTS: So I'm the trustee,
19 and I say I would like legal advice as to whether I
20 should renegotiate this lease with the government.

21 MR. GORDON: Yes, Your Honor.

22 CHIEF JUSTICE ROBERTS: Now, I want that
23 advice so I manage the trust correctly, and I'm
24 concerned if I don't manage the trust correctly I'm
25 going to be sued. Now is the document from the lawyer

1 responding to that inquiry privileged or not?

2 MR. GORDON: I think, Your Honor, that if it
3 focuses on how to manage it properly, then -- and it's
4 prospective, then I think that the -- it -- it is not
5 privileged. If, instead, you posit, you know, this is
6 what I did and I'm concerned I may have screwed up, do
7 you think I'm liable, then I think a different answer
8 may obtain.

9 CHIEF JUSTICE ROBERTS: So if he says this
10 is what I did and I might be liable, it's privileged.
11 If he says this is what I'm going to do --

12 MR. GORDON: Please tell me what to do, yes.

13 JUSTICE KENNEDY: Which means you can't get
14 preventative advice, which is one of the most important
15 kinds of advice an attorney can give.

16 MR. GORDON: Well, Your Honor, I agree
17 preventative advice is the most -- is among the most
18 important one can give. But why should the government
19 be in a different position with regard to this than the
20 private beneficiary?

21 JUSTICE BREYER: I have a question on that
22 particular point, and there may be an obvious answer to
23 this which I just couldn't find. But if the lawyer is
24 in the government and he writes a memo, then -- and if
25 it's available to a litigant who litigates against the

1 government, as it would be here, then why isn't it
2 available to the entire world via the Freedom of
3 Information Act?

4 MR. GORDON: Your Honor, the Court said in
5 the Sears decision, which is the cited in our brief -- I
6 believe it's in footnote 16 -- that citizens' access
7 rights under FOIA are not necessarily coextensive
8 with --

9 JUSTICE BREYER: That's certainly true,
10 they're not. But I just wonder, what is it in FOIA that
11 would make this not available to the world?

12 MR. GORDON: That, Your Honor, and also the
13 fundamental --

14 JUSTICE BREYER: Well, that just -- that
15 just says it may or may not be coextensive. Reading the
16 statute, it says you have to make all inter- agency or
17 all memos available of a certain type, which I think
18 this would fall into. Then exception 5 protects, among
19 other things, attorney-client memos that are privileged
20 because they're inter-agency or intra-agency memos that
21 would not be available by law to a party other than an
22 agency in litigation.

23 MR. GORDON: Right.

24 JUSTICE BREYER: Now, they are available if
25 you win. And so, if you win that exception doesn't seem

1 to apply. And if it doesn't seem to apply, that's what
2 was -- then the whole world can get this memo. And what
3 I'm wondering is there must -- either there is a very
4 obvious answer to that, which there could be, or there
5 isn't. If there is an obvious answer, that's the end of
6 it.

7 MR. GORDON: I would say --

8 JUSTICE BREYER: If there isn't an obvious
9 answer, I'll have to go away and worry about it.

10 MR. GORDON: I would say, Your Honor, that
11 this Court's decision in Julian, where it said that
12 different classes of persons may have different rights
13 under FOIA -- the right we are talking about here is the
14 right of the beneficiaries. We're not talking about the
15 citizen's right to see how Indian trust monies have been
16 managed.

17 JUSTICE BREYER: I know you don't want that,
18 and what I'm looking is how you prevent that.

19 MR. GORDON: But I believe that under the
20 precedent in Julian, that it would be that what we're
21 talking about here is access to Indians whose money is
22 being managed.

23 JUSTICE ALITO: If we assume for the sake of
24 argument that a private trustee may, using the private
25 trustee's own fund, hire an attorney to obtain

1 prospective advice about liability, does that doom your
2 argument here for the reason that the government claims
3 it has no ability to set up a system like this, to have
4 some attorneys in the solicitor's office provide advice
5 regarding the management of the funds and other
6 attorneys in the solicitor's office provide advice
7 regarding -- regarding the possibility of prospective
8 liability in light of all of these suits that you
9 mentioned?

10 MR. GORDON: Well, Your Honor, again I come
11 back that the trustee is entitled where the issue is
12 liability, rather than how to manage the money. The --
13 that gets into an area that would not be subject to the
14 fiduciary exceptions. So if that is the focus of the
15 advice, a private beneficiary wouldn't have to give up
16 that advice and we don't contend that the government
17 should, either. But where, as here, all of the
18 documents are general documents that deal generally with
19 how to manage Indian trust funds --

20 JUSTICE SCALIA: Again, as the Chief Justice
21 pointed out, that seems to me an artificial distinction.
22 What I ask from -- for from the attorney is advice as to
23 how I can manage the trust so as to avoid liability. I
24 mean, the -- the two are connected. You can't separate
25 out advice as to how to manage, how to manage the trust

1 from advice as to how to avoid liability. In the -- in
2 the context of asking, of a trustee's asking advice, the
3 two are the same.

4 MR. GORDON: Well, Your Honor, at -- at some
5 logical level there is a link there that can never be
6 severed, but I submit, respectfully, that the
7 government, when it's getting advice about managing
8 trust funds, is not really focused on its liability.
9 The government's liability, after all, is much more
10 circumscribed than private fiduciaries, in any number of
11 ways.

12 It is seeking legal advice about what is the
13 proper way to invest, can we do this, can we pool funds,
14 can we do -- you know, can we make a certain type of
15 investment or is it prohibited to us. And advice of
16 that nature is advice to which the beneficiary is
17 entitled.

18 A private beneficiary -- the beneficiaries
19 of private trusts are entitled, and Indians, whose money
20 is being managed because the government has taken on
21 itself by statute and said, we are going to take control
22 of your monies and we're going to manage them, have no
23 lesser right to get access to this highly relevant
24 information when they litigate for breach of trust.

25 JUSTICE GINSBURG: You make a distinction,

1 I -- I take it, between attorney-client privilege and
2 work product. Initially, you were seeking both on the
3 theory that the tribe is in fact the client, but
4 apparently you are not pressing that point any more
5 about work product?

6 MR. GORDON: In fact, Your Honor, there is
7 some case law that says the fiduciary exception can be
8 applied to -- to work product. We did not press that
9 point in the Court of Federal Claims. We -- focused our
10 request for documents on attorney-client, not on work
11 product.

12 CHIEF JUSTICE ROBERTS: So under your theory
13 if there's a claim of privilege on -- on -- on the
14 government's behalf, presumably the district court would
15 conduct an in-camera review to determine whether it was
16 retrospective for liability or prospective for
17 responsibility?

18 MR. GORDON: Yes, Your Honor, which is
19 exactly what happened here. The Court of Federal Claims
20 reviewed all of the documents in camera and made a
21 document-by-document determination, which is, of course,
22 the standard approach when you're talking about
23 attorney-client privilege. It's done on a document by
24 document basis.

25 JUSTICE SCALIA: Did it do -- did it do on

1 that basis, retrospective versus prospective?

2 MR. GORDON: It didn't come up, Your Honor,
3 because there weren't any retrospective wants.

4 JUSTICE SOTOMAYOR: There were no
5 prospective, is that -- did you --

6 MR. GORDON: They're all prospective, Your
7 Honor. They're all prospective. The --

8 CHIEF JUSTICE ROBERTS: Well, they -- they
9 could be retrospective, too, right? The government
10 exposes itself to liability, obviously, in these areas
11 as well. That's the basis for your suit, right?

12 MR. GORDON: Yes, Your Honor.

13 The -- I want to pick up, I believe it was
14 on a comment that you made, Justice Sotomayor, when you
15 said that under the government's theory there would be
16 no need for Rule 501. And indeed, they say that it's
17 not enough. 501 on its face says apply common law
18 principles. And the government's argument is that's not
19 enough unless there's some other statute that requires
20 common law principles to be applied to.

21 Now, this is a neat trick. You just read
22 501 out of the Rules of Evidence when it comes to the
23 government, notwithstanding that 501 itself says it's to
24 be used to determine privilege claims by the government,
25 and that's reinforced in Federal Rule of Evidence 1101,

1 which specifically says that the Rules of Evidence are
2 to apply in the Court of Federal Claims.

3 CHIEF JUSTICE ROBERTS: I suppose the
4 government as a whole has an obligation to act in the
5 best interests of the citizenry, right? Why doesn't the
6 same theory apply to any citizen?

7 Look, government, you're supposed to --
8 you're acting in a fiduciary statute -- status with
9 respect to me. You're supposed to be acting in my best
10 interests. If you're getting advice from the, you know,
11 Department of Justice about what to do, I'm entitled to
12 get that.

13 MR. GORDON: Your Honor, it -- I think that
14 that could pick up on the same distinction that the
15 Court has already drawn in Mitchell 1 and Mitchell 2,
16 between bare trust and a full-fledged trust. The
17 government may have a general duty to act in the
18 interests of all citizens. Indeed, I think we would all
19 agree with that. But that does not mean that the
20 government is engaging in the conduct of a full-fledged
21 trust with respect to citizens. It's not.

22 Its relationship to citizens day in and day
23 out is akin to, in fact maybe even a level below, the
24 bare trust relationship that was at issue in Mitchell 1.

25 So, we're not proposing a -- a sweeping new

1 rule here. It's the government that's proposing to
2 transform this Court's jurisprudence about Indians,
3 because the notion that the only enforceable obligations
4 it has are those set forth in statute or regulation,
5 were the Court to adopt that, it would be overruling its
6 decision in White Mountain Apache.

7 CHIEF JUSTICE ROBERTS: Are there any
8 other -- are there any other areas in which the
9 government's relationship to particular groups of
10 citizens is that of fiduciary to beneficiary?

11 MR. GORDON: Yes, Your Honor.

12 CHIEF JUSTICE ROBERTS: What are some of
13 those?

14 MR. GORDON: Well, the -- the principal one
15 we could find, which is cited in our brief, is with
16 respect to government retirees who make voluntary
17 contributions to their fund, and the government's
18 argument here could be applied to them.

19 CHIEF JUSTICE ROBERTS: And your argument
20 could be applied to them?

21 MR. GORDON: Yes, Your Honor, and I'm happy
22 for it to be. I believe it should be.

23 CHIEF JUSTICE ROBERTS: So if I'm a
24 government retiree, I have the ability to get the legal
25 advice that whoever it is that runs that trust gets?

1 MR. GORDON: Yes. I might add, Your Honor,
2 fortunately it's not the Bureau of Indian Affairs that
3 runs that.

4 JUSTICE BREYER: Does that happen a lot? I
5 mean, I -- I -- I'm not -- does that happen a lot? I
6 mean, are there a lot of instances where the lawyers who
7 work for all -- the retirement funds are huge. There
8 must be cases coming up all the time. And all the
9 advice of the lawyers is just available --

10 MR. GORDON: Your Honor, no, frankly it
11 hasn't come up that much with -- in terms of Federal
12 retirees. There's the Cavanaugh v. Wainstein case that
13 we cite in our brief which is about the only published
14 decision I've been able to find.

15 The fact of the matter, I -- I was being
16 humorous a moment ago, but the fact of the matter is
17 that the government retirement funds have been, it
18 appears, run quite well and there have been relatively
19 few claims brought against them. There's a reason that
20 there are a bunch of pending cases regarding Indian --

21 JUSTICE BREYER: I know that. I'm just
22 worried about the -- the attorney-client privilege is
23 somewhat sacred, and suddenly making everything
24 available to the whole public has got me worried. And I
25 looked at that Sears case. I didn't see anything there

1 that eases my concern. And then you referred to a
2 different case, the name of which I forgot, and I could
3 not find.

4 MR. GORDON: That's the Julian case, Your
5 Honor.

6 JUSTICE BREYER: Is that in the --

7 MR. GORDON: I'm sorry, it's not cited in
8 our brief.

9 JUSTICE BREYER: How am I going to find it?
10 I couldn't get how you spell it.

11 MR. GORDON: I will -- it -- 486 U.S. 1,
12 1988, Your Honor.

13 The -- there is another inconsistency in the
14 government's position here that I would like to
15 highlight for the Court, if I may. That is this: The
16 government relies on the common law in the first place
17 to say it has a privilege. There's no statute that
18 gives the government attorney-client privilege. So it
19 relies on common law saying: We have an attorney-client
20 privilege.

21 Now, that's fine under Federal Rule 501.
22 But the government says, while it can rely on common
23 law, Jicarilla cannot rely on that same common law to
24 establish the limits on the privilege it's claiming.
25 This Court described that sort of argument as "heads I

1 win, tails you lose," and said that it can't be right.
2 And I submit that it can't be right here. The --

3 JUSTICE GINSBURG: The government is
4 maintaining throughout that it wears two hats. On the
5 one hand it is a guardian or a trustee, and on the other
6 hand it is the sovereign. So it's the latter, the
7 government's claim that it is the sovereign, that makes
8 the difference, it's not the --

9 MR. GORDON: I agree, Your Honor, that
10 that's their claim. But the government hasn't shown how
11 the fact that it is the sovereign, which we certainly
12 concede, makes any meaningful difference for purposes of
13 the issue presented here. The cases it cites establish
14 that the government, because it is sovereign, in some
15 instances has broader authority than a private trustee
16 would to help out the beneficiary. And I believe that
17 that is --

18 JUSTICE KENNEDY: But it also has broader
19 authority, and that's just their point, I take it, for
20 many other areas. The sovereign can't easily divest
21 itself of its responsibilities. A trustee can so
22 conform and shape its business that it doesn't have
23 conflicts. A government just can't do that.

24 MR. GORDON: Well, Your Honor, I agree, but
25 the issue of conflicting, competing interests, first of

1 all it arises in the private trust context and it arises
2 frequently. Anytime you've got a life beneficiary and a
3 remainderman, you've got a potential conflict between
4 the beneficiaries; and this issue of conflict has led to
5 the development of the duty of impartiality for private
6 trustees; and it's discussed at length in section 79 of
7 the Restatement.

8 So the notion of competing interests is not
9 unique to the government. The government may have some
10 different competing interests than a private trustee
11 might have. That's certainly conceivable. And if it
12 does, the existence of a specific competing interest may
13 affect whether the action that the government takes is
14 or is not a breach of trust.

15 JUSTICE SCALIA: We're not talking here
16 about competing interests. I mean, the example you give
17 of -- of the life beneficiary and the remainderman,
18 those are interests of the beneficiaries that conflict.

19 MR. GORDON: That's correct, Your Honor.

20 JUSTICE SCALIA: We're talking here about an
21 interest of the trustee that conflicts with what he is
22 supposed to do, with respect to the person who is the
23 beneficiary of the trust. That -- that's a totally
24 different situation.

25 MR. GORDON: Well, Your Honor, I submit that

1 it's not totally --

2 JUSTICE SCALIA: And ordinarily if there is
3 that kind of a conflict where the trustee has a personal
4 conflict, he has to step down as trustee. You can't
5 continue to be trustee when you -- your own financial
6 interests, for example, are against the financial
7 interests of the beneficiary; right?

8 MR. GORDON: Well, Your Honor, you're
9 positing that the trustee has a personal interest that's
10 adverse to the beneficiary.

11 JUSTICE SCALIA: That's what the government
12 asserts: I have other duties as government besides my
13 duties to the -- to these Indians.

14 MR. GORDON: That's correct.

15 JUSTICE SCALIA: And sometimes those duties
16 conflict with my duties to the Indians.

17 MR. GORDON: Those are competing
18 responsibilities. I agree that the government may have
19 that, and that may affect whether the decision that they
20 ultimately make is or is not an appropriate decision.
21 But it does not affect their duty to disclose as a
22 matter of evidence the legal advice that they use to
23 make that judgment. The beneficiary, when the
24 beneficiary's money is at stake, is entitled to see what
25 advice the government acted on in dealing with its

1 money.

2 JUSTICE KENNEDY: Is this true regardless of
3 the fact that the government may have a very powerful
4 interest in seeking neutral, independent advice from an
5 attorney, and that were you to prevail that advice would
6 become watered down?

7 MR. GORDON: Yes, Your Honor. I don't -- I
8 submit that the ultimate balancing of interests here is
9 the same as it is for a private fiduciary. There is no
10 -- the Court -- we urge the Court to affirm that under
11 Rule 501 Indian tribes are entitled to the same evidence
12 as other trust beneficiaries about how their money was
13 managed. That is our request of this Court.

14 CHIEF JUSTICE ROBERTS: The trustee I guess
15 is -- is broadly conceived of as the government?

16 MR. GORDON: Yes, Your Honor.

17 CHIEF JUSTICE ROBERTS: Well, isn't the
18 lawyer working for the trustee then a trustee too, an
19 employee of the trustee?

20 MR. GORDON: I think that may in a
21 theoretical sense be true, Your Honor. But practically
22 speaking, there's a difference between the BIA officials
23 who are acting as the trustee and the attorneys who are
24 advising the trustee. Our claim is against the trustee.
25 It's not against the attorneys. We are not seeking to

1 impose any professional responsibilities on the
2 government attorneys.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 Gordon.

5 MR. GORDON: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Shah, you have 4
7 minutes remaining.

8 REBUTTAL ARGUMENT OF PRATIK A. SHAH
9 ON BEHALF OF THE PETITIONER

10 MR. SHAH: Your Honor, if I can just make
11 three -- three points on rebuttal.

12 The first is with respect to Federal Rule of
13 Evidence 501. The government is not implementing any
14 trick here. This is not a "heads you win, tails you
15 lose" type situation. Our argument is simple. We look
16 to -- we invoke a valid attorney-client privilege. The
17 other side invokes a common law exception to that
18 privilege. Our argument is not that no common law
19 exception is applicable to the government. It's simply
20 that the basis for this common law exception is not
21 applicable, so the exception should not be applicable.
22 It's a very straightforward argument.

23 The second point I would like to make is in
24 response to the contention that we have a full-fledged
25 trust here as opposed to a bare trust in Mitchell. I'm

1 not quite sure what "a full-fledged trust" means in the
2 Indian trust context. Certainly there's specific
3 investment-related duties that the statute sets forth
4 with respect to trust funds, but this Court has made
5 clear in -- in Mitchell and reiterated in the Navajo
6 Nation decision that it's not enough for the statute to
7 simply set forth the statutory duties, but it must
8 define, and this is a quote, "define the contours of
9 those duties."

10 The statutes at issue, section 161a, 162a,
11 do nothing of the sort. They don't even set out a
12 general disclosure obligation, let alone the contours of
13 any such disclosure obligation. But even if we were to
14 disregard this Court's precedents in Mitchell and in
15 Navajo Nation, and we were to resort to the common law
16 to flesh out the nature of the responsibilities, again
17 there's nothing from the discrete investment obligations
18 that are set forth in those statutes that would lead to
19 a general disclosure obligation, let alone an intrusive
20 obligation to disclose the government's attorney-client
21 communications.

22 And there's good reasons to think that
23 Congress did not apply such an obligation when it has
24 set forth a fairly reticulated statutory and regulatory
25 regime governing disclosures, and with respect to other

1 statutes. For example, the 1982 Indian Claims
2 Limitation Act specifically addressed privileged versus
3 nonprivileged information.

4 The last point I would make goes to the
5 general duty to disclose. Whether that's contingent
6 simply on payment, ownership or other factors. While it
7 may not be the case that the payment is the sole factor,
8 it's certainly an important factor, and I think as my
9 friend responded in response to Justice Kennedy, if in
10 fact the private trustee is paying for the legal advice
11 on their own, that's going to be a significant
12 consideration as to whether the beneficiary can get it.

13 And as Justice Scalia pointed out, the lines
14 are not always going to be clear between trust
15 administration advice and liability advice. In fact,
16 they're often going to run into one another.

17 Beyond payment, I think the even more
18 important factor here is the ownership of the records.
19 While payment is indicative of ownership, when we're
20 talking about the government context, payment is not the
21 only reason why we say that the government owns the
22 records that result from legal advice or any other trust
23 administration facet. That's set forth by statute and
24 regulation, the Federal Records Act, and the Interior
25 Department regulations that are set forth in the

1 appendix of the brief. The reason why I think --

2 CHIEF JUSTICE ROBERTS: If I -- if I pay --
3 if I pay a lawyer to prepare a document for me, is
4 that -- I do own that document or does the lawyer?

5 MR. SHAH: I think as a general -- I think
6 as a general matter, one would think that the client
7 would -- it would belong to the client, at least in the
8 sense that the client would have full access to that
9 document.

10 And I think that's a fundamental distinction
11 here, that we're not -- because the -- these are
12 governmental records, they're subject to the statutory
13 and regulatory regime that governs disclosure of
14 government documents, either specific disclosure
15 obligations set forth by Congress, Interior Department
16 regulation or the more general Freedom of Information
17 Act.

18 JUSTICE SOTOMAYOR: But aren't you
19 confusing, just following up on the Chief Justice's,
20 ownership with access? FOIA itself doesn't make these
21 records less -- the government doesn't own them less
22 merely because FOIA requires them to share it with other
23 people. So the ownership interest is not the defining
24 legal obligation.

25 MR. SHAH: You're absolutely correct. The

1 fact that they're accessible by FOIA does not -- does
2 not change the government's ownership of those records,
3 but the fact that Congress is able to set forth a scheme
4 like FOIA is turned on the fact that these are
5 government records that are owned by the government.

6 Because they're government records, it's
7 Congress and it's the Interior Department that decides
8 when to disclose them and under what circumstances to
9 disclose them. The tribe's rule here would eviscerate
10 that very reticulated statutory and regulatory regime.

11 Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr. Shah,
13 and Mr. Gordon.

14 The case is submitted.

15 (Whereupon, at 11:06 a.m., the case in the
16 above-entitled matter was submitted.)

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