



10-1982

United States v. Mitchell

Lewis F. Powell, Jr.

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5 brought lined with:
81-1747 U.S. v. Duncan

Grant

df1 05/20/82

Ct/Claims ~~are~~ implied as
cause of action is the U.S.
Suit is class action by individual
Indians (1,465 of them!) of the
Quenault Tribe, claiming Gov't
as Trustee, mis-managed the
tribal timber resources.

Under Testan requires a
specific authorization to sue
U.S. Gov't

PRELIMINARY MEMORANDUM

May 17, 1982, Conference
List 1, Sheet 3

No. 81-1748

Cert to Ct. of Claims
(Friedman, Cowen, Davis,
Nichols (diss. in part), Kunzig
Bennett, Smith) (en banc)

United States

v.

OK Mitchell et al

Federal/Civil Timely (w/ extn)

1. SUMMARY: Petr argues that the Court of Claims
erred in permitting a suit for damages against the United States
when the relevant statutes did not expressly provide for such a

Grant. The question is whether statutes creating
a fiduciary relationship between the gov't & Indians
thereby provide a damage remedy against the gov't.

DL

remedy. This case is straightlined with #81-1747, United States v. Duncan.

2. FACTS AND DECISION BELOW: Resps seek to recover damages from the United States for the alleged mismanagement of timber resources on lands allotted to individual Indians from the Quinault Reservation. Resps are 1,465 individuals owning interests in allotments, the Quinault tribe, and an unincorporated association of Quinault Reservation allottees.

Between 1905 and 1935 the entire reservation was allotted to individual Indians under the General Allotment Act of 1887. However, under the Allotment Act and the Indian Reorganization Act of 1934, the United States holds the allotted land in trust for the benefit of the Indian to whom the allotment has been made. Other statutes direct the Secretary of Interior to manage the timber resources on these lands for the benefit of the Indians. Under 25 U.S.C. 406 the Secretary is authorized to approve the sale of timber. Under 25 U.S.C. 466, the Secretary is directed to adhere to the principles of sustained-yield forestry on all Indian forest lands. And under 25 U.S.C. 406, the Secretary is required to consider the state of growth of the timber and the present and future financial needs of the allottee and his heirs in making decisions respecting timber sales. Finally, the Secretary is authorized to deduct an administrative fee for his serviced from the timber revenues. 25 U.S.C. 406(a), 413. On the basis of these statutes, the Secretary has developed a detailed set of regulations governing sale and harvesting of Indian timber. 25 C.F.R. Part 141.

Resps -filed their claims in 1971, alleging that the Secretary: (1) failed to obtain fair market value for timber sold; (2) failed to manage timber on a sustained yield basis; (3) failed to obtain payment for some merchantable timber; (4) failed to develop a proper system of roads and easements, and exacted improper charges from allottees for roads; (5) failed to pay interest on certain funds; (6) paid insufficient interest on certain funds; (7) exacted excessive administrative fees. Resps sought money damages, and premised jurisdiction on the Tucker Act, 28 U.S.C. §1491, and, in the case of the tribal claimant, on the Indian Claims Commission Act, 28 U.S.C. §1505.

In 1977, petr moved to dismiss on the basis that the U.S. had not consented to suit with respect to these claims. In Mitchell I, the Court of Claims, en banc, held that the General Allotment Act provided Indian allottees with a cause of action for money damages. This Court reversed, 445 U.S. 535 (1980), holding that the Allotment Act could not be understood to place upon the U.S. full fiduciary responsibilities with respect to the management of allotted lands. However, the Court indicated that the Court of Claims could consider on remand whether any of the additional legislation governing management of allotted lands would support a claim for money damages under the Tucker Act or its equivalent in §1505 for tribal claimants.

On remand, the Court of Claims, en banc, again found the U.S. subject to suit, this time on the basis of the statutes providing for timber management (25 U.S.C. §§ 406, 407, 66) and governing rights of way (25 U.S.C. §§318a, 323-325). In

order to find a waiver of sovereign immunity, the statute or regulation providing the basis for a claim must be capable of being fairly "interpreted as mandating compensation by the Federal Government." United States v. Testan, 424 U.S. 392, 400 (1976). It was not necessary, however, for the statute or regulation to specifically direct that a claim could be brought in the Court of Claims or federal district court. Nor was it necessary that the statute or regulation specifically authorize the payment of money; "non-express" indications of a right to compensation may serve as well. Thus, the right to compensation need not be explicitly stated although the "statute should fairly be read as mandating compensation" and that "reading should be strong and clear." For these principles, the court relied upon Testan and Mitchell.

The court concluded that 25 U.S.C. §§406-407 (timber sales), 25 U.S.C. §466 (sustained yield), and 25 U.S.C. §318a, 323-25 (rights of way) created a fiduciary relationship between the allottees and the government and that resps could recover for breach of these fiduciary obligations. Federal control of Indian timber is comprehensive. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). These statutes reflect a congressional intent to maximize Indian revenues. The court defined the nature of the damages resps might seek as follows: "any fall-off from the income they would have received from their forests and lands if the Government had properly complied with the directives of the statutes and regulations, and (b) the value (or decrease in value) of thier property which is lost (or diminished in value) through improper actions of Interior. But there can be no recovery

for other, consequential, indirect damages which a private cestui might possibly recover because of his trustee's derelictions." Further, the court found a right to recover damages for payment of a less than optimal interest rate under 25 U.S.C. § 162a.

In dissent, Judge Nichols argued that the United States had not consented to be sued for mismanagement of forest resources and rights-of-way.

3. CONTENTIONS: Petr argues that the Court of Claims' finding of liability marks a significant departure from the rule in Testan and Mitchell. Under Testan and Mitchell waivers of immunity must be unequivocal. None of the statutes relied upon by the Court of Claims expressly provides for maintenance of a damage suit. Although the allottees could sue for the proceeds of timber sales or the sales of rights-of-way under the statutes, there is no statutory basis for a suit to recover proceeds that arguably should have been, but were not captured by the Secretary. Admittedly, the question is closer as to a right to recover damages for less payment of a less than optimal interest rate under 25 U.S.C. §162a. Yet the statute does not appear to compel a particular level of compensation. The allottees could sue if the secretary retained interest actually earned, but the statute provides no right to recover a shortfall.

Petr suggests that resp may seek declaratory, injunctive or mandamus relief against the Secretary. The mere fact that the statutes in this case place duties upon the Secretary does not provide the basis for a damages claim. The statute at issue in estan placed duties upon the government as well, but no damage

claim was allowed. Moreover, it is relevant that when the statutes at issue in this case were adopted, Indian claimants were generally denied any monetary remedy against the United States. Finally, although the relationship between the Indian tribes and the United States is special, the requirement of unequivocal consent to suit against the U.S. is fully applicable to Indian claimants. See Klamath Indians v. United States, 296 U.S. 244 (1935).

Resps track the Court of Claims opinion. They argue that the statutory scheme requires the Secretary to pay the proceeds of timber sales to the allottees. This obligation, in context, "cannot fairly be read otherwise than to mandate the payment of those proceeds that will be produced by prudent management in accordance with statutory guidelines." It is clear that the Secretary has a duty of prudent management. It is inconceivable that Congress did not intend a damages remedy. Moreover, Testan does not dictate a different result. Unlike the situation in Testan or Mitchell I in this case a special trust relationship has been created.

4. DISCUSSION: I tend to a grant. Because of the ✓ special trust relationship, the decision below may not be inconsistent with Testan. Yet in the circulating opinion in Army & Air Force Exchange Service v. Sheehan, 80-1437, Testan is said to require the explicit authorization of damages awards. ("As Testan makes clear, jurisdiction over respondent's complaint cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages." Page 11.) The statutes here do not expressly authorize damages awards.

There is a response.

05/20/82

Levi

Op. in petn.

May 27, 1982

Court
 Argued, 19...
 Submitted, 19...

Voted on, 19...
 Assigned, 19...
 Announced, 19...

No. 81-1748

UNITED STATES

vs.

MITCHELL

*Grant
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 for W.H.R.*

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| Burger, Ch. J. | ✓ | ✓ | ✓ | | | | | | | | | | |
| Brennan, J. | | ✓ | ✓ | | | | | | | | | | |
| White, J. | | ✓ | ✓ | | | | | | | | | | |
| Marshall, J. | | ✓ | ✓ | | | | | | | | | | |
| Blackmun, J. | ✓ | ✓ | ✓ | | | | | | | | | | |
| Powell, J. | | ✓ | ✓ | | | | | | | | | | |
| Rehnquist, J. | | ✓ | ✓ | | | | | | | | | | |
| Stevens, J. | | | ✓ | | | | | | | | | | |
| O'Connor, J. | ✓ | | | | | | | | | | | | |

Hold for Sherman

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No. 81-1748

VS.

MITCHELL

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lfp/ss 01/27/83

81-1748 United States v. Mitchell

MEMO TO FILE:

This is the second time this case has been here. In 1980, 445 U.S. 535, we reversed the Court of Claims. This litigation, conducted since 1971, is a consolidated suit by some 1,400 Indians who own interests in land allotments on the former reservation of the Quiault tribe (Pacific Northwest). These allotments - about 80 acres each and heavily timbered - commenced in 1905. Each allottee received a deed containing the promise of the U.S. that it would hold the allotment "in trust for the sole use and benefit of the Indian" or his heirs. The ~~facts~~^{tracts} were so heavily timbered that farming or grazing was rarely possible. As a result of sales and large families, the reservation today is a "complex checkerboard of trust allotments and former trust allotments".

In 1920, the government was authorized to sell timber from the allotted lands on long term, large volume contracts. There have been 14 such contracts, embracing many allotments in each.

The Secretary of the Interior has exercised continuous control over the management and disposition of

the lands and timber. Indeed, few of the Indians actually live on the allotted lands. Nor may an allotment owner cut and sell timber without the prior permission of the Bureau of Indian Lands.

It is alleged that, far from being a passive trust, the BIA has exercised pervasive and total control over the mangement and disposition of the allotted land and timber, and has done so for a fee.

by Indian (Rurks)
This suit, [^]that has involved extensive discover depositions over many years, alleges various failures and neglects by the federal government, including mismanagement of the timber resources, failure to obtain fair market value for timber sold, etc. (See p. 5 of SG's brief).

Sketch → ~~This suit~~ ⁹ in the Court of Claims seeks damages for breach of trust. The suit is based on the statutes and regulations - dating back to 1873 - that provide for the setting aside of these lands and allotment to the individual Indians on the reservation. The [✓]respondents also rely on the Indian Tucker Act and on the Tucker Act itself.

Question Presented

Ct/Claims
answer
said U.S.
is liable
for breaches
of trust

The sole question - though framed differently by the parties - is whether the U.S. is accountable in money damages for alleged breaches of trust in connection with its management of the timber on these allotted lands.

The Court of Claims, to which we remanded this case in 1980, again answered this question in the affirmative.

The SG's Argument

In a long and repetitive brief, the SG fails - as I view it now - to make an overwhelming argument for reversal. It concedes that the Court of Claims has jurisdiction, but says the statutory jurisdictional provisions do not "create any substantive right enforceable" against the U.S. They merely provide jurisdiction for the Court to hear such claims. U.S. v. Testan, 424 U.S. 392, 398 and the earlier decision in this case, U.S. v. Mitchell, 445 U.S. 538-540. The SG says:

"The applicable rule is that where a claim for money damages is predicated upon an alleged statutory violation, a suit for damages may not be maintained against the U.S. unless the statute in question 'in itself . . . can fairly be interpreted as mandating compensation by the federal government for the damages sustained'". Testan, at 402.

The SG ~~then~~ argues that none of the statutes relied on justifies the "inferring of a right of action" to recover damages for mismanagement. Then, emphasizing that surrender of sovereignty may not be implied and must be expressly declared by Congress, the SG relies on several implied cause of action cases (e.g., Touche, Ross & Co.) for the settled proposition that absent an express damages remedy, courts must look to the intention of Congress. Since none of the statutes relied upon by plaintiffs expressly provide for a damages remedy, the SG says none may be inferred or implied. This will not leave the Indians remedyless, as they may have injunctive or declaratory relief - though neither of these is specifically authorized.

The Respondents' Brief

My first reading leaves me under the impression that respondents may have the better of this case. At least, they have a stronger brief in addition to the opinion of the Court of Claims en banc. Respondents also rely on U.S. v. Testan, 424 U.S. 392, 401-402 in which we said that a cause of action for money damages does not lie unless its basis "in itself . . . can fairly be

interpreted as mandating compensation by the federal government for the damages sustained". (Br., p. 11)

Thus, according to respondent "a waiver of federal sovereign immunity will be deemed to have occurred where the constitutional, statutory or regulatory basis of a claim against the United States 'can fairly be interpreted as mandating compensation . . . for the damage sustained'".

Relying of the "many federal statutes for regulations governing the management and sale of Indian timber trusts resources", it is argued that they must be construed as "mandating compensation for damages incurred as a result of the government's mismanagement and waste of such trust resources".

Testan is thus relied upon as making clear that an express authorization of a damage remedy is not required where the statutory framework may be construed as "mandating compensation". This is said to be appropriate in this case because of the statutes and regulations that impose such positive duties upon the government as trustee for the Indian owners.

In our 1980 Mitchell I decision we reversed a ruling of the Court of Claims favorable to the Indians,

holding (i) that the General Allotment Act "created only a limited trust relationship between the U.S. and the allottee that does not impose any duty upon the government to manage timber resources"; (ii) that the Act should not be read as authorizing, much less requiring, the government to manage timber resources for the benefit of the Indian allottees", and (iii) that "any right of the respondents to recover money damages for government mismanage of timber resources must therefore be found in some source other than the General Allotment Act". See respondents brief, p. 9, 10. Brennan, Marshall and Stevens dissented.

Subject to reading Mitchell I (that is not at all clear in my memory), I judge that it focused on what the General Allotment Act required, rather than the broader question presented in this case. In any event, on remand, the Court of Claims by a 6-1 vote held (a) that the federal Indian timber management statutes and regulations imposed specific fiduciary duties on the U.S. in connection with the sale and management of Indian land, timber of funds held in trust; and (b) that those statute and regulations mandate compensation for damages sustained as a result of the government's breach of its prescribed

duties; and that under the Tucker Act and the Indian Tucker Act, the Court of Claims had jurisdiction to adjudicate these claims.

* * *

The foregoing is dictated in our apartment with only the briefs before me. I need to read Testan and Mitchell I, and perhaps other decisions. Nor do I have clearly in mind the provisions of all of the statutes and regulations relied upon. I do have the impression, however, that the United States certainly occupied a substantial position of trust, that the individual Indians - apart from their lack of sophistication and education - could not manage successfully these 80-acre parcels scattered about the reservation. Thus, not only the statutes but the practical situation seem to require that the government exercise reasonable care in managing the property of these individual Indians. A failure to exercise such care normally gives rise to a damage remedy, particularly where no other remedy seems available.

L.F.P., Jr.

SS

Reviewed 2/28 Excellent memo.

job 02/28/83

Jim ~~will~~ would Rev in part
& app in part.

Generally he finds no basis for
holding that Congress intended to consent
to damage suits for breach of trust
in management of allotted lands.

But ~~But~~ ^{Jim} would agree with
Ct/Claimer that Reser properly has
stated claim: (i) to recover excessive
management fees, (ii) to recover interest
on the theory, ~~as~~ ^{as} SG concedes, that
there is money belonging to Reser but
not pd. over to them.

x x x

Jim also doubts if power of
atty were granted ~~under~~ to Secretary
under § 406(c), Reser were entitled
to recover for
mismanagement.

BOBTAIL BENCH MEMORANDUM

No. 81-1748

United States v. Mitchell

Jim

March 1, 1983

I. Question Presented

Is the U.S. accountable in money damages for alleged breaches
of trust in connection with its management of forest resources situ-
ated on allotted lands of the Quinault Indian Reservation?

II. Facts

The Quinault Reservation was established in 1873. The Reservation is heavily forested. In 1905, the federal government began to allot the Reservation to individual Indians. Each allottee received a deed, signed in the name of the President, containing the promise that the United States would hold the allotment "in trust for the sole use and benefit of the Indian...or, in the case of his decease, of his heirs...."

The Secretary of the Interior was first authorized to approve the sale by the allottee of timber on any Indian land "held under a trust or other patent containing restrictions on alienations." Since 1934, Congress has required the Interior Department to adhere to the principles of sustained-yield forestry on all Indian forest lands under its supervision. And since 1964, Congress has directed ID to consider the state of growth of the timber and the present and future financial needs of the allottee and his heirs in making his decisions respecting timber sales. The ID is authorized to deduct an administrative fee for his services from the timber revenues paid out to the Indian allottees, and under this statutory authority, the ID has developed a detailed set of regulations governing sale and harvesting of Indian timber, and has the power to exercise day-to-day supervision over the harvesting and management of timber.

III. Proceedings Below

In 1971, resps, individual Indians owning interests in the allotments, brought actions for damages from the U.S. for the alleged mismanagement of timber resources on the allotments. Specifically, resps claim that the U.S. has: (i) failed to obtain fair

market value for timber sold; (ii) failed to manage timber on a sustained-yield basis; (iii) failed to obtain payment for some merchantable timber; (iv) failed to develop a proper system of roads and easements, and exacted improper charges from allottees for roads; (v) failed to pay interest on certain funds; (vi) paid insufficient interest on certain funds; and (vii) exacted excessive administrative fees from allottees. In 1979, the Ct. of Claims ruled that the General Allotment Act of 1887, by itself, was a sufficient basis to warrant its exercise of jurisdiction over resps' money damages claims for breach of trust.

Our 1980 decision
This Court reversed, holding (i) that the General Allotment Act "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources," 445 U.S., at 542; (ii) that the Act "should not be read as authorizing, much less requiring, the Government to manage timber resources for the benefit of Indian allottees," id., at 545; and (iii) that "[a]ny right of the respondents to recover money damages for Government mismanagement of timber resources must [therefore] be found in some source other than that Act," id., at 546. The Court expressly declined to address the issue whether the Government, as trustee, is accountable in damages for breaches of trust. Id., at 542. On remand, in its 1981 Mitchell decision, the Ct. of Claims, held (i) that the federal Indian timber management statutes, and regulations promulgated pursuant thereto, impose specific fiduciary duties upon the U.S. in connection with the management of Indian land, timber, and funds held in trust by the U.S.; (ii) that those statutes and regulations mandate

let's open

Ct Claims

4.

compensation for damages sustained as a result of the Government's breach of those duties; and (iii) that, under the Tucker Act and the Indian Tucker Act, the Ct. of Claims has jurisdiction to adjudicate such claims.

IV. Summary of the Parties' Contentions

1. Petr. The Ct. of Claims has jurisdiction under the Tucker Acts over individual claims for money damages founded upon an "Act of Congress." These ^{Tucker Act} jurisdictional provisions do not, however, create any substantive right enforceable against the U.S. They merely provide jurisdiction for the court to hear such claims "whenever the substantive right exists." Mitchell, 445 U.S., at 538-540; United States v. Testan, 424 U.S. 392, 398 (1976). The applicable rule is that where a claim for money damages is predicated upon an alleged statutory violation, a suit for damages may not be maintained against the U.S. unless the statute in question "in itself...can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Testan, 424 U.S., at 402.

None of the statutes from which the Ct. of Claims inferred a right of action to recover against the U.S. for alleged mismanagement of Indian forest resources and their proceeds reflects the necessary legislative mandate for the availability of the damages remedy. It may be correct that a statute vesting an individual with an absolute right to receive a sum certain from the U.S. grounds an action for at least the sum withheld in the event of nonpayment. Resps' claims, however, do not rest upon any such statute, and the Ct. of Claims' decision rests upon the novel proposition that a

statute that does not in terms create any right to payment of money nonetheless may support a damage action against the U.S.

56
argued

Nothing in this Court's decisions respecting the special relationship between the U.S. and the Indian tribes supports creating a presumptive monetary liability for statutory violations in Indian cases. The Court has on many occasions characterized the special relationship as a "fiduciary" or "trust" relationship, but nothing in this trust relationship can constitute the "affirmative statutory authority" necessary to maintain an action against the U.S. for the recovery of damages. See United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940). The Court has never invoked this doctrine to suggest that the U.S. is answerable in money damages for breaches of the standards applicable to a private fiduciary.

B. Resp. In Testan, 424 U.S., at 401-402, the Court stated:

"Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim--whether it be the Constitution, a statute, or a regulation--does not create a cause of action for money damages" unless, as the Court of Claims has stated, that basis 'in itself...can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'"

Thus, a waiver of federal sovereign immunity will be deemed to have occurred where the statutory basis of a claim against the U.S. "can fairly be interpreted as mandating compensation by the Federal Government for damage sustained." The many federal statutes and regulations governing the management and sale of Indian timber trust resources--which expressly mandate that such management and sale be conducted so as to convert the Indians' trust property into its full monetary equivalent for the benefit of the Indians and that the pro-

ceeds of such sales be paid to them or used for their benefit-- cannot fairly be construed otherwise than as "mandating compensation" for damages incurred as a result of the Government's mismanagement and waste of such trust resources.

It is not required, as the Government suggests, that Congress have specifically contemplated and approved a suit for damages. It is enough that Congress intended that the beneficiaries be entitled to the payment of money. Given that, a suit for damages lies under the Tucker Act.

Moreover, consistent with this Court's rulings in Testan and Mitchell I, the Court of Claims has jurisdiction to entertain and rule upon resps' claims because of the express trust relationships that the Congress has established between the U.S. and resps. Congressional establishment of those relationships and the imposition, by statute and by regulation, of specific management responsibilities upon the U.S. as trustee constituted a waiver of federal sovereign immunity from suit for money damages in the event of the Government's breach of its trust responsibilities. The court below also had jurisdiction over these claims by virtue of (i) the fact that resps' claims are equivalent to claims for "money improperly exacted or retained," or (ii) the express and implied contractual relationships that the U.S. has entered into with resps concerning the timber resources.

Testan IV. Discussion

Mitchell and Tucker make clear that \$1491 does not waive the U.S.'s sovereign immunity and that \$1505 "no more confers a substantive right against the United States to recover money damages than

does 28 U.S.C. 1491." Mitchell I, 445 U.S., at 538-540. Therefore, the Tucker Acts do not create any rights, but only provide jurisdiction for other statutes that create the substantive right against the U.S. for "actual, presently due money damages." United States v. King, 395 U.S. 1, 3 (1969). The principle that governs claims for damages resting upon an alleged statutory violation was stated in Testan: No waiver of immunity will be found unless the particular statute "in itself...can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." 424 U.S., at 402.

The SG seeks to add a third requirement: whether Congress intended to permit suits to secure "compensation...for the damage sustained." There is some basis for this. Some statutes mandating compensation expressly bar judicial review. See 38 U.S.C. §211(a) (veterans' benefits). In other cases, Congress may provide alternative remedies. See Nichols v. United States, 74 U.S. (7 Wall.) 122 (1868). But, contrary to the SG's argument, the strong presumption has to be that, where the statute mandates compensation, the claimant has an action against the U.S. for nonpayment, even if the statute does not expressly provide for the institution of litigation. The issue here is whether resps have a statutory right to payment of money by the U.S.

A. Timber Management Statutes. The monetary character of a statutory right is a strong indication that a statute "in itself...can fairly be interpreted as mandating compensation...for the damages sustained." Ibid. Where the duties imposed by a statute are not essentially monetary in character, but require implemen-

tation through conduct by federal officials, the contrary inference arises: that Congress, by its silence as to a damages remedy, created only a substantive right enforceable through injunctive relief. Id., at 403. This distinction is reflected in Testan in the Court's recognition that where suit is maintained to require the U.S. to disgorge a claimant's "money improperly exacted or retained," the statutory predicate need not specify that a right of action for damages is created. 424 U.S., at 401. It should be emphasized, however, that the inquiry is not whether the ultimate value to resps of the duties imposed is financial, but whether Congress imposed a duty to pay money upon the U.S.

The "timber sale" and "management statutes", 25 U.S.C. §§406, 407 & 466 are "monetary" in character. Although nothing in these provisions expressly consents to maintenance of suits against the U.S. for recovery of damages incurred through improvident federal management on

Indian timber lands, §406 does authorize the sale of timber on allotted Indian lands by the allottee, and §407 provides that the proceeds of such sales shall be used for the benefit of resps. It

seems clear that these provisions would ground an action to compel the ID to ^{Int. Dept} disgorge unlawfully retained proceeds. See Testan, 424

U.S., at 401 ("money wrongfully exacted or retained"). There is little basis, however, for extending that remedy to proceeds that arguably could have been captured, but were not, by the ID. There is no indication in the legislative history of the Act of June 25, 1910 that Congress meant to consent to suit for mismanagement of Indian timber resources by enacting these provisions.

In 1964, the timber sale statutes were amended so as to direct the Secretary to adhere to principles of sustained-yield management on tribal lands, to permit the deduction of administrative fees by the ID from the proceeds of timber sales, and to prescribe a generalized standard to guide the Secretary in determining whether to authorize sale of timber on allotted lands. While Congress clearly imposed certain duties on U.S. officials, the statutes do not mandate compensation for violation of those duties. See H.R. Resp. No. 1292, 88th Cong., 2d Sess. 2 (1964) (stating that "[n]o additional expenditure of Federal funds" was expected to be incurred by reason of the enactment of the legislation).

Section 466 merely requires the ID to "make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management." Here, there is simply no statutory directive to pay compensation.

B. Road Building Statutes. Section 318a merely authorizes appropriations for building of roads on Indian reservations. Sections 323 through 325 empower the ID to grant rights-of-way over tribal and individual lands subject to the requirement that there be paid to the Secretary "such compensation as the Secretary...shall determine to be just," with the proceeds to be disposed of under the Secretary's regs. This provision would ground an action to recover proceeds of a "right-of-way sale wrongfully withheld" from the Indians over whose lands it was granted, but it does not permit damages for failure to secure more generous compensation, particularly given that the Secretary determines the amount of statutory compensation. And there is even less basis for inferring from those statutes, as

did the Ct. of Claims, a right to recover damages for the Secretary's alleged failure to plan and build an optimal road network, or properly to maintain rights of way.

C. Interest Statute. Section 162a does not compel a particular level of compensation, but rather affords the Secretary substantial discretion respecting the investments to be made with individual Indian funds. There is nothing in the statute that requires payment of a particular rate of interest. It is difficult to conclude that Congress has consented to pay damages for any amount by which the revenues earned fall short of a standard of "reasonable management zeal to get for the Indians the best rate." *True*

D. Trust Theory. Resps argue that congressional establishment of an express trust relationship constitutes a waiver of sovereign immunity from suit for money damages when the U.S. breaches its trust duties. It is true that the relationship between the U.S. and Indians can be viewed as a trust relationship, but it is more difficult to argue that the duties imposed by the statutes are trust duties. Section 406 and 407, for example, apply to more than Indian lands held in trust. In any case, the inquiry remains whether the statutes setting up any trust each "in itself...can fairly be interpreted as mandating compensation." A review of the individual statutes, supra, shows that the U.S. has not consented to suit for damages in its mismanagement of the trust. *no consent to suit*

E. Tucker Act. Resps also argue that, when the U.S. assumes complete control over an Indian's trust property and, in the exercise of such control, sells the property for less than its value, or otherwise wastes the property, the occurrence of the loss is the

equivalent of the U.S. improperly "taking from" the cestui, and the U.S. may be sued under the Tucker Act for such loss. For many of resps' claims, the retention or exaction would be of property, not of money, and again, resps' claims fail for lack of a statutory basis that establishes the wrongfulness of an exaction or nonpayment of money. The allegation of a violation of a non-monetary duty is insufficient to render all of resps' claims ones for money improperly exacted or retained. Resps might ~~could~~ allege an unconstitutional taking, and thus come within the Fifth Amendment's self-executing right to recover damages against the U.S. under the Tucker Act. See Jacobs v. United States, 290 U.S. 13, 16 (1933). Resps have not suggested, however, that they could make such a demonstration, and thus their statutory "taking" theory for the most part has little merit.

redress claim on two claims
There are, however, a couple of claims that fit squarely within this theory. In addition to alleging certain breaches of duty, resps allege that ^① the U.S. failed to pay interest on certain funds ^② and exacted excessive administrative fees from allottees. The SG ~~consider~~ states: "[W]e assume that an action to recover unlawfully high administrative fees may be maintained against the United States as one seeking recovery of 'money improperly exacted or retained.'" He also concedes that "failure to apply to the resps' account interest monies actually earned would likely give rise to a right to redress in damages on the theory respondents' fund had been 'wrongfully retained.'" I think these claims must be recognized. The SG ~~concedes~~ ^{also} the validity of the claim for fees, but disputes the one for interest. It appears to me that the SG understands resps to be making

12.
only a claim for inadequate interest; I understand them to making the additional argument of no interest.

bet BIA & individual Indians
F. Express Contract. The contracts authorize the BIA "to perform every act necessary and requisite to the consummation of [the sale of timber on resps' lands]." The resps also agreed that the proceeds would be disposed of in accordance with ID regulations, "including those providing for the payment of the cost of administration." These grants of power impose some duty, not only to enter into the contract, but to administer it. The Ct. of Claims dismissed this argument, stating that the powers of attorney do not contain any express commitments against mismanagement in exercising the powers. I have some problem saying that there are not commitments against mismanagement implied in an agency relationship, and once there is a contractual duty, it may be necessary to say that damages are available. This conclusion might follow from the fact that damages from contracts are different from damages grounded on a statute. More likely, it follows from the fact that the statutes that permit the BIA to receive the powers of attorney from resps contemplate the payment of money. In that case, it would be helpful to know whether the U.S. is authorized in this case to sell the timber pursuant to §406(a), (b) or (c). I am unable to tell from the briefs, the authorization, or Mitchell I. If under (c), I think resps probably have an action for failure to obtain a fair market value for timber sold and for failure to obtain payment for some merchantable timber. Otherwise, I think the express contract theory does not help resp.

??

13.

The timber sales contracts run between resps and the loggers, hence they are not enforceable against the U.S. in the Ct. of Claims.

G. Implied Contract. Resps argue that the express contracts, the trust relationship, and the statutory duties impose a implied-in-fact contract, but I think their argument is more that there is an implied-in-law contract. Such a contract may not be inferred from the terms of the pertinent statutes and regulations. See Army & Air Force Exchange Service v. Sheehan, 50 U.S.L.W. 4563, 4565 (June 1, 1982). Statutes and regulations also do not create an implied-in-fact contract. Ibid.

VI. Summary

I think this is a hard case. The implied causes of action cannot be supported under Testan. The trust theory is harder to refute, but Testan and Sheehan make clear that there is no cause of action except where the regulations or law "specifically authorize awards of money damages." Ibid. I am unable to say that this is the case here. The contract theories are without merit, unless it can be determined that the powers of attorney were granted to the Secretary under §406(c), in which case I would be willing to say ⁽ⁱⁱⁱ⁾ that resps could collect for mismanagement in the sale of merchant-
able timber and for failure to obtain fair market value for timber
sold. Resps also should be able to sue under the Tucker Acts for ⁽ⁱ⁾ excessive management fees and for ~~an~~ interest ⁽ⁱⁱ⁾ under the theory that
such money is unlawfully retained. ?

I recommend affirming in part and reversing in part.

from

81-1748 U.S. v. MITCHELL

Argued 3/1/83

Suit by Indians for mis mgmt. of
timber lands

Schwartz (SG)

Congress has not authorized recovery damages. Testate is relied on.

None of statutes relied on by Resp contain such authorized.

Compare with Tort Claims Act language. Also Alien's Claim Act.

Timber sales statute does require that proceeds be paid over; See 43a of Petr.

Some of our cases have spoken in terms of con't "imply a cause of action" & others of "sovereign immunity". This is a matter of semantics - not substantive

There are a number of separate statutes (too many for "oral presentation")

406a

Main statute is § 406a (see 43a of Petr.)

The "power of atty" executed by Indians conferred broad auth. on the Secretary of Interior

Hobbs (Reser) (Excellent argument)

Background of this long litigation is set forth in Brief in Mitchell I, here three yrs. ago.

Indians could not sell the timber. This resulted in Act of ~~1880~~ 1910 authorizing Sec. to sell it. Amended in 1934. See also 1934 Act.

Tribes also owns ^{timber} ~~land~~ & it is a party to this suit. The Secretaries control over ~~in~~ Tribal land is created by different statutes.

Mitchell I held that the "trust" alone doesn't create a waiver of immunity. We ~~so~~ remanded to determine whether the statutes authorize a damage suit vs U.S.

~~First~~ Agrees statutes do not ~~expressly~~ ^{expressly} authorize damages remedy. Otherwise there would be no argument. Tertian says such a remedy exists if the statutes may "fairly be interpreted" to authorize it.

Over
decided
3 yrs
ago

Hobbs (cont.)

Agree with SG that Q is what the Congress intended.

1. There is trust relation - not present in Testan. Congress must ~~not~~ have intended that trust would be fulfilled for benefit of Indians

2. Indian Tucker Act - leg. hist. clearly indicates Congress intended recovery for breach of trust.

See ~~quoting~~ quote on p 28. (Jackson)

3. ~~But for~~ Negative interest in Testan not present here

4. Testan involved a statutory right (Pay Act). Here a trust relationship that is well known at same law

5. Canon of construction - favor Indians. See p 23

6. Here the right is a present one to be paid. Not so in Testan

7. There is a money consideration

8. If Govt were trustee of money rather than timber, recovery would be allowed

81-1748 U.S. v Mitchell (Quenault Indians)
Pre-~~and~~ Conf. notes.

1. Teslar v Mitchell I relied on by both parties
In ~~Quenault~~ Teslar; we said no
recovery unless "the statute itself
--- can fairly be interpreted as
mandating compensation for damages
sustained. Can't imply consent."

2. No damages nor remedy
Can't so interpret any statute

3. No ~~damages~~ damages under Trust
Theory. Can't imply.

4. Tucker Act ~~claims~~ for specific
failure:

(a) Failure to pay over interest

SG considered (b) Excessive fees charged
(funds wrongfully retained)

5. Express Ct theory based on power
of atty to mgmt. & sell timber. Ct claims
found no merit to claim this
authorized suit for mis-management
(Go back to statute authorizing
the Pow/atty - but not clear which statute)

The Chief Justice

Aff'm

There has been a limited waiver.

Ch/Claimer is right.

Govt has assumed full control
of these lands. Damages claim OK

Justice Brennan

Aff'm

Govt agrees on injunctive
relief. NO reason to make
distinction.

Justice White

Aff'm

Leg. history supports
responsibility of Govt.

Justice Marshall

Aff'm

There is like eminent domain

Justice Blackmun

Aff'm

Case is close

Justice Powell

Aff'm in part/Rev in part.

See my notes

Justice Rehnquist

App in part & Rev in part

Only difference bet. This case &

Testate

Agrees with LFP.

Justice Stevens

App

Justice O'Connor

Rev

Agrees with LFP & BRW

But may not dissent

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: **MAY 31 1983**

Recirculated: _____

*9-11 dissent
- see letter
to TM*

1st DRAFT

SUPREME COURT OF THE UNITED STATES

81-1748

UNITED STATES, PETITIONER *v.*
HELEN MITCHELL ET AL.

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

[June —, 1983]

JUSTICE MARSHALL delivered the opinion of the Court.

The principal question in this case is whether the United States is accountable in money damages for alleged breaches of trust in connection with its management of forest resources on allotted lands of the Quinault Indian Reservation.

I

A

In the 1850s, the United States undertook a policy of removing Indian tribes from large areas of the Pacific Northwest in order to facilitate the settlement of non-Indians.¹ Pursuant to this policy, the first Governor and Superintendent of Indian Affairs of the Washington Territory began negotiations in 1855 with various tribes living on the west coast of the Territory. The negotiations culminated in a treaty between the United States and the Quinault and Quileute Tribes, 12 Stat. 971 (Treaty of Olympia). In the Treaty the Indians ceded to the United States a vast tract of land on the Olympic Peninsula in the State of Washington, and the

¹See Act of June 5, 1850, 9 Stat. 437; Appropriation Act of March 3, 1853, 10 Stat. 226, 238; *Quinault Allottee Association v. United States*, 202 Ct. Cl. 625, 628-269, 485 F. 2d 1391, 1392 (1973), cert. denied 416 U. S. 961 (1974).

United States agreed to set aside a reservation for the Indians.

In 1861 a reservation of about 10,000 acres was provisionally chosen for the tribes.² This tract proved undesirable because of its limited size and heavy forestation. The Quinault Agency superintendent subsequently recommended that since the coastal tribes drew their subsistence almost entirely from the water,³ they should be collected on a reservation suitable for their fishing needs. Acting on this suggestion, President Grant issued an order on November 4, 1873, designating about 200,000 acres along the Washington coast as an Indian reservation.⁴ The vast bulk of this land consisted of rain forest covered with huge, coniferous trees.

In 1905 the Federal Government began to allot the Quinault Reservation in trust to individual Indians under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.*⁵ See also the Quinault Allotment Act of March 4, 1911, 36 Stat. 1345. The Government initially determined that the forested areas of the Reservation were not to be allotted because they were not suitable for agriculture or grazing. In 1924, however, this Court concluded that the character of lands to be set apart for

² See *Halbert v. United States*, 283 U. S. 753, 757 (1931).

³ See generally *United States v. Washington*, 384 F. Supp. 312, 350-353 (WD Wash. 1974), *aff'd*, 520 F. 2d 676 (CA9 1975), *cert. denied*, 423 U. S. 1086 (1976) (describing pre-Treaty role of fishing among Northwest Indians).

⁴ Executive Order, I C. Kappler, *Indian Affairs* 923 (2d ed. 1904). The Order declared that the reservation would be held for the use of the Quinault, Quileute, Hoh, Queets, "and other tribes of fish-eating Indians on the Pacific Coast." *Ibid.*

⁵ Section 5 of the Act provided that the United States would hold the allotted land for 25 years "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made." The period during which the United States was to hold the allotted land was extended indefinitely by the Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984, 25 U. S. C. § 462.

the Indians was not restricted by the General Allotment Act. *United States v. Payne*, 264 U. S. 446, 449 (1924). Thereafter, the forested lands of the Reservation were allotted. By 1935 the entire Reservation had been divided into 2,340 trust allotments, most of which were 80 acres of heavily timbered land. About a third of the Reservation has since gone out of trust, but the bulk of the land has remained in trust status.⁶

The forest resources on the allotted lands have long been managed by the Department of the Interior, which exercises "comprehensive" control over the harvesting of Indian timber. *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136, 145 (1980). The Secretary of the Interior has broad statutory authority over the sale of timber on reservations. See 25 U. S. C. §§ 405–407. Sales of timber "must be based upon a consideration of the needs and best interests of the Indian owner and his heirs," § 406(a), and the proceeds from such sales are to be used for the benefit of the Indians or transferred to the Indian owner, §§ 406(a), 407. Congress has directed the Secretary to adhere to principles of sustained-yield forestry on all Indian forest lands under his supervision. 25 U. S. C. § 466. Under these statutes, the Secretary has promulgated detailed regulations governing the management of Indian timber. 25 CFR Part 163 (1982). The Secretary is authorized to deduct an administrative fee for his services from the timber revenues paid to Indian allottees. 25 U. S. C. §§ 406(a), 413.

B

The respondents are 1,465 individuals owning interests in allotments on the Quinault Reservation, an unincorporated association of Quinault Reservation allottees, and the Quinault Tribe, which now holds some portions of the allotted

⁶ See *Mitchell v. United States*, 219 Ct. Cl. 95, 97, 591 F. 2d 1300, 1300–1301 (1979).

lands. In 1971 respondents filed four actions that were consolidated in the Court of Claims. Jurisdiction was based on 28 U. S. C. §§ 1491 and 1505. Respondents sought to recover damages from the United States based on allegations of pervasive waste and mismanagement of timber lands on the Quinault Reservation. More specifically, respondents claimed that the Government (1) failed to obtain a fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis; (3) failed to obtain any payment at all for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations and exacted improper charges from allottees for maintenance of roads; (5) failed to pay any interest on certain funds from timber sales held by the Government and paid insufficient interest on other funds; and (6) exacted excessive administrative fees from allottees. Respondents assert that the alleged misconduct constitutes a breach of the fiduciary duty owed them by the United States as trustee under various statutes.

Six years after the suits were filed, the United States moved to dismiss for lack of jurisdiction, contending that the Court of Claims had no authority over claims based on a breach of trust. The court denied the motion, holding that the General Allotment Act created a fiduciary duty on the United States' part to manage the timber resources properly and thereby provided the necessary authority for recovery of damages against the United States. 219 Ct. Cl. 95, 591 F. 2d 1300 (1979) (*en banc*).

In *United States v. Mitchell*, 445 U. S. 535 (1980), this Court reversed the ruling of the Court of Claims, stating that the General Allotment Act "created only a limited trust relationship between the United States and the allottees that does not impose any duty upon the Government to manage timber resources." *Id.*, at 542. We concluded that "[a]ny right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than [the General Allotment] Act."

Id., at 546. Since the Court of Claims had not considered respondents' assertion that other statutes render the United States answerable in money damages for the alleged mismanagement in this case, we remanded the case for consideration of these alternative grounds for liability. See *id.*, at 546, n. 7.

On remand, the Court of Claims once again held the United States subject to suit for money damages on most of respondents' claims. — Ct. Cl. —, 664 F. 2d 265 (1981) (*en banc*). The court ruled that the timber management statutes, 25 U. S. C. §§ 406, 407, and 466, various federal statutes governing road building and rights of way, §§ 318 and 323–325, statutes governing Indian funds and government fees, §§ 162a and 413, and regulations promulgated under these statutes imposed fiduciary duties upon the United States in its management of forested allotted lands. The court concluded that the statutes and regulations implicitly required compensation for damages sustained as a result of the Government's breach of its duties. Thus, the Court held that respondents could proceed on their claims.

Because the decision of the Court of Claims raises issues of substantial importance concerning the liability of the United States,⁷ we granted the Government's petition for certiorari. — U. S. — (1982). We affirm.

II

Respondents have invoked the jurisdiction of the Court of Claims under the Tucker Act, 28 U. S. C. § 1491, and its counterpart for claims brought by Indian tribes, 28 U. S. C. § 1505, known as the Indian Tucker Act.⁸ The Tucker Act states in pertinent part:

⁷The Government has informed us that the damages claimed in this suit alone may amount to \$100 million. Pet. for Cert. 24.

⁸Section 24 of the Indian Claims Commission Act, 28 U. S. C. § 1505, provides tribal claimants the same access to the Court of Claims provided

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U. S. C. § 1491.

It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.⁹ The terminology employed in some of our prior decisions has unfortunately generated some confusion as to whether the Tucker Act constitutes a waiver of sovereign immunity. The time has come to resolve this confusion. For the reasons set forth below, we conclude that by giving the Court of Claims jurisdiction over specified types of claims against the United States,¹⁰ the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims.

A

Before 1855 no general statute gave the consent of the United States to suit on claims for money damages; the only recourse available to private claimants was to petition Congress for relief.¹¹ In order to relieve the pressure caused by the volume of private bills and to avoid the delays and inequities of the private bill procedure, Congress created the

to individual claimants by 28 U. S. C. § 1491. See *United States v. Mitchell*, 445 U. S. 535, 538-540 (1980).

⁹See *United States v. Sherwood*, 312 U. S. 584, 586 (1941); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice And Procedure* § 3654, at 156-157 (1976).

¹⁰The Tucker Act provided concurrent jurisdiction in the district courts over claims not exceeding \$10,000. See 28 U. S. C. § 1346(a)(2).

¹¹See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and the Federal System* 98 (2d ed. 1973); Richardson, *History, Jurisdiction, and Practice of the Court of Claims*, 17 Ct. Cl. 3, 3-4 (1882).

Court of Claims. Act of February 24, 1855, c. 122, 10 Stat. 612. The 1855 Act empowered that court to hear claims and report its findings to Congress and to submit a draft of a private bill in each case which received a favorable decision. § 7, 10 Stat. 613. The limited powers initially conferred upon the court failed to relieve Congress from "the laborious necessity of examining the merits of private bills." *Glidden Co. v. Zdanok*, 370 U. S. 530, 553 (1962) (opinion of Harlan, J.). Thus, in his State of the Union Message of 1861, President Lincoln recommended that the court be authorized to render final judgments. He declared that it is "as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862). Congress adopted the President Lincoln's recommendation and made the court's judgments final. Act of March 3, 1863, ch. 92, 12 Stat. 765.¹²

In 1886 Representative John Randolph Tucker introduced a bill to revise in several respects the jurisdiction and procedures of the Court of Claims and to replace most provisions of the 1855 and 1863 Acts. H. R. 6974, 59th Cong., 1st Sess. (1886). The House Judiciary Committee reported that the bill was a "comprehensive measure by which claims against the United States may be heard and determined." H. R. Rep. No. 1077, 49th Cong., 1st Sess. 1 (1886). The measure was designed "to give the people of the United States what

¹² Section 14 of the 1863 Act provided that "no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." 12 Stat. 768. In *Gordon v. United States*, 2 Wall. 561 (1864), this Court dismissed an appeal from a judgment of the Court of Claims for want of jurisdiction, holding that § 14 gave the Secretary a revisory authority over the court inconsistent with its exercise of judicial power. Congress promptly repealed the provision, Act of March 17, 1866, c. 19, § 1, 14 Stat. 9. See *Glidden Co. v. Zdanok*, 370 U. S. 530, 554 (1962) (opinion of Harlan, J.).

every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances.” 18 Cong. Rec. 2680 (1887) (remarks of Rep. Bayne). See *id.*, at 622 (remarks of Rep. Tucker); *id.*, at 2679 (colloquy between Reps. Tucker and Townshend); *id.*, at 2680 (remarks of Rep. Holman). The eventual enactment thus “provide[d] for the bringing of suits against the Government of the United States.” Act of March 3, 1887, ch. 359, 24 Stat. 505.

✓ The Indian Tucker Act, 28 U. S. C. § 1505, has a similar history. An early amendment to the original enactment creating the Court of Claims had excluded claims by Indian tribes. Act of March 3, 1863, ch. 92, § 9, 12 Stat. 767. As a result, Congress eventually confronted a “vast and growing burden” resulting from the large number of tribes seeking special jurisdictional acts. H. R. Rep. No. 1466, 79th Cong., 1st Sess. 6 (1945). Congress responded by conferring jurisdiction on the Court of Claims to hear any tribal claim “of a character which would be cognizable in the Court of Claims if the claimant were not an Indian tribe.” *Id.*, at 13. As the House sponsor of the Act stated, an important goal of the Act was to ensure that it would “never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriation of Indian funds or of any other Indian property by Federal officials that might occur in the future.” 92 Cong. Rec. 5313 (1946) (statement of Rep. Jackson). Indians were to be given “their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal government assumed.” *Id.*, at 5312.¹⁸ The House

¹⁸ See 92 Cong. Rec. 5312 (statement of Rep. Jackson) (“The Interior Department itself suggested that it ought not be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability.”) See also Hearings on H. R. 1198 and H. R. 1341 before the House Committee on Indian Affairs, 79th Cong., 1st Sess.

Report stressed the same point: "If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States." H. R. Rep. No. 1466, at 4.

For decades this Court consistently interpreted the Tucker Act as having provided the consent of United States to be sued *eo nomine* for the classes of claims described in the Act. See, e. g., *Shillinger v. United States*, 155 U. S. 163, 166-167 (1894); *Belknap v. Schild*, 161 U. S. 10, 17 (1896); *Dooley v. United States*, 182 U. S. 222, 227-228 (1901); *Reid v. United States*, 211 U. S. 529, 538 (1909); *United States v. Sherwood*, 312 U. S. 584, 590 (1940); *Dalehite v. United States*, 346 U. S. 15, 25, n. 10 (1953); *Soriano v. United States*, 352 U. S. 270, 273 (1957). In at least two recent decisions this Court explicitly stated that the Tucker Act effects a waiver of sovereign immunity. *Army & Air Force Exchange Service v. Sheehan*, — U. S. —, — (1982); *Hatzlachh Supply Co. v. United States*, 444 U. S. 460, 466 (1980) (per curiam). These decisions confirm the unambiguous thrust of the history of the Act.

The existence of a waiver is readily apparent in claims founded upon "any express or implied contract with the United States." 28 U. S. C. § 1491. The Court of Claims' jurisdiction over contract claims against the government has long been recognized, and government liability in contract is viewed as perhaps "the widest and most unequivocal waiver of federal immunity from suit." *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 876 (1957). See also 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3656, at 202 (1976). The source of consent for such suits unmistakably lies in the Tucker Act. Otherwise, it is doubtful that *any* consent would exist, for no contracting officer or other

130 (1945) (statement of Assistant Solicitor Cohen).

official is empowered to consent to suit against the United States.¹⁴ The same is true for claims founded upon executive regulations. Indeed, the Act makes absolutely no distinction between claims founded upon contracts and claims founded upon other specified sources of law.

In *United States v. Testan*, 424 U. S. 392, 398, 400 (1976), and in *United States v. Mitchell*, 445 U. S., at 538, this Court employed language suggesting that the Tucker Act does not effect a waiver of sovereign immunity. Such language was not necessary to the decision in either case. See *infra*, at 11-12. Without in any way questioning the result in either case, we conclude that this isolated language should be disregarded. If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit.

B

It nonetheless remains true that the Tucker Act “‘does not create any substantive right enforceable against the United States for money damages.’” *United States v. Mitchell*, 445 U. S., at 538, quoting *United States v. Testan*, 424 U. S., at 398. A substantive right must be found in some other source of law, such as “the Constitution, or any Act of Congress, or any regulation of an executive department.” 28 U. S. C. § 1491. Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, see *United States v. King*, 395 U. S. 1, 2-3 (1969), and the claimant must demonstrate that the source of substantive law he relies upon “‘can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.’” *United States v. Testan*, 424 U. S., at

¹⁴ See *United States v. New York Rayon Importing Co.*, 329 U. S. 654, 660 (1957); *United States v. Shaw*, 309 U. S. 495, 501 (1940); *Carr v. United States*, 98 U. S. 433, 438 (1879).

400, quoting *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967).¹⁵

For example, in *United States v. Testan*, *supra*, two government attorneys contended that they were entitled to a higher salary grade under the Classification Act,¹⁶ and to an award of back pay under the Back Pay Act¹⁷ for the period during which they were classified at a lower grade. This Court concluded that neither the Classification Act nor the Back Pay Act could fairly be interpreted as requiring compensation for wrongful classifications. See 424 U. S., at 398-407. Particularly in light of the "established rule that one is not entitled to the benefit of a position until he has been appointed to it," *id.*, at 402,¹⁸ the Classification Act does not support a claim for money damages. While the Back Pay Act does provide a basis for money damages as a remedy "in carefully limited circumstances" such as wrongful reductions in grade, *id.*, at 404, it does not apply to wrongful classifications. *Id.*, at 405.

Similarly, in *United States v. Mitchell*, *supra*, this Court concluded that the General Allotment Act does not confer a right to recover money damages against the United States. While § 5 of the Act provided that the United States would hold land "in trust" for Indian allottees, 25 U. S. C. § 348, we held that the Act creates only a limited trust relationship. 445 U. S., at 542. The trust language of the Act does not impose any fiduciary management duties or render the United States answerable for breach thereof, but only prevents improvident alienation of the allotted lands and assures

¹⁵ As the *Eastport* decision recognized, the substantive source of law may grant the claimant a right to recover damages either "expressly or by implication." *Id.*, at 605; 372 F. 2d, at 1007. See also *Ralston Steel Corp. v. United States*, 169 Ct. Cl. 119, 125, 340 F. 2d 663, 667, cert. denied, 381 U. S. 950 (1965).

¹⁶ 5 U. S. C. § 5101.

¹⁷ 5 U. S. C. § 5596.

¹⁸ Citing *United States v. McLean*, 95 U. S. 750 (1878); *Ganse v. United States*, 180 Ct. Cl. 183, 186, 376 F. 2d 900, 902 (1967).

✓
But see
Mitchell
538 at

their immunity from state taxation. *Id.*, at 544.

✓ Thus, for claims against the United States “founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department,” 28 U. S. C. § 1491, a court must inquire whether the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained. In undertaking this inquiry, a court need not find a separate waiver of sovereign immunity in the substantive provision, just as a court need not find consent to suit in “any express or implied contract with the United States.” *Ibid.* The Tucker Act itself provides the necessary consent.

✓ Of course, in determining the general scope of the Tucker Act, this Court has not lightly inferred the United States’ consent to suit. See *United States v. King*, 395 U. S. 1, 4–5 (1969) (Court of Claims lacks authority to issue declaratory judgment); *Soriano v. United States*, 352 U. S. 270, 276 (1957) (non-tolling of limitations beyond statutory provisions). For example, although the Tucker Act refers to claims founded upon any implied contract with the United States, we have held that the Act does not reach claims based on contracts implied in law, as opposed to those implied in fact. *Merritt v. United States*, 267 U. S. 338, 341 (1925).

In this case, however, there is simply no question that the Tucker Act provides the United States’ consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a claim falls within this category, the existence of a waiver of sovereign immunity is clear. The question in this case is thus analytically distinct: whether the statutes or regulations at issue can be interpreted as requiring compensation. Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity. See *United States v. Emery, Bird, Thayer Realty*

Co., 237 U. S. 28, 32 (1915). “The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.” *United States v. Aetna Surety Co.*, 338 U. S. 366, 383 (1949), quoting *Anderson v. John L. Hayes Constr. Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29-30 (1926) (Cardozo, J.).¹⁹

III

Respondents have based their money claims against the United States on various Acts of Congress and executive department regulations. We begin by describing these sources of substantive law. We then examine whether they can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose.

A

The Secretary of the Interior's pervasive role in the sales of timber from Indian lands began with the Act of June 25, 1910, ch. 431, §§ 7-8, 36 Stat. 855, 857, as amended, 25 U. S. C. §§ 406-407. Prior to that time, Indians had no right to sell timber on reservation land,²⁰ and there existed “no general law under which authority for sale of timber on Indian lands, whether allotted or unallotted, can be granted.” H. R. Rep. No. 1135, 61st Cong., 2d Sess. 3 (1910) (quoting letter of the Secretary of the Interior). Congress recognized that this situation was undesirable “because in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment.” *Ibid.* The 1910 Act empowered the Secretary to sell timber

¹⁹ Cf. *Block v. Neal*, — U. S. —, — (1983); *Indian Towing Co. v. United States*, 350 U. S. 61, 69 (1955).

²⁰ See *United States v. Cook*, 19 Wall. 591 (1874); *Pine River Logging Co. v. United States*, 186 U. S. 279 (1902); 19 Op. Atty. Gen. 194 (1888).

on unallotted lands and apply the proceeds of the sales for the benefit of the Indians, § 7, and authorized the Secretary to consent to sales by allottees, with the proceeds to be paid to the allottees or disposed of for their benefit, § 8. Congress thus sought to provide for harvesting timber "in such a manner as to conserve the interests of the people on the reservations, namely, the Indians." 45 Cong. Rec. 6087 (1910) (remarks of Rep. Saunders).

From the outset, the Interior Department recognized its obligation to supervise the cutting of Indian timber. In 1911, the Department's Office of Indian Affairs promulgated detailed regulations covering its responsibilities in "managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911). The regulations addressed virtually every aspect of forest management, including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source. *Id.*, at 8-28. The regulations applied to allotted as well as tribal lands, and the Secretary's approval of timber sales on allotted lands was explicitly conditioned upon compliance with the regulations. *Id.*, at 9.

Over time, deficiencies in the Interior Department's performance of its responsibilities became apparent. Accordingly, as part of the Indian Reorganization Act of 1934, c. 576, 484 Stat. 984, Congress imposed even stricter duties upon the Government with respect to Indian timber management. In § 6 of the Act, now codified as 25 U. S. C. § 466, Congress expressly directed that the Interior Department manage Indian forest resources "on the principle of sustained-yield management." Representative Howard, co-

sponsor of the Act and Chairman of the House Committee on Indian Affairs, explained that the purpose of the provision was "to assure a proper and permanent management of the Indian Forest" under modern sustained-yield methods so as to "assure that the Indian forests will be permanently productive and will yield continuous revenues to the tribes." 78 Cong. Rec. 11730 (1934). See *United States v. Anderson*, 625 F. 2d 910, 915 (CA9 1980), cert. denied, 450 U. S. 920 (1981). Referring to the relationship between the Indians and the Government as a "sacred trust," Representative Howard stated that "[t]he failure of their governmental guardian to conserve the Indians' land and assets and the consequent loss of income or earning power, has been the principal cause of the present plight of the Indian." 78 Cong. Rec., at 11726.²¹

Regulations promulgated under the Act required the preservation of Indian forest lands in a perpetually productive state, forbade the clear-cutting of large contiguous areas, called for the development of long-term working plans for all major reservations, required adequate provision for new growth when mature timber was removed, and required the regulation of run-off and the minimization of erosion.²² The regulatory scheme was designed to assure that the Indians receive "the benefit of whatever profit [the forest] is capable of yielding." *White Mountain Apache Tribe v. Bracker*, 448 U. S., at 149 (quoting 25 CFR § 141.3(a)(3) (1979)).

²¹ John Collier, the Commissioner of Indian Affairs and a principal author of the Act, had testified that

"there must be a constructive handling of Indian timber. We have got to stop the slaughtering of Indian timber lands, to operate them on a perpetual yield basis and the bill expressly directs that this principle of conservation shall be applied throughout."

Hearings on H. R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess., pt. 2, at 35 (1934).

²² The Bureau of Indian Affairs's 1936 General Forest Regulations remain essentially unchanged within 25 CFR Part 163 (1982).

In 1964 Congress amended the timber provisions of the 1910 Act, again emphasizing the Secretary of the Interior's management duties. Act of April 30, 1964, 78 Stat. 186. As to sales of timber on allotted lands, the Secretary was directed to consider "the needs and best interests of the Indian owner and his heirs." 25 U. S. C. § 406(a). In performing this duty, the Secretary was specifically required to take into account:

"(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs." *Ibid.* See also § 407 (timber sales on unallotted trust lands).

The timber management statutes, 25 U. S. C. §§ 406–407, 466, and the regulations promulgated thereunder, 25 CFR Part 163 (1982), establish the "comprehensive" responsibilities of the Federal Government in managing the harvesting of Indian timber. *White Mountain Apache Tribe v. Bracker*, 448 U. S., at 145. The Department of the Interior—through the Bureau of Indian Affairs—⁽¹⁾exercises literally daily supervision over the harvesting and management of tribal timber." *Id.*, at 147.²³ Virtually every stage of the process is under federal control.²⁴

²³ By virtue of the Act of February 14, 1920, ch. 75, § 1, 41 Stat. 415, as amended by the Act of March 1, 1933, ch. 158, 47 Stat. 1417, the Secretary of the Interior is authorized to collect "reasonable fees" from Indian timber sale proceeds to cover the cost of the management and sale of the Indians' timber. 25 U. S. C. § 413. Sections 406 and 407, as amended in 1964, both provide for deductions of administrative expenses "to the extent permissible under section 413." See also 25 CFR § 163.18 (1982). Respondents have asserted that administrative fee deductions were excessive or improper in several respects. The Court of Claims concluded that there is

✓ The Department exercises comparable control over grants of rights-of-way on Indian lands held in trust.²⁵ The Secretary is empowered to grant rights-of-way for all purposes across trust land, 25 U. S. C. § 323, provided that he obtains the consent of the tribal or individual Indian landowner, § 324,²⁶ and that the Indian owners are paid appropriate compensation, § 325. Regulations detail the scope of federal supervision. 25 CFR Part 169 (1982).²⁷ For example, an applicant for a right-of-way must deposit with the Secretary an amount not less than the fair market value of the rights granted, plus an amount to cover potential damages associated with activity on the right-of-way. The Secretary must determine the adequacy of the compensation, and the amounts deposited must be held in a special account for distribution to Indian landowners. See 25 CFR §§ 169.12, 169.14 (1982).²⁸

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“undoubted consent-to-suit from such claims that the Government illegally kept some of the Indians’ own money or property.” — Ct. Cl. —, —, 664 F. 2d 265, 274, citing *United States v. Testan*, 424 U. S., at 400–401; *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 598, 605–606, 372 F. 2d 1002, 1007–1008 (1967). The Government does not appear to dispute this conclusion. Brief for the United States 33, n. 27.

²⁴ The Secretary even has authority to invest tribal and individual Indian funds held in trust in banks, bonds, notes, or other public debt obligations of the United States if deemed advisable and for the best interest of the Indians. Act of June 24, 1938, 52 Stat. 1037, 25 U. S. C. § 162a. In this case the funds maintained on behalf of individual allottees were derived primarily from timber sales.

²⁵ See Act of February 5, 1948, 62 Stat. 17, codified in part at 25 U. S. C. §§ 323–325. See also Act of May 26, 1928, 45 Stat. 750, 25 U. S. C. § 318a (road building).

²⁶ Rights-of-way over lands of individual Indians may be granted without the consent of the owners under certain specific circumstances. § 324.

²⁷ Such regulations have a long history. See 25 CFR Part 256 (1949).

²⁸ See also § 169.3 (consent of Indian landowners to grants of rights-of-way); § 169.5 (specifying required elements of agreements between Secretary and applicants, including stipulation that upon termination of the right-of-way the applicant will restore land to its original condition so far as

B

In *United States v. Mitchell*, 445 U. S., at 542, this Court recognized that the General Allotment Act creates a trust relationship between the United States and Indian allottees but concluded that the trust relationship was limited. We held that the Act could not be read "as establishing that the United States has a fiduciary responsibility for management of allotted forest lands." *Id.*, at 546. In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

The language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship. For example, § 8 of the 1910 Act, as amended, expressly mandates that sales of timber from Indian trust lands be based upon the Secretary's consideration of "the needs and best interests of the Indian owner and his heirs" and that proceeds from such sales be paid to owners "or disposed of for their benefit." 25 U. S. C. § 406(a). Similarly, even in its earliest regulations, the Government recognized its duties in "managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911). Thus, the Government has "expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber." *White Mountain Apache Tribe v. Bracker*, 448 U. S., at 149.²⁹

is reasonably possible). As to roads on Indian reservations, respondents have alleged improper deduction of road maintenance costs as a charge against the allottees' timber payments.

²⁹ The pattern of pervasive federal control evident in the area of timber

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Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).³⁰ "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such 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." *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F. 2d 981, 987 (1980).

Our 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. This Court has previously emphasized "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Seminole Nation v. United States*, 316 U. S. 286, 296 (1942). This principle has long dominated the Government's dealings with Indians. *United States v. Mason*, 412 U. S. 391, 398 (1973); *Minnesota v. United States*, 305 U. S. 382, 386 (1939); *United States v. Shoshone Tribe*, 304 U. S. 111, 117-118 (1938); *United States v. Candelaria*, 271 U. S. 432, 442 (1926); *McKay v. Kalyton*, 204 U. S. 458, 469 (1907); *Minnesota v. Hitchcock*, 185 U. S. 373, 396 (1902); *United States v. Kagama*, 118 U. S. 375, 382-384 (1886); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831).

Because the statutes and regulations at issue in this case

sales and timber management applies equally to grants of rights-of-way and to management of Indian funds. See *supra*, at 17, and n. 24.

³⁰ See Restatement (Second) of the Law of Trusts § 2, Comment *h*, at 10 (1959).

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clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. See Restatement (Second) of the Law of Trusts §§ 205–212 (1959); G. Bogert, *The Law of Trusts & Trustees* § 862 (2d ed. 1965); 3 A. Scott, *The Law of Trusts* § 205 (3d ed. 1967). This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.³¹

The recognition of a damages remedy also furthers the purposes of the statutes and regulations, which clearly require that the Secretary manage Indian resources so as to generate proceeds for the Indians. It would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no

³¹ See, e. g., *Seminole Nation v. United States*, 316 U. S. 286, 295–300 (1942); *United States v. Creek Nation*, 295 U. S. 103, 109–110 (1935); *Moose v. United States*, 674 F. 2d 1277, 1281 (CA9 1982); *Whiskers v. United States*, 600 F. 2d 1332, 1335 (CA10 (1979), cert. denied, 444 U. S. 1078 (1980); *Coast Indian Community v. United States*, 213 Ct. Cl. 129, 152–156, 550 F. 2d 639, 652–654 (1977); *Cheyenne-Arapaho Tribes v. United States*, 206 Ct. Cl. 340, 345, 512 F. 2d 1390, 1392 (1975); *Mason v. United States*, 198 Ct. Cl. 599, 613–616, 461 F. 2d 1364, 1372–1373 (1972), rev'd on other grounds, 412 U. S. 391 (1973); *Navajo Tribe v. United States*, 176 Ct. Cl. 502, 507, 364 F. 2d 320, 322 (1966); *Klamath & Modoc Tribes, v. United States*, 174 Ct. Cl. 483, 490–491 (1966); *Menominee Tribe v. United States*, 102 Ct. Cl. 555, 562 (1945); *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 18–20 (1944); *Smith v. United States*, 515 F. Supp. 56, 60 (ND Cal. 1978); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1243–1248 (ND Cal. 1973).

right to the value of the resources if the Secretary's duties are not performed. "Absent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties, at least until the allottees managed to obtain a judicial decree against future breaches of trust." *United States v. Mitchell*, 445 U. S., at 550 (WHITE, J., dissenting). Cf. H. R. Rep. No. 1466, 79th Cong., 1st Sess. 5 (1945).

The Government contends that violations of duties imposed by the various statutes may be cured by actions for declaratory, injunctive or mandamus relief against the Secretary, although it concedes that sovereign immunity might have barred such suits before 1976.³² Brief of the United States at 40. In this context, however, prospective equitable remedies are totally inadequate. To begin with, the Indian allottees are in no position to monitor federal management of their lands on a consistent basis. Many are poorly educated, most are absentee owners, and many do not even know the exact physical location of their allotments. Indeed, it was the very recognition of the inability of the Indians to oversee their interests that led to federal management in the first place. A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.

In addition, by the time government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless. For example, if timber on an allotment has been destroyed through Government mismanagement, it will take many years for nature to restore the timber. As this Court has observed,

³² See *Naganab v. Hitchcock*, 202 U. S. 473, 475-476 (1906). In 1976 Congress enacted a general consent to such suits. See 5 U. S. C. § 702.

"Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to [the allottee's] ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence."

Squire v. Capoeman, 351 U. S. 1, 10 (1956).

We thus conclude that the statutes and regulations at issue here can fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property. The Court of Claims therefore has jurisdiction over respondents' claims for alleged breaches of trusts. ✓

IV

The judgment of the Court of Claims is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

*This would Hold that
Govt is liable for breach
of fiduciary duty to
manage the timber lands
of the ~~Quinault~~ Tribe,
& that the Ct/Claimer
has juris.*

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: **MAY 31 1983**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

81-1748

UNITED STATES, PETITIONER v.
HELEN MITCHELL ET AL.

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

[June —, 1983]

JUSTICE MARSHALL delivered the opinion of the Court.

The principal question in this case is whether the United States is accountable in money damages for alleged breaches of trust in connection with its management of forest resources on allotted lands of the Quinault Indian Reservation.

I

A

In the 1850s, the United States undertook a policy of removing Indian tribes from large areas of the Pacific Northwest in order to facilitate the settlement of non-Indians.¹ Pursuant to this policy, the first Governor and Superintendent of Indian Affairs of the Washington Territory began negotiations in 1855 with various tribes living on the west coast of the Territory. The negotiations culminated in a treaty between the United States and the Quinault and Quileute Tribes, 12 Stat. 971 (Treaty of Olympia). In the Treaty the Indians ceded to the United States a vast tract of land on the Olympic Peninsula in the State of Washington, and the

¹ See Act of June 5, 1850, 9 Stat. 437; Appropriation Act of March 3, 1853, 10 Stat. 226, 238; *Quinault Allottee Association v. United States*, 202 Ct. Cl. 625, 628-269, 485 F. 2d 1391, 1392 (1973), cert. denied 416 U. S. 961 (1974).

*I voted
to affirm
or to
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United States agreed to set aside a reservation for the Indians.

In 1861 a reservation of about 10,000 acres was provisionally chosen for the tribes.² This tract proved undesirable because of its limited size and heavy forestation. The Quinault Agency superintendent subsequently recommended that since the coastal tribes drew their subsistence almost entirely from the water,³ they should be collected on a reservation suitable for their fishing needs. Acting on this suggestion, President Grant issued an order on November 4, 1873, designating about 200,000 acres along the Washington coast as an Indian reservation.⁴ The vast bulk of this land consisted of rain forest covered with huge, coniferous trees.

In 1905 the Federal Government began to allot the Quinault Reservation in trust to individual Indians under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.*⁵ See also the Quinault Allotment Act of March 4, 1911, 36 Stat. 1345. The Government initially determined that the forested areas of the Reservation were not to be allotted because they were not suitable for agriculture or grazing. In 1924, however, this Court concluded that the character of lands to be set apart for

² See *Halbert v. United States*, 283 U. S. 753, 757 (1931).

³ See generally *United States v. Washington*, 384 F. Supp. 312, 350-353 (WD Wash. 1974), *aff'd*, 520 F. 2d 676 (CA9 1975), cert. denied, 423 U. S. 1086 (1976) (describing pre-Treaty role of fishing among Northwest Indians).

⁴ Executive Order, I C. Kappler, Indian Affairs 923 (2d ed. 1904). The Order declared that the reservation would be held for the use of the Quinault, Quileute, Hoh, Queets, "and other tribes of fish-eating Indians on the Pacific Coast." *Ibid.*

⁵ Section 5 of the Act provided that the United States would hold the allotted land for 25 years "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made." The period during which the United States was to hold the allotted land was extended indefinitely by the Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984, 25 U. S. C. § 462.

the Indians was not restricted by the General Allotment Act. *United States v. Payne*, 264 U. S. 446, 449 (1924). Thereafter, the forested lands of the Reservation were allotted. By 1935 the entire Reservation had been divided into 2,340 trust allotments, most of which were 80 acres of heavily timbered land. About a third of the Reservation has since gone out of trust, but the bulk of the land has remained in trust status.⁶

The forest resources on the allotted lands have long been managed by the Department of the Interior, which exercises "comprehensive" control over the harvesting of Indian timber. *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136, 145 (1980). The Secretary of the Interior has broad statutory authority over the sale of timber on reservations. See 25 U. S. C. §§ 405–407. Sales of timber "must be based upon a consideration of the needs and best interests of the Indian owner and his heirs," § 406(a), and the proceeds from such sales are to be used for the benefit of the Indians or transferred to the Indian owner, §§ 406(a), 407. Congress has directed the Secretary to adhere to principles of sustained-yield forestry on all Indian forest lands under his supervision. 25 U. S. C. § 466. Under these statutes, the Secretary has promulgated detailed regulations governing the management of Indian timber. 25 CFR Part 163 (1982). The Secretary is authorized to deduct an administrative fee for his services from the timber revenues paid to Indian allottees. 25 U. S. C. §§ 406(a), 413.

B

The respondents are 1,465 individuals owning interests in allotments on the Quinault Reservation, an unincorporated association of Quinault Reservation allottees, and the Quinault Tribe, which now holds some portions of the allotted

⁶See *Mitchell v. United States*, 219 Ct. Cl. 95, 97, 591 F. 2d 1300, 1300–1301 (1979).

lands. In 1971 respondents filed four actions that were consolidated in the Court of Claims. Jurisdiction was based on 28 U. S. C. §§ 1491 and 1505. Respondents sought to recover damages from the United States based on allegations of pervasive waste and mismanagement of timber lands on the Quinault Reservation. More specifically, respondents claimed that the Government (1) failed to obtain a fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis; (3) failed to obtain any payment at all for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations and exacted improper charges from allottees for maintenance of roads; (5) failed to pay any interest on certain funds from timber sales held by the Government and paid insufficient interest on other funds; and (6) exacted excessive administrative fees from allottees. Respondents assert that the alleged misconduct constitutes a breach of the fiduciary duty owed them by the United States as trustee under various statutes.

Six years after the suits were filed, the United States moved to dismiss for lack of jurisdiction, contending that the Court of Claims had no authority over claims based on a breach of trust. The court denied the motion, holding that the General Allotment Act created a fiduciary duty on the United States' part to manage the timber resources properly and thereby provided the necessary authority for recovery of damages against the United States. 219 Ct. Cl. 95, 591 F. 2d 1300 (1979) (*en banc*).

In *United States v. Mitchell*, 445 U. S. 535 (1980), this Court reversed the ruling of the Court of Claims, stating that the General Allotment Act "created only a limited trust relationship between the United States and the allottees that does not impose any duty upon the Government to manage timber resources." *Id.*, at 542. We concluded that "[a]ny right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than [the General Allotment] Act."

Id., at 546. Since the Court of Claims had not considered respondents' assertion that other statutes render the United States answerable in money damages for the alleged mismanagement in this case, we remanded the case for consideration of these alternative grounds for liability. See *id.*, at 546, n. 7.

On remand, the Court of Claims once again held the United States subject to suit for money damages on most of respondents' claims. — Ct. Cl. —, 664 F. 2d 265 (1981) (*en banc*). The court ruled that the timber management statutes, 25 U. S. C. §§ 406, 407, and 466, various federal statutes governing road building and rights of way, §§ 318 and 323-325, statutes governing Indian funds and government fees, §§ 162a and 413, and regulations promulgated under these statutes imposed fiduciary duties upon the United States in its management of forested allotted lands. The court concluded that the statutes and regulations implicitly required compensation for damages sustained as a result of the Government's breach of its duties. Thus, the Court held that respondents could proceed on their claims.

Because the decision of the Court of Claims raises issues of substantial importance concerning the liability of the United States,⁷ we granted the Government's petition for certiorari. — U. S. — (1982). We affirm.

II

Respondents have invoked the jurisdiction of the Court of Claims under the Tucker Act, 28 U. S. C. § 1491, and its counterpart for claims brought by Indian tribes, 28 U. S. C. § 1505, known as the Indian Tucker Act.⁸ The Tucker Act states in pertinent part:

⁷ The Government has informed us that the damages claimed in this suit alone may amount to \$100 million. Pet. for Cert. 24.

⁸ Section 24 of the Indian Claims Commission Act, 28 U. S. C. § 1505, provides tribal claimants the same access to the Court of Claims provided

“The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U. S. C. § 1491.

It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.⁹ The terminology employed in some of our prior decisions has unfortunately generated some confusion as to whether the Tucker Act constitutes a waiver of sovereign immunity. The time has come to resolve this confusion. For the reasons set forth below, we conclude that by giving the Court of Claims jurisdiction over specified types of claims against the United States,¹⁰ the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims.

A

Before 1855 no general statute gave the consent of the United States to suit on claims for money damages; the only recourse available to private claimants was to petition Congress for relief.¹¹ In order to relieve the pressure caused by the volume of private bills and to avoid the delays and inequities of the private bill procedure, Congress created the

to individual claimants by 28 U. S. C. § 1491. See *United States v. Mitchell*, 445 U. S. 535, 538–540 (1980).

⁹See *United States v. Sherwood*, 312 U. S. 584, 586 (1941); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice And Procedure* § 3654, at 156–157 (1976).

¹⁰The Tucker Act provided concurrent jurisdiction in the district courts over claims not exceeding \$10,000. See 28 U. S. C. § 1346(a)(2).

¹¹See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *The Federal Courts and the Federal System* 98 (2d ed. 1973); Richardson, *History, Jurisdiction, and Practice of the Court of Claims*, 17 Ct. Cl. 3, 3–4 (1882).

Court of Claims. Act of February 24, 1855, c. 122, 10 Stat. 612. The 1855 Act empowered that court to hear claims and report its findings to Congress and to submit a draft of a private bill in each case which received a favorable decision. § 7, 10 Stat. 613. The limited powers initially conferred upon the court failed to relieve Congress from "the laborious necessity of examining the merits of private bills." *Glidden Co. v. Zdanok*, 370 U. S. 530, 553 (1962) (opinion of Harlan, J.). Thus, in his State of the Union Message of 1861, President Lincoln recommended that the court be authorized to render final judgments. He declared that it is "as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862). Congress adopted the President Lincoln's recommendation and made the court's judgments final. Act of March 3, 1863, ch. 92, 12 Stat. 765.¹²

In 1886 Representative John Randolph Tucker introduced a bill to revise in several respects the jurisdiction and procedures of the Court of Claims and to replace most provisions of the 1855 and 1863 Acts. H. R. 6974, 59th Cong., 1st Sess. (1886). The House Judiciary Committee reported that the bill was a "comprehensive measure by which claims against the United States may be heard and determined." H. R. Rep. No. 1077, 49th Cong., 1st Sess. 1 (1886). The measure was designed "to give the people of the United States what

¹² Section 14 of the 1863 Act provided that "no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." 12 Stat. 768. In *Gordon v. United States*, 2 Wall. 561 (1864), this Court dismissed an appeal from a judgment of the Court of Claims for want of jurisdiction, holding that § 14 gave the Secretary a revisory authority over the court inconsistent with its exercise of judicial power. Congress promptly repealed the provision, Act of March 17, 1866, c. 19, § 1, 14 Stat. 9. See *Glidden Co. v. Zdanok*, 370 U. S. 530, 554 (1962) (opinion of Harlan, J.).

every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances.” 18 Cong. Rec. 2680 (1887) (remarks of Rep. Bayne). See *id.*, at 622 (remarks of Rep. Tucker); *id.*, at 2679 (colloquy between Reps. Tucker and Townshend); *id.*, at 2680 (remarks of Rep. Holman). The eventual enactment thus “provide[d] for the bringing of suits against the Government of the United States.” Act of March 3, 1887, ch. 359, 24 Stat. 505.

The Indian Tucker Act, 28 U. S. C. § 1505, has a similar history. An early amendment to the original enactment creating the Court of Claims had excluded claims by Indian tribes. Act of March 3, 1863, ch. 92, § 9, 12 Stat. 767. As a result, Congress eventually confronted a “vast and growing burden” resulting from the large number of tribes seeking special jurisdictional acts. H. R. Rep. No. 1466, 79th Cong., 1st Sess. 6 (1945). Congress responded by conferring jurisdiction on the Court of Claims to hear any tribal claim “of a character which would be cognizable in the Court of Claims if the claimant were not an Indian tribe.” *Id.*, at 13. As the House sponsor of the Act stated, an important goal of the Act was to ensure that it would “never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriation of Indian funds or of any other Indian property by Federal officials that might occur in the future.” 92 Cong. Rec. 5313 (1946) (statement of Rep. Jackson). Indians were to be given “their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal government assumed.” *Id.*, at 5312.¹³ The House

¹³ See 92 Cong. Rec. 5312 (statement of Rep. Jackson) (“The Interior Department itself suggested that it ought not be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability.”) See also Hearings on H. R. 1198 and H. R. 1341 before the House Committee on Indian Affairs, 79th Cong., 1st Sess.

Report stressed the same point: "If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States." H. R. Rep. No. 1466, at 4.

For decades this Court consistently interpreted the Tucker Act as having provided the consent of United States to be sued *eo nomine* for the classes of claims described in the Act. See, e. g., *Shillinger v. United States*, 155 U. S. 163, 166-167 (1894); *Belknap v. Schild*, 161 U. S. 10, 17 (1896); *Dooley v. United States*, 182 U. S. 222, 227-228 (1901); *Reid v. United States*, 211 U. S. 529, 538 (1909); *United States v. Sherwood*, 312 U. S. 584, 590 (1940); *Dalehite v. United States*, 346 U. S. 15, 25, n. 10 (1953); *Soriano v. United States*, 352 U. S. 270, 273 (1957). In at least two recent decisions this Court explicitly stated that the Tucker Act effects a waiver of sovereign immunity. *Army & Air Force Exchange Service v. Sheehan*, — U. S. —, — (1982); *Hatzlachh Supply Co. v. United States*, 444 U. S. 460, 466 (1980) (per curiam). These decisions confirm the unabiguous thrust of the history of the Act.

The existence of a waiver is readily apparent in claims founded upon "any express or implied contract with the United States." 28 U. S. C. § 1491. The Court of Claims' jurisdiction over contract claims against the government has long been recognized, and government liability in contract is viewed as perhaps "the widest and most unequivocal waiver of federal immunity from suit." *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 876 (1957). See also 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3656, at 202 (1976). The source of consent for such suits unmistakably lies in the Tucker Act. Otherwise, it is doubtful that *any* consent would exist, for no contracting officer or other

130 (1945) (statement of Assistant Solicitor Cohen).

official is empowered to consent to suit against the United States.¹⁴ The same is true for claims founded upon executive regulations. Indeed, the Act makes absolutely no distinction between claims founded upon contracts and claims founded upon other specified sources of law.

In *United States v. Testan*, 424 U. S. 392, 398, 400 (1976), and in *United States v. Mitchell*, 445 U. S., at 538, this Court employed language suggesting that the Tucker Act does not effect a waiver of sovereign immunity. Such language was not necessary to the decision in either case. See *infra*, at 11-12. Without in any way questioning the result in either case, we conclude that this isolated language should be disregarded. If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit.

B

It nonetheless remains true that the Tucker Act “‘does not create any substantive right enforceable against the United States for money damages.’” *United States v. Mitchell*, 445 U. S., at 538, quoting *United States v. Testan*, 424 U. S., at 398. A substantive right must be found in some other source of law, such as “the Constitution, or any Act of Congress, or any regulation of an executive department.” 28 U. S. C. § 1491. Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, see *United States v. King*, 395 U. S. 1, 2-3 (1969), and the claimant must demonstrate that the source of substantive law he relies upon “‘can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.’” *United States v. Testan*, 424 U. S., at

¹⁴See *United States v. New York Rayon Importing Co.*, 329 U. S. 654, 660 (1957); *United States v. Shaw*, 309 U. S. 495, 501 (1940); *Carr v. United States*, 98 U. S. 433, 438 (1879).

400, quoting *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967).¹⁵

For example, in *United States v. Testan*, *supra*, two government attorneys contended that they were entitled to a higher salary grade under the Classification Act,¹⁶ and to an award of back pay under the Back Pay Act¹⁷ for the period during which they were classified at a lower grade. This Court concluded that neither the Classification Act nor the Back Pay Act could fairly be interpreted as requiring compensation for wrongful classifications. See 424 U. S., at 398-407. Particularly in light of the "established rule that one is not entitled to the benefit of a position until he has been appointed to it," *id.*, at 402,¹⁸ the Classification Act does not support a claim for money damages. While the Back Pay Act does provide a basis for money damages as a remedy "in carefully limited circumstances" such as wrongful reductions in grade, *id.*, at 404, it does not apply to wrongful classifications. *Id.*, at 405.

Similarly, in *United States v. Mitchell*, *supra*, this Court concluded that the General Allotment Act does not confer a right to recover money damages against the United States. While § 5 of the Act provided that the United States would hold land "in trust" for Indian allottees, 25 U. S. C. § 348, we held that the Act creates only a limited trust relationship. 445 U. S., at 542. The trust language of the Act does not impose any fiduciary management duties or render the United States answerable for breach thereof, but only prevents improvident alienation of the allotted lands and assures

¹⁵ As the *Eastport* decision recognized, the substantive source of law may grant the claimant a right to recover damages either "expressly or by implication." *Id.*, at 605; 372 F. 2d, at 1007. See also *Ralston Steel Corp. v. United States*, 169 Ct. Cl. 119, 125, 340 F. 2d 663, 667, cert. denied, 381 U. S. 950 (1965).

¹⁶ 5 U. S. C. § 5101.

¹⁷ 5 U. S. C. § 5596.

¹⁸ Citing *United States v. McLean*, 95 U. S. 750 (1878); *Ganse v. United States*, 180 Ct. Cl. 183, 186, 376 F. 2d 900, 902 (1967).

their immunity from state taxation. *Id.*, at 544.

Thus, for claims against the United States “founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department,” 28 U. S. C. § 1491, a court must inquire whether the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained. In undertaking this inquiry, a court need not find a separate waiver of sovereign immunity in the substantive provision, just as a court need not find consent to suit in “any express or implied contract with the United States.” *Ibid.* The Tucker Act itself provides the necessary consent.

Of course, in determining the general scope of the Tucker Act, this Court has not lightly inferred the United States’ consent to suit. See *United States v. King*, 395 U. S. 1, 4–5 (1969) (Court of Claims lacks authority to issue declaratory judgment); *Soriano v. United States*, 352 U. S. 270, 276 (1957) (non-tolling of limitations beyond statutory provisions). For example, although the Tucker Act refers to claims founded upon any implied contract with the United States, we have held that the Act does not reach claims based on contracts implied in law, as opposed to those implied in fact. *Merritt v. United States*, 267 U. S. 338, 341 (1925).

In this case, however, there is simply no question that the Tucker Act provides the United States’ consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a claim falls within this category, the existence of a waiver of sovereign immunity is clear. The question in this case is thus analytically distinct: whether the statutes or regulations at issue can be interpreted as requiring compensation. Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity. See *United States v. Emery, Bird, Thayer Realty*

Co., 237 U. S. 28, 32 (1915). “The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.” *United States v. Aetna Surety Co.*, 338 U. S. 366, 383 (1949), quoting *Anderson v. John L. Hayes Constr. Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29-30 (1926) (Cardozo, J.).¹⁹

III

Respondents have based their money claims against the United States on various Acts of Congress and executive department regulations. We begin by describing these sources of substantive law. We then examine whether they can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose.

A

The Secretary of the Interior's pervasive role in the sales of timber from Indian lands began with the Act of June 25, 1910, ch. 431, §§ 7-8, 36 Stat. 855, 857, as amended, 25 U. S. C. §§ 406-407. Prior to that time, Indians had no right to sell timber on reservation land,²⁰ and there existed “no general law under which authority for sale of timber on Indian lands, whether allotted or unallotted, can be granted.” H. R. Rep. No. 1135, 61st Cong., 2d Sess. 3 (1910) (quoting letter of the Secretary of the Interior). Congress recognized that this situation was undesirable “because in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment.” *Ibid.* The 1910 Act empowered the Secretary to sell timber

¹⁹ Cf. *Block v. Neal*, — U. S. —, — (1983); *Indian Towing Co. v. United States*, 350 U. S. 61, 69 (1955).

²⁰ See *United States v. Cook*, 19 Wall. 591 (1874); *Pine River Logging Co. v. United States*, 186 U. S. 279 (1902); 19 Op. Atty. Gen. 194 (1888).

on unallotted lands and apply the proceeds of the sales for the benefit of the Indians, § 7, and authorized the Secretary to consent to sales by allottees, with the proceeds to be paid to the allottees or disposed of for their benefit, § 8. Congress thus sought to provide for harvesting timber "in such a manner as to conserve the interests of the people on the reservations, namely, the Indians." 45 Cong. Rec. 6087 (1910) (remarks of Rep. Saunders).

From the outset, the Interior Department recognized its obligation to supervise the cutting of Indian timber. In 1911, the Department's Office of Indian Affairs promulgated detailed regulations covering its responsibilities in "managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911). The regulations addressed virtually every aspect of forest management, including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source. *Id.*, at 8-28. The regulations applied to allotted as well as tribal lands, and the Secretary's approval of timber sales on allotted lands was explicitly conditioned upon compliance with the regulations. *Id.*, at 9.

Over time, deficiencies in the Interior Department's performance of its responsibilities became apparent. Accordingly, as part of the Indian Reorganization Act of 1934, c. 576, 484 Stat. 984, Congress imposed even stricter duties upon the Government with respect to Indian timber management. In § 6 of the Act, now codified as 25 U. S. C. § 466, Congress expressly directed that the Interior Department manage Indian forest resources "on the principle of sustained-yield management." Representative Howard, co-

sponsor of the Act and Chairman of the House Committee on Indian Affairs, explained that the purpose of the provision was "to assure a proper and permanent management of the Indian Forest" under modern sustained-yield methods so as to "assure that the Indian forests will be permanently productive and will yield continuous revenues to the tribes." 78 Cong. Rec. 11730 (1934). See *United States v. Anderson*, 625 F. 2d 910, 915 (CA9 1980), cert. denied, 450 U. S. 920 (1981). Referring to the relationship between the Indians and the Government as a "sacred trust," Representative Howard stated that "[t]he failure of their governmental guardian to conserve the Indians' land and assets and the consequent loss of income or earning power, has been the principal cause of the present plight of the Indian." 78 Cong. Rec., at 11726.²¹

Regulations promulgated under the Act required the preservation of Indian forest lands in a perpetually productive state, forbade the clear-cutting of large contiguous areas, called for the development of long-term working plans for all major reservations, required adequate provision for new growth when mature timber was removed, and required the regulation of run-off and the minimization of erosion.²² The regulatory scheme was designed to assure that the Indians receive "the benefit of whatever profit [the forest] is capable of yielding." *White Mountain Apache Tribe v. Bracker*, 448 U. S., at 149 (quoting 25 CFR § 141.3(a)(3) (1979)).

²¹ John Collier, the Commissioner of Indian Affairs and a principal author of the Act, had testified that

"there must be a constructive handling of Indian timber. We have got to stop the slaughtering of Indian timber lands, to operate them on a perpetual yield basis and the bill expressly directs that this principle of conservation shall be applied throughout."

Hearings on H. R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess., pt. 2, at 35 (1934).

²² The Bureau of Indian Affairs's 1936 General Forest Regulations remain essentially unchanged within 25 CFR Part 163 (1982).

In 1964 Congress amended the timber provisions of the 1910 Act, again emphasizing the Secretary of the Interior's management duties. Act of April 30, 1964, 78 Stat. 186. As to sales of timber on allotted lands, the Secretary was directed to consider "the needs and best interests of the Indian owner and his heirs." 25 U. S. C. § 406(a). In performing this duty, the Secretary was specifically required to take into account:

"(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs." *Ibid.* See also § 407 (timber sales on unallotted trust lands).

The timber management statutes, 25 U. S. C. §§ 406–407, 466, and the regulations promulgated thereunder, 25 CFR Part 163 (1982), establish the "comprehensive" responsibilities of the Federal Government in managing the harvesting of Indian timber. *White Mountain Apache Tribe v. Bracker*, 448 U. S., at 145. The Department of the Interior—through the Bureau of Indian Affairs—"exercises literally daily supervision over the harvesting and management of tribal timber." *Id.*, at 147.²³ Virtually every stage of the process is under federal control.²⁴

²³ By virtue of the Act of February 14, 1920, ch. 75, § 1, 41 Stat. 415, as amended by the Act of March 1, 1933, ch. 158, 47 Stat. 1417, the Secretary of the Interior is authorized to collect "reasonable fees" from Indian timber sale proceeds to cover the cost of the management and sale of the Indians' timber. 25 U. S. C. § 413. Sections 406 and 407, as amended in 1964, both provide for deductions of administrative expenses "to the extent permissible under section 413." See also 25 CFR § 163.18 (1982). Respondents have asserted that administrative fee deductions were excessive or improper in several respects. The Court of Claims concluded that there is

The Department exercises comparable control over grants of rights-of-way on Indian lands held in trust.²⁵ The Secretary is empowered to grant rights-of-way for all purposes across trust land, 25 U. S. C. § 323, provided that he obtains the consent of the tribal or individual Indian landowner, § 324,²⁶ and that the Indian owners are paid appropriate compensation, § 325. Regulations detail the scope of federal supervision. 25 CFR Part 169 (1982).²⁷ For example, an applicant for a right-of-way must deposit with the Secretary an amount not less than the fair market value of the rights granted, plus an amount to cover potential damages associated with activity on the right-of-way. The Secretary must determine the adequacy of the compensation, and the amounts deposited must be held in a special account for distribution to Indian landowners. See 25 CFR §§ 169.12, 169.14 (1982).²⁸

“undoubted consent-to-suit from such claims that the Government illegally kept some of the Indians’ own money or property.” — Ct. Cl. —, —, 664 F. 2d 265, 274, citing *United States v. Testan*, 424 U. S., at 400–401; *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 598, 605–606, 372 F. 2d 1002, 1007–1008 (1967). The Government does not appear to dispute this conclusion. Brief for the United States 33, n. 27.

²⁴ The Secretary even has authority to invest tribal and individual Indian funds held in trust in banks, bonds, notes, or other public debt obligations of the United States if deemed advisable and for the best interest of the Indians. Act of June 24, 1938, 52 Stat. 1037, 25 U. S. C. § 162a. In this case the funds maintained on behalf of individual allottees were derived primarily from timber sales.

²⁵ See Act of February 5, 1948, 62 Stat. 17, codified in part at 25 U. S. C. §§ 323–325. See also Act of May 26, 1928, 45 Stat. 750, 25 U. S. C. § 318a (road building).

²⁶ Rights-of-way over lands of individual Indians may be granted without the consent of the owners under certain specific circumstances. § 324.

²⁷ Such regulations have a long history. See 25 CFR Part 256 (1949).

²⁸ See also § 169.3 (consent of Indian landowners to grants of rights-of-way); § 169.5 (specifying required elements of agreements between Secretary and applicants, including stipulation that upon termination of the right-of-way the applicant will restore land to its original condition so far as

B

In *United States v. Mitchell*, 445 U. S., at 542, this Court recognized that the General Allotment Act creates a trust relationship between the United States and Indian allottees but concluded that the trust relationship was limited. We held that the Act could not be read “as establishing that the United States has a fiduciary responsibility for management of allotted forest lands.” *Id.*, at 546. In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States’ fiduciary responsibilities.

The language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship. For example, §8 of the 1910 Act, as amended, expressly mandates that sales of timber from Indian trust lands be based upon the Secretary’s consideration of “the needs and best interests of the Indian owner and his heirs” and that proceeds from such sales be paid to owners “or disposed of for their benefit.” 25 U. S. C. §406(a). Similarly, even in its earliest regulations, the Government recognized its duties in “managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests.” Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911). Thus, the Government has “expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber.” *White Mountain Apache Tribe v. Bracker*, 448 U. S., at 149.²⁹

is reasonably possible). As to roads on Indian reservations, respondents have alleged improper deduction of road maintenance costs as a charge against the allottees’ timber payments.

²⁹The pattern of pervasive federal control evident in the area of timber

Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).³⁰ "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such 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." *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F. 2d 981, 987 (1980).

Our 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. This Court has previously emphasized "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Seminole Nation v. United States*, 316 U. S. 286, 296 (1942). This principle has long dominated the Government's dealings with Indians. *United States v. Mason*, 412 U. S. 391, 398 (1973); *Minnesota v. United States*, 305 U. S. 382, 386 (1939); *United States v. Shoshone Tribe*, 304 U. S. 111, 117-118 (1938); *United States v. Candelaria*, 271 U. S. 432, 442 (1926); *McKay v. Kalyton*, 204 U. S. 458, 469 (1907); *Minnesota v. Hitchcock*, 185 U. S. 373, 396 (1902); *United States v. Kagama*, 118 U. S. 375, 382-384 (1886); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831).

Because the statutes and regulations at issue in this case

sales and timber management applies equally to grants of rights-of-way and to management of Indian funds. See *supra*, at 17, and n. 24.

³⁰See Restatement (Second) of the Law of Trusts § 2, Comment h, at 10 (1959).

clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. See Restatement (Second) of the Law of Trusts §§ 205–212 (1959); G. Bogert, *The Law of Trusts & Trustees* § 862 (2d ed. 1965); 3 A. Scott, *The Law of Trusts* § 205 (3d ed. 1967). This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.³¹

The recognition of a damages remedy also furthers the purposes of the statutes and regulations, which clearly require that the Secretary manage Indian resources so as to generate proceeds for the Indians. It would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no

³¹ See, e. g., *Seminole Nation v. United States*, 316 U. S. 286, 295–300 (1942); *United States v. Creek Nation*, 295 U. S. 103, 109–110 (1935); *Moose v. United States*, 674 F. 2d 1277, 1281 (CA9 1982); *Whiskers v. United States*, 600 F. 2d 1332, 1335 (CA10 (1979), cert. denied, 444 U. S. 1078 (1980); *Coast Indian Community v. United States*, 213 Ct. Cl. 129, 152–156, 550 F. 2d 639, 652–654 (1977); *Cheyenne-Arapaho Tribes v. United States*, 206 Ct. Cl. 340, 345, 512 F. 2d 1390, 1392 (1975); *Mason v. United States*, 198 Ct. Cl. 599, 613–616, 461 F. 2d 1364, 1372–1373 (1972), rev'd on other grounds, 412 U. S. 391 (1973); *Navajo Tribe v. United States*, 176 Ct. Cl. 502, 507, 364 F. 2d 320, 322 (1966); *Klamath & Modoc Tribes, v. United States*, 174 Ct. Cl. 483, 490–491 (1966); *Menominee Tribe v. United States*, 102 Ct. Cl. 555, 562 (1945); *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 18–20 (1944); *Smith v. United States*, 515 F. Supp. 56, 60 (ND Cal. 1978); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1243–1248 (ND Cal. 1973).

right to the value of the resources if the Secretary's duties are not performed. "Absent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties, at least until the allottees managed to obtain a judicial decree against future breaches of trust." *United States v. Mitchell*, 445 U. S., at 550 (WHITE, J., dissenting). Cf. H. R. Rep. No. 1466, 79th Cong., 1st Sess. 5 (1945).

The Government contends that violations of duties imposed by the various statutes may be cured by actions for declaratory, injunctive or mandamus relief against the Secretary, although it concedes that sovereign immunity might have barred such suits before 1976.²² Brief of the United States at 40. In this context, however, prospective equitable remedies are totally inadequate. To begin with, the Indian allottees are in no position to monitor federal management of their lands on a consistent basis. Many are poorly educated, most are absentee owners, and many do not even know the exact physical location of their allotments. Indeed, it was the very recognition of the inability of the Indians to oversee their interests that led to federal management in the first place. A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.

In addition, by the time government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless. For example, if timber on an allotment has been destroyed through Government mismanagement, it will take many years for nature to restore the timber. As this Court has observed,

²² See *Naganab v. Hitchcock*, 202 U. S. 473, 475-476 (1906). In 1976 Congress enacted a general consent to such suits. See 5 U. S. C. § 702.

"Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to [the allottee's] ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence."

Squire v. Capoeman, 351 U. S. 1, 10 (1956).

We thus conclude that the statutes and regulations at issue here can fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property. The Court of Claims therefore has jurisdiction over respondents' claims for alleged breaches of trusts.

IV

The judgment of the Court of Claims is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

June 1, 1983

81-1748 United States v. Mitchell

Dear Thurgood:

As I am unpersuaded that a damages remedy should be imposed on the government in this case,, I will write a dissent - though it may be a while.

Sincerely,

Justice Marshall

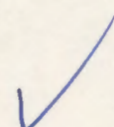
lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1983



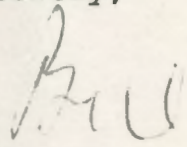
No. 81-1748

United States v. Mitchell, et al.

Dear Thurgood,

I agree.

Sincerely,



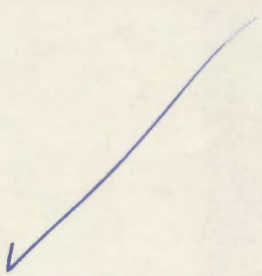
Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

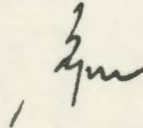
June 1, 1983



Re: 81-1748 - United States v. Mitchell

Dear Thurgood,
Please join me.

Sincerely,



Justice Marshall

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1983



Re: 81-1748 - United States v. Mitchell

Dear Thurgood:

Please join me.

Respectfully,

A handwritten signature, likely of Justice Marshall, is written below the word "Respectfully,".

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

✓

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

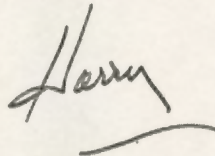
June 3, 1983

Re: No. 81-1748 - United States v. Mitchell

Dear Thurgood:

Please join me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harry", with a horizontal line underneath.

Justice Marshall

cc: The Conference

File

lfp/ss 06/15/83

MEMORANDUM

TO: Jim DATE: June 15, 1983
FROM: Lewis F. Powell, Jr.

81-1748 U.S. v. Mitchell

I think your dissent effectively destroys the Court's opinion, and reflects your usual care and thoroughness.

In the rush of this month, I have not been able to do what I usually think is a part of my responsibility: i.e., refresh my recollection by looking back at our file, the briefs and the Court opinion.

To the extent that my recollection is accurate, I agree with your reasoning. Indeed, it is a great deal stronger - and better documented - than I ever thought possible.

It seems so totally to undermine the Court's reasoning and conclusion, I do want you to be sure that we are fair.

Not unexpectedly, I think the opinion is too long, and may be too fully documented in lengthy footnotes, to be as effective as a somewhat briefer opinion will be. I am not expecting, at this season of

the Term, to persuade two other Justices to defect from TM's opinion. I am thinking, rather, about the judgment of the soundness of our position by the lawyers and courts - and commentators - who will review carefully what the Court has done in this case. I think their overall judgment will agree with us that the Court has gone off on an unprecedented tangent.

My editing has been essentially stylistic. Only occasionally have I tried to identify deletions. I do suggest, in a further review by you and your editor that you be on the lookout for repetition that may weaken rather than strengthen the logic and flow of our analysis.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

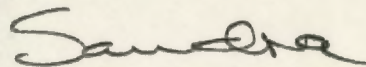
June 6, 1983

No. 81-1748 United States v. Mitchell

Dear Thurgood,

For now I will wait for the dissent in this
case.

Sincerely,



Justice Marshall

Copies to the Conference

lfp/ss 06/15/83

MEMORANDUM

TO: Jim DATE: June 15, 1983
FROM: Lewis F. Powell, Jr.

81-1748 U.S. v. Mitchell

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Editor

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L.F.P., Jr.

ss

lfp/ss 06/15/83

MEMORANDUM

TO: Jim DATE: June 15, 1983
FROM: Lewis F. Powell, Jr.

81-1748 U.S. v. Mitchell

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In the rush of this month, I have not been able to do what I usually think is a part of my responsibility: i.e., refresh my recollection by looking back at our file, the briefs and the Court opinion.

To the extent that my recollection is accurate, I agree with your reasoning. Indeed, it is a great deal stronger - and better documented - that I ever thought possible.

It seems so totally to undermine the Court's reasoning and conclusion, I do want you to be sure that we are fair.

Not unexpectedly, I think the opinion is too long, and may be too fully documented in lengthy footnotes, to be as effective as a somewhat briefer opinion will be. I am not expecting, at this season of

the Term, to persuade two other Justices to defect from TM's opinion. I am thinking, rather, about the judgment of the soundness of our position by the lawyers and courts - and commentators - who will review carefully what the Court has done in this case. I think their overall judgment will agree with us that the Court has gone off on an unprecedented tangent.

My editing has been essentially stylistic. Only occasionally have I tried to identify deletions. I do suggest, in a further review by you and your editor that you be on the lookout for repetition that may weaken rather than strengthen the logic and flow of our analysis.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1983

Re: No. 81-1748 United States v. Mitchell

Dear Lewis:

Please join me in your dissenting opinion.

Sincerely,

Wm

Justice Powell

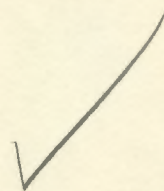
cc: The Conference



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 21, 1983



No. 81-1748 U. S. v. Mitchell

Dear Lewis,

Please join me in your dissenting opinion.

Sincerely,

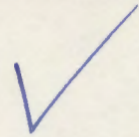
Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 21, 1983



Re: 81-1748 - U.S. v. MITCHELL

Dear Thurgood:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'WRB', is written below the typed name.

Justice Marshall

Copies to the Conference

81-1748 U.S. v. Mitchell (Jim)

TM for the Court

1st draft 5/31/83

2nd draft 6/21/83

Joined by CJ, WJB, BRW, HAB, JPS

LFP dissent

Atex draft 6/18/83

2nd draft 6/21/83

3rd draft 6/22/83

Joined by WHR, SOC

LJP.
6/14

See my memo.

FIRST DRAFT: United States v. Mitchell, No. 81-1748

JUSTICE POWELL, dissenting.

The controlling law in this case is clear. Speaking for the Court in United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I), JUSTICE MARSHALL reaffirmed the general principle that a cause of action for damages against the United States "'cannot be implied but must be unequivocally expressed.'" Id., at 538 (quoting United States v. King, 395 U.S. 1, 4 (1969)). See Lehman v. Nakshian, 453 U.S. 156, 170 (1981) (BRENNAN, J., dissenting). ^AWhere, as here, a claim for money damages is predicated upon an alleged statutory violation, the rule is that the statute does not create a cause of action for damages unless the statute "in itself ... can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." United States v. Testan, 424 U.S. 392, 402 (1976) (quoting Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967)). See, e. g., Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 739-740 (1982) ("Testan [held] that the Tucker Act provides a remedy only where

damages claims against the United States have been authorized explicitly") (emphasis added); id., at 739 (damages remedy available where the statutes "specifically authorize awards of money damages"); id., at 741 (reaffirming that an action for damages under the Tucker Act may not be premised upon "regulations ... which do not explicitly authorize damages awards"). In sum, whether the United States has created a cause of action turns upon the intent of Congress, not the inclinations of the courts. See United States v. Shaw, 309 U.S. 495, 502 (1940); Munro v. United States, 303 U.S. 36, 41 (1938). Today, the Court ~~does not bother to discover~~ *seems disinterested in* the intent of Congress. The rights of action that the Court finds "mandated" by an amalgamation of federal statutes "is in cold reality but a strong and clear wish upon the judge's part." United States v. Mitchell, 664 F.2d 265, 277 (Ct. Cl. 1981) (Nichols, J., concurring and dissenting). I ~~therefore~~ dissent.

from what I perceive is long the Court's departure from settled principles.

The Court does not--and clearly cannot--contend that any of the statutes standing alone reflects the necessary

legislative mandate for ~~the availability of the~~^a damages remedy. None of the statutes contain any "provision ... that expressly makes the United States liable" for its alleged mismanagement of Indian forest resources and their proceeds or that "grant[s] ... a right of action ... with specificity." Testan, 424 U.S., at 399-400. Indeed, nothing in the timber sale statutes, 25 U.S.C. §§406, 407,¹ 466,² the road and right-of-way statutes, §§318a, 323-325,³ or the interest statute, §162a,⁴ addresses in

¹The only monetary obligation imposed upon the Secretary by §406 or §407 is to pay the actual "proceeds" of timber sales to the owners of the land. Thus, while it may be that those sections would ground an action to compel the Secretary to disgorge unlawfully retained proceeds, see United States v. Testan, 424 U.S. 392, 401 (1976), no statutory basis exists for extending that remedy to proceeds that arguably or ideally should have been, but were not, captured by the Secretary. On the contrary, the statutory recognition of some right to receive the "proceeds" of sales conducted suggests that this is the limit of any damages action implicitly authorized by Congress. See United States v. Erika, Inc., 456 U.S. 201, 208 (1982); Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 14-15, 20-21 (1981).

²Section 466 merely requires the Secretary to "make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management." As the Court of Claims recognized, 664 F.2d 265, 272 (1981), there plainly is no statutory directive to pay compensation. Rather the duty imposed upon the Secretary is simply to adopt appropriate regulations.

³Section 318a merely authorizes the appropriation of funds for building of roads on Indian reservations. It would be a ~~very~~ radical change in the law of sovereign immunity to hold that a routine authorization statute allows individuals who might be benefitted if the appropriations were made to bring an action to recover

Footnote continued on next page.

Footnote(s) 4 will appear on following pages.

are

any respect the institution of damages actions against the United States. Nor is there any indication in the legislative history of the statutes that Congress intended to consent to damages actions for mismanagement of Indian assets by enacting these provisions.⁵ The Court does not

or
damages. And although §325 may ~~ground an action to~~ *authorize* recovery compensation wrongfully withheld from the Indians, ~~over whose lands it was granted~~, it does not follow that damages for failure to secure more generous compensation are available. Indeed, the explicit statutory recognition of the Secretary's authority to determine the amount of compensation militates ~~powerfully~~ against any damages remedy for insufficient compensation.

agreed to hold
⁴Rather than compelling a particular level of compensation, §162a affords the Secretary substantial discretion respecting the investments to be made with individual Indian funds. There is nothing in the statute that requires payment of a particular rate of interest. A fortiori, Congress has not ~~consented to render the United States accountable in damages for any amount by which the revenues earned fall short of a standard of "reasonable management zeal to get for the Indians the best rate."~~ 664 F.2d 265, 274 (Ct. Cl. 1981).

⁵It is especially improbable that Congress intended to consent to monetary liability for forestry mismanagement on allotted lands, because, at the time in question, at least some, if not all, government officials believed that heavily forested lands were not to be allotted. See United States v. Payne, 264 U.S. 446, 449 (1924). And before 1964, §406 was a rather bare instrument, simply giving an Indian permission to sell his timber with the Secretary's permission. The legislative history of the 1964 amendments to §406 also fails to supply the necessary evidence of congressional intent. The House Report states that "[n]o additional expenditure of Federal funds" was expected to be incurred by reason of the enactment of the legislation. H.R. Rep. No. 1292, 88th Cong., 2d Sess., 2 (1964). A letter from the Interior Department to the Congress urging enactment of the legislation explained that the standards for timber sales on allotted lands "should help allay disputes and avoid misunderstanding." S. Rep. No. 672, 88th Cong., 1st Sess., 3 (1963). *If the Court at all is interested in furthering congressional intent, it is difficult to see how litigation over damages will do it.*

suggest otherwise.

It ordinarily may be correct that a statute vesting an individual or members of a designated class with an absolute right to receive a sum certain from an administrative office of the United States grounds an action for the recovery of damages--or at least the sum withheld--in the event of nonpayment. See Testan, 424 U.S., at 400 (reserving the question and citing with approval Mosca v. United States, 417 F.2d 1382, 1386 (Ct.Cl. 1969) (statute must create a "right to recover a certain sum"), cert. denied, 399 U.S. 911 (1970)); United States v. Hvoslef, 237 U.S. 1, 10 (1915) (statute "leave[s] no question" that refunds are to be made to particular claimants by an administrative officer). Monetary recovery may be had against the United States upon such a claim for "actual, presently due money money damages." United States v. King, 395 U.S., at 3 ("'[T]he only judgments which the Court of Claims [is] authorized to render against the government ... are judgments for money found due from the government to the [claimant]'" (quoting United States v. Alire, 73 U.S. (6 Wall.) 573,

*Jim -
98 TM
doesn't
rely
on this,
why
include
the H. ?
On its
face, it
seems to
add little.*

575 (1867)). But again, the Court does not rest upon any such statute or right.⁶

its decision on
~~Instead,~~ ^T the Court rests ^{upon} the novel proposition
 that statutes ^{that} ~~which~~ do not in terms create any right to
 payment of money nonetheless may support a damage action

against the United States. *This view hardly can*
~~That proposition is difficult~~
~~indeed to~~ ^{be} reconcile ^d with this Court's ^{the} decisions in Testan

and Mitchell I. A nonmonetary duty,⁷ without more, ~~hardly~~
is insufficient to
 overcome the ~~omnipresent~~ "presumption" that Congress has

⁶The Government concedes that, because the 1964 amendment to §406 provided for deduction of administrative fees from timber sale proceeds "to the extent permissible under [25 U.S.C. §413]," an action to recover unlawfully high administrative fees may be maintained against the United States as one seeking recovery of "money improperly exacted or retained." Testan, 424 U.S., at 401. And like claims for excessive administration fees, respondents' claim for deduction of roadbuilding fees also may be maintainable on the theory that recovery of funds unlawfully retained is sought. Finally, the Government concedes that failure to apply to the respondents' account interest actually earned likely would give rise to a right to redress in damages on the theory that respondents' fund had been "wrongfully retained." Thus, to the extent that the judgment of the Court of Claims would permit an action to recover withheld fees and interest, the Government apparently does not seek review, and I have no occasion to decide the issue.

⁷Although not dispositive, the monetary character of the statutory right is a strong indication that a statute "in itself ... can fairly be interpreted as mandating compensation." By contrast, where, as here, the duties imposed by a statute are not essentially monetary in character, but require implementation through conduct by federal officials, the contrary inference arises: that Congress, by its silence as to a damages remedy, created only a substantive right enforceable through injunctive relief. See Testan, 424 U.S., at 401, n. 5, 403.

not consented to suit for money damages. See Eastern

Transportation Co. v. United States, 272 U.S. 675, 686

(1927). ~~It is also difficult to square with~~ This Court's *has had occasion to emphasize that* emphasis in recent cases ~~upon~~ congressional intent as the

ultimate standard in determining whether a private right of

action should be inferred from a statute that does not, in

terms, provide for such an action.⁸ Those cases are

instructive ~~in this context~~ for here, too, the "ultimate

question is one of congressional intent, not one of

whether this Court thinks that it can improve upon the

statutory scheme that Congress enacted into law." Touche

Ross & Co. v. Redington, 442 U.S. 560, 578 (1979). As the

we Court recognized in Testan, courts are not free to

dispense with "established principles" requiring explicit

congressional authorization for maintenance of suits

⁸See, e. g., Jackson Transit Authority v. Transit Union, 457 U.S. 15, 20-23 (1982); Middlesex County, 453 U.S., at 13-18; Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639-640 (1981); California v. Sierra Club, 451 U.S. 287, 292-298 (1981); Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 91-95 (1981); Universities Research Assn., Inc. v. Contu, 450 U.S. 754, 770-784 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-24 (1979). *Because of the background of sovereign immunity in this case, the Court should apply strictly, in my opinion, the rule that Congress' intention to permit a damages remedy must be shown with special clarity.*

Against the background of sovereign immunity, the rationale of these cases should apply here with particular force.

against the United States simply "because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." 424 U.S., at 400.⁹ See Shaw, 309 U.S., at 502. ~~But~~ ^{today} the Court does

~~not purport to adduce~~ ^{no} "any" evidence that Congress anticipated that there would be a private remedy."

California v. Sierra Club, 451 U.S. 287, 298 (1981).

Thus, it is clear that "[n]othing on the face" of any of the statutes at issue, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978), or in their legislative histories, ^[can] "fairly be interpreted as mandating compensation" for the conduct alleged by respondents. Some of the statutes involved here, to be sure, create substantive duties that

⁹The Court's conclusion that ~~the availability of~~ injunctive relief is insufficient to vindicate the statutory rights of the respondents is precisely the kind of legislative policy judgment that ~~this Court has~~ recognized to be beyond the province of the courts. Cf. Universities Research Assn., Inc., 450 U.S., at 769, and n. 19, 776-777, 782-783. ^{thought to be} ~~In any case, I am puzzled why~~ injunctive relief is ~~so inadequate in this case.~~ The Court states that a trusteeship "would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery." Ante, at 21. It is not clear what the Court's analysis would be if it did not assume that there was a right to recover damages--the very issue in this case. And I have difficulty understanding why the existence of a damages remedy will or should alleviate the burden on Indians to see if there is a breach of duty before instigating a lawsuit against the United States.

Not has the Court satisfactorily explained ~~why~~

of a policy judgment that properly should be left to the legislature

the Secretary must fulfill. But this could equally be 11

said of the Classification Act, considered in Testan,

⁹⁺
which unambiguously requires that pay classification

ratings of federal employees be carried out pursuant to

the principle of "equal pay for substantially equal work."

✓ 5 U.S.C. §5101(1)(A). Although Testan alleged a violation 12

of the Act, the Court concluded that a back pay remedy was

unavailable, rejecting the ~~notion~~ ^{very argument} that the substantive

right necessarily ^{implies} ~~imparts~~ a damages remedy. 424 U.S., at

400-403. The Court's conclusion in this case, however,

rests largely upon its ~~notion~~ ^{view} that an injunctive remedy is 12

inadequate to redress the violations alleged--precisely

the inference deemed inadmissible in Testan.¹⁰

¹⁰ ~~More~~ ^{Also} significant perhaps than its departure from
all precedent is the Court's remand for further
proceedings consistent with its opinion. The compass has
no hands. Given the strictness with which consents to
suit by the sovereign are to be construed, United States
v. Sherwood, 312 U.S. 584, 590-591 (1941), where the
statute upon which liability is premised creates no right
to payment of a sum certain, the Court of Claims will be
obliged to determine the extent of liability, if any, and
the items of damages that are cognizable, ~~without any~~
~~legislative guidance~~. This task, unlike the factual or
legal determination whether a particular individual falls
within a class granted a right to payment of money by a
statute, is not one to which courts are adapted. Any
rules established will be of "judicial cloth, not
legislative cloth." See Weinberger v. Catholic Action of
Hawaii, 454 U.S. 139, 141 (1981). I assume, however, that
the law of trusts generally will control and that all
defenses to actions on breaches of trust, such as consent
by the beneficiary and laches, will be fully available to

Footnote continued on next page.

required
, without
legislative
guidance,

standardless

It is the ordinary result of sovereign immunity that
unconsented claims for money damages are barred. The fact

that ~~such~~ damages cannot be recovered without the

sovereign's consent ^{hardly} ~~does not~~ support ⁵ the conclusion that

consent has been given. Yet ^{then, in substance, is} the Court's reasoning ~~is no~~

~~more weighty than that.~~ If ^{or can be argued,} ~~it is correct in concluding~~

^{the Court is saying} that a remedy is necessary to redress injury sustained, ^{even}

the doctrine of sovereign immunity ^{will have been} ~~would be robbed of all~~

~~effect.~~ Moreover, "many of the federal statutes ... that

expressly provide money damages as a remedy against the

United States in carefully limited circumstances would be

rendered superfluous." Testan, 424 U.S., at 404.

II

To the Court's credit, however, it does not purport

^{is} to be following doctrine or analysis that this Court

^{has established} heretofore has embraced. Simply to state the Court's

reasoning shows the departure that it makes from

precedent. ^{Its opinion contains} There is no examination of the language and

the legislative history of the statutes held to give rise

the United States.

Jim - I'm this
a fair statement.
We don't
want to
overstate
the
extent of
the errors
we perceive.
I've not
had an
opportunity
to review
TM's op.

Jim - Part II needs
to be
"paragraphed". Solid
block of type can be
forbidding.

to monetary liability, ~~to determine whether Congress~~

~~intended to grant a cause of action for damages. Indeed,~~

~~The Court's analysis can be reduced to one conclusory~~ ^{consists essentially of a single}

sentence: "Because the statutes and regulations at issue

in this case clearly establish fiduciary obligations of

the Government in the management and operation of Indian

lands and resources, they can fairly be interpreted as

mandating compensation by the Federal Government for

damages sustained." ^{Thus} ~~The Court's~~ conclusion

~~thus~~ rests on two dubious assumptions. ~~The Court~~ ^{first,} it

decides that the statutes ^{involved} create or recognize

fiduciary duties. The Court ~~proceeds to~~ ^{reasons} that

because a private express trust normally imports a right

to recover damages for breach, and because injunctive

relief is perceived to be inadequate, ~~in this case,~~

Congress necessarily must have authorized recovery of

damages for ~~breach of~~ ^{failure} ~~imperfect~~ ^{adequately} performance of the statutory duties.

~~I have trouble determining~~ ^{The} relevancy of the first

^{is questionable, and} conclusion, ~~and I think~~ the second is simply wrong.

~~The Court does not produce, nor apparently feel any~~ ^{certain points to no extent}

~~compulsion to produce, any~~ evidence that the statutory

duties Congress imposed ~~by enacting the various provisions~~

~~at issue~~ were intended to impose ^{fiduciary} ~~trust~~ duties. Yet none

~~of~~ ^{nor do any} the timber sale or management statutes upon which

respondents rely makes any reference ^{such} ~~whatsoever~~ to ~~trust~~

duties. Rather, the Court simply holds that the statutes

here "clearly establish fiduciary obligations." Ante, at

20. See also id., at 19 ("a fiduciary relationship

necessarily arises"). ^{"[T]"} ~~I am afraid~~ there is kind of a

bootstrap quality of reasoning in saying that [the United

States'] duties expressed by law are those of a trustee,

and, therefore, we may look at Scott on Trusts or the

Restatement of Trusts and impose on [the Government] all

the other consequences the law, as stated by those

authorities, derives from the status of an erring

nongovernmental trustee." 664 F.2d, at 283 (Nichols, J.,

concurring and dissenting). ~~The Court in its eagerness to~~

~~create a damages remedy for Indians overlooks the fact~~

~~that the federal~~ ^{authority} power over Indian lands is so different

in nature and origin from that of a private trustee that

caution ^{surely} is warranted in ~~using the mere label "trust"~~ and a

~~then to relying on~~ ~~reading of~~ Scott on Trusts to impose liability where

^{before}
labeling an obligation assumed
by the government a "trust,"

~~consent is not unequivocally expressed.~~ ^{none has been authorized} Ibid.¹¹ The H

trusteeship⁵ to which the Court has referred in the past 19

has^{ve} manifested more the view that pervasive control over

Indian life is such a high attribute of federal

sovereignty that states cannot infringe upon that control.

Ibid.¹² The Court, ^{today} ~~however,~~ ^{is} has turned the shield into a

^{That}
 11 "There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships. It is important to differentiate trusts from these other relationships, since many of the rules applicable to trusts are not applicable to them." Restatement (Second) of Trusts §4, at 15 (1959). For example, the Court often has described the fiduciary relationship between the United States and Indians as one between a guardian and a ward. But "[a] guardianship is not a trust." Id., §8. There is no explanation, however, why the Court chooses one analogy and not another. I can only conclude that the choice was influenced by the fact that "[t]he duties of a trustee are more intensive than the duties of other fiduciaries." Id., §2, comment b.

The Court asserts that "[a]ll of the necessary elements of a common-law trust are present"--a trustee, a beneficiary, and a trust corpus. Ante, at 19. But ~~clearly~~ two persons and a parcel of real property, without more, do not create a trust. Rather, "[a] trust ... arises as a result of a manifestation of an intention to create it." Id., §2. See id., §23 ("A trust is created only if the settlor properly manifests an intention to create a trust."); id., §25 ("No trust is created unless the settlor manifests an intention to impose enforceable duties."). This is the element that is missing in this case, and the Court does not, and cannot, find that Congress has manifested its intent to make the statutory duties upon which respondents rely trust duties. Cf. id., §95 ("The United States ... has capacity to take and hold property in trust, but in the absence of a statute otherwise providing the trust is unenforceable against the United States"). Furthermore, a trustee can "reserv[e] powers with respect to the administration of the trust." Id., §37. Unless the United States agrees to be held liable in damages, ~~I do not see how~~ the existence of a trust ~~automatically~~ means that the Government ~~has not reserved~~ its immunity from damages. ^{even}

Footnote(s) 12 will appear on following pages.

^{do not necessarily}

has surrendered.

is liable for damages

sword. It is ~~more than arguable~~ ^{plausible} that mismanagement of

Indian lands is ~~really~~ more analogous to misgovernment

than it is to the misfeasance of a ~~testamentary~~ ^{common law} trust.

Ibid. Cf. Nevada v. United States, ___ U.S. ___, ___, n.

15 (1983) (breach of fiduciary duty to Indians "reflects

the nature of a democratic government that is charged with

¹²The Court has invoked the fiduciary relation primarily (i) to preclude unauthorized state interference in the relations between the United States and the Indian tribes or other unauthorized exercise of state jurisdiction on Indian lands, see e. g., United States v. Kagama, 118 U.S. 375, 382-384 (1886); (ii) to bar or nullify exercises of state court jurisdiction in matters affecting Indian property rights, in which the United States was not properly joined or represented, see, e. g., Minnesota v. United States, 305 U.S. 382, 386 (1939); United States v. Candelaria, 271 U.S. 432, 442 (1926); (iii) to interpret doubtful or ambiguous treaty language in favor of the Indians, see, e. g., United States v. Shoshone Tribe, 304 U.S. 111, 117-118 (1938); Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902); (iv) to limit the liability of the United States for damages under the Just Compensation Clause where, acting as a fiduciary manager, it has converted the form of Indian property, see, e. g., United States v. Sioux Nation of Indians, 448 U.S. 371, 415-416 (1980); cf. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903); and (v) to emphasize the high standard of care that the United States is obliged to exercise in carrying out its duties respecting the Indians, see, e. g., United States v. Mason, 412 U.S. 391, 398 (1973); Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942). But the Court has never, until today, invoked the doctrine to suggest that the United States is answerable in money damages for breaches of the standards applicable to a private fiduciary. The Court apparently realizes that fact, and states that the existence of a general trust relationship between the United States and the Indian people merely "reinforces" its construction of the statutes upon which the Indians specifically rely. There is no indication in the Court's opinion, however, why this special relationship should "reinforce" its conclusion that there are implied private rights of action. While I agree with the Court that the doctrine alone cannot ground any right of action for damages, I disagree with the Court's assumption that the doctrine remains relevant to our inquiry.

hold

more than one responsibility"). In my view, the Court today substantially retreats from JUSTICE BLACKMUN's words for the Court in Army & Air Force, where we "explicitly rejected the argument that 'the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages.'" 456 U.S., at 739 (quoting Testan, 424

U.S., at 401). I would have thought the issue before us also remains one of congressional intent and that respondent's claims must stand or fall on the statutes themselves, not on some judicially implied or recognized "trust."¹³

But more remarkable than the implication of trust duties from statutory duties is the conclusion that the mere existence of a trust of some kind necessarily establishes that Congress has consented to ^{the} recovery of

¹³I do not suggest that an express declaration of trust embodied in a statute is without bearing in our inquiry. But such an explicit declaration of trust simply is to be considered along with all other evidence of legislative intent, including, most importantly, the language of the statute itself, in determining whether Congress has made the United States accountable in money damages for a statutory violation. And any such factor is irrelevant in this case, for there is no such declaration of trust, and the Court does not suggest otherwise.

damages. We apparently are to accept the existence of a cause of action for damages on faith: "Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." Ante, at 20 (emphasis added). See also id., at 20 (damages are a "fundamental incident" of a trust relationship); id. (it would be "anomalous" not to find a damages remedy). The Court can find no more support for this proposition than the dissenting opinion in Mitchell I. See ante, at 21.¹⁴ The Court ~~never~~ ^{do not} explains why it is especially proper to infer a trust giving rise to monetary liabilities in the absence of any affirmative indication that Congress has consented to recovery of money damages. In my opinion, the Court has effectively reversed the "presumption," Eastern Transportation, 272 U.S., at 686, that absent "affirmative statutory authority," United States v. United States

¹⁴The Court tries to get support out of Seminole Nation v. United States, *supra*, and United States v. Creek Nation, 295 U.S. 103 (1935), but both actually cut against the Court's theory in this case. The Court's discussion of the Government's fiduciary duty in Seminole Nation referred to a claim to compel payments expressly prescribed by Treaty. See 316 U.S., at 296-297. Creek Nation involved a taking claim.

Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940); see Shaw, 309 U.S., at 500 ("specific statutory consent"); Munro, 303 U.S., at 41 ("only by permission"), the United States has not consented to be sued. It has substituted a contrary presumption, applicable to the conduct of the United States in Indian affairs, that the United States has consented to be sued for statutory violations and other departures from the rules that govern private fiduciaries.

I do not believe that the fact that respondents are Indians should alter the analysis through which courts determine whether damages may be recovered against the United States for statutory violations. So far as the availability of money damages is concerned, Indians are situated no differently than any other claimant against the United States. It simply does not follow that, merely because Congress has authorized the Secretary to act in Indian affairs, every act of Congress constitutes the "affirmative statutory authority" necessary to maintain an action for damages. On the contrary, the requirement of unequivocal congressional consent to suit against the

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United States is fully applicable to Indian claimants. 255

See, e. g., Klamath Indians v. United States, 296 U.S.

244, 250 (1935); id., at 254-255 ("Regard being had to the

nature of duties, resembling those arising out of the

relation of guardian and ward, owed by the United States

to Indian tribes, ... it is clear that, in the absence of 260

specific authorization, they may not [complain] that the

payment was too small.") (footnote omitted); Blackfeather

v. United States, 190 U.S. 368, 376 (1903).¹⁵ In each

case, the question is whether the particular statute

invoked "in itself ... can fairly be interpreted as 265

mandating compensation." Indians, like other claimants

against the United States, must be able to identify a

statutory basis for their claims. There has been no

attempt here.

¹⁵Indeed, if the fact that respondents are Indians has any bearing on the question whether the statutes upon which the Court relies implicitly grant the right to recover damages against the United States, it must be the accompanying fact that the prevailing legal regime at the time most of the statutes now invoked were adopted generally deprived Indian claimants of any monetary remedy against the United States. Until 1946, the Court of Claims could not have even entertained these claims absent a special jurisdictional act. Ante, at 8. Thus, it is most unlikely that Congress intended to create a right to recover damages against the United States in 1910 by enacting §407, in 1928 by enacting §318a, in 1934 by enacting §466, and in 1938 by enacting §162a.

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Jinn - I d omit. then
III & add a very brief
conclusion.

III

illuminate them

On occasion I have warned of the problems--both theoretical and practical--of courts implying causes of action. This case ~~illustrates the~~ ^{shows} those problems more clearly than ⁱⁿ most cases in which this Court has followed the temptation to play legislature. I continue to believe that the Court's willingness to imply causes of action it sees as necessary to further perceived public policy encourages not only "political default by Congress," but "an increase in the governmental power exercised by the federal judiciary." Cannon v. University of Chicago, 441 U.S. 677, 743-744 (1979) (POWELL, J., dissenting). Any such self-made expansion of our jurisdiction "runs contrary to the established principle that '[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation ..., ' American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17 (1951), and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction." Cannon, 441 U.S., at 747.

The Court has not endeavored to demonstrate that Congress actually intended to render the United States

answerable in damages upon claims of the kind presented here. Nor did the Court of Claims. As would have Judge Davis,

"I would hold that the mere application of a trust label to certain governmental functions respecting Indians, whether applied expressly by Congress or by judicial wish-fulfillment inference from the statutory imposition of trustee-like duties on the executive branch, does not constitute unequivocal assent to suits against the government for money damages when these duties are badly performed. It does not bring into play all that Scott on Trusts thunders against an erring testamentary trustee. Something more is required, such as the expressed duty to pay over money...." 664 F.2d, at 284.

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Jim - Good job at condensing
the opinion. When cleared
by Editor, circulate an ATEX
draft ~~also~~ as well as print.
When in print, take a careful ~~to~~
look at language & style.

L.F.P.
6/17

SECOND DRAFT: United States v. Mitchell, No. 81-1748

JUSTICE POWELL, dissenting.

The controlling law in this case is clear. Speaking for the Court in United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I), JUSTICE MARSHALL reaffirmed the general principle that a cause of action for damages against the United States "'cannot be implied but must be unequivocally expressed.'" Id., at 538 (quoting United States v. King, 395 U.S. 1, 4 (1969)). See United States v. Hopkins, 427 U.S. 123, 128 (1976) ("specific command of statute or authorized regulations"); Lehman v. Nakshian, 453 U.S. 156, 170 (1981) (BRENNAN, J., dissenting). Where, as here, a claim for money damages is predicated upon an alleged statutory violation, the rule is that the statute does not create a cause of action for damages unless the statute "'in itself ... can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" United States v. Testan, 424 U.S. 392, 402 (1976) (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967)). See, e. g., Army & Air Force Exchange Service v.

Sheehan, 456 U.S. 728, 739-740 (1982) ("Testan [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized explicitly") (emphasis added); id., at 739 (damages remedy available where the regulations "specifically authorize awards of money damages"); id., at 741 (reaffirming that an action for damages under the Tucker Act may not be premised upon "regulations ... which do not explicitly authorize damages awards"). It In sum, whether the United States has created a cause of action turns upon the intent of Congress, not the inclinations of the courts. See United States v. Shaw, 309 U.S. 495, 500 (1940) ("specific statutory consent"); Munro v. United States, 303 U.S. 36, 41 (1938) ("only by permission").

Today, the Court appears disinterested in the intent of Congress. It ~~In my opinion, the Court~~ has effectively reversed the presumption that absent "affirmative statutory authority," United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940), the United States has not consented to be sued for damages. It has substituted a contrary presumption, applicable to

the conduct of the United States in Indian affairs, that the United States has consented to be sued for statutory violations and other departures from the rules that govern private fiduciaries. I ^{thus} dissent from the Court's departure from long-settled principles. ✓

I

The Court does not--and clearly cannot--contend that any of the statutes standing alone reflects the necessary legislative ^{authorization of} ~~mandate~~ for a damages remedy. None of the statutes contains any "provision ... that expressly makes the United States liable" for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action "with specificity." Testan, 424 U.S., at 399, 400. Indeed, nothing in the timber-sales statutes, 25 U.S.C. §§406, 407,¹ 466,² the road and right-of-way

¹The only monetary ^{pay over} obligation imposed upon the Secretary by §406 or §407 is to pay the actual "proceeds" of timber sales to the owners of the land. Thus, while it may ^{well} be that those sections would permit an action to compel the Secretary to ^{profits} ~~disgorge~~ unlawfully retained proceeds, see United States v. Testan, 424 U.S. 392, 401 (1976), no statutory basis exists for extending that ^{earned} ~~remedy to~~ ^{proceeds} that arguably or ideally should have been, but were not, ^{captured} by the Secretary. On the contrary, the statutory recognition of a right to receive the "proceeds" of sales conducted suggests that this is the limit of any damages action implicitly authorized by Congress. See Middlesex County Sewerage Authority v.

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Footnote(s) 2 will appear on following pages.

statutes, §§318a, 323-325,³ or the interest statute, §162a,⁴ addresses in any respect the institution of damages actions against the United States. Nor is there any indication in the legislative history of the statutes that Congress intended to consent to damages actions for mismanagement of Indian assets by enacting these provisions.⁵ The Court does not suggest otherwise.

National Sea Clammers Assn., 453 U.S. 1, 14-15, 20-21 (1981). Cf. United States v. Erika, Inc., 456 U.S. 201, 208 (1982).

²Section 466 merely requires the Secretary to "make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management."

³Section 318a ~~merely~~ ^{also} authorizes the appropriation of funds for building of roads on Indian reservations. It would be a radical change in the law of sovereign immunity to hold that a routine authorization statute allows individuals who might benefit from appropriations to bring an action to recover damages. And although §325 requires "the payment of such compensation as the Secretary of the Interior shall determine to be just," it does not follow that damages for failure to secure more generous compensation are available. Indeed, the explicit statutory recognition of the Secretary's authority to determine the amount of compensation militates against any damages remedy for insufficient compensation. See Plumbers & Pipefitters v. Plumbers & Pipefitters, 452 U.S. 615, 630 (1981) (BURGER, C.J., dissenting).

⁴Section 162a affords the Secretary substantial discretion respecting investments to be made with individual Indian funds. There is nothing in the statute that requires payment of a particular rate of interest, much less that makes the United States accountable in damages for any amount by which the revenues earned fall short of a standard of "reasonable management zeal to get for the Indians the best rate." Mitchell v. United States, 664 F.2d 265, 274 (Ct. Cl. 1981).

✓ ⁵It is ~~especially~~ ^{also} improbable that Congress intended §406 to constitute consent to monetary liability for forestry mismanagement on allotted lands, because, at the

Footnote continued on next page.

The Court for the most part rests its decision on the *implausible* ~~novel~~ proposition that statutes that do not in terms

create a right to payment of money nonetheless may support

a damage action against the United States. This view

simply cannot ~~hardly~~ be reconciled with the decisions in Testan and

Mitchell I. A nonmonetary duty,⁶ without more, is

insufficient to overcome the "presumption" that Congress

has not consented to suit for money damages. See Eastern

Transportation Co. v. United States, 272 U.S. 675, 686

(1927).⁷ This Court has had occasion in recent cases to

time in question, it appears the Government maintained the position that heavily forested lands were not to be allotted. See United States v. Payne, 264 U.S. 446, 449 (1924). And before 1964, §406 was a rather bare instrument, simply giving an Indian permission to sell his timber with the Secretary's permission. See ante, at 13-14. The legislative history of the 1964 amendments to §406, see ante, at 16, also fails to supply the necessary evidence of congressional intent. The House Report states that "[n]o additional expenditure of Federal funds" was expected to be incurred by reason of the enactment of the legislation. H.R. Rep. No. 1292, 88th Cong., 2d Sess. 2 (1964). A letter from the Interior Department to the Congress urging enactment of the legislation explained only that the standards for timber sales on allotted lands "should help allay disputes and avoid misunderstanding." S. Rep. No. 672, 88th Cong., 1st Sess., 3 (1963).

⁶Although not dispositive, the monetary character of the statutory right is a strong indication that a statute "in itself ... can fairly be interpreted as mandating compensation." By contrast, where, as here, the duties imposed by a statute are not essentially monetary in character, but require implementation through conduct by federal officials, the contrary inference arises: that Congress, by its silence as to a damages remedy, created only a substantive right enforceable through injunctive relief. See Testan, 424 U.S., at 401, n. 5, 403.

emphasize that congressional intent is the ultimate standard in determining whether a private right of action should be inferred from a statute that does not, in terms, provide for such an action.⁷ Those cases are instructive, for here, too, the "ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979). As we recognized in Testan, courts are not free to dispense with "established principles" requiring explicit congressional authorization for maintenance of suits against the United States simply "because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." 424 U.S., at 400. See Shaw, 309 U.S., at 502. The Court today adduces no "evidence that

⁷See, e. g., Jackson Transit Authority v. Transit Union, 457 U.S. 15, 20-23 (1982); Middlesex County, 453 U.S., at 13-18; Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639-640 (1981); California v. Sierra Club, 451 U.S. 287, 292-298 (1981); Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 91-95 (1981); Universities Research Assn., Inc. v. Coutu, 450 U.S. 754, 770-784 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-24 (1979). Against the background of sovereign immunity, the rationale of these cases should apply here with particular force.

Congress anticipated that there would be a private remedy." California v. Sierra Club, 451 U.S. 287, 298 (1981).

II ?

The Court defends its departure from our precedents on the ground that the statutes and regulations upon which respondents rely need not be "construed in the manner appropriate to waivers of sovereign immunity." Ante, at

✓ ✓ 12. The Court ^{in effect is} ~~today must be~~ overruling Mitchell I, ^{sub silentio,} for as

✓ ✓ the ~~Court's~~ ^{its} discussion ^{of} the Tucker Act makes clear, see ante, at 10-13, ~~there is no doubt that~~ there we "accepted

the government's ... claim that a strict standard of construction, applicable to deciding whether Congress had enacted a waiver of sovereign immunity, should be applied in interpreting substantive legislation for the benefit of Indian people." Hughes, Can the Trustee be Sued for its

Breach? The Sad Saga of United States v. Mitchell, 26 S.D. L. Rev. 447, 473 (1981). We expressly held that the

General Allotment Act at issue in Mitchell I "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities." 445 U.S., at

542 (emphasis added). Cf. Army & Air Force Exchange

*Despite these ~~so~~ long settled principles
the Court views*

Service v. Sheehan, 456 U.S., at 739 ("explicitly
reject[ing] the argument that 'the violation of any
statute or regulation ... automatically creates a cause of
action against the United States for money damages'")

(quoting Testan, 424 U.S., at 401). ~~I am forced to
conclude that either the Court desires to rob Mitchell I~~

~~of all meaning, or that it sees the statutes here as~~
"unambiguously" imposing trust duties on the Government.

~~The Court does not say, and I find both positions~~
indefensible.

III
II

?

*Despite the clarity of ~~our statements~~ ^{prior rulings} on the subject
of implied damages suits against the United States, the*

Court makes little or no pretense that it is following

doctrine this Court heretofore ~~has~~ established. ~~The~~

~~Court's~~ ^{Without ~~pertinent~~ analysis, ~~decisions~~ simply}
~~analysis consists essentially of a single~~

it simply concludes:

~~conclusory sentence:~~ "Because the statutes and regulations

at issue in this case clearly establish fiduciary

obligations of the Government in the management and

operation of Indian lands and resources, they can fairly

be interpreted as mandating compensation by the Federal

Government for damages sustained." Ante, at 19-20. This conclusion rests on two dubious assumptions. First, the Court decides that the statutes create or recognize fiduciary duties. It then reasons that because a private express trust normally imports a right to recover damages for breach, and because injunctive relief is perceived to be inadequate, Congress necessarily must have authorized recovery of damages for failure properly to perform the statutory duties. The relevancy of the first conclusion is questionable, and the other departs from our precedents, chiefly Testan and Mitchell I.

~~In a word,~~ ^The Court simply holds that the statutes here "clearly establish fiduciary obligations." Ante, at

20. See also id., at 19 ("a fiduciary relationship necessarily arises"). I agree with the dissent in the

~~of the~~ Court of Claims that "there is kind of a bootstrap quality of reasoning in saying that [the United States'] duties expressed by law are those of a trustee, and, therefore, we may look at SCOTT ON TRUSTS or the RESTATEMENT OF TRUSTS and impose on [the Government] all the other consequences the law, as stated by those authorities,

derives from the status of an erring nongovernmental

trustee." Mitchell v. United States, 664 F.2d, at 283

155

(Ct. Cl. 1981) (Nichols, J., concurring and dissenting).

"The federal power over Indian lands is so different in

nature and origin from that of a private trustee ... that

caution is taught in using the mere label of a trust plus

a reading of SCOTT ON TRUSTS to impose liability on claims

160

where assent is not unequivocally expressed." Ibid.⁸ The

⁸"There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships. It is important to differentiate trusts from these other relationships, since many of the rules applicable to trusts are not applicable to them." Restatement (Second) of Trusts §4, Introductory Note, at 15 (1959). For example, the Court often has described the fiduciary relationship between the United States and Indians as one between a guardian and a ward. But "[a] guardianship is not a trust." Id., §7. There is no explanation, however, why the Court chooses one analogy and not another. ~~I can only conclude that the choice was influenced by the fact that "[t]he duties of a trustee are more intensive than the duties of other fiduciaries."~~ Id., §2, comment b.

appear to have been

The Court asserts that "[a]ll of the necessary elements of a common-law trust are present"--a trustee, a beneficiary, and a trust corpus. Ante, at 19. But two persons and a parcel of real property, without more, do not create a trust. Rather, "[a] trust ... arises as a result of a manifestation of an intention to create it." Restatement (Second) of Trusts, §2. See id., §23 ("A trust is created only if the settlor properly manifests an intention to create a trust."); id., §25 ("No trust is created unless the settlor manifests an intention to impose enforceable duties."). This is the element that is missing in this case, and the Court does not, and cannot, find that Congress has manifested its intent to make the statutory duties upon which respondents rely trust duties. Cf. id., §95. Indeed, given the language of the statute at issue in Mitchell I, the case for finding that Congress intended to impose fiduciary obligations on the United States was much stronger than it is here. See 445 U.S. at 547 (WHITE, J., dissenting). One of the authorities cited

Footnote continued on next page.

trusteeships to which the Court has referred in the past have manifested more the view that pervasive control over Indian life is such a high attribute of federal sovereignty that States cannot infringe upon that control.

165

Ibid.⁹ The Court today turns this shield into a sword.

In my view, it is clear that "[n]othing on the face" of any of the statutes at issue, Santa Clara Pueblo v.

by JUSTICE WHITE, A. Scott, Law of Trusts §95 (1967), specifically discusses the General Allotment Act as an example of the United States acting as a trustee. Furthermore, a trustee can "reserv[e] powers with respect to the administration of the trust." Id., §37. Unless the United States agrees to be held liable in damages, even the existence of a trust does not necessarily ~~mean~~ ^{establish} that the Government has surrendered its immunity from damages.

⁹The Court has invoked the fiduciary relation primarily (i) to preclude unauthorized state interference in the relations between the United States and the Indian tribes or other unauthorized exercise of state jurisdiction on Indian lands, see e. g., United States v. Kagama, 118 U.S. 375, 382-384 (1886); (ii) to bar or nullify exercises of state court jurisdiction in matters affecting Indian property rights, in which the United States was not properly joined or represented, see, e. g., Minnesota v. United States, 305 U.S. 382, 386 (1939); United States v. Candelaria, 271 U.S. 432, 442-444 (1926); (iii) to interpret doubtful or ambiguous treaty language in favor of the Indians, see, e. g., United States v. Shoshone Tribe, 304 U.S. 111, 117-118 (1938); Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902); (iv) to determine the liability of the United States for damages under the Just Compensation Clause where, acting as a fiduciary manager, it has converted the form of Indian property, see, e. g., United States v. Sioux Nation of Indians, 448 U.S. 371, 415-416 (1980); and (v) to emphasize the high standard of care that the United States is obliged to exercise in carrying out its duties respecting the Indians, see, e. g., United States v. Mason, 412 U.S. 391, 398 (1973); Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942). But the Court has never, until today, invoked the doctrine to hold that the United States is answerable in money damages for breaches of the standards applicable to a private fiduciary.

Martinez, 436 U.S. 49, 59 (1978), or in their legislative histories, "fairly [can] be interpreted as mandating compensation" for the conduct alleged by respondents. Some of the statutes involved here, to be sure, create substantive duties that the Secretary must fulfill. But this could equally be said of the Classification Act, considered in Testan. It requires that pay classification ratings of federal employees be carried out pursuant to "the principle of equal pay for substantially equal work." 5 U.S.C. §5101(1)(A). Although the federal employee in Testan alleged a violation of the Act, the Court concluded that a back pay remedy was unavailable, rejecting the argument that the substantive right necessarily implies a damages remedy. 424 U.S., at 400-403.

Ignoring this holding in Testan, the Court concludes that the mere existence of a trust of some kind necessarily establishes that Congress has consented to a recovery of damages.

In effect we are told to
~~We apparently are to accept the~~
on faith the *damages*
 existence of a cause of action, ~~for damages on faith:~~

"Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages

The language superficially imports resembling ~~per~~ rejected perceptions of "natural law"; the Court rules that

for the breach of its fiduciary duties." Ante, at 20 19

(emphasis added). See also ibid. (damages are a

"fundamental incident" of a trust relationship); ibid. (it

would be "anomalous" not to find a damages remedy). The

Court can find no more support for this proposition than

the dissenting opinion in Mitchell I. See ante, at 21.¹⁰ 19

It is fair to say that
 The Court's ~~conclusion rests largely upon~~ *is influenced by* its view

that an injunctive remedy is inadequate to redress the

~~The difficulty is the~~ violations alleged--precisely the inference deemed

inadmissible in Testan.¹¹ It is the ordinary result of

¹⁰The Court *reaches for* ~~tries to get~~ support out of *cases in* Seminole Nation v. United States, supra, and United States v. Creek Nation, 295 U.S. 103 (1935), but both ~~actually~~ cut against the Court's theory in this case. The ~~Court's~~ discussion of the Government's fiduciary duty in Seminole Nation referred to a claim to compel payments expressly prescribed by Treaty. See 316 U.S., at 296-297. Creek Nation involved a taking claim.

¹¹Also significant is the Court's standardless remand for further proceedings consistent with its opinion. Given the strictness with which consents to suit by the sovereign are to be construed, United States v. Sherwood, 312 U.S. 584, 590-591 (1941), where the statute upon which liability is premised creates no right to payment of a sum certain, the Court of Claims will be required, without legislative guidance, to determine the extent of liability, if any, and the items of damages that are cognizable. This task, unlike the factual or legal determination whether a particular individual falls within a class granted a right to payment of money by a statute, is not one to which courts are adapted. Any rules established will be of "judicial cloth, not legislative cloth." Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 141 (1981). I assume, however, that the law of trusts generally will control and that all defenses to actions on breaches of trust, such as consent by the beneficiary and laches, will be fully available to the United States. Cf. 664 F.2d, at 274.

sovereign immunity that unconsented claims for money damages are barred. The fact that damages cannot be recovered without the sovereign's consent hardly supports the conclusion that consent has been given. Yet this, in substance, is the Court's reasoning. If ~~the Court~~^{it} is saying that a remedy is necessary to redress every injury sustained, the doctrine of sovereign immunity will have been drained of all meaning. Moreover, "many of the federal statutes ... that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous." Testan, 424 U.S., at 404.

III IV ?

The Court has ~~not endeavored~~^{made no effort} to demonstrate that Congress ~~actually~~^{by a court} intended to render the United States answerable in damages upon claims of the kind presented here. I ~~think~~^{by a court} the mere application of the label "trust" to a ~~few~~^{large the is responsibility} governmental functions respecting Indians does not constitute unequivocal consent to suits against the United States for money damages when these duties allegedly are badly performed. I would reverse the

cannot properly justify disregard of a sovereign immunity the government has never waived.

judgment of the Court of Claims.

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FIRST DRAFT: United States v. Mitchell, No. 81-1748

JUSTICE POWELL, dissenting.

The controlling law in this case is clear. Speaking for the Court in United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I), JUSTICE MARSHALL reaffirmed the general principle that a cause of action for damages against the United States "'cannot be implied but must be unequivocally expressed.'" Id., at 538 (quoting United States v. King, 395 U.S. 1, 4 (1969)). See United States v. Hopkins, 427 U.S. 123, 128 (1976) ("specific command of statute or authorized regulations"); Lehman v. Nakshian, 453 U.S. 156, 170 (1981) (BRENNAN, J., dissenting). Where, as here, a claim for money damages is predicated upon an alleged statutory violation, the rule is that the statute does not create a cause of action for damages unless the statute "'in itself ... can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" United States v. Testan, 424 U.S. 392, 402 (1976) (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967)). See, e. g., Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 739-740 (1982) ("Testan [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized explicitly") (emphasis added); id., at 739 (damages remedy available where the regulations "specifically authorize awards of money damages"); id., at 741 (reaffirming that an action for damages under the Tucker Act may not be premised upon "regulations ... which do not explicitly authorize damages awards").

In sum, whether the United States has created a cause of action

turns upon the intent of Congress, not the inclinations of the courts. See United States v. Shaw, 309 U.S. 495, 500 (1940) ("specific statutory consent"); Munro v. United States, 303 U.S. 36, 41 (1938) ("only by permission"). Today, the Court appears disinterested in the intent of Congress. It has effectively reversed the presumption that absent "affirmative statutory authority," United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940), the United States has not consented to be sued for damages. It has substituted a contrary presumption, applicable to the conduct of the United States in Indian affairs, that the United States has consented to be sued for statutory violations and other departures from the rules that govern private fiduciaries. I dissent from the Court's departure from long-settled principles.

I

The Court does not--and clearly cannot--contend that any of the statutes standing alone reflects the necessary legislative authorization of a damages remedy. None of the statutes contains any "provision ... that expressly makes the United States liable" for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action "with specificity." Testan, 424 U.S., at 399, 400. Indeed, nothing in the timber-sales statutes, 25 U.S.C. §§406, 407,¹ 466,² the road and right-of-way

¹The only monetary obligation imposed upon the Secretary by §406 or §407 is to pay the actual "proceeds" of timber sales to the owners of the land. Thus, while it may well be that those sections would permit an action to compel the Secretary to pay

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Footnote(s) 2 will appear on following pages.

statutes, §§318a, 323-325,³ or the interest statute, §162a,⁴ addresses in any respect the institution of damages actions against the United States. Nor is there any indication in the legislative history of the statutes that Congress intended to consent to damages actions for mismanagement of Indian assets by enacting these provisions.⁵ The Court does not suggest otherwise.

over unlawfully retained proceeds, see United States v. Testan, 424 U.S. 392, 401 (1976), no statutory basis exists for extending that remedy to profits that arguably or ideally should have been, but were not, earned by the Secretary. On the contrary, the statutory recognition of a right to receive the "proceeds" of sales conducted suggests that this is the limit of any damages action implicitly authorized by Congress. See Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 14-15, 20-21 (1981). Cf. United States v. Erika, Inc., 456 U.S. 201, 208 (1982).

²Section 466 merely requires the Secretary to "make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management."

³Section 318a authorizes the appropriation of funds for building of roads on Indian reservations. It would be a radical change in the law of sovereign immunity to hold that a routine authorization statute allows individuals who might benefit from appropriations to bring an action to recover damages. And although §325 requires "the payment of such compensation as the Secretary of the Interior shall determine to be just," it does not follow that damages for failure to secure more generous compensation are available. Indeed, the explicit statutory recognition of the Secretary's authority to determine the amount of compensation militates against any damages remedy for insufficient compensation. See Plumbers & Pipefitters v. Plumbers & Pipefitters, 452 U.S. 615, 630 (1981) (BURGER, C.J., dissenting).

⁴Section 162a affords the Secretary substantial discretion respecting investments to be made with individual Indian funds. There is nothing in the statute that requires payment of a particular rate of interest, much less that makes the United States accountable in damages for any amount by which the revenues earned fall short of a standard of "reasonable management zeal to get for the Indians the best rate." Mitchell v. United States, 664 F.2d 265, 274 (Ct. Cl. 1981).

Footnote(s) 5 will appear on following pages.

The Court for the most part rests its decision on the implausible proposition that statutes that do not in terms create a right to payment of money nonetheless may support a damage action against the United States. This view simply cannot be reconciled with the decisions in Testan and Mitchell I. A nonmonetary duty,⁶ without more, is insufficient to overcome the "presumption" that Congress has not consented to suit for money damages. See Eastern Transportation Co. v. United States, 272 U.S. 675, 686 (1927).

This Court has had occasion in recent cases to emphasize that congressional intent is the ultimate standard in determining whether a private right of action should be inferred from a statute that

⁵It is improbable that Congress intended §406 to constitute consent to monetary liability for forestry mismanagement on allotted lands, because, at the time in question, it appears the Government maintained the position that heavily forested lands were not to be allotted. See United States v. Payne, 264 U.S. 446, 449 (1924). And before 1964, §406 was a rather bare instrument, simply giving an Indian permission to sell his timber with the Secretary's permission. See ante, at 13-14. The legislative history of the 1964 amendments to §406, see ante, at 16, also fails to supply the necessary evidence of congressional intent. The House Report states that "[n]o additional expenditure of Federal funds" was expected to be incurred by reason of the enactment of the legislation. H.R. Rep. No. 1292, 88th Cong., 2d Sess. 2 (1964). A letter from the Interior Department to the Congress urging enactment of the legislation explained only that the standards for timber sales on allotted lands "should help allay disputes and avoid misunderstanding." S. Rep. No. 672, 88th Cong., 1st Sess., 3 (1963).

⁶Although not dispositive, the monetary character of the statutory right is a strong indication that a statute "in itself ... can fairly be interpreted as mandating compensation." By contrast, where, as here, the duties imposed by a statute are not essentially monetary in character, but require implementation through conduct by federal officials, the contrary inference arises: that Congress, by its silence as to a damages remedy, created only a substantive right enforceable through injunctive relief. See Testan, 424 U.S., at 401, n. 5, 403.

does not, in terms, provide for such an action.⁷ Those cases are instructive, for here, too, the "ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979). As we recognized in Testan, courts are not free to dispense with "established principles" requiring explicit congressional authorization for maintenance of suits against the United States simply "because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." 424 U.S., at 400. See Shaw, 309 U.S., at 502. The Court today adduces no "evidence that Congress anticipated that there would be a private remedy." California v. Sierra Club, 451 U.S. 287, 298 (1981).

The Court defends its departure from our precedents on the ground that the statutes and regulations upon which respondents rely need not be "construed in the manner appropriate to waivers of sovereign immunity." Ante, at 12. The Court in effect is overruling Mitchell I sub silentio, for as its discussion on the Tucker Act makes clear, see ante, at 10-13, we there at least "accepted the government's ... claim that a strict standard of

⁷See, e. g., Jackson Transit Authority v. Transit Union, 457 U.S. 15, 20-23 (1982); Middlesex County, 453 U.S., at 13-18; Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639-640 (1981); California v. Sierra Club, 451 U.S. 287, 292-298 (1981); Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 91-95 (1981); Universities Research Assn., Inc. v. Coutu, 450 U.S. 754, 770-784 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-24 (1979). Against the background of sovereign immunity, the rationale of these cases should apply here with particular force.

construction, applicable to deciding whether Congress had enacted a waiver of sovereign immunity, should be applied in interpreting substantive legislation for the benefit of Indian people." Hughes, *Can the Trustee be Sued for its Breach? The Sad Saga of United States v. Mitchell*, 26 S.D. L. Rev. 447, 473 (1981). We expressly held that the General Allotment Act at issue in Mitchell I "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities." 445 U.S., at 542 (emphasis added). Cf. Army & Air Force Exchange Service v. Sheehan, 456 U.S., at 739 ("explicitly reject[ing] the argument that 'the violation of any statute or regulation ... automatically creates a cause of action against the United States for money damages'" (quoting Testan, 424 U.S., at 401)). The Court hardly can view the statutes here as "unambiguously" imposing trust duties on the Government.

II

The Court makes little or no pretense that it is following doctrine heretofore established. Without pertinent analysis, it simply concludes: "Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." Ante, at 19-20. This conclusion rests on two dubious assumptions. First, the Court decides that the statutes create or recognize fiduciary duties. It then reasons that because a private express trust normally imports a right to recover damages for breach, and because injunctive relief is perceived to be inadequate, Congress necessarily must have authorized recovery of

damages for failure properly to perform the statutory duties. The relevancy of the first conclusion is questionable, and the other departs from our precedents, chiefly Testan and Mitchell I.

The Court simply holds that the statutes here "clearly establish fiduciary obligations." Ante, at 20. See also id., at 19 ("a fiduciary relationship necessarily arises"). I agree with the dissent in the Court of Claims that "there is kind of a bootstrap quality of reasoning in saying that [the United States'] duties expressed by law are those of a trustee, and, therefore, we may look at SCOTT ON TRUSTS or the RESTATEMENT OF TRUSTS and impose on [the Government] all the other consequences the law, as stated by those authorities, derives from the status of an erring nongovernmental trustee." Mitchell v. United States, 664 F.2d, at 283 (Ct. Cl. 1981) (Nichols, J., concurring and dissenting). "The federal power over Indian lands is so different in nature and origin from that of a private trustee ... that caution is taught in using the mere label of a trust plus a reading of SCOTT ON TRUSTS to impose liability on claims where assent is not unequivocally expressed." Ibid.⁸ The

⁸"There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships. It is important to differentiate trusts from these other relationships, since many of the rules applicable to trusts are not applicable to them." Restatement (Second) of Trusts §4, Introductory Note, at 15 (1959). For example, the Court often has described the fiduciary relationship between the United States and Indians as one between a guardian and a ward. But "[a] guardianship is not a trust." Id., §7. There is no explanation, however, why the Court chooses one analogy and not another. The choice appears to be influenced by the fact that "[t]he duties of a trustee are more intensive than the duties of other fiduciaries." Id., §2, comment b.

The Court asserts that "[a]ll of the necessary elements of a
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trusteeships to which the Court has referred in the past have manifested more the view that pervasive control over Indian life is such a high attribute of federal sovereignty that States cannot infringe upon that control. Ibid.⁹ The Court today turns this

common-law trust are present"--a trustee, a beneficiary, and a trust corpus. Ante, at 19. But two persons and a parcel of real property, without more, do not create a trust. Rather, "[a] trust ... arises as a result of a manifestation of an intention to create it." Restatement (Second) of Trusts, §2. See id., §23 ("A trust is created only if the settlor properly manifests an intention to create a trust."); id., §25 ("No trust is created unless the settlor manifests an intention to impose enforceable duties."). This is the element that is missing in this case, and the Court does not, and cannot, find that Congress has manifested its intent to make the statutory duties upon which respondents rely trust duties. Cf. id., §95; 2 A. Scott, Law of Trusts §95, at 772 (2d ed. 1967) ("At common law it was held that a use ... could not be enforced against the Crown"). Indeed, given the language of the statute at issue in Mitchell I, the case for finding that Congress intended to impose fiduciary obligations on the United States was much stronger than it is here. See 445 U.S. at 547 (WHITE, J., dissenting). One of the authorities cited by JUSTICE WHITE, 2 A. Scott, supra, §95, specifically discusses the General Allotment Act as an example of the United States acting as a trustee. Furthermore, a trustee can "reserv[e] powers with respect to the administration of the trust." Id., §37. Unless the United States agrees to be held liable in damages, even the existence of a trust does not necessarily establish that the Government has surrendered its immunity from damages.

⁹The Court has invoked the fiduciary relation primarily (i) to preclude unauthorized state interference in the relations between the United States and the Indian tribes or other unauthorized exercise of state jurisdiction on Indian lands, see e. g., United States v. Kagama, 118 U.S. 375, 382-384 (1886); (ii) to bar or nullify exercises of state court jurisdiction in matters affecting Indian property rights, in which the United States was not properly joined or represented, see, e. g., Minnesota v. United States, 305 U.S. 382, 386 (1939); United States v. Candelaria, 271 U.S. 432, 442-444 (1926); (iii) to interpret doubtful or ambiguous treaty language in favor of the Indians, see, e. g., United States v. Shoshone Tribe, 304 U.S. 111, 117-118 (1938); Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902); (iv) to determine the liability of the United States for damages under the Just Compensation Clause where, acting as a fiduciary manager, it has converted the form of Indian property,

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shield into a sword.

In my view, it is clear that "[n]othing on the face" of any of the statutes at issue, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978), or in their legislative histories, "fairly [can] be interpreted as mandating compensation" for the conduct alleged by respondents. Some of the statutes involved here, to be sure, create substantive duties that the Secretary must fulfill. But this could equally be said of the Classification Act, considered in Testan. It requires that pay classification ratings of federal employees be carried out pursuant to "the principle of equal pay for substantially equal work." 5 U.S.C. §5101(1)(A). Although the federal employee in Testan alleged a violation of the Act, the Court concluded that a back pay remedy was unavailable, rejecting the argument that the substantive right necessarily implies a damages remedy. 424 U.S., at 400-403.

Ignoring this holding in Testan, the Court concludes that the mere existence of a trust of some kind necessarily establishes that Congress has consented to a recovery of damages. In language superficially resembling rejected perceptions of "natural law," the Court rules that, "[g]iven the existence of a trust relationship, it

see, e. g., United States v. Sioux Nation of Indians, 448 U.S. 371, 415-416 (1980); and (v) to emphasize the high standard of care that the United States is obliged to exercise in carrying out its duties respecting the Indians, see, e. g., United States v. Mason, 412 U.S. 391, 398 (1973); Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942). But the Court has never, until today, invoked the doctrine to hold that the United States is answerable in money damages for breaches of the standards applicable to a private fiduciary.

naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." Ante, at 20 (emphasis added). See also ibid. (damages are a "fundamental incident" of a trust relationship); ibid. (it would be "anomalous" not to find a damages remedy). The Court can find no more support for this proposition than the dissenting opinion in Mitchell I. See ante, at 21.¹⁰

It is fair to say that the Court is influenced by its view that an injunctive remedy is inadequate to redress the violations alleged--precisely the inference deemed inadmissible in Testan.¹¹ It is the ordinary result of sovereign immunity that unconsented claims for money damages are barred. The fact that damages cannot

¹⁰The Court reaches for support in Seminole Nation v. United States, supra, and United States v. Creek Nation, 295 U.S. 103 (1935), but both cases cut against the Court's theory in this case. The discussion of the Government's fiduciary duty in Seminole Nation referred to a claim to compel payments expressly prescribed by Treaty. See 316 U.S., at 296-297. Creek Nation involved a taking claim.

¹¹Also significant is the Court's standardless remand for further proceedings consistent with its opinion. Given the strictness with which consents to suit by the sovereign are to be construed, United States v. Sherwood, 312 U.S. 584, 590-591 (1941), where the statute upon which liability is premised creates no right to payment of a sum certain, the Court of Claims will be required, without legislative guidance, to determine the extent of liability, if any, and the items of damages that are cognizable. This task, unlike the factual or legal determination whether a particular individual falls within a class granted a right to payment of money by a statute, is not one to which courts are adapted. Any rules established will be of "judicial cloth, not legislative cloth." Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 141 (1981). I assume, however, that the law of trusts generally will control and that all defenses to actions on breaches of trust, such as consent by the beneficiary and laches, will be fully available to the United States. Cf. 664 F.2d, at 274.

be recovered without the sovereign's consent hardly supports the conclusion that consent has been given. Yet this, in substance, is the Court's reasoning. If it is saying that a remedy is necessary to redress every injury sustained, the doctrine of sovereign immunity will have been drained of all meaning. Moreover, "many of the federal statutes ... that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous." Testan, 424 U.S., at 404.

III

The Court has made no effort to demonstrate that Congress intended to render the United States answerable in damages upon claims of the kind presented here. The mere application by a court of the label "trust" cannot properly justify disregard of an immunity from damages the Government has never waived. I would reverse the judgment of the Court of Claims.

mn edit
SECOND DRAFT: United States v. Mitchell, No. 81-1748

JUSTICE POWELL, dissenting.

2
The controlling law in this case is clear. Speaking for the Court in United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I), JUSTICE MARSHALL reaffirmed the general principle that ~~a cause of action for damages~~ against the United States "cannot be implied but must be unequivocally expressed." Id., at 538 (quoting United States v. King, 395 U.S. 1, 4 (1969)). See Lehman v. Nakshian, 453 U.S. 156, 170 (1981) (BRENNAN, J., dissenting). Where, as here, a claim for money damages is predicated upon an alleged statutory violation, the rule is that the statute does not create a cause of action for damages unless the statute "in itself ... can fairly be interpreted as mandating compensation by the Federal

TM says:

"[a] waiver of sovereign immunity"

Government for the damage sustained." United States v. Testan, 424 U.S. 392, 402 (1976) (quoting Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967)). See, e.g., Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 739-740 (1982) ("Testan [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized explicitly") (emphasis added); id., at 739 (damages remedy available where the ~~statutes~~ ^{regulations} "specifically authorize awards of money damages"); id., at 741 (reaffirming that an action for damages under the Tucker Act may not be premised upon "regulations ... which do not explicitly authorize damages awards").

In sum, whether the United States has created a cause of action turns upon the intent of Congress, not the

inclinations of the courts. See United States v. Shaw,
 309 U.S. 495, 502 (1940); Munro v. United States, 303 U.S.
 36, 41 (1938). Today, the Court appears disinterested in
 the intent of Congress. The rights of action that the
 Court finds "mandated" by an amalgamation of federal
 statutes "is in cold reality but a strong and clear wish
 upon the judge's part." Mitch v. U.S.
~~United States v. Mitchell~~, 664
 F.2d 265, 277 (Ct. Cl. 1981) (Nichols, J., concurring and
 dissenting). I dissent from what I perceive is the
 Court's departure from long-settled principles.

I

The Court does not--and clearly cannot--contend that
 any of the statutes standing alone reflects the necessary
 legislative mandate for a damages remedy. None of the
 statutes contains any "provision ... that expressly makes

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Testan, 424 U.S., at 399-400. Indeed, nothing in the

timber sales statutes, 25 U.S.C. §§406, 407,¹ 466,² the

¹The only monetary obligation imposed upon the Secretary by §406 or §407 is to pay the actual "proceeds" of timber sales to the owners of the land. Thus, while it may be that those sections ~~would ground~~ *would permit* an action to compel the Secretary to disgorge unlawfully retained proceeds, see United States v. Testan, 424 U.S. 392, 401 (1976), no statutory basis exists for extending that remedy to proceeds that arguably or ideally should have been, but were not, captured by the Secretary. On the contrary, the statutory recognition of ~~some~~ *a* right to receive the "proceeds" of sales conducted suggests that this is the limit of any damages action implicitly authorized by Congress. See United States v. Erika, Inc., 456 U.S. 201, 208 (1982); Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 14-15, 20-21 (1981).

I would cite Middlesex, then cf. Erika;
²Section 466 merely requires the Secretary to "make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management." ~~As the Court of Claims recognized, 664 F.2d 265, 272 (1981), there plainly is no statutory directive to pay compensation. Rather the duty imposed upon the Secretary is simply to adopt appropriate regulations.~~

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road and right-of-way statutes, §§318a, 323-325,³ or the interest statute, §162a,⁴ addresses in any respect the institution of damages actions against the United States. Nor is there any indication in the legislative history of the statutes that Congress intended to consent to damages

³Section 318a merely authorizes the appropriation of funds for building of roads on Indian reservations. It would be a radical change in the law of sovereign immunity to hold that a routine authorization statute allows individuals who might be benefited if the appropriations are made to bring an action to recover damages. And although §325 authorizes an action for recovery of compensation wrongfully withheld from the Indians, it does not follow that damages for failure to secure more generous compensation are available. Indeed, the explicit statutory recognition of the Secretary's authority to determine the amount of compensation militates against any damages remedy for insufficient compensation.

⁴Section 162a Rather than compelling a particular level of compensation, §162a affords the Secretary substantial discretion respecting the investments to be made with individual Indian funds. There is nothing in the statute that requires payment of a particular rate of interest. A fortiori, Congress has not agreed to hold the United States accountable in damages for any amount by which the revenues earned fall short of a standard of "reasonable management zeal to get for the Indians the best rate." 664 F.2d 265, 274 (Ct. Cl. 1981).

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actions for mismanagement of Indian assets by enacting these provisions.⁵ The Court does not suggest otherwise.⁶

We aren't told what the 1964 amendments are, what prior language said, etc. So the note on it especially persuasive.

⁵It is especially improbable that Congress intended to consent to monetary liability for forestry mismanagement on allotted lands, because, at the time in question, at least some, if not all, government officials believed that heavily forested lands were not to be allotted. See United States v. Payne, 264 U.S. 446, 449 (1924). And before 1964, §406 was a rather bare instrument, simply giving an Indian permission to sell his timber with the Secretary's permission. The legislative history of the 1964 amendments to §406 also fails to supply the necessary evidence of congressional intent. The House Report states that "[n]o additional expenditure of Federal funds" was expected to be incurred by reason of the enactment of the legislation. H.R. Rep. No. 1292, 88th Cong., 2d Sess. 2 (1964). A letter from the Interior Department to the Congress urging enactment of the legislation explained that the standards for timber sales on allotted lands "should help allay disputes and avoid misunderstanding." S. Rep. No. 672, 88th Cong., 1st Sess. 3 (1963).

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⁶It ordinarily may be correct that a statute vesting an individual or members of a designated class with an absolute right to receive a sum certain from an administrative office of the United States grounds an action for the recovery of damages--or at least the sum withheld--in the event of nonpayment. See Testan, 424 U.S., at 400 (reserving the question). But again, the Court does not rest upon any such statute or right. The Government, on the other hand, concedes that an action to recover unlawfully high administrative fees and to recover for the failure to pay any interest may be maintained against the United States as one seeking recovery of "money improperly exacted or retained." Testan, 424 U.S., at 401. Thus, to the extent that the judgment of the Footnote continued on next page.

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The Court rests its discussion on the novel proposition that statutes that do not in terms create any right to payment of money nonetheless may support a damage action against the United States. This view hardly can be reconciled with the decisions in Testan and Mitchell I. A nonmonetary duty,⁷ without more, is insufficient to overcome the "presumption" that Congress has not consented to suit for money damages. See Eastern Transportation Co. v. United States, 272 U.S. 675, 686 (1927). This Court

Court of Claims would permit an action to recover withheld fees and interest, the Government apparently does not seek review, and I have no occasion to decide the issue.

⁷Although not dispositive, the monetary character of the statutory right is a strong indication that a statute "in itself ... can fairly be interpreted as mandating compensation." By contrast, where, as here, the duties imposed by a statute are not essentially monetary in character, but require implementation through conduct by federal officials, the contrary inference arises: that Congress, by its silence as to a damages remedy, created only a substantive right enforceable through injunctive relief. See Testan, 424 U.S., at 401, n. 5, 403.

has had occasion in recent cases to emphasize that congressional intent is the ultimate standard in determining whether a private right of action should be inferred from a statute that does not, in terms, provide for such an action.⁸ Those cases are instructive, for here, too, the "ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979). As we recognized in Testan, courts are not free to dispense with

⁸See, e.g., Jackson Transit Authority v. Transit Union, 457 U.S. 15, 20-23 (1982); Middlesex County, 453 U.S., at 13-18; Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639-640 (1981); California v. Sierra Club, 451 U.S. 287, 292-298 (1981); Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 91-95 (1981); Universities Research Assn., Inc. v. Cortu, 450 U.S. 754, 770-784 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-24 (1979). Against the background of sovereign immunity, the rationale of these cases should apply here with particular force.

"established principles" requiring explicit congressional authorization for maintenance of suits against the United States simply "because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." 424 U.S., at 400.⁹ See Shaw, 309 U.S., at 502. The Court today adduces no "evidence that Congress anticipated that there would be a private remedy." California v. Sierra Club, 451 U.S. 287,

⁹The Court's conclusion that injunctive relief is insufficient to vindicate the statutory rights of the respondents is the kind of policy judgment that properly should be left to the legislature. Cf. Universities Research Assn., Inc., 450 U.S., at 769, and n. 19, 776-777, 782-783. Nor has the Court satisfactorily explained why injunctive relief is thought to be inadequate. The Court states that a trusteeship "would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery." Ante, at 21. It is not clear what the Court's analysis would be if it did not assume that there was a right to recover damages--the issue in this case.

This could be deleted. The text makes the essence of these points.

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298 (1981).

Thus, it is clear that "[n]othing on the face" of any of the statutes at issue, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978), or in their legislative histories, "fairly [can] be interpreted as mandating compensation" for the conduct alleged by respondents. Some of the statutes involved here, to be sure, create substantive duties that the Secretary must fulfill. But this could equally be said of the Classification Act, considered in Testan. It ~~unambiguously~~ requires that pay classification ratings of federal employees be carried out pursuant to "the principle of ^gequal pay for substantially equal work." 5 U.S.C. §5101(1)(A). Although the federal employee in Testan alleged a violation of the Act, the Court concluded that a back pay remedy was unavailable, rejecting the

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argument that the substantive right necessarily implies a damages remedy. 424 U.S., at 400-403. The Court's conclusion in this case, however, rests largely upon its view that an injunctive remedy is inadequate to redress the violations alleged--precisely the inference deemed inadmissible in Testan.¹⁰

It is the ordinary result of sovereign immunity that

¹⁰Also significant is the Court's standardless remand for further proceedings consistent with its opinion. The compass has no hands. Given the strictness with which consents to suit by the sovereign are to be construed, United States v. Sherwood, 312 U.S. 584, 590-591 (1941), where the statute upon which liability is premised creates no right to payment of a sum certain, the Court of Claims will be required, without legislative guidance, to determine the extent of liability, if any, and the items of damages that are cognizable. This task, unlike the factual or legal determination whether a particular individual falls within a class granted a right to payment of money by a statute, is not one to which courts are adapted. Any rules established will be of "judicial cloth, not legislative cloth." See Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 141 (1981). I assume, however, that the law of trusts generally will control and that all defenses to actions on breaches of trust, such as consent by the beneficiary and laches, will be fully available to the United States.

Is this
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1 of 664 F.2d at

unconsented claims for money damages are barred. The fact that damages cannot be recovered without the sovereign's consent hardly supports the conclusion that consent has been given. Yet this, in substance, is the Court's reasoning. If, ~~as can be argued,~~ the Court is saying that a remedy is necessary to redress every injury sustained, the doctrine of sovereign immunity will have been drained of all meaning. Moreover, "many of the federal statutes ... that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous." Testan, 424 U.S., at 404. ✓

II

The Court makes little or no pretense that it is following doctrine this Court heretofore has established.

redundant

Its opinion contains no examination of the language and the legislative history of the statutes held to give rise to monetary liability to determine whether Congress intended to grant a cause of action for damages. The Court's analysis consists essentially of a single conclusory sentence: "Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." Ante, at ¹⁹⁻20. This conclusion rests on two dubious assumptions. First, the Court decides that the statutes create or recognize fiduciary duties. It then reasons that because a private express trust normally imports a right to recover damages

for breach, and because injunctive relief is perceived to be inadequate, Congress necessarily must have authorized recovery of damages for failure properly to perform the statutory duties. The relevancy of the first conclusion is questionable, and the second is simply wrong.

The Court points to no evidence that the statutory duties Congress imposed were intended to impose fiduciary duties. Nor do any of the timber sales or management statutes upon which respondents rely make any reference to such duties. Rather, the Court simply holds that the statutes here "clearly establish fiduciary obligations."

Ante, at 20. See also id., at 19 ("a fiduciary relationship necessarily arises"). "There is kind of a bootstrap quality of reasoning in saying that [the United States'] duties expressed by law are those of a trustee,

you already argued about this, pp 11-12

you already have said this

you never say why except "presumption"

I agree with the dissent in the Court's claim that

and, therefore, we may look at Scott on Trusts or the Restatement of Trusts and impose on [the Government] all the other consequences the law, as stated by those

authorities, derives from the status of an erring nongovernmental trustee." Mitchell v. United States, 664 F.2d, at 283 (Nichols, J., concurring and dissenting). Federal authority over Indian lands is so different in nature and origin from that of a private trust that caution surely is warranted before labeling an obligation assumed by the Government a "trust" and then relying on Scott on Trusts to impose liability where none has been authorized. Ibid.¹¹ ✓

¹¹"There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships. It is important to differentiate trusts from these other relationships, since many of the rules applicable to trusts are not applicable to them." Restatement (Second) of Trusts §4, at 15 (1959). For example, the Court often
Footnote continued on next page.

This is sufficiently close to Nichols' language that you might use a direct quote

Introductory note

The trusteeships to which the Court has referred in the past have manifested more the view that pervasive control over Indian life is such a high attribute of

has described the fiduciary relationship between the United States and Indians as one between a guardian and a ward. But "[a] guardianship is not a trust." Id., §8. There is no explanation, however, why the Court chooses one analogy and not another. I can only conclude that the choice was influenced by the fact that "[t]he duties of a trustee are more intensive than the duties of other fiduciaries." Id., §2, comment b.

The Court asserts that "[a]ll of the necessary elements of a common-law trust are present"--a trustee, a beneficiary, and a trust corpus. Ante, at 19. But two persons and a parcel of real property, without more, do not create a trust. Rather, "[a] trust ... arises as a result of a manifestation of an intention to create it." Id., §2. See id., §23 ("A trust is created only if the settlor properly manifests an intention to create a trust."); id., §25 ("No trust is created unless the settlor manifests an intention to impose enforceable duties."). This is the element that is missing in this case, and the Court does not, and cannot, find that Congress has manifested its intent to make the statutory duties upon which respondents rely trust duties. Cf. id., §95 ("The United States ... has capacity to take and hold property in trust, but in the absence of a statute otherwise providing the trust is unenforceable against the United States ..."). Furthermore, a trustee can "reserv[e] powers with respect to the administration of the trust." Id., §37. Unless the United States agrees to be held liable in damages, even the existence of a trust does not necessarily mean that the Government has surrendered its immunity from damages.

Restatement
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federal sovereignty that States cannot infringe upon that control. Ibid.¹² The Court today turns this shield into

a sword. It is plausible that mismanagement of Indian

lands is more analogous to misgovernment than it is to the

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¹²The Court has invoked the fiduciary relation primarily (i) to preclude unauthorized state interference in the relations between the United States and the Indian tribes or other unauthorized exercise of state jurisdiction on Indian lands, see e.g., United States v. Kagama, 118 U.S. 375, 382-384 (1886); (ii) to bar or nullify exercises of state court jurisdiction in matters affecting Indian property rights, in which the United States was not properly joined or represented, see, e.g., Minnesota v. United States, 305 U.S. 382, 386 (1939); United States v. Candelaria, 271 U.S. 432, 442 (1926); (iii) to interpret doubtful or ambiguous treaty language in favor of the Indians, see, e.g., United States v. Shoshone Tribe, 304 U.S. 111, 117-118 (1938); Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902); (iv) to limit the liability of the United States for damages under the Just Compensation Clause where, acting as a fiduciary manager, it has converted the form of Indian property, see, e.g., United States v. Sioux Nation of Indians, 448 U.S. 371, 415-416 (1980); cf. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903); and (v) to emphasize the high standard of care that the United States is obliged to exercise in carrying out its duties respecting the Indians, see, e.g., United States v. Mason, 412 U.S. 391, 398 (1973); Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942). But the Court has never, until today, invoked the doctrine to hold that the United States is answerable in money damages for breaches of the standards applicable to a private fiduciary.

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→ Do these really say to "limit" liability? It's more "to judge the liability."

misfeasance of a common-law trust. Ibid. Cf. Nevada v.

United States, ___ U.S. ___, ___, n. 15 (1983) (breach of

fiduciary duty to Indians "reflects the nature of a

democratic government that is charged with more than one

responsibility"). In my view, the Court today

substantially retreats from JUSTICE BLACKMUN's words for

the Court in Army & Air Force Exchange Service v. Sheehan,

supra, where we "explicitly rejected the argument that

'the violation of any statute or regulation ~~relating to~~

~~federal employment~~ automatically creates a cause of action

against the United States for money damages.'" 456 U.S.,

at 739 (quoting Testan, 424 U.S., at 401).

B

But more remarkable than the implication of trust

duties from statutory duties is the conclusion that the

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establishes that Congress has consented to a recovery of damages. We apparently are to accept the existence of a cause of action for damages on faith: "Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." Ante, at 20 (emphasis added). See also ^{ibid.} ~~id.~~, at 20 (damages are a "fundamental incident" of a trust relationship); ^{ibid.} ~~id.~~ (it would be "anomalous" not to find a damages remedy). The Court can find no more support for this proposition than the dissenting opinion in Mitchell I. See ante, at 21.¹³ In my opinion, the

¹³The Court tries to get support out of Seminole Nation v. United States, *supra*, and United States v. Creek Nation, 295 U.S. 103 (1935), but both actually cut against the Court's theory in this case. The Court's discussion of the Government's fiduciary duty in Seminole Nation referred to a claim to compel payments expressly prescribed by Treaty. See 316 U.S., at 296-297. Creek Nation involved a taking claim.

Court has effectively reversed the presumption, Eastern
Transportation, 272 U.S., at 686, that absent "affirmative
 statutory authority," United States v. United States
Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940); see
Shaw, 309 U.S., at 500 ("specific statutory consent");
Munro, 303 U.S., at 41 ("only by permission"), the United
 States has not consented to be sued. It has substituted a
 contrary presumption, applicable to the conduct of the
 United States in Indian affairs, that the United States
 has consented to be sued for statutory violations and
 other departures from the rules that govern private
 fiduciaries.

III

The Court has not endeavored to demonstrate that
 Congress actually intended to render the United States
 answerable in damages upon claims of the kind presented

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here. I think the mere application of the label "trust" to a few governmental functions respecting Indians does not constitute unequivocal consent to suits against the United States for money damages when these duties ^{allegedly} are badly performed. I would reverse the judgment of the Court of Claims.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

JUN 19 1983

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1748

UNITED STATES, PETITIONER v.
HELEN MITCHELL ET AL.

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

[June —, 1983]

JUSTICE POWELL, dissenting.

The controlling law in this case is clear. Speaking for the Court in *United States v. Mitchell*, 445 U. S. 535 (1980) (*Mitchell I*), JUSTICE MARSHALL reaffirmed the general principle that a cause of action for damages against the United States “cannot be implied but must be unequivocally expressed.” *Id.*, at 538 (quoting *United States v. King*, 395 U. S. 1, 4 (1969)). See *United States v. Hopkins*, 427 U. S. 123, 128 (1976) (“specific command of statute or authorized regulations”); *Lehman v. Nakshian*, 453 U. S. 156, 170 (1981) (BRENNAN, J., dissenting). Where, as here, a claim for money damages is predicated upon an alleged statutory violation, the rule is that the statute does not create a cause of action for damages unless the statute “in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.” *United States v. Testan*, 424 U. S. 392, 402 (1976) (quoting *Eastport S.S. Corp. v. United States*, 372 F. 2d 1002, 1008-1009 (Ct. Cl. 1967)). See, e. g., *Army & Air Force Exchange Service v. Sheehan*, 456 U. S. 728, 739-740 (1982) (“*Testan* [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized *explicitly*”) (emphasis added); *id.*, at 739 (damages remedy available where the regulations “specifically authorize awards of

money damages"); *id.*, at 741 (reaffirming that an action for damages under the Tucker Act may not be premised upon "regulations . . . which do not explicitly authorize damages awards").

In sum, whether the United States has created a cause of action turns upon the intent of Congress, not the inclinations of the courts. See *United States v. Shaw*, 309 U. S. 495, 500 (1940) ("specific statutory consent"); *Munro v. United States*, 303 U. S. 36, 41 (1938) ("only by permission"). Today, the Court appears disinterested in the intent of Congress. It has effectively reversed the presumption that absent "affirmative statutory authority," *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 514 (1940), the United States has not consented to be sued for damages. It has substituted a contrary presumption, applicable to the conduct of the United States in Indian affairs, that the United States has consented to be sued for statutory violations and other departures from the rules that govern private fiduciaries. I dissent from the Court's departure from long-settled principles.

I

The Court does not—and clearly cannot—contend that any of the statutes standing alone reflects the necessary legislative authorization of a damages remedy. None of the statutes contains any "provision . . . that expressly makes the United States liable" for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action "with specificity." *Testan*, 424 U. S., at 399, 400. Indeed, nothing in the timber-sales statutes, 25 U. S. C. §§ 406, 407,¹

¹The only monetary obligation imposed upon the Secretary by § 406 or § 407 is to pay the actual "proceeds" of timber sales to the owners of the land. Thus, while it may well be that those sections would permit an action to compel the Secretary to pay over unlawfully retained proceeds, see *United States v. Testan*, 424 U. S. 392, 401 (1976), no statutory basis exists for extending that remedy to profits that arguably or ideally should have

466,² the road and right-of-way statutes, §§ 318a, 323-325,³ or the interest statute, § 162a,⁴ addresses in any respect the institution of damages actions against the United States. Nor is there any indication in the legislative history of the statutes that Congress intended to consent to damages actions for mismanagement of Indian assets by enacting these provisions.⁵ The Court does not suggest otherwise.

been, but were not, earned by the Secretary. On the contrary, the statutory recognition of a right to receive the "proceeds" of sales conducted suggests that this is the limit of any damages action implicitly authorized by Congress. See *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U. S. 1, 14-15, 20-21 (1981). Cf. *United States v. Erika, Inc.*, 456 U. S. 201, 208 (1982).

² Section 466 merely requires the Secretary to "make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management."

³ Section 318a authorizes the appropriation of funds for building of roads on Indian reservations. It would be a radical change in the law of sovereign immunity to hold that a routine authorization statute allows individuals who might benefit from appropriations to bring an action to recover damages. And although § 325 requires "the payment of such compensation as the Secretary of the Interior shall determine to be just," it does not follow that damages for failure to secure more generous compensation are available. Indeed, the explicit statutory recognition of the Secretary's authority to determine the amount of compensation militates against any damages remedy for insufficient compensation. See *Plumbers & Pipefitters v. Plumbers & Pipefitters*, 452 U. S. 615, 630 (1981) (BURGER, C. J., dissenting).

⁴ Section 162a affords the Secretary substantial discretion respecting investments to be made with individual Indian funds. There is nothing in the statute that requires payment of a particular rate of interest, much less that makes the United States accountable in damages for any amount by which the revenues earned fall short of a standard of "reasonable management zeal to get for the Indians the best rate." *Mitchell v. United States*, 664 F. 2d 265, 274 (Ct. Cl. 1981).

⁵ It is improbable that Congress intended § 406 to constitute consent to monetary liability for forestry mismanagement on allotted lands, because, at the time in question, it appears the Government maintained the position that heavily forested lands were not to be allotted. See *United States v. Payne*, 264 U. S. 446, 449 (1924). And before 1964, § 406 was a rather

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The Court for the most part rests its decision on the implausible proposition that statutes that do not in terms create a right to payment of money nonetheless may support a damage action against the United States. This view simply cannot be reconciled with the decisions in *Testan* and *Mitchell I*. A nonmonetary duty,⁶ without more, is insufficient to overcome the “presumption” that Congress has not consented to suit for money damages. See *Eastern Transportation Co. v. United States*, 272 U. S. 675, 686 (1927).

This Court has had occasion in recent cases to emphasize that congressional intent is the ultimate standard in determining whether a private right of action should be inferred from a statute that does not, in terms, provide for such an action.⁷ Those cases are instructive, for here, too, the “ulti-

bare instrument, simply giving an Indian permission to sell his timber with the Secretary's permission. See *ante*, at 13–14. The legislative history of the 1964 amendments to § 406, see *ante*, at 16, also fails to supply the necessary evidence of congressional intent. The House Report states that “[n]o additional expenditure of Federal funds” was expected to be incurred by reason of the enactment of the legislation. H. R. Rep. No. 1292, 88th Cong., 2d Sess. 2 (1964). A letter from the Interior Department to the Congress urging enactment of the legislation explained only that the standards for timber sales on allotted lands “should help allay disputes and avoid misunderstanding.” S. Rep. No. 672, 88th Cong., 1st Sess., 3 (1963).

⁶Although not dispositive, the monetary character of the statutory right is a strong indication that a statute “in itself . . . can fairly be interpreted as mandating compensation.” By contrast, where, as here, the duties imposed by a statute are not essentially monetary in character, but require implementation through conduct by federal officials, the contrary inference arises: that Congress, by its silence as to a damages remedy, created only a substantive right enforceable through injunctive relief. See *Testan*, 424 U. S., at 401, n. 5, 403.

⁷See, e. g., *Jackson Transit Authority v. Transit Union*, 457 U. S. 15, 20–23 (1982); *Middlesex County*, 453 U. S., at 13–18; *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U. S. 630, 639–640 (1981); *California v. Sierra Club*, 451 U. S. 287, 292–298 (1981); *Northwest Airlines, Inc. v. Transport Workers*, 451 U. S. 77, 91–95 (1981); *Universities Research Assn., Inc. v. Coutu*, 450 U. S. 754, 770–784 (1981); *Transamerica Mort-*

mate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co. v. Redington*, 442 U. S. 560, 578 (1979). As we recognized in *Testan*, courts are not free to dispense with "established principles" requiring explicit congressional authorization for maintenance of suits against the United States simply "because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." 424 U. S., at 400. See *Shaw*, 309 U. S., at 502. The Court today adduces no "evidence that Congress anticipated that there would be a private remedy." *California v. Sierra Club*, 451 U. S. 287, 298 (1981).

The Court defends its departure from our precedents on the ground that the statutes and regulations upon which respondents rely need not be "construed in the manner appropriate to waivers of sovereign immunity." *Ante*, at 12. The Court in effect is overruling *Mitchell I sub silentio*, for as its discussion on the Tucker Act makes clear, see *ante*, at 10-13, we there at least "accepted the government's . . . claim that a strict standard of construction, applicable to deciding whether Congress had enacted a waiver of sovereign immunity, should be applied in interpreting substantive legislation for the benefit of Indian people." Hughes, *Can the Trustee be Sued for its Breach? The Sad Saga of United States v. Mitchell*, 26 S. D. L. Rev. 447, 473 (1981). We expressly held that the General Allotment Act at issue in *Mitchell I* "does not *unambiguously* provide that the United States has undertaken full fiduciary responsibilities." 445 U. S., at 542 (emphasis added). Cf. *Army & Air Force Exchange Service v. Sheehan*, 456 U. S., at 739 ("explicitly reject[ing] the argument that 'the violation of any statute or regulation . . . auto-

gage Advisors, Inc. v. Lewis, 444 U. S. 11, 19-24 (1979). Against the background of sovereign immunity, the rationale of these cases should apply here with particular force.

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matically creates a cause of action against the United States for money damages”) (quoting *Testan*, 424 U. S., at 401). The Court hardly can view the statutes here as “unambiguously” imposing trust duties on the Government.

II

The Court makes little or no pretense that it is following doctrine heretofore established. Without pertinent analysis, it simply concludes: “Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained.” *Ante*, at 19–20. This conclusion rests on two dubious assumptions. First, the Court decides that the statutes create or recognize fiduciary duties. It then reasons that because a private express trust normally imports a right to recover damages for breach, and because injunctive relief is perceived to be inadequate, Congress necessarily must have authorized recovery of damages for failure properly to perform the statutory duties. The relevancy of the first conclusion is questionable, and the other departs from our precedents, chiefly *Testan* and *Mitchell I*.

The Court simply holds that the statutes here “clearly establish fiduciary obligations.” *Ante*, at 20. See also *id.*, at 19 (“a fiduciary relationship necessarily arises”). I agree with the dissent in the Court of Claims that “there is kind of a bootstrap quality of reasoning in saying that [the United States’] duties expressed by law are those of a trustee, and, therefore, we may look at SCOTT ON TRUSTS or the RESTATEMENT OF TRUSTS and impose on [the Government] all the other consequences the law, as stated by those authorities, derives from the status of an erring nongovernmental trustee.” ~~*Mitchell v. United States*~~ 664 F. 2d, at 283 (Ct. Cl. 1981) (Nichols, J., concurring and dissenting). “The federal power over Indian lands is so different in nature and

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origin from that of a private trustee . . . that caution is taught in using the mere label of a trust plus a reading of SCOTT ON TRUSTS to impose liability on claims where assent is not unequivocally expressed." *Ibid.*⁸ The trustee-ship to which the Court has referred in the past have mani-

⁸"There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships. It is important to differentiate trusts from these other relationships, since many of the rules applicable to trusts are not applicable to them." Restatement (Second) of Trusts § 4, Introductory Note, at 15 (1959). For example, the Court often has described the fiduciary relationship between the United States and Indians as one between a guardian and a ward. But "[a] guardianship is not a trust." *Id.*, § 7. There is no explanation, however, why the Court chooses one analogy and not another. The choice appears to be influenced by the fact that "[t]he duties of a trustee are more intensive than the duties of other fiduciaries." *Id.*, § 2, comment b.

The Court asserts that "[a]ll of the necessary elements of a common-law trust are present"—a trustee, a beneficiary, and a trust corpus. *Ante*, at 19. But two persons and a parcel of real property, without more, do not create a trust. Rather, "[a] trust . . . arises as a result of a manifestation of an intention to create it." Restatement (Second) of Trusts, § 2. See *id.*, § 23 ("A trust is created only if the settlor properly manifests an intention to create a trust."); *id.*, § 25 ("No trust is created unless the settlor manifests an intention to impose enforceable duties."). This is the element that is missing in this case, and the Court does not, and cannot, find that Congress has manifested its intent to make the statutory duties upon which respondents rely trust duties. Cf. *id.*, § 95; 2 A. Scott, Law of Trusts § 95, at 772 (2d ed. 1967) ("At common law it was held that a use . . . could not be enforced against the Crown. . ."). Indeed, given the language of the statute at issue in *Mitchell I*, the case for finding that Congress intended to impose fiduciary obligations on the United States was much stronger than it is here. See 445 U. S. at 547 (WHITE J., dissenting). One of the authorities cited by JUSTICE WHITE, 2 A. Scott, *supra*, § 95, specifically discusses the General Allotment Act as an example of the United States acting as a trustee. Furthermore, a trustee can "reserv[e] powers with respect to the administration of the trust." *Id.*, § 37. Unless the United States agrees to be held liable in damages, even the existence of a trust does not necessarily establish that the Government has surrendered its immunity from damages.

cites? (Maybe not necessary)

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fested more the view that pervasive control over Indian life is such a high attribute of federal sovereignty that States cannot infringe upon that control. *Ibid.*⁹ The Court today turns this shield into a sword.

In my view, it is clear that “[n]othing on the face” of any of the statutes at issue, *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 59 (1978), or in their legislative histories, “fairly [can] be interpreted as mandating compensation” for the conduct alleged by respondents. Some of the statutes involved here, to be sure, create substantive duties that the Secretary must fulfill. But this could equally be said of the Classification Act, considered in *Testan*. It requires that pay classification ratings of federal employees be carried out pursuant to “the principle of equal pay for substantially equal work.” 5 U. S. C. §5101(1)(A). Although the federal employee in *Testan* alleged a violation of the Act, the Court concluded that a back pay remedy was unavailable, rejecting the argu-

⁹The Court has invoked the fiduciary relation primarily (i) to preclude unauthorized state interference in the relations between the United States and the Indian tribes or other unauthorized exercise of state jurisdiction on Indian lands, see *e. g.*, *United States v. Kagama*, 118 U. S. 375, 382-384 (1886); (ii) to bar or nullify exercises of state court jurisdiction in matters affecting Indian property rights, in which the United States was not properly joined or represented, see, *e. g.*, *Minnesota v. United States*, 305 U. S. 382, 386 (1939); *United States v. Candelaria*, 271 U. S. 432, 442-444 (1926); (iii) to interpret doubtful or ambiguous treaty language in favor of the Indians, see, *e. g.*, *United States v. Shoshone Tribe*, 304 U. S. 111, 117-118 (1938); *Minnesota v. Hitchcock*, 185 U. S. 373, 396 (1902); (iv) to determine the liability of the United States for damages under the Just Compensation Clause where, acting as a fiduciary manager, it has converted the form of Indian property, see, *e. g.*, *United States v. Sioux Nation of Indians*, 448 U. S. 371, 415-416 (1980); and (v) to emphasize the high standard of care that the United States is obliged to exercise in carrying out its duties respecting the Indians, see, *e. g.*, *United States v. Mason*, 412 U. S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U. S. 286, 296-297 (1942). But the Court has never, until today, invoked the doctrine to hold that the United States is answerable in money damages for breaches of the standards applicable to a private fiduciary.

ment that the substantive right necessarily implies a damages remedy. 424 U. S., at 400-403.

Ignoring this holding in *Testan*, the Court concludes that the mere existence of a trust of some kind *necessarily* establishes that Congress has consented to a recovery of damages. In language superficially resembling rejected perceptions of "natural law," the Court rules that, "[g]iven the existence of a trust relationship, it *naturally follows* that the Government should be liable in damages for the breach of its fiduciary duties." *Ante*, at 20 (emphasis added). See also *ibid.* (damages are a "fundamental incident" of a trust relationship); *ibid.* (it would be "anomalous" not to find a damages remedy). The Court can find no more support for this proposition than the dissenting opinion in *Mitchell I.* See *ante*, at 21.¹⁰

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It is fair to say that the Court is influenced by its view that an injunctive remedy is inadequate to redress the violations alleged—precisely the inference deemed inadmissible in *Testan*.¹¹ It is the ordinary result of sovereign immunity

¹⁰ The Court reaches for support in *Seminole Nation v. United States*, *supra*, and *United States v. Creek Nation*, 295 U. S. 103 (1935), but both cases cut against the Court's theory in this case. The discussion of the Government's fiduciary duty in *Seminole Nation* referred to a claim to compel payments expressly prescribed by Treaty. See 316 U. S., at 296-297. *Creek Nation* involved a taking claim.

¹¹ Also significant is the Court's standardless remand for further proceedings consistent with its opinion. Given the strictness with which consents to suit by the sovereign are to be construed, *United States v. Sherwood*, 312 U. S. 584, 590-591 (1941), where the statute upon which liability is premised creates no right to payment of a sum certain, the Court of Claims will be required, without legislative guidance, to determine the extent of liability, if any, and the items of damages that are cognizable. This task, unlike the factual or legal determination whether a particular individual falls within a class granted a right to payment of money by a statute, is not one to which courts are adapted. Any rules established will be of "judicial cloth, not legislative cloth." *Weinberger v. Catholic Action of Hawaii*, 454 U. S. 139, 141 (1981). I assume, however, that the law of trusts generally will control and that all defenses to actions on breaches of trust, such as consent by the beneficiary and laches, will be fully available to the

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I don't understand this sentence, especially by the "given the strictness..." point

that unconsented claims for money damages are barred. The fact that damages cannot be recovered without the sovereign's consent hardly supports the conclusion that consent has been given. Yet this, in substance, is the Court's reasoning. If it is saying that a remedy is necessary to redress every injury sustained, the doctrine of sovereign immunity will have been drained of all meaning. Moreover, "many of the federal statutes . . . that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous." *Testan*, 424 U. S., at 404.

III

The Court has made no effort to demonstrate that Congress intended to render the United States answerable in damages upon claims of the kind presented here. The mere application by a court of the label "trust" cannot properly justify disregard of an immunity from damages the Government has never waived. I would reverse the judgment of the Court of Claims.

United States. Cf. 664 F. 2d, at 274.

JUN 21 1983

Changes: 1-4, 6-9

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1748

UNITED STATES, PETITIONER *v.*
HELEN MITCHELL ET AL.

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

[June —, 1983]

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

The controlling law in this case is clear. Speaking for the Court in *United States v. Mitchell*, 445 U. S. 535 (1980) (*Mitchell I*), JUSTICE MARSHALL reaffirmed the general principle that a cause of action for damages against the United States “cannot be implied but must be unequivocally expressed.” *Id.*, at 538 (quoting *United States v. King*, 395 U. S. 1, 4 (1969)). See *United States v. Hopkins*, 427 U. S. 123, 128 (1976) (“specific command of statute or authorized regulations”); *Lehman v. Nakshian*, 453 U. S. 156, 170 (1981) (BRENNAN, J., dissenting). Where, as here, a claim for money damages is predicated upon an alleged statutory violation, the rule is that the statute does not create a cause of action for damages unless the statute “in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.” *United States v. Testan*, 424 U. S. 392, 402 (1976) (quoting *Eastport S.S. Corp. v. United States*, 372 F. 2d 1002, 1008-1009 (Ct. Cl. 1967)). See, e. g., *Army & Air Force Exchange Service v. Sheehan*, 456 U. S. 728, 739-740 (1982) (“*Testan* [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized *explicitly*”) (emphasis added); *id.*, at 739 (damages remedy avail-

able where the regulations “specifically authorize awards of money damages”); *id.*, at 741 (reaffirming that an action for damages under the Tucker Act may not be premised upon “regulations . . . which do not explicitly authorize damages awards”). In sum, whether the United States has created a cause of action turns upon the intent of Congress, not the inclinations of the courts. See *United States v. Shaw*, 309 U. S. 495, 500 (1940) (“specific statutory consent”); *Munro v. United States*, 303 U. S. 36, 41 (1938) (“only by permission”).

Today, the Court appears disinterested in the intent of Congress. It has effectively reversed the presumption that absent “affirmative statutory authority,” *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 514 (1940), the United States has not consented to be sued for damages. It has substituted a contrary presumption, applicable to the conduct of the United States in Indian affairs, that the United States has consented to be sued for statutory violations and other departures from the rules that govern private fiduciaries. I dissent from the Court’s departure from long-settled principles.

I

The Court does not—and clearly cannot—contend that any of the statutes standing alone reflects the necessary legislative authorization of a damages remedy. None of the statutes contains any “provision . . . that expressly makes the United States liable” for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action “with specificity.” *Testan*, 424 U. S., at 399, 400. Indeed, nothing in the timber-sales statutes, 25 U. S. C. §§ 406, 407,¹

¹The only monetary obligation imposed upon the Secretary by § 406 or § 407 is to pay the actual “proceeds” of timber sales to the owners of the land. Thus, while it may well be that those sections would permit an action to compel the Secretary to pay over unlawfully retained proceeds, see *United States v. Testan*, 424 U. S. 392, 401 (1976), no statutory basis exists for extending that remedy to profits that arguably or ideally should have

466,² the road and right-of-way statutes, §§318a, 323-325,³ or the interest statute, §162a,⁴ addresses in any respect the institution of damages actions against the United States. Nor is there any indication in the legislative history of the statutes that Congress intended to consent to damages actions for mismanagement of Indian assets by enacting these provisions.⁵ The Court does not suggest otherwise.

been, but were not, earned by the Secretary. On the contrary, the statutory recognition of a right to receive the "proceeds" of sales conducted suggests that this is the limit of any damages action implicitly authorized by Congress. See *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U. S. 1, 14-15, 20-21 (1981). Cf. *United States v. Erika, Inc.*, 456 U. S. 201, 208 (1982).

²Section 466 merely requires the Secretary to "make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management."

³Section 318a authorizes the appropriation of funds for building of roads on Indian reservations. It would be a radical change in the law of sovereign immunity to hold that a routine authorization statute allows individuals who might benefit from appropriations to bring an action to recover damages. And although §325 requires "the payment of such compensation as the Secretary of the Interior shall determine to be just," it does not follow that damages for failure to secure more generous compensation are available. Indeed, the explicit statutory recognition of the Secretary's authority to determine the amount of compensation militates against any damages remedy for insufficient compensation. See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U. S. 630, 644-645 (1981); *Plumbers & Pipefitters v. Local 334*, 452 U. S. 615, 630 (1981) (BURGER, C. J., dissenting).

⁴Section 162a affords the Secretary substantial discretion respecting investments to be made with individual Indian funds. There is nothing in the statute that requires payment of a particular rate of interest, much less that makes the United States accountable in damages for any amount by which the revenues earned fall short of a standard of "reasonable management zeal to get for the Indians the best rate." *Mitchell v. United States*, 664 F. 2d 265, 274 (Ct. Cl. 1981).

⁵It is improbable that Congress intended §406 to constitute consent to monetary liability for forestry mismanagement on allotted lands, because before 1924, the Government maintained the position that heavily forested lands were not to be allotted. See *United States v. Payne*, 264 U. S. 446;

The Court for the most part rests its decision on the implausible proposition that statutes that do not in terms create a right to payment of money nonetheless may support a damage action against the United States. This view simply cannot be reconciled with the decisions in *Testan* and *Mitchell I*. A nonmonetary duty,⁶ without more, is insufficient to overcome the “presumption” that Congress has not consented to suit for money damages. See *Eastern Transportation Co. v. United States*, 272 U. S. 675, 686 (1927).

This Court has had occasion in recent cases to emphasize that congressional intent is the ultimate standard in determining whether a private right of action should be inferred from a statute that does not, in terms, provide for such an action.⁷ Those cases are instructive, for here, too, the “ulti-

449 (1924); Brief for Petitioner 3. And before 1964, § 406 was a rather bare instrument, simply giving an Indian permission to sell his timber with the Secretary's permission. See *ante*, at 13–14. The legislative history of the 1964 amendments to § 406, see *ante*, at 16, also fails to supply the necessary evidence of congressional intent. The House Report states that “[n]o additional expenditure of Federal funds” was expected to be incurred by reason of the enactment of the legislation. H. R. Rep. No. 1292, 88th Cong., 2d Sess. 2 (1964). A letter from the Interior Department to the Congress urging enactment of the legislation explained only that the standards for timber sales on allotted lands “should help allay disputes and avoid misunderstanding.” S. Rep. No. 672, 88th Cong., 1st Sess., 3 (1963).

⁶ Although not dispositive, the monetary character of a statutory right is a strong indication that a statute “in itself . . . can fairly be interpreted as mandating compensation.” By contrast, where, as here, the duties imposed by a statute are not essentially monetary in character, but require implementation through conduct by federal officials, the contrary inference arises: that Congress, by its silence as to a damages remedy, created only a substantive right enforceable through injunctive relief. See *Testan*, 424 U. S., at 401, n. 5, 403.

⁷ See, e. g., *Jackson Transit Authority v. Transit Union*, 457 U. S. 15, 20–23 (1982); *Middlesex County*, 453 U. S., at 13–18; *Texas Industries*, 451 U. S., at 639–640; *California v. Sierra Club*, 451 U. S. 287, 292–298 (1981); *Northwest Airlines, Inc. v. Transport Workers*, 451 U. S. 77, 91–95 (1981); *Universities Research Assn. v. Coutu*, 450 U. S. 754, 770–784 (1981);

(N. 2.)

mate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co. v. Redington*, 442 U. S. 560, 578 (1979). As we recognized in *Testan*, courts are not free to dispense with "established principles" requiring explicit congressional authorization for maintenance of suits against the United States simply "because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." 424 U. S., at 400. See *Shaw*, 309 U. S., at 502. The Court today adduces no "evidence that Congress anticipated that there would be a private remedy." *California v. Sierra Club*, 451 U. S. 287, 298 (1981).

The Court defends its departure from our precedents on the ground that the statutes and regulations upon which respondents rely need not be "construed in the manner appropriate to waivers of sovereign immunity." *Ante*, at 12. The Court in effect is overruling *Mitchell I sub silentio*, for as its discussion on the Tucker Act makes clear, see *ante*, at 10-13, we there at least "accepted the government's . . . claim that a strict standard of construction, applicable to deciding whether Congress had enacted a waiver of sovereign immunity, should be applied in interpreting substantive legislation for the benefit of Indian people." Hughes, *Can the Trustee be Sued for its Breach? The Sad Saga of United States v. Mitchell*, 26 S. D. L. Rev. 447, 473 (1981). We expressly held that the General Allotment Act at issue in *Mitchell I* "does not *unambiguously* provide that the United States has undertaken full fiduciary responsibilities." 445 U. S., at 542 (emphasis added). Cf. *Army & Air Force Exchange Service v. Sheehan*, 456 U. S., at 739 ("explicitly reject[ing] the argument that 'the violation of any statute or regulation . . . auto-

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matically creates a cause of action against the United States for money damages'") (quoting *Testan*, 424 U. S., at 401). The Court hardly can view the statutes here as "unambiguously" imposing trust duties on the Government.

II

The Court makes little or no pretense that it is following doctrine heretofore established. Without pertinent analysis, it simply concludes: "Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Ante*, at 19-20. This conclusion rests on two dubious assumptions. First, the Court decides that the statutes create or recognize fiduciary duties. It then reasons that because a private express trust normally imports a right to recover damages for breach, and because injunctive relief is perceived to be inadequate, Congress necessarily must have authorized recovery of damages for failure to perform the statutory duties properly. The relevancy of the first conclusion is questionable, and the other departs from our precedents, chiefly *Testan* and *Mitchell I*.

The Court simply asserts that the statutes here "clearly establish fiduciary obligations." *Ante*, at 20. See also *id.*, at 19 ("a fiduciary relationship necessarily arises"). I agree with the dissent in the Court of Claims that "there is kind of a bootstrap quality of reasoning in saying that [the United States'] duties expressed by law are those of a trustee, and, therefore, we may look at SCOTT ON TRUSTS or the RESTATEMENT OF TRUSTS and impose on [the Government] all the other consequences the law, as stated by those authorities, derives from the status of an erring nongovernmental trustee." 664 F. 2d 265, 283 (Nichols, J., concurring and dissenting). "The federal power over Indian lands is so different in nature and origin from that of a private trustee

... that caution is taught in using the mere label of a trust plus a reading of SCOTT ON TRUSTS to impose liability on claims where assent is not unequivocally expressed." *Ibid.*⁸ The trusteeships to which the Court has referred in the past

⁸"There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships. It is important to differentiate trusts from these other relationships, since many of the rules applicable to trusts are not applicable to them." Restatement (Second) of Trusts § 4, Introductory Note, at 15 (1959). For example, the Court often has described the fiduciary relationship between the United States and Indians as one between a guardian and a ward. See, *e. g.*, *Klamath Indians v. United States*, 296 U. S. 244, 254 (1935); *United States v. Kagama*, 118 U. S. 375, 383 (1886). But "[a] guardianship is not a trust." Restatement (Second) of Trusts, § 7. There is no explanation, however, why the Court chooses one analogy and not another. The choice appears to be influenced by the fact that "[t]he duties of a trustee are more intensive than the duties of other fiduciaries." *Id.*, § 2, comment b.

The Court asserts that "[a]ll of the necessary elements of a common-law trust are present"—a trustee, a beneficiary, and a trust corpus. *Ante*, at 19. But two persons and a parcel of real property, without more, do not create a trust. Rather, "[a] trust . . . arises as a result of a manifestation of an intention to create it." Restatement (Second) of Trusts, § 2. See *id.*, § 23 ("A trust is created only if the settlor properly manifests an intention to create a trust."); *id.*, § 25 ("No trust is created unless the settlor manifests an intention to impose enforceable duties."). This is the element that is missing in this case, and the Court does not, and cannot, find that Congress has manifested its intent to make the statutory duties upon which respondents rely trust duties. Cf. *id.*, § 95; 2 A. Scott, *Law of Trusts* § 95, at 772 (2d ed. 1967) ("At common law it was held that a use . . . could not be enforced against the Crown . . .").

Indeed, given the language of the statute at issue in *Mitchell I*, the case for finding that Congress intended to impose fiduciary obligations on the United States was much stronger there than it is here. See 445 U. S., at 547 (WHITE, J., dissenting). One of the authorities cited by JUSTICE WHITE, 2 A. Scott, *supra*, § 95, specifically discusses the General Allotment Act as an example of the United States acting as a trustee. Furthermore, a trustee can "reserv[e] powers with respect to the administration of the trust." Restatement (Second) of Trusts, § 37. Unless the United States agrees to be held liable in damages, even the existence of a trust does not

have manifested more the view that pervasive control over Indian life is such a high attribute of federal sovereignty that States cannot infringe upon that control. *Ibid.*⁹ The Court today turns this shield into a sword.

In my view, it is clear that “[n]othing on the face” of any of the statutes at issue, *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 59 (1978), or in their legislative histories, “fairly [can] be interpreted as mandating compensation” for the conduct alleged by respondents. Some of the statutes involved here, to be sure, create substantive duties that the Secretary must fulfill. But this could equally be said of the Classification Act, considered in *Testan*. It requires that pay classification ratings of federal employees be carried out pursuant to “the principle of equal pay for substantially equal work.” 5 U. S. C. §5101(1)(A). Although the federal employee in

necessarily establish that the Government has surrendered its immunity from damages.

⁹The Court has invoked the fiduciary relation primarily (i) to preclude unauthorized state interference in the relations between the United States and the Indian tribes or other unauthorized exercise of state jurisdiction on Indian lands, see *e. g.*, *Kagama*, 118 U. S., at 382–384; (ii) to bar or nullify exercises of state court jurisdiction in matters affecting Indian property rights, in which the United States was not properly joined or represented, see, *e. g.*, *Minnesota v. United States*, 305 U. S. 382, 386 (1939); *United States v. Candelaria*, 271 U. S. 432, 442–444 (1926); (iii) to interpret doubtful or ambiguous treaty language in favor of the Indians, see, *e. g.*, *United States v. Shoshone Tribe*, 304 U. S. 111, 117–118 (1938); *Minnesota v. Hitchcock*, 185 U. S. 373, 396 (1902); (iv) to determine the liability of the United States for damages under the Just Compensation Clause where, acting as a fiduciary manager, it has converted the form of Indian property, see, *e. g.*, *United States v. Sioux Nation of Indians*, 448 U. S. 371, 415–416 (1980); and (v) to emphasize the high standard of care that the United States is obliged to exercise in carrying out its duties respecting the Indians, see, *e. g.*, *United States v. Mason*, 412 U. S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U. S. 286, 296–297 (1942). But the Court has never, until today, invoked the doctrine to hold that the United States is answerable in money damages for breaches of the standards applicable to a private fiduciary.

Testan alleged a violation of the Act, the Court concluded that a back-pay remedy was unavailable, rejecting the argument that the substantive right necessarily implies a damages remedy. 424 U. S., at 400–403.

Ignoring this holding in *Testan*, the Court concludes that the mere existence of a trust of some kind *necessarily* establishes that Congress has consented to a recovery of damages. In effect we are told to accept on faith the existence of a damages cause of action: “Given the existence of a trust relationship, it *naturally follows* that the Government should be liable in damages for the breach of its fiduciary duties.” *Ante*, at 20 (emphasis added). See also *ibid.* (damages are a “fundamental incident” of a trust relationship); *ibid.* (it would be “anomalous” not to find a damages remedy). The Court can find no more support for this proposition than the dissenting opinion in *Mitchell I.* See *ante*, at 21.¹⁰

It is fair to say that the Court is influenced by its view that an injunctive remedy is inadequate to redress the violations alleged—precisely the inference deemed inadmissible in *Testan*.¹¹ It is the ordinary result of sovereign immunity

¹⁰The Court reaches for support in *Seminole Nation v. United States*, *supra*, and *United States v. Creek Nation*, 295 U. S. 103 (1935), but both cases cut against the Court’s theory in this case. The discussion of the Government’s fiduciary duty in *Seminole Nation* referred to a claim to compel payments expressly prescribed by Treaty. See 316 U. S., at 296–297. *Creek Nation* involved a taking claim.

¹¹Also significant is the Court’s standardless remand for further proceedings consistent with its opinion. Where the statute upon which liability is premised creates no right to payment of a sum certain, the Court of Claims will be required, without legislative guidance, to determine the extent of liability, if any, and the items of damages that are cognizable. This task, unlike the factual or legal determination whether a particular individual falls within a class granted a right to payment of money by a statute, is not one to which courts are adapted. Any rules established will be of “judicial cloth, not legislative cloth.” *Weinberger v. Catholic Action of Hawaii*, 454 U. S. 139, 141 (1981). I assume, however, that the law of trusts generally will control and that all defenses to actions on breaches of trust,

omission

that unconsented claims for money damages are barred. The fact that damages cannot be recovered without the sovereign's consent hardly supports the conclusion that consent has been given. Yet this, in substance, is the Court's reasoning. If it is saying that a remedy is necessary to redress every injury sustained, the doctrine of sovereign immunity will have been drained of all meaning. Moreover, "many of the federal statutes . . . that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous." *Testan*, 424 U. S., at 404.

III

The Court has made no effort to demonstrate that Congress intended to render the United States answerable in damages upon claims of the kind presented here. The mere application by a court of the label "trust" cannot properly justify disregard of an immunity from damages the Government has never waived. I would reverse the judgment of the Court of Claims.

such as consent by the beneficiary and laches, will be fully available to the United States. Cf. 664 F. 2d, at 274.

JUN 21 1983

Jim Downing
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Changes: 1-4, 6-9

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To: The Chief Justice
Justice Brennan
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The controlling law in this case is clear. Speaking for the Court in *United States v. Mitchell*, 445 U. S. 535 (1980) (*Mitchell I*), JUSTICE MARSHALL reaffirmed the general principle that a cause of action for damages against the United States "cannot be implied but must be unequivocally expressed." *Id.*, at 538 (quoting *United States v. King*, 395 U. S. 1, 4 (1969)). See *United States v. Hopkins*, 427 U. S. 123, 128 (1976) ("specific command of statute or authorized regulations"); *Lehman v. Nakshian*, 453 U. S. 156, 170 (1981) (BRENNAN, J., dissenting). Where, as here, a claim for money damages is predicated upon an alleged statutory violation, the rule is that the statute does not create a cause of action for damages unless the statute "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Testan*, 424 U. S. 392, 402 (1976) (quoting *Eastport S.S. Corp. v. United States*, 372 F. 2d 1002, 1008-1009 (Ct. Cl. 1967)). See, e. g., *Army & Air Force Exchange Service v. Sheehan*, 456 U. S. 728, 739-740 (1982) ("*Testan* [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized *explicitly*") (emphasis added); *id.*, at 739 (damages remedy avail-

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I

The Court does not—and clearly cannot—contend that any of the statutes standing alone reflects the necessary legislative authorization of a damages remedy. None of the statutes contains any “provision . . . that expressly makes the United States liable” for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action “with specificity.” *Testan*, 424 U. S., at 399, 400. Indeed, nothing in the timber-sales statutes, 25 U. S. C. §§ 406, 407,¹

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II

The Court makes little or no pretense that it is following doctrine heretofore established. Without pertinent analysis, it simply concludes: "Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Ante*, at 19-20. This conclusion rests on two dubious assumptions. First, the Court decides that the statutes create or recognize fiduciary duties. It then reasons that because a private express trust normally imports a right to recover damages for breach, and because injunctive relief is perceived to be inadequate, Congress necessarily must have authorized recovery of damages for failure to perform the statutory duties properly. The relevancy of the first conclusion is questionable, and the other departs from our precedents, chiefly *Testan* and *Mitchell I*.

The Court simply asserts that the statutes here "clearly establish fiduciary obligations." *Ante*, at 20. See also *id.*, at 19 ("a fiduciary relationship necessarily arises"). I agree with the dissent in the Court of Claims that "there is kind of a bootstrap quality of reasoning in saying that [the United States'] duties expressed by law are those of a trustee, and, therefore, we may look at SCOTT ON TRUSTS or the RESTATEMENT OF TRUSTS and impose on [the Government] all the other consequences the law, as stated by those authorities, derives from the status of an erring nongovernmental trustee." 664 F. 2d 265, 283 (Nichols, J., concurring and dissenting). "The federal power over Indian lands is so different in nature and origin from that of a private trustee

... that caution is taught in using the mere label of a trust plus a reading of SCOTT ON TRUSTS to impose liability on claims where assent is not unequivocally expressed." *Ibid.*⁸ The trusteeships to which the Court has referred in the past

⁸"There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships. It is important to differentiate trusts from these other relationships, since many of the rules applicable to trusts are not applicable to them." Restatement (Second) of Trusts § 4, Introductory Note, at 15 (1959). For example, the Court often has described the fiduciary relationship between the United States and Indians as one between a guardian and a ward. See, e. g., *Klamath Indians v. United States*, 296 U. S. 244, 254 (1935); *United States v. Kagama*, 118 U. S. 375, 383 (1886). But "[a] guardianship is not a trust." Restatement (Second) of Trusts, § 7. There is no explanation, however, why the Court chooses one analogy and not another. The choice appears to be influenced by the fact that "[t]he duties of a trustee are more intensive than the duties of other fiduciaries." *Id.*, § 2, comment b.

The Court asserts that "[a]ll of the necessary elements of a common-law trust are present"—a trustee, a beneficiary, and a trust corpus. *Ante*, at 19. But two persons and a parcel of real property, without more, do not create a trust. Rather, "[a] trust . . . arises as a result of a manifestation of an intention to create it." Restatement (Second) of Trusts, § 2. See *id.*, § 23 ("A trust is created only if the settlor properly manifests an intention to create a trust."); *id.*, § 25 ("No trust is created unless the settlor manifests an intention to impose enforceable duties."). This is the element that is missing in this case, and the Court does not, and cannot, find that Congress has manifested its intent to make the statutory duties upon which respondents rely trust duties. Cf. *id.*, § 95; 2 A. Scott, *Law of Trusts* § 95, at 772 (2d ed. 1967) ("At common law it was held that a use . . . could not be enforced against the Crown . . .").

Indeed, given the language of the statute at issue in *Mitchell I*, the case for finding that Congress intended to impose fiduciary obligations on the United States was much stronger there than it is here. See 445 U. S., at 547 (WHITE, J., dissenting). One of the authorities cited by JUSTICE WHITE, 2 A. Scott, *supra*, § 95, specifically discusses the General Allotment Act as an example of the United States acting as a trustee. Furthermore, a trustee can "reserv[e] powers with respect to the administration of the trust." Restatement (Second) of Trusts, § 37. Unless the United States agrees to be held liable in damages, even the existence of a trust does not

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have manifested more the view that pervasive control over Indian life is such a high attribute of federal sovereignty that States cannot infringe upon that control. *Ibid.*⁹ The Court today turns this shield into a sword.

In my view, it is clear that “[n]othing on the face” of any of the statutes at issue, *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 59 (1978), or in their legislative histories, “fairly [can] be interpreted as mandating compensation” for the conduct alleged by respondents. Some of the statutes involved here, to be sure, create substantive duties that the Secretary must fulfill. But this could equally be said of the Classification Act, considered in *Testan*. It requires that pay classification ratings of federal employees be carried out pursuant to “the principle of equal pay for substantially equal work.” 5 U. S. C. §5101(1)(A). Although the federal employee in

necessarily establish that the Government has surrendered its immunity from damages.

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Testan alleged a violation of the Act, the Court concluded that a back-pay remedy was unavailable, rejecting the argument that the substantive right necessarily implies a damages remedy. 424 U. S., at 400–403.

Ignoring this holding in *Testan*, the Court concludes that the mere existence of a trust of some kind necessarily establishes that Congress has consented to a recovery of damages. In effect we are told to accept on faith the existence of a damages cause of action: “Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.” *Ante*, at 20 (emphasis added). See also *ibid.* (damages are a “fundamental incident” of a trust relationship); *ibid.* (it would be “anomalous” not to find a damages remedy). The Court can find no more support for this proposition than the dissenting opinion in *Mitchell I.* See *ante*, at 21.¹⁰

It is fair to say that the Court is influenced by its view that an injunctive remedy is inadequate to redress the violations alleged—precisely the inference deemed inadmissible in *Testan*.¹¹ It is the ordinary result of sovereign immunity

¹⁰The Court reaches for support in *Seminole Nation v. United States*, *supra*, and *United States v. Creek Nation*, 295 U. S. 103 (1935), but both cases cut against the Court’s theory in this case. The discussion of the Government’s fiduciary duty in *Seminole Nation* referred to a claim to compel payments expressly prescribed by Treaty. See 316 U. S., at 296–297. *Creek Nation* involved a taking claim.

¹¹Also significant is the Court’s standardless remand for further proceedings consistent with its opinion. Where the statute upon which liability is premised creates no right to payment of a sum certain, the Court of Claims will be required, without legislative guidance, to determine the extent of liability, if any, and the items of damages that are cognizable. This task, unlike the factual or legal determination whether a particular individual falls within a class granted a right to payment of money by a statute, is not one to which courts are adapted. Any rules established will be of “judicial cloth, not legislative cloth.” *Weinberger v. Catholic Action of Hawaii*, 454 U. S. 139, 141 (1981). I assume, however, that the law of trusts generally will control and that all defenses to actions on breaches of trust,

that unconsented claims for money damages are barred. The fact that damages cannot be recovered without the sovereign's consent hardly supports the conclusion that consent has been given. Yet this, in substance, is the Court's reasoning. If it is saying that a remedy is necessary to redress every injury sustained, the doctrine of sovereign immunity will have been drained of all meaning. Moreover, "many of the federal statutes . . . that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous." *Testan*, 424 U. S., at 404.

III

The Court has made no effort to demonstrate that Congress intended to render the United States answerable in damages upon claims of the kind presented here. The mere application by a court of the label "trust" cannot properly justify disregard of an immunity from damages the Government has never waived. I would reverse the judgment of the Court of Claims.

such as consent by the beneficiary and laches, will be fully available to the United States. Cf. 664 F. 2d, at 274.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: **JUN 22 1983**

JUN 22 1983

Change: 1

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1748

UNITED STATES, PETITIONER *v.*
HELEN MITCHELL ET AL.

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

[June —, 1983]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and
JUSTICE O'CONNOR join, dissenting.

The controlling law in this case is clear. Speaking for the Court in *United States v. Mitchell*, 445 U. S. 535 (1980) (*Mitchell I*), JUSTICE MARSHALL reaffirmed the general principle that a cause of action for damages against the United States "cannot be implied but must be unequivocally expressed." *Id.*, at 538 (quoting *United States v. King*, 395 U. S. 1, 4 (1969)). See *United States v. Hopkins*, 427 U. S. 123, 128 (1976) ("specific command of statute or authorized regulations"); *Lehman v. Nakshian*, 453 U. S. 156, 170 (1981) (BRENNAN, J., dissenting). Where, as here, a claim for money damages is predicated upon an alleged statutory violation, the rule is that the statute does not create a cause of action for damages unless the statute "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Testan*, 424 U. S. 392, 402 (1976) (quoting *Eastport S.S. Corp. v. United States*, 372 F. 2d 1002, 1008-1009 (Ct. Cl. 1967)). See, e. g., *Army & Air Force Exchange Service v. Sheehan*, 456 U. S. 728, 739-740 (1982) ("*Testan* [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized *explicitly*") (emphasis added); *id.*, at 739 (damages remedy avail-

able where the regulations “specifically authorize awards of money damages”); *id.*, at 741 (reaffirming that an action for damages under the Tucker Act may not be premised upon “regulations . . . which do not explicitly authorize damages awards”). In sum, whether the United States has created a cause of action turns upon the intent of Congress, not the inclinations of the courts. See *United States v. Shaw*, 309 U. S. 495, 500 (1940) (“specific statutory consent”); *Munro v. United States*, 303 U. S. 36, 41 (1938) (“only by permission”).

Today, the Court appears disinterested in the intent of Congress. It has effectively reversed the presumption that absent “affirmative statutory authority,” *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 514 (1940), the United States has not consented to be sued for damages. It has substituted a contrary presumption, applicable to the conduct of the United States in Indian affairs, that the United States has consented to be sued for statutory violations and other departures from the rules that govern private fiduciaries. I dissent from the Court’s departure from long-settled principles.

I

The Court does not—and clearly cannot—contend that any of the statutes standing alone reflects the necessary legislative authorization of a damages remedy. None of the statutes contains any “provision . . . that expressly makes the United States liable” for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action “with specificity.” *Testan*, 424 U. S., at 399, 400. Indeed, nothing in the timber-sales statutes, 25 U. S. C. §§ 406, 407,¹

¹The only monetary obligation imposed upon the Secretary by § 406 or § 407 is to pay the actual “proceeds” of timber sales to the owners of the land. Thus, while it may well be that those sections would permit an action to compel the Secretary to pay over unlawfully retained proceeds, see *United States v. Testan*, 424 U. S. 392, 401 (1976), no statutory basis exists for extending that remedy to profits that arguably or ideally should have

466,² the road and right-of-way statutes, §§ 318a, 323–325,³ or the interest statute, § 162a,⁴ addresses in any respect the institution of damages actions against the United States. Nor is there any indication in the legislative history of the statutes that Congress intended to consent to damages actions for mismanagement of Indian assets by enacting these provisions.⁵ The Court does not suggest otherwise.

been, but were not, earned by the Secretary. On the contrary, the statutory recognition of a right to receive the “proceeds” of sales conducted suggests that this is the limit of any damages action implicitly authorized by Congress. See *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U. S. 1, 14–15, 20–21 (1981). Cf. *United States v. Erika, Inc.*, 456 U. S. 201, 208 (1982).

² Section 466 merely requires the Secretary to “make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management.”

³ Section 318a authorizes the appropriation of funds for building of roads on Indian reservations. It would be a radical change in the law of sovereign immunity to hold that a routine authorization statute allows individuals who might benefit from appropriations to bring an action to recover damages. And although § 325 requires “the payment of such compensation as the Secretary of the Interior shall determine to be just,” it does not follow that damages for failure to secure more generous compensation are available. Indeed, the explicit statutory recognition of the Secretary’s authority to determine the amount of compensation militates against any damages remedy for insufficient compensation. See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U. S. 630, 644–645 (1981); *Plumbers & Pipefitters v. Local 334*, 452 U. S. 615, 630 (1981) (BURGER, C. J., dissenting).

⁴ Section 162a affords the Secretary substantial discretion respecting investments to be made with individual Indian funds. There is nothing in the statute that requires payment of a particular rate of interest, much less that makes the United States accountable in damages for any amount by which the revenues earned fall short of a standard of “reasonable management zeal to get for the Indians the best rate.” *Mitchell v. United States*, 664 F. 2d 265, 274 (Ct. Cl. 1981).

⁵ It is improbable that Congress intended § 406 to constitute consent to monetary liability for forestry mismanagement on allotted lands, because before 1924, the Government maintained the position that heavily forested lands were not to be allotted. See *United States v. Payne*, 264 U. S. 446,

The Court for the most part rests its decision on the implausible proposition that statutes that do not in terms create a right to payment of money nonetheless may support a damage action against the United States. This view simply cannot be reconciled with the decisions in *Testan* and *Mitchell I*. A nonmonetary duty,⁶ without more, is insufficient to overcome the “presumption” that Congress has not consented to suit for money damages. See *Eastern Transportation Co. v. United States*, 272 U. S. 675, 686 (1927).

This Court has had occasion in recent cases to emphasize that congressional intent is the ultimate standard in determining whether a private right of action should be inferred from a statute that does not, in terms, provide for such an action.⁷ Those cases are instructive, for here, too, the “ulti-

449 (1924); Brief for Petitioner 3, n. 2. And before 1964, § 406 was a rather bare instrument, simply giving an Indian permission to sell his timber with the Secretary's permission. See *ante*, at 13–14. The legislative history of the 1964 amendments to § 406, see *ante*, at 16, also fails to supply the necessary evidence of congressional intent. The House Report states that “[n]o additional expenditure of Federal funds” was expected to be incurred by reason of the enactment of the legislation. H. R. Rep. No. 1292, 88th Cong., 2d Sess. 2 (1964). A letter from the Interior Department to the Congress urging enactment of the legislation explained only that the standards for timber sales on allotted lands “should help allay disputes and avoid misunderstanding.” S. Rep. No. 672, 88th Cong., 1st Sess., 3 (1963).

⁶ Although not dispositive, the monetary character of a statutory right is a strong indication that a statute “in itself . . . can fairly be interpreted as mandating compensation.” By contrast, where, as here, the duties imposed by a statute are not essentially monetary in character, but require implementation through conduct by federal officials, the contrary inference arises: that Congress, by its silence as to a damages remedy, created only a substantive right enforceable through injunctive relief. See *Testan*, 424 U. S., at 401, n. 5, 403.

⁷ See, e. g., *Jackson Transit Authority v. Transit Union*, 457 U. S. 15, 20–23 (1982); *Middlesex County*, 453 U. S., at 13–18; *Texas Industries*, 451 U. S., at 639–640; *California v. Sierra Club*, 451 U. S. 287, 292–298 (1981); *Northwest Airlines, Inc. v. Transport Workers*, 451 U. S. 77, 91–95 (1981);

mate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co. v. Redington*, 442 U. S. 560, 578 (1979). As we recognized in *Testan*, courts are not free to dispense with "established principles" requiring explicit congressional authorization for maintenance of suits against the United States simply "because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." 424 U. S., at 400. See *Shaw*, 309 U. S., at 502. The Court today adduces no "evidence that Congress anticipated that there would be a private remedy." *California v. Sierra Club*, 451 U. S. 287, 298 (1981).

The Court defends its departure from our precedents on the ground that the statutes and regulations upon which respondents rely need not be "construed in the manner appropriate to waivers of sovereign immunity." *Ante*, at 12. The Court in effect is overruling *Mitchell I sub silentio*, for as its discussion on the Tucker Act makes clear, see *ante*, at 10-13, we there at least "accepted the government's . . . claim that a strict standard of construction, applicable to deciding whether Congress had enacted a waiver of sovereign immunity, should be applied in interpreting substantive legislation for the benefit of Indian people." Hughes, *Can the Trustee be Sued for its Breach? The Sad Saga of United States v. Mitchell*, 26 S. D. L. Rev. 447, 473 (1981). We expressly held that the General Allotment Act at issue in *Mitchell I* "does not *unambiguously* provide that the United States has undertaken full fiduciary responsibilities." 445 U. S., at 542 (emphasis added). Cf. *Army & Air Force Exchange Service v. Sheehan*, 456 U. S., at 739 ("explicitly reject[ing] the argu-

Universities Research Assn. v. Coutu, 450 U. S. 754, 770-784 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U. S. 11, 19-24 (1979). Against the background of sovereign immunity, the rationale of these cases should apply here with particular force.

ment that 'the violation of any statute or regulation . . . automatically creates a cause of action against the United States for money damages'") (quoting *Testan*, 424 U. S., at 401). The Court hardly can view the statutes here as "unambiguously" imposing trust duties on the Government.

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different in nature and origin from that of a private trustee . . . that caution is taught in using the mere label of a trust plus a reading of SCOTT ON TRUSTS to impose liability on claims where assent is not unequivocally expressed." *Ibid.*⁸

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Indeed, given the language of the statute at issue in *Mitchell I*, the case for finding that Congress intended to impose fiduciary obligations on the United States was much stronger there than it is here. See 445 U. S., at 547 (WHITE, J., dissenting). One of the authorities cited by JUSTICE WHITE, 2 A. Scott, *supra*, § 95, specifically discusses the General Allotment Act as an example of the United States acting as a trustee. Furthermore, a trustee can "reserv[e] powers with respect to the administration of the trust." Restatement (Second) of Trusts, § 37. Unless the United States agrees to be held liable in damages, even the existence of a trust does not

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U. S. C. §5101(1)(A). Although the federal employee in *Testan* alleged a violation of the Act, the Court concluded that a back-pay remedy was unavailable, rejecting the argument that the substantive right necessarily implies a damages remedy. 424 U. S., at 400–403.

Ignoring this holding in *Testan*, the Court concludes that the mere existence of a trust of some kind *necessarily* establishes that Congress has consented to a recovery of damages. In effect we are told to accept on faith the existence of a damages cause of action: “Given the existence of a trust relationship, it *naturally follows* that the Government should be liable in damages for the breach of its fiduciary duties.” *Ante*, at 20 (emphasis added). See also *ibid.* (damages are a “fundamental incident” of a trust relationship); *ibid.* (it would be “anomalous” not to find a damages remedy). The Court can find no more support for this proposition than the dissenting opinion in *Mitchell I*. See *ante*, at 21.¹⁰

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III

The Court has made no effort to demonstrate that Congress intended to render the United States answerable in damages upon claims of the kind presented here. The mere application by a court of the label "trust" cannot properly justify disregard of an immunity from damages the Government has never waived. I would reverse the judgment of the Court of Claims.

generally will control and that all defenses to actions on breaches of trust, such as consent by the beneficiary and laches, will be fully available to the United States. Cf. 664 F. 2d, at 274.