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SPECIAL FEATURE

CHICKASAW NATION V. UNITED STATES: THE BEGINNING OF THE END OF THE INDIAN-LAW CANONS IN STATUTORY CASES AND THE START OF THE JUDICIAL ASSAULT ON THE TRUST RELATIONSHIP?

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I. Introduction

The significance of *Chickasaw Nation v. United States*¹ arguably transcends the obscure question of statutory construction involving federal taxation of tribal pull-tab operations that the decision resolves. The Court in *Chickasaw Nation*, in a clever assault on the primacy of the Indian canons of construction, through an unprecedented reading out of statutory text to avoid ambiguity, implicitly underscored a subtle assimilationist agenda that, if unchecked, foreshadows significant consequences for decades of established Indian law. In the end, *Chickasaw Nation* can be read as suggesting that even the continued judicial recognition of the trust relationship between the federal government and Indian tribes could be in jeopardy under the Rehnquist Court.

II. The Issue Presented

Chickasaw Nation presented the Court with an inter-circuit conflict concerning the application of section 20(d) of the Indian Gaming Regulatory Act.² That section provides:

(d) Application of Internal Revenue Code of 1986

(1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations

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1. *Chickasaw Nation v. United States*, 534 U.S. 84 (2001).

2. 26 U.S.C. § 2719(d) (2000).

shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State and wagering operations.³

At issue was whether the express parenthetical references to IRC chapter 35, which affords to state governmental lotteries an exemption from federal excise taxes, provides the same tax-exemption to tribal pull-tab operations, which are lotteries under the IRC.

The statutory provision is ambiguous. The Tenth Circuit⁴ resolved the ambiguity against the tribes by reading out the ambiguous portion of the statute, then determining the statute to be unambiguous, and concluding that application of the Indian-law canon requiring resolution of statutory ambiguity in favor of the Indians was unnecessary.⁵ The Federal Circuit,⁶ addressing the same issue only weeks after the Tenth Circuit, found the provisions ambiguous, applied the Indian-law canon, expressly criticized the Tenth Circuit for failing to do so, and pursuant to that canon resolved the ambiguity in favor of a tax-exemption for the tribes.

In the Supreme Court, the Nations' opening brief accepted as a given the ambiguity of the statutory provision as written, which language even the Tenth Circuit conceded was "cryptic."⁷ The Nations devoted the bulk of their opening brief to demonstrating that the legislative history did not resolve the ambiguity against a tax-exemption for tribal gaming, that such an exemption was consistent with the federal Indian policy represented in IGRA, and that the Supreme Court, in every case of actual textual ambiguity where Indians claim a tax-exemption, had applied the Indian canon requiring construction of the ambiguity in favor of the tribes rather than the general tax-exemption maxim requiring construction of ambiguities in tax-exemptions in favor of the federal government. The federal government's brief claimed that no construction of the text could support the tribe's claim of exemption, that the question arose from statutory language enacted "by mistake," that the language creating the ambiguity should be read out, and that in any event the general tax-exemption maxim should trump the Indian canon because in cases in which an exemption was claimed only on pure

3. *Id.*

4. *Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000).

5. Statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

6. *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000).

7. Brief for Petitioner, *Chickasaw Nation v. United States*, 534 U.S. 84 (No. 00-507), available at 2001 WL 1518267.

policy (and not on textual ambiguity) the Court applied the general tax-exemption maxim.⁸ In reply⁹, the Nations demonstrated that in fact a grammatical reading of the statute giving effect to every word of the statute was possible, that none of the general tax-exemption maxim Indian cases involved textual ambiguity, that the federal government failed to show how the legislative history established that the statute contained a mistake warranting a reading out of chapter 35 from the statute, and that no Supreme Court precedent supported reading out any portion of a statute which could otherwise be given effect.

At the oral argument three particularly important events occurred.¹⁰ First, Justice Scalia, author of the *County of Yakima* opinion stating that if an Indian law statute was capable of two possible constructions,¹¹ then the possible construction in favor of the Indians must control, directly challenged the government by stating that the Nations' construction was both possible and gave effect to every word of the statute.¹² Second, the Chief Justice made clear his view that the Court's long held Indian-law canon of construction requiring construction of *statutory* ambiguity in favor of the Indians, should not apply to statutory ambiguity but must be limited to *treaty* issues.¹³ Third, Justice Breyer, who ultimately authored the Court's opinion, solicited and did not challenge, a detailed description of the legislative history, which showed how "chapter 35" was expressly regarded by the legislative history as synonymous with "taxation," which the phrase "chapter 35" replaced, and therefore how chapter 35 came to the statute during the progress of the legislation.¹⁴ That complete legislative history was explained as consistent with the Nations' proffered construction.

III. The Opinion

A. The Court's Reading Out of the Ambiguity and the Rejection of the Nations' Grammatically Possible Construction

For Indian law practitioners, the significance of *Chickasaw Nation* is not so

8. Brief for Respondent, *Chickasaw Nation* (No. 00-507), available at 2001 WL 705826.

9. Reply Brief for Petitioner, *Chickasaw Nation* (No. 00-507), available at 2001 WL 825963.

10. The transcript of the oral argument is available at 2001 WL 1183439.

11. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

12. See Transcript of Oral Argument, *Chickasaw Nation* (No. 00-507), available at 2001 WL 1183439, at *39-40 (Oct. 2, 2001).

13. See *id.* at *20.

14. See *id.* at *16-18.

much the result but rather the process employed by the Court in reaching that result. The Court began its analysis by implicitly recognizing the statutory ambiguity:

The subsection says that Internal Revenue Code provisions that “concer[n] the reporting and withholding of taxes” with respect to gambling operations shall apply to Indian tribes in the same way as they apply to States. The subsection also says in its parenthetical that those provisions “includ[e]” Internal Revenue Code “chapter 35.” Chapter 35, however, says nothing about the *reporting* or the *withholding* of taxes. Rather, that chapter simply *imposes* taxes — excise taxes and occupational taxes related to gambling — from which it exempts certain state-controlled gambling activities.¹⁵

In discussing the Nation’s argument, the Court omitted the complete description of the subsection’s language outside the parenthetical by stating that the subsection’s language “applies to those Internal Revenue Code provisions that concern ‘reporting and withholding’.”¹⁶ The Court failed to provide the further statutory language, “of taxes.” That further language makes incorrect the Court’s statement that “[t]he other four parenthetical references are provisions to that concern, or at least arguable concern, reporting and withholding,” because § 6050I has nothing to do with reporting or withholding “of taxes,” as the Court’s own description confirms (“§ 6050I (reporting by businesses of large cash receipts, arguably applicable to certain gambling winnings or receipts).”)¹⁷ The effect of the misstatement is to give credibility to the Court’s speculative assumption that Congress’ inclusion of IRC chapter 35 in the parenthetical was a singular mistaken oversight.

The Court implicitly conceded the Nations’ arguments that chapter 35’s inclusion made the statute ambiguous.

But what about chapter 35? The Tribes correctly point out that chapter 35 has nothing to do with “reporting and withholding.” They add that the reference must serve some purpose, and the only purpose that the Tribes can find is that of expanding the scope of the Gaming Act’s subsection beyond reporting and withholding

15. *Chickasaw Nation v. United States*, 534 U.S. 84, 87 (2001). Tellingly, in initially describing chapter 35 as one that “simply *imposes* taxes,” the Court omitted mentioning that the chapter also expressly exempts from those taxes state lotteries. That early statement belies a perspective permeating the Opinion.

16. *Id.* at 88.

17. *Id.*

provisions — to the tax-imposing provisions that chapter 35 does contain. The Gaming Act therefore must exempt them (like States) from those tax payment requirements. The Tribes add that at least the reference to chapter 35 makes the subsection ambiguous. And they ask us to resolve the ambiguity by applying a special Indian-related interpretative canon, namely, “statutes are to be construed liberally in favor of the Indians’ with ambiguous provisions interpreted to their benefit.”¹⁸

In its struggle to reject the Tribes’ position by finding no ambiguity and therefore avoid application of the Indian-law canon, the Court built a platform grounded on judicial inconsistency. First, the Court attempted to avoid statutory ambiguity by segregating the ambiguity-creating language in the parenthetical from the rest of the statute, thereby implicitly violating the general statutory canon recognized by Justice Scalia at oral argument that every word of a statute should be given effect: “[f]or one thing, the language outside the parenthetical is unambiguous.”¹⁹ Then, the Court said, in laying its premise for rewriting the statute: “[n]or can one give the chapter 35 reference independent operative effect without seriously rewriting the language of the rest of the statute.”²⁰

In the very next paragraph of its opinion, the Court contradicted that all-important premise by recognizing two possible readings (therefore confirming the existence of ambiguity) and acknowledging that the statute’s language permits a reading that gives effect to every word of the statute and thereby securing the tax-exemption for the Nations:

We recognize the Tribes’ claim (made here for the first time) that one could avoid rewriting the statute by reading the language outside the parenthetical as if it referred to two kinds of “provisions of the . . . Code”: first, those “concerning the reporting and withholding of taxes with respect to the winnings from gaming,” and, second, those “concerning . . . wagering operations.” The subsection’s grammar literally permits this reading.²¹

Under the test authored by Justice Scalia in *County of Yakima*, the Court’s acknowledgment of the actual possibility of the Nations’ construction and its effect should have immediately ended the inquiry with a victory for the

18. *Id.* (citations omitted).

19. *Id.* at 89.

20. *Id.*

21. *Id.* at 90 (citations omitted).

Nations. The statute was ambiguous and the Nations' construction of the statute was possible.

Without mentioning *County of Yakima*, or any other authority, and without any explanation of any deficiency in the Nations' construction, the Court adopted a new test, "the far too convoluted" standard, ostensibly in lieu of the test in *County of Yakima*: "[B]ut that reading, even if ultimately comprehensible, is far too convoluted to believe Congress intended it. Nor is there any reason to think Congress intended to sweep within the subsection's scope every Internal Revenue Code provision concerning wagering — a result that this unnatural reading would accomplish."²² The Court offered no test for determining when a grammatically permissible construction expressly comprehended and acknowledged by the Court is "far too convoluted" to represent congressional intent.

The Court then employed language clearly in conflict with the Indian-law canon that in *County of Yakima* focused on possibility without reference to plausibility or any other evaluation of competing constructions in resolving ambiguity in favor of Indian interests. In so doing, the Court, without reference to any support whatsoever, speculated that the ambiguity causing parenthetical reference to chapter 35 was inadvertently included (the Nations' grammatically permissible reading to the contrary notwithstanding) and therefore did not require a rewriting of the statute (that the Nations' possible construction would avoid anyway). The Court stated:

As we have said, the more plausible role for the parenthetical to play in this subsection is that of providing an illustrative list of examples. So considered, "chapter 35" is simply a bad example — an example that Congress included inadvertently. The presence of a bad example in a statute does not warrant rewriting the remainder of the statute's language. Nor does it necessarily mean that the statute is ambiguous, *i.e.*, "capable of being understood in two or more possible senses or ways."²³

22. *Id.* The Court's use of "even if ultimately comprehensible" is puzzling. Obviously, the Court ultimately comprehended the Nation's reading because the Opinion not only clearly explained the Nations' reading, but also acknowledged that the statutory language "literally permits this reading." The Opinion offers no authority suggesting that the time of initial comprehension is a factor, much less the dispositive factor, in resolving ambiguity in Indian law statutes.

23. *Id.* (citations omitted).

The Court's reasoning is remarkable. First, the Court cited nothing to support its speculation.²⁴ Second, the Nations' grammatically permissible construction, already acknowledged by the court, rebutted the speculation of inadvertent inclusion. Third, as the Court earlier noted, the Nations' construction resulted in the very rewriting which the Court claimed that its speculation was intended to prevent. Finally, the Court's earlier acknowledgment of the actually possible and grammatically correct construction by the Nations rendered wrong the Court's critical assertion that ambiguity "capable of being understood in two or more possible senses or ways," is not present.²⁵

B. The Portion of the Legislative History Included by the Court

The second portion of the Court's analysis addressed, in an incomplete way, legislative history. The Court focused on the substitution of the more specific IRC "chapter 35" (containing the taxing provisions as well as the exemption-granting language at issue here) for the more general "taxation" contained in earlier drafts of the bill that ultimately became IGRA. The Court posed the question: "Why did it [the Senate Committee] permit the cross-reference to chapter 35 to remain [after deleting the "taxation" language]?"²⁶

The Court's question was inaccurately phrased and appears to have been crafted to support an undocumented conclusion. There is no evidence that "taxation" and the reference to "chapter 35" were in any legislative draft at the same time. In other words, the Court's premise that "taxation" was deleted after "chapter 35" had been included and allowed to remain in the draft text is pure speculation unsupported by the legislative history, as lack of citation in the Opinion confirms and the dissent notes.

The more accurate inquiries should have been why did the Committee agree to the substitution of "chapter 35" in subsequent legislation for "taxation" in prior drafts and why did Congress adopt the statutory language? Although the Court attempts to address those inquiries in a roundabout manner, in doing so

24. Justice O'Connor, in her dissent joined by Justice Souter, expressly referenced this portion of the Opinion as "speculation." "The Court can do no more than speculate that the bill's drafters included the parenthetical while the original restriction was in place and failed to remove it when that restriction was altered." *Id.* at 97.

25. If the Court recognized the presence of ambiguity in the statute before its judicial modification, the Court would then have to either apply the Indian-law canon or actually hold for the first time that the canon did not apply in cases of statutory ambiguity involving a claim of tax-exemption by Indians.

26. *Chickasaw Nation v. United States*, 534 U.S. 84, 91 (2001).

the Court omitted a critical part of the legislative history stressed at oral argument. The committee report accompanying the initial draft of the bill, contained the word “taxation” and indicated that taxation was synonymous with IRC chapter 35. In commenting on section 4 of House Bill 1920,²⁷ the House Committee Report expressly identified two portions of the IRC, 26 U.S.C. § 3402(q) (involving only reporting and withholding of taxes related to the operation of gaming activities), and chapter 35 (both authorizing the taxes and creating the state gaming exemption from them at issue). That report stated:

Section 4 provides that related provisions of the Internal Revenue Code, such as section 3402(q) and Chapter 35, 26 U.S.C., concerning taxation and the reporting and withholding of taxes relating to the operation of gaming activities shall apply to tribal gaming activities as they apply to State operated gaming activities.²⁸

In light of that explanation, which preceded the substitution of IRC “chapter 35” for “taxation” in the draft legislation, the replacement of the specific by the general not only makes sense but also is consistent with both the intention of tribal representatives mentioned in the Opinion and the Nations’ construction. That piece of legislative history, omitted by the Court and expressly known by the Opinion’s author as a result of his questioning at oral argument,²⁹ impeaches the Court’s speculative premise on which depends its ultimate reading out of chapter 35 from the statute — that IRC chapter 35 remained in the draft legislation as mistaken inadvertence. That complete legislative history, as opposed to the portions selected by the Court for inclusion in its Opinion, does not “on balance” support the Court’s conclusion and justify rejection of the Nations’ construction.

C. Treatment of the Indian-Law Canon in Dictum

The final section of the Opinion addressed the Indian-law canon. The section’s very existence is unusual because having earlier determined that only one construction existed, that no ambiguity was present, and that the legislative history supported the Court’s interpretation of the then partially

27. H.R. 1920, 99th Cong. § 4 (1986).

28. H.R. REP. No. 99-488, at 13 (1986).

29. See Transcript of Oral Argument, *Chickasaw Nation* (No. 00-507), available at 2001 WL 1183439, at *17-19 (Oct. 2, 2001).

excised statute, the canons had become legally irrelevant to the disposition of the case. Nevertheless, the Court pursued a lengthy discussion containing several significant new items of dicta.

The Court opened its treatment of the Indian-law canon by diminishing its legal importance with the observation that the canons are not mandatory rules.³⁰ In stating that the canons are subservient to other indications of congressional intent, the Court implicitly moved the canons further toward the foot of the list of tools available to resolve ambiguity behind, at least implicitly, the newly approved tool of speculation as to the drafting process. Tellingly, unlike in *Chickasaw Nation*, none of the three Indian law cases cited by the Court to bolster that action involved actual textual ambiguity.

Of particular note, the Court appeared to adopt a new test for application of the Indian-law canon and therefore to implicitly abandon the test in *County of Yakima*. “In light of the considerations discussed earlier, we cannot say that the statute is ‘fairly capable’ of two interpretations, nor that the Tribes’ interpretation is fairly ‘possible.’”³¹ No guidance was given as to when a construction either satisfies the “fairly possible” test or falls short of that new qualitative standard. Because the Court already had pronounced the then rejected Nations’ construction as “grammatically possible,” the new test appeared to require something more than grammatical accuracy as a condition precedent to the application of the canons.

The Court, consistent with its earlier announced result, also diminished the general canon requiring that effect be given to every statutory word if possible by offsetting the canon with the power of courts to reject statutory language “as surplusage” if “inadvertently inserted or repugnant to the rest of the statute.”³² No Supreme Court decision in support of that rule was cited.

Further, the Court, without detailed analysis of the facts of any of its prior decisions recognizing tax-exemptions for Indians by application of the Indian-law canon to acknowledged textual ambiguity, offset the Indian-law canon with the general tax-exemption maxim that exemptions must be clearly stated. The Court invoked three decisions to support its offsetting dicta. Two did not involve Indians.³³ The single Indian-law case cited by the Court granted to

30. The Court’s diminution of the canons’ importance was underscored by the Court’s acknowledgment that the Courts’ construction violated both the general canon requiring that every clause and word of a statute should if possible be given effect and the Indian-law canon that statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit. See *Chickasaw Nation*, 534 U.S. at 94.

31. *Id.* (citations omitted).

32. *Id.*

33. *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988); *United States Trust Co. v.*

Indians an exemption from federal taxation by applying the Indian-law canon after expressly noting, and failing to apply, the general tax-exemption maxim.³⁴ The Court then refused to follow its prior Indian tax-exemption decisions involving actual textual ambiguity on the ground that those cases were “too individualized, involving too many different kinds of legal circumstances” to be of value,³⁵ although those prior cases were quoted by the Court with approval in previous decisions.³⁶ To further downplay that precedent, the Court failed to note that the first group of its cited decisions (in which the Indian canon was applied and the exemption allowed) included textual ambiguity and the comparative second group (in which the general tax maxim was applied and the Indian-law canon not discussed) involved no textual ambiguity, but only asserted policy as the basis for the claimed exemption. The Court failed to acknowledge the critical, and correct, points made by the Nations that when confronted by a claim of tax-exemption by Indians premised on textual ambiguity, the Court had always applied the Indian-law canon to grant the exemption³⁷ and that the general tax maxim was applied only in the absence of textual ambiguity when the claimed exemption was based on pure policy.³⁸

Lastly, in one sentence of dictum, unaccompanied by any citation to authority, the Court cast doubt on the continued primacy and, perhaps even the vitality, of the Indian-law canon in cases of statutory construction: “[n]or can one say that the pro-Indian canon is inevitably stronger — particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue.”³⁹ The Court did not discuss its development of the Indian canon in cases of statutory construction, including the canon’s genesis from treaty cases, the identical trust relationship undergirding the canon in both statutory

Helvering, 307 U. S. 57 (1939).

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

35. *Chickasaw Nation*, 534 U.S. at 95.

36. As Justice O’Connor noted in her dissent, “This Court has repeatedly held that, when these two canons conflict, the Indian canon predominates.” *Id.* at 100.

37. See *McClanahan v. Ariz. State Tax Comm’n*, 411 U. S. 164 (1973); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Choate v. Trapp*, 224 U.S. 665 (1912).

38. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935); *Choteau v. Burnet*, 283 U.S. 691 (1931). Justice O’Connor noted in her dissent, “This Court has failed to apply the Indian canon to extend tax-exemptions to the Nations only when nothing in the language of the underlying statute or treaty suggest the Nations should be exempted.” *Chickasaw Nation*, 534 U.S. at 101.

39. *Chickasaw Nation*, 534 U.S. at 95.

and treaty cases, and the Court's previously unbroken application of the canon in cases of statutory textual ambiguity.⁴⁰

IV. Observations on the Potential Impact of the Opinion

The long term impact of *Chickasaw Nation* on decisional Indian law, if any, remains to be seen. Unfortunately for Indian interests, the Opinion contains several indicia, albeit subtle, as to the Rehnquist Court's view towards Indians. First and foremost, the Opinion demonstrates that to avoid "favorable treatment" of Indians, the Court will read out a portion of a statute and reject an admittedly grammatically correct construction of a statute in order to destroy the presence of ambiguity and prevent application of the Indian-law canons. In so doing, the Court has shown that it will abandon the long-held test of the mere existence of a possible construction in favor of the Indians (which requires no qualitative or quantitative weighing or determination of degree) and replace it with the arbitrary, judicially subjective, and unexplained test that the Indians' construction be "fairly possible." Further, to foster its newly revealed attitude toward Indians, the Court is willing to premise an entire analysis on both speculation and the omission of a portion of the legislative history, which impeaches that analysis.

The future of Indian law cases before the Rehnquist Court is further darkened by the Court's treatment, in unnecessary dicta in *Chickasaw Nation*, of the Indian-law canon. Not only did the Court use an inappropriate, incomplete analysis to avoid application of the canon, but also the Court sent the Indian-law canons to the end of the line of statutory tools of construction, stating that they are offset by general canons and implying that they are subservient to those general canons. The Court's express failure to recognize its unbroken precedent of applying the Indian-law canons when tax-exemptions were claimed by Indians because of textual ambiguity, the general tax-exemption maxim notwithstanding, does not bode well for future dominance of the Indian-law canons in any statutory context.

Finally, and most significantly, the Court's unexplained single sentence of dicta, unsupported by any citation to authority, drawing a distinction of the canon's "strength" in statutory cases from treaty cases, is particularly alarming. The canon is undergirded by the same, constant trust relationship of the federal government with the tribes, regardless of whether the ambiguity

40. *Id.* at 101. "As the purpose behind the Indian canon is the same regardless of the form of enactment, there is no reason to alter the Indian canon's relative strength where a statute rather than a treaty is involved." *Id.* (O'Connor, J., dissenting).

is statutory or treaty-based. If the Supreme Court is now diminishing the force of that trust-based canon in cases of statutory construction, what then is the Court's view of the continued vitality of the underlying congressionally established trust-based relationship and of the Court's own power to diminish or ultimately abolish that trust-based relationship? The mere fact that *Chickasaw Nations'* dictum causes the question to be raised is significant indeed.

*V. Subsequent Supreme Court Developments Concerning
the Trust Relationship*

Since *Chickasaw Nation*, the Court has taken two opportunities to address trust relationships between the United States and Indian tribes, although without citation to *Chickasaw Nation*. In *United States v. Navajo Nation*,⁴¹ the same majority as in *Chickasaw Nation*, less Justice Stevens, refused to recognize a claim for damages for breach of fiduciary duty based on the Secretary of the Interior's conduct in approving a coal lease royalty increase negotiated by the Navajo Nation. The Court held that the Secretary's statutorily required approval power was not a trust responsibility. The dissent by Justice Souter, joined by Justices Stevens and O'Connor, noted "serious indications that the 12½ percent royalty rate in the lease amendments was substantially less than fair market value for the Tribe's high quality coal," that the Acting Assistant Secretary was prepared to approve a much higher increase, that the higher increase was derailed by the Secretary only after an ex parte meeting between the Secretary and coal company personnel, and that the Secretary directed the Tribe be misled about the status of the adjustment process.⁴² Utilizing ample supporting authority, the dissent made clear that viewed in light of the "legislative history and the general trust relationship between the United States and the Indians, [the statute in question] supports the existence of a fiduciary responsibility to review mineral leases for substance to safeguard the Indians' interests."⁴³ The dissent was unavailing.

In *United States v. White Mountain Apache Tribe*,⁴⁴ the Court recognized a claim for restoration damages against the United States based on a statute that gave lands, including Fort Apache, in trust for the use and benefit of the

41. 123 S. Ct. 1079 (2003).

42. *Id.* at 1098 (Souter, J., dissenting).

43. *Id.* at 1097 (citation omitted) (citing *United States v. Mitchell*, 463 U.S. 206, 224-25 (1983) (*Mitchell II*)).

44. 123 S. Ct. 1126 (2003).

Tribe and allowed the Secretary of the Interior to use any part of the land and improvements. The Court found that the express statutory trust language coupled with the government's daily use of a portion of the property permits a fair inference that the Government is subject to duties as a trustee and potentially liable in damages for breach. The Court, in its opinion delivered by Justice Souter, did not mention the general trust relationship invoked by Justice Souter as support for a fiduciary duty in his dissent in *Navajo Nation*, decided the same day.

Of substantial importance for the trust relationship's future is the dissent in *White Mountain Apache Tribe* of Justice Thomas, joined by the Chief Justice, Justice Scalia, and Justice Kennedy, all in the majority in *Chickasaw Nation*. That dissent invoked a court of claims decision in a patent attempt to lower the status of the trust relationship:

The Court of Claims has observed that the relationship between the United States and Indians is not governed by ordinary trust principles: "The general relationship between the United States and the Indian tribes is not comparable to a private trust relationship. When the source of substantive law intended and recognized only the general, or bare, trust relationship, fiduciary obligations applicable to private trustees are not imposed on the United States. Rather, the general relationship between Indian tribes and [the United States] traditionally has been understood to be in the nature of a guardian-ward relationship. A guardianship is not a trust. The duties of a trustee are more intensive than the duties of some other fiduciaries."⁴⁵

With four votes for such a view, coupled with the rejection of fiduciary duties in *Navajo* and the unsupported dictum in *Chickasaw Nation*, concern over the future vitality of the general trust relationship under the Rehnquist Court appears well founded.

45. *Id.* at 1138 n.1 (Thomas, J., dissenting) (citations omitted) (quoting *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 573 (1990)).

