

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* JICARILLA APACHE NATIONCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

No. 10–382. Argued April 20, 2011—Decided June 13, 2011

Respondent Jicarilla Apache Nation’s (Tribe) reservation contains natural resources that are developed pursuant to statutes administered by the Interior Department. Proceeds from these resources are held by the United States in trust for the Tribe. The Tribe filed a breach-of-trust action in the Court of Federal Claims (CFC), seeking monetary damages for the Government’s alleged mismanagement of the Tribe’s trust funds in violation of 25 U. S. C. §§161–162a and other laws. During discovery, the Tribe moved to compel production of certain documents. The Government agreed to release some of the documents, but asserted that others were protected by, *inter alia*, the attorney-client privilege. The CFC granted the motion in part, holding that departmental communications relating to the management of trust funds fall within a “fiduciary exception” to the attorney-client privilege. Under that exception, which courts have applied to common-law trusts, a trustee who obtains legal advice related to trust administration is precluded from asserting the attorney-client privilege against trust beneficiaries.

Denying the Government’s petition for a writ of mandamus directing the CFC to vacate its production order, the Federal Circuit agreed with the CFC that the trust relationship between the United States and the Indian tribes is sufficiently similar to a private trust to justify applying the fiduciary exception. The appeals court held that the United States cannot deny a tribe’s request to discover communications between the Government and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the Government has not claimed that it or its attorneys considered a specific competing interest in those communications.

Syllabus

Held: The fiduciary exception to the attorney-client privilege does not apply to the general trust relationship between the United States and the Indian tribes. Pp. 5–24.

(a) The Court considers the bounds of the fiduciary exception and the nature of the Indian trust relationship. Pp. 5–14.

(1) Under English common law, when a trustee obtained legal advice to guide his trust administration and not for his own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice on the rationale that the advice was sought for their benefit and obtained at their expense in that trust funds were used to pay the attorney. In the leading American case, *Riggs Nat. Bank of Washington, D. C. v. Zimmer*, 355 A. 2d 709, the Delaware Chancery Court applied the fiduciary exception to hold that trust beneficiaries could compel trustees to produce a legal memorandum related to the trust’s administration because: (1) the trustees had obtained the legal advice as “mere representative[s]” of the beneficiaries, who were the “real clients” of the attorney, *id.*, at 711–712, and (2) the fiduciary duty to furnish trust-related information to the beneficiaries outweighed the trustees’ interest in the attorney-client privilege, *id.*, at 714. The Federal Courts of Appeals apply the fiduciary exception based on the same two criteria. Pp. 6–9.

(2) The Federal Circuit analogized the Government to a private trustee. While the United States’ responsibilities with respect to the management of tribal funds bear some resemblance to those of a private trustee, this analogy cannot be taken too far. The Government’s trust obligations to the tribes are established and governed by statute, not the common law, see, e.g., *United States v. Navajo Nation*, 537 U. S. 488, 506 (*Navajo I*), and in fulfilling its statutory duties, the Government acts not as a private trustee, but pursuant to its sovereign interest in the execution of federal law, see, e.g., *Heckman v. United States*, 224 U. S. 413, 437. Once federal law imposes fiduciary obligations on the Government, the common law “could play a role,” *United States v. Navajo Nation*, 556 U. S. ___, ___ (*Navajo II*); e.g., to inform the interpretation of statutes, see *United States v. White Mountain Apache Tribe*, 537 U. S. 465, 475–476. But the applicable statutes and regulations control. When “the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . neither the Government’s ‘control’ over [Indian assets] nor common-law trust principles matter.” *Navajo II, supra*, at ___. Pp. 9–14.

(b) The two criteria justifying the fiduciary exception are absent in the trust relationship between the United States and Indian tribes. Pp. 14–23.

(1) In cases applying the fiduciary exception, courts identify the

Syllabus

“real client” based on whether the advice was bought by the trust corpus, whether the trustee had reason to seek advice in a personal rather than a fiduciary capacity, and whether the advice could have been intended for any purpose other than to benefit the trust. *Riggs*, 355 A. 2d, at 711–712. Applying these factors, the Court concludes that the United States does not obtain legal advice as a “mere representative” of the Tribe; nor is the Tribe the “real client” for whom that advice is intended. See *id.*, at 711. Here, the Government attorneys are paid out of congressional appropriations at no cost to the Tribe. The Government also seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe. Because its sovereign interest is distinct from the beneficiaries’ private interests, the Government seeks legal advice in a personal, not a fiduciary, capacity. Moreover, the Government has too many competing legal concerns to allow a case-by-case inquiry into each communication’s purpose. In addition to its duty to the Tribe, the Government may need to comply with other statutory duties, such as environmental and conservation obligations. It may also face conflicting duties to different tribes or individual Indians. It may seek the advice of counsel for guidance in balancing these competing interests or to help determine whether there are conflicting interests at all. For the attorney-client privilege to be effective, it must be predictable. See, e.g., *Jaffee v. Redmond*, 518 U. S. 1, 18. The Government will not always be able to predict what considerations qualify as competing interests, especially before receiving counsel’s advice. If the Government were required to identify the specific interests it considered in each communication, its ability to receive confidential legal advice would be substantially compromised. See *Upjohn Co. v. United States*, 449 U. S. 383, 393. Pp. 15–20.

(2) The Federal Circuit also decided that the fiduciary exception properly applied here because of the fiduciary’s duty to disclose all trust-management-related information to the beneficiary. The Government, however, does not have the same common-law disclosure obligations as a private trustee. In this case, 25 U. S. C. §162a(d) delineates the Government’s “trust responsibilities.” It identifies the Interior Secretary’s obligation to supply tribal account holders “with periodic statements of their account performance” and to make “available on a daily basis” their account balances, §162a(d)(5). The Secretary has complied with these requirements in regulations mandating that each tribe be provided with a detailed quarterly statement of performance. 25 CFR pt. 115.8. The common law of trusts does not override these specific trust-creating statutes and regulations. A statutory clause labeling the enumerated trust responsibilities as nonexhaustive, see §162a(d), cannot be read to include a gen-

Syllabus

eral common-law duty to disclose all information related to the administration of Indian trusts, since that would vitiate Congress' specification of narrowly defined disclosure obligations, see, *e.g.*, *Mackey v. Lanier Collection Riggs Agency & Service, Inc.*, 486 U. S. 825, 837. By law and regulation, moreover, the documents at issue are classed "the property of the United States" while other records are "the property of the tribe." 25 CFR §115.1000. This Court considers ownership of records to be a significant factor in deciding who "ought to have access to the document," *Riggs, supra*, at 712. Here, that privilege belongs to the United States. Pp. 20–23.

590 F. 3d 1305, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, in which BREYER, J., joined. SOTOMAYOR, J., filed a dissenting opinion. KAGAN, J., took no part in the consideration or decision of the case.