No. 10-382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JICARILLA APACHE NATION

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

REPLY BRIEF FOR THE UNITED STATES

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The question presented in this case is whether trust-law principles applicable to private fiduciaries at common law impose a judicially enforceable duty, lacking any statutory or regulatory basis, on the United States to disclose to an Indian tribe certain attorney-client privileged information. Despite the Tribe's contentions, the answer is no.

First, three lines of this Court's precedents—(1) *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Minnesota*, 270 U.S. 181 (1926); *Heckman* v. *United States*, 224 U.S. 413 (1912); (2) *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo Nation I*); *United States* v. *Navajo Nation*, 129 S. Ct. 1547 (2009) (*Navajo Nation II*); and (3) *Nevada* v. *United States*, 463 U.S. 110 (1983)—distinguish the United States from a private trustee. Those decisions establish that the United States' duties to Indian tribes do not derive from the tribes' property interests, but rather arise solely from statutes and regulations that the

United States administers as part of its sovereign functions. U.S. Br. 13-16, 31-33, 41-43. No applicable statute or regulation imposes on the United States a general duty to disclose to an Indian tribe all trust-related information, let alone to disclose attorney-client privileged communications, and there is no common-law right of access to information held by an Executive Department. Contrary to the Tribe's contention (Resp. Br. 19-20), 25 U.S.C. 161a and 162a, which specify *by statute* limited investment-related duties for tribal funds held in trust, make no mention of and thus cannot support the entirely distinct disclosure obligation sought here.

Second, reflecting the sovereign nature of the government's functions, the underpinnings critical to recognition of a fiduciary exception for private trusts are absent here. In contrast to the situation of a private trust, government attorneys and other federal officials involved in the administration of Indian affairs owe an exclusive duty of loyalty to the government (U.S. Br. 16-22); the government pays the cost of trust administration, including legal advice, out of appropriated funds, not the trust corpus (U.S. Br. 27-28); the government owns any records produced in its administration of tribal trust property (U.S. Br. 29-30, 39-40); and the release of such records, including to a tribe or individual Indian, is governed by specific statutes and regulations and the Freedom of Information Act (FOIA), 5 U.S.C. 552 *et seq.* (U.S. Br. 37-38, 40).

Third, abrogating the attorney-client privilege in this context would pose significant practical problems. Notwithstanding the Tribe's attempt to narrow the consequences of the court of appeals' rationale that the tribe or individual Indian is the "real client" of the government attorney (Resp. Br. 26), professional responsibility and conflict-of-interest concerns would remain. U.S. Br. 23-27. And abro-

gation of the attorney-client privilege would chill the seeking and rendering of legal advice with respect to administration of Indian property—a serious concern for the agencies charged with that responsibility. U.S. Br. 43-45.

A. Preserving The Government's Attorney-Client Privilege Is Consistent With Federal Rule Of Evidence 501

1. The Tribe contends that because common-law principles generally govern privileges under Federal Rule of Evidence 501 (Rule 501), a fiduciary exception to the attorney-client privilege—which has been recognized in certain circumstances involving private trustees, whose duties are defined by common law—should be applied to the United States as well. Resp. Br. 11-12, 13-17. That argument conflates two separate points. The first point—that determination of privileges under Rule 501 "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience"—is not in dispute in this case. The second point—that the government's obligations to Indian tribes are defined by the common law of trusts, untethered to any statutory or regulatory duty—is the critical issue in dispute here. It was on that second point, which furnished the rationale for in turn abrogating the attorney-client privilege, that the court of appeals fundamentally erred.

Because the fiduciary exception that the Tribe seeks is premised on a general common-law duty of disclosure (apart from litigation discovery), the Tribe can prevail only if that duty attaches to the United States. It does not, for at least two sets of reasons: (1) unlike for a private trustee whose duties are governed by common law, only duties specified by statute or regulation are legally enforceable against the United States; and (2) none of the circumstances on which courts have relied in fashioning a fiduciary exception applicable to private trustees apply to the gov-

ernment in this context. See pp. 1-2, *supra*. Because the courts are to interpret the common law of privilege "in the light of reason and experience," Rule 501, those fundamental distinctions require rejection of a fiduciary exception to the United States' attorney-client privilege here. Just like the government has special privileges for reasons unique to the government (*e.g.*, deliberative process, law enforcement, state secrets, and Executive privilege), there are unique reasons why a fiduciary exception should not extend to the government. And as in any circumstance in which the courts are asked to fashion federal common law, the courts must take account of the governing statutory and regulatory framework—*e.g.*, *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 69 (1966)—which in this context departs materially from common-law trust standards (see pp. 12-15, *infra*).

2. The Tribe's contention (Resp. Br. 13) that the "government has a weaker claim to the attorney-client privilege than a private party" is incorrect in this context. As noted in the government's opening brief (Br. 11), "[c]ourts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts," *In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir.) (per curiam), cert. denied, 525 U.S. 996 (1998), because "[t]he objectives of the attorney-client privilege * * * apply in general to governmental clients." 1 Restatement (Third) of the Law Governing Lawyers § 74 cmt. b at 573-574 (2000)). The recognition that agencies may withhold attorney-client privileged communications pursuant to FOIA Exemption 5 confirms that conclusion, and indeed courts have upheld under Exemption 5 the withholding from Indian tribes of

information concerning the management of Indian trust property. U.S. Br. 12-13.[1]

The Tribe's reliance (Resp. Br. 14-15) on cases involving governmental invocation of the privilege in grand jury proceedings is unavailing. At most, those cases stand for the proposition that distinct countervailing interests exist when a potential violation of *criminal* law is at issue, and that a government attorney may owe a greater duty of loyalty to the United States as a whole and to the public interest in criminal-law enforcement than to a more narrowly conceived government client in those circumstances. See *In re Lindsey*, 158 F.3d at 1272-1273; *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir.), cert. denied, 521 U.S. 1105 (1997); but see *In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005) (upholding invocation of attorney-client privilege by

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[1] The Tribe relies (Resp. Br. 13) on a 1986 treatise excerpt to question the availability of the privilege to the government. But that treatise acknowledges that courts have long recognized that federal agencies qualify as "clients" entitled to the privilege; that government officials qualify as "person[s]" within the meaning of Rule 501; and that "[w]here the governmental agency has its own staff of lawyers, courts may invoke the analogy of corporate house counsel in working out the application of the privilege." Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5475, at 128-129, 131-132 (1986). The treatise thus concludes that it is "likely that some form of privilege for governmental clients will be recognized by federal courts applying Rule 501." *Id.* at 128.

The Tribe's citation (Resp. Br. 14 n.5) to Uniform Rule of Evidence 502 as limiting the scope of the government's attorney-client privilege is equally unavailing. "[M]ost states rejected that limitation," and the "generally prevailing rule" is "that governmental agencies and employees enjoy the same privilege as nongovernmental counterparts." 1 Restatement (Third) of the Law Governing Lawyers § 74 cmt. b at 574.

governor's office over grand jury subpoena). Those countervailing interests are heightened in the special context of a grand jury—a body "deeply rooted in Anglo-American history" and guaranteed by the Fifth Amendment, *United States* v. *Calandra*, 414 U.S. 338, 342-343 (1974)—which holds "broad powers" to collect evidence through judicially enforceable subpoenas. *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 423-424 (1983). Moreover, Executive Branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General pursuant to 28 U.S.C. 535(b). See *In re Lindsey*, 158 F.3d at 1274-1275; *Duces Tecum*, 112 F.3d at 920.

In *In re Lindsey* (one of the grand jury cases relied on by the Tribe), the D.C. Circuit made clear that the government can generally avail itself of the attorney-client privilege in civil cases (158 F.3d at 1268)—a proposition that the D.C. Circuit has reiterated on numerous occasions. U.S. Br. 11-12. Although the Tribe relies on the D.C. Circuit's observation that "[u]nlike a private practitioner, the loyalties of a government lawyer * * * cannot and must not lie solely with his or her client agency," Resp. Br. 14 (quoting *In re Lindsey*, 158 F.3d at 1273), that observation means a government lawyer's duties extend more broadly to the United States as a whole, or the public interest, not to a specific *non*-government actor like an Indian tribe. Moreover, that observation reinforces the conclusion (U.S. Br. 8, 13-16) that because government lawyers are situated differently than private lawyers, abrogation of the attorney-client privilege on the basis of a supposed fiduciary exception would be especially inappropriate in this context.[2]

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[2] The Tribe cites *Cavanaugh* v. *Wainstein*, Civ. No. 05-123-GK, 2007 WL 1601723 (D.D.C. June 4, 2007), as a case in which the fiduciary exception was "applied" to the Thrift Savings Investment Board, a federal

B. The Federal Circuit's "Real Client" Rationale Does Not Support Applying A Fiduciary Exception To The Government

1. As explained in our opening brief, the Federal Circuit's conclusion that the Interior Department "was not the government attorneys' exclusive client, but acted as a proxy for the beneficiary Indian tribes" (Pet. App. 15a), is deeply flawed. It departs from this Court's precedents establishing that the United States has independent sovereign interests in the administration of statutes pertaining to Indian property (U.S. Br. 13-16), as well as from the settled Executive Branch position that the United States is the exclusive client of government attorneys when the government acts in furtherance of its responsibilities towards Indians (U.S. Br. 16-22).

Rather than wrestle with the potentially broad and problematic implications of the Federal Circuit's "real client" rationale (U.S. Br. 23-30), none of which the Tribe disputes on their own terms, the Tribe all but walks away from that rationale as an independent justification for dispensing with the privilege here. See Resp. Br. 24-28. As an initial

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agency that manages a defined contribution retirement plan for federal employees. Resp. Br. 16-17 & n.7. The plaintiff in that case, who alleged that several Board members had breached fiduciary responsibilities in settling a prior lawsuit, sought to depose Department of Justice attorneys involved in litigating the lawsuit. The district court concluded only that the government had arbitrarily and capriciously denied the deposition request based on the attorney work-product protection, by "fail[ing]" even "to consider the application of the fiduciary exception" in making an "across-the-board denial." 2007 WL 1601723, at *10 & n.11. The district court did not hold that an exception actually applied, and the discussion of such an exception was arguably dictum given the court's apparent conclusion that privileges had been waived by the Board members' reliance on an advice-of-counsel defense. See *id.* at *6-*7.

matter, the Tribe's interpretation of the "real client" rationale as meaning nothing more than that the Indian tribe is an ultimate beneficiary of the legal advice at issue (*i.e.*, the "'real client' *of the advice*," Resp. Br. 4, 7 (emphasis added)) cannot be squared with the Federal Circuit's characterization of the fiduciary exception as "a logical extension of the client's control of the attorney-client privilege" (Pet. App. 13a) or its statement that "Interior was not the government attorneys' exclusive client" (*id.* at 15a). Those descriptions obviously contemplate something other than an exclusive attorney-client relationship between government officials and government attorneys, and instead contemplate that a tribe or individual Indian is a "client" who can "control" assertion of the privilege.

Moreover, the Tribe's attempt to substitute a more benign view of the "real client" rationale as merely derivative of a "policy of full disclosure in the trustee-beneficiary relationship" (Resp. Br. 26) robs it of any independent force and effectively collapses it with the Federal Circuit's other deeply flawed rationale, *i.e.*, that the Interior Department is subject to a generally applicable common-law duty to disclose all internal governmental information concerning its administration of statutes affecting the property of Indian tribes or hundreds of thousands of individual Indians. There is no such general common law right of access, and orderly disclosure is instead governed by—and restricted by—statutes (including FOIA) and regulations. U.S. Br. 29-30, 35, 37-40. It follows *a fortiori* that there is no duty to furnish any such information that is protected by the attorney-client privilege. The Tribe's position also ignores the practical professional responsibility concerns that the Federal Circuit's ruling poses for federal government attorneys (U.S. Br. 23-27)—particularly given that those attorneys may be subject to the rules of individual States whose

courts have concluded that counsel for a private trustee can owe attorney-client duties to the trust's beneficiaries.[3] See Robert S. Held, *A Trust Counsel's Duty to Beneficiaries*, 92 Ill. B.J. 636, 649 (2004) (noting that "many jurisdictions * * * recognize a duty between a lawyer for a trust and third parties," and that while there is still uncertainty in the law, "it seems at this point that an attorney's obligations flow to the beneficiaries rather than the individual self-interest of the trust fiduciaries"); see also, *e.g.*, *Charleson* v. *Hardesty*, 839 P.2d 1303, 1306-1307 (Nev. 1993) ("[W]hen an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law.").[4]

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[3] The Interior Department's Office of the Solicitor alone employs "three hundred * * * attorneys licensed in forty states." United States Dep't of the Interior—Office of the Solicitor (Aug. 3, 2010), http://www.doi.gov/solicitor/index.html. In addition, "attorney[s] for the Government," a term which includes many Justice Department attorneys, are subject to the laws and rules of "each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. 530B(a); see 28 C.F.R. 77.2(a).

[4] The practical problems of fashioning an exception to the attorney-client privilege in this context are further illustrated by the request from amici Navajo Nation and Pueblo of Laguna to reproduce in a publicly available appendix to their brief two documents (among others) at issue in this litigation but allegedly obtained from other tribal sources. See Letter to Hon. William K. Suter, Clerk of the Court, from Daniel I.S.J. Rey-Bear (Mar. 16, 2011). Amici's request validates the government's concern (U.S. Br. 26-27) that tribes possessing a privileged document might unilaterally attempt to waive the privilege—which otherwise would continue to exist as against third parties even if a fiduciary exception applied—by disclosing the document publicly.

Amici are correct that 11 of the documents at issue were part of the public record in a prior Court of Claims case, see Navajo Nation Amicus Br. 22-23; *id.* at 1a-3a, and the United States intends to withdraw its privilege assertion over those documents. But amici are not correct

2. The Tribe's attempted distinction (Resp. Br. 20-21) of the trio of precedents establishing that the government acts as a sovereign in Indian affairs—*Candelaria*, *Minnesota*, and *Heckman*—as not involving property formally held in trust is without merit. Both the Federal Circuit and the Tribe rely heavily on the existence of a "general trust relationship" between the government and Indians, and those three cases establish that the protection of Indian interests—whether characterized as that of a "guardian" or "trustee"—is always "distinctly an interest of the United States * * * *not to be expressed in terms of property, or to be limited * * * to the holding of a technical title in trust*." *Heckman*, 224 U.S. at 437 (emphasis added); see *Candelaria*, 271 U.S. at 443-444; *Minnesota*, 270 U.S. at 194. Because the government acts in a distinct sovereign capacity in this context and its responsibilities are defined entirely by treaty, statute, or regulation, its obligations necessarily differ from those of a private trustee, whose duties are defined by the common law and whose "real client" may be viewed as the beneficiary.

Equally without merit is the Tribe's assertion (Resp. Br. 26) that, like private trustees, government officials seeking legal advice regarding their Indian trust duties lack a "personal stake" in the advice. That analogy fails because no government official or agency has a "personal stake" in

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insofar as they suggest that the government waived its privilege as to seven other documents allegedly produced under an unspecified confidentiality and protective order. *Id.* at 2a-3a. Such orders typically provide that production of privileged material during alternative dispute resolution proceedings does not waive the privilege, and thereby serve as a safety net against inadvertent disclosure. But even assuming none of the documents in amici's possession remains privileged, the applicability of the privilege to approximately 30 other substantially unique documents at issue still turns on resolution of the question presented.

legal advice regarding performance of *any* sovereign function; thus, under the Tribe's rationale, the government presumably would *never* be entitled to the attorney-client privilege. More significantly, unlike a private trustee, the duty of a government official or agency that manages Indian trust property does not derive from the property itself, but rather arises from the governing statutes and regulations. Accordingly, the government official's interest is not derivative of the "beneficiary" interest of a tribe or individual Indian. U.S. Br. 13-16.

3. The fact that the legal advice, like other costs of administering statutes affecting Indian property, is paid for by annual appropriations by Congress and not from the trust corpus reinforces the conclusion that execution of such statutes is a distinctly sovereign function and that Indian tribes are not the "real clients" of government attorneys. U.S. Br. 27-30. The Tribe ignores that in what the Federal Circuit called the "leading American case" on the fiduciary exception (Pet. App. 11a), the court found that payment for the advice from the trust corpus was a "strong indication of precisely who the real clients were." *Riggs Nat'l Bank* v. *Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976). And the Tribe in fact concedes that the source of payment may have been a relevant factor in "some cases involving private trustees." Resp. Br. 27-28. Relatedly, the fact that the government owns all of the relevant records, and that disclosure of all such records is restricted by statute and regulation, contrasts starkly to the common-law rule that such records belong to the trust estate and are freely available to the beneficiary. It thereby refutes the notion that Indian beneficiaries have a general right of access to all records pertaining to the government's administration of statutes affecting Indian property. U.S. Br. 39-40. Because the supposed existence of a general and ongoing common-

law right of access to all such records was an essential premise of the court of appeals' conclusion that the Tribe should have access to the information protected by the attorney-client privilege (Pet. App. 21a-22a), elimination of that premise requires reversal of the judgment below.

C. The Government Does Not Have A Common-Law Trust Duty To Disclose Attorney-Client Privileged Communications To Indian Tribes

1. a. The Federal Circuit departed from firmly established principles in positing that the United States has a freestanding common-law "duty to disclose information related to trust management to the beneficiary Indian tribes, including legal advice on how to manage trust funds" that is otherwise protected by the attorney-client privilege. Pet. App. 21a. To defend that result, the Tribe attempts (Resp. Br. 29-30) to read the legal principles articulated in *Navajo Nation I* and *Navajo Nation II* as strictly limited to determining jurisdiction under the Indian Tucker Act. That attempt does not withstand scrutiny.

Although the *Navajo Nation* decisions involved the viability of claims brought under the Indian Tucker Act, the Court focused on the requirement of an independent "source of substantive rights." *Navajo Nation I*, 537 U.S. at 503 ("Although the Indian Tucker Act confers jurisdiction upon the Court of Federal Claims, it is not itself a source of substantive rights."); see *Navajo Nation II*, 129 S. Ct. at 1552. For a duty to be judicially enforceable, a tribe first "must identify a substantive source of law that establishes specific fiduciary or other duties." *Navajo Nation I*, 537 U.S. at 506. That "substantive source of law" must be a "statutory or regulatory prescription," not arising merely out of a "general trust relationship." *Ibid.* Although "principles of trust law might be relevant" to the subsequent and separate question of whether that source in

turn creates a *money-mandating* duty, *Navajo Nation II*, 129 S. Ct. at 1552, they have no place in the threshold inquiry into whether there is any duty in the first place—the relevant inquiry here. The limited role that the common law played in the *Navajo Nation* decisions (U.S. Br. 31-33) vitiates the premise of the Federal Circuit's decision—*i.e.*, that the United States is a "general trustee" against which common-law trust duties, divorced from any statute or regulation, are judicially enforceable. Pet. App. 21a, 22a.

The Tribe's reliance (Resp. Br. 30-31) on pre-*Navajo Nation* cases that it contends imposed common-law duties on the government in the Indian trust context is misplaced. As the government has explained (U.S. Br. 34), *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), involved a statute requiring the government to "hold the land" allotted for Indians "in trust for the sole use and benefit" of those Indians. *Id.* at 541 (quoting Indian General Allotment Act, 25 U.S.C. 348 (1976)). Even then, the Court interpreted that statute to create, at most, a "bare trust" requiring only limited responsibilities. *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II*). Although *Mitchell II* recognized a claim for breach of certain duties concerning management of timber resources on lands held in trust, those duties were predicated on specific statutes and regulations prescribing detailed responsibilities. *Ibid.* The *Mitchell* decisions thus evince the necessity of statutes and regulations to "establish a fiduciary relationship *and define the contours of the United States' fiduciary responsibilities*" to make any such responsibilities judicially enforceable. *Ibid.* (emphasis added).[5]

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[5] For similar reasons, this case bears no resemblance to *Morton* v. *Ruiz*, 415 U.S. 199, 205-208, 237-238 (1974) (interpreting the Snyder Act, 25 U.S.C. 13, and related appropriations acts, to extend general assistance benefits to Indians living near reservations based on tradi-

b. The Tribe's reliance on 25 U.S.C. 161a and 162a, which indicate that certain tribal funds are "held in trust" (Resp. Br. 19-20), fails for that reason. Those statutes' recognition of a trust with respect to tribal funds—specifying certain requirements with respect to investment of such funds, 25 U.S.C. 161a(a), 162a(a)-(c)—does not support imposition on the United States of duties imported from the common law but not mentioned in the statutes, let alone a duty to disclose attorney-client privileged communications to an Indian tribe. U.S. Br. 33-34.

The Tribe acknowledges (Resp. Br. 31-32) that cases such as *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003),[6] and *Seminole Nation* v. *United States*, 316 U.S. 286 (1942),[7] invoked common-law trust principles only to "flesh out" duties specified in statutes and regulations. The Tribe, however, seeks to do something quite different than merely "flesh out" the contours of an existing statutory or regulatory duty. Neither 25 U.S.C. 161a(a) nor 162a(a) makes any mention of any duty to disclose to a tribe

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tional canons of statutory construction, rather than imposing freestanding trust duty), and *Cramer* v. *United States*, 261 U.S. 219, 229-230 (1923) (interpreting statutory terms of land grant based on property law rules and "settled governmental policy," not common-law trust principles).

[6] In *White Mountain*, the Court interpreted a federal statute as requiring the government to preserve tribal trust property that the government was also authorized to use for its own purposes. 537 U.S. at 475; see *id*. at 479-480 (Ginsburg, J., concurring); U.S. Br. 34-35 & n.13.

[7] The claim in *Seminole Nation* was predicated on alleged violations of express promises by the United States in treaties and statutes to pay sums certain to the tribe. 316 U.S. at 288-297; see *Mitchell II*, 463 U.S. at 237 n.10 (Powell, J., dissenting) ("The discussion of the Government's fiduciary duty in *Seminole Nation* referred to a claim to compel payments expressly prescribed by Treaty.").

internal governmental information about the administration of those statutes, and the limited nature of the duty under the American Indian Trust Fund Management Reform Act of 1994 (1994 Act), 25 U.S.C. 162a(d)(5), to furnish periodic account statements refutes the existence of an open-ended and far more intrusive right of access to government records.[8]

2. The Tribe also lifts out of context certain statements from a treatise and two briefs previously filed by the government in this Court. See Resp. Br. 32, 34. Neither source supports the Tribe's attempt to impose on the United States a sweeping, judicially enforceable common-law duty to disclose to Indian tribes trust-related information, including attorney-client privileged information.

a. The treatise refers to duties owed to Indian tribes by the government as those "guaranteed by treaty and federal statute," not a body of general common law. *Cohen's Handbook of Federal Indian Law* § 14.02[2][d][i] at 912 (2005). The passage of the treatise quoted by the Tribe—referring to additional "common law duties of a trustee," *id.* § 5.03[3][b] at 410—is confined to a discussion of the duties prescribed by the 1994 Act in 25 U.S.C. 162a(d). For that

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[8] Tellingly, amici National Congress of American Indians et al. (Br. 7-14) retreat from the Federal Circuit's rationale that a "general trust relationship" between the United States and Indian tribes is "sufficiently similar to a private trust" to justify application of a fiduciary exception (Pet. App. 14a, 16a, 17a), and instead rely on the investment duties imposed by the aforementioned statutes. As explained in the text above, however, determining the scope of substantive investment-related duties by reference to common-law trust principles is very different than requiring disclosure of attorney-client privileged communications. Amici Navajo Nation and Pueblo of Laguna's reliance (Br. 24-25) on memoranda from the Solicitor's office citing trust principles to interpret the scope of statutory investment duties—*e.g.*, whether pooling of assets is permitted—fails for the same reason.

limited point, the treatise cites only *Cobell* v. *Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001), the same pre-*Navajo Nation* lower-court decision on which the Federal Circuit relied in its misreading of the 1994 Act.

As explained in the government's opening brief (U.S. Br. 38), the 1994 Act's caveat that its requirements were "not limited to" those specified in the Act, 25 U.S.C. 162a(d), is properly read as a reference to other requirements imposed by statute or regulation rather than requirements drawn from the common law. At the very least, there is no basis for concluding that Congress implicitly imposed through the 1994 Act a wholesale obligation to disclose all internal governmental information, and especially attorney-client privileged information, concerning the administration of statutes concerning Indian property when it prescribed a very discrete and tailored disclosure requirement in that Act itself (*i.e.*, to furnish account statements). Indeed, Congress elsewhere has expressly preserved the government's invocation of privileges against Indian tribes and individual Indians. U.S. Br. 38-39; see Indian Claims Limitation Act of 1982 (1982 Act), Pub. L. No. 97-394, § 5(b), 96 Stat. 1978 (requiring that Interior Department disclose to Indian claimants only "nonprivileged" information documenting certain pre-1966 claims).[9] That is especially true given Congress's plenary power to legislate in the field of Indian affairs, including with respect to management of Indian property, and its vesting of au-

[9] The Tribe attempts (Resp. Br. 29 n.13) to distinguish the 1982 Act by noting that it applies only to claims arising prior to 1966 and not to the Tribe's claims in this case. While correct, that fact is beside the point. The Act demonstrates Congress's understanding that, contrary to the Federal Circuit's ruling and the Tribe's contentions, the government does possess privileges on which it may rely to withhold information concerning the management of Indian trust property. The attorney-client privilege is perhaps the most obvious such privilege.

thority in the Interior Department to issue regulations governing the disclosure to tribes and individual Indians of trust-related information in particular. U.S. Br. 39-41.

b. Contrary to the Tribe's contention (Resp. Br. 32), the government has never argued that common-law trust duties, independent of statutory or regulatory requirements, are judicially enforceable by tribes. In *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), the government, arguing that correspondence between a tribe and the government was exempt from disclosure under FOIA, cited one aspect of "traditional trust doctrine"—a trustee's duty of confidentiality when disclosure is harmful to a beneficiary's interests (Gov't Br. 6, 17, 34, 36, *Klamath*, *supra* (No. 99-1871))—in support of its argument that "compelled release * * * would impair the [government's] performance of the functions assigned to it." *Id.* at 36. Those functions were ones assigned *by statute and agency directive* (see *id.* at 5-7)—including a requirement that the government deem information received from tribes "confidential * * * if disclosure would negatively impact upon a trust resource," *id.* at 7. By contrast, no such statutory or agency directive exists to support the disclosures sought in this case. U.S. Br. 36-41.

In *United States* v. *Mason*, 412 U.S. 391 (1973), the government argued that it did *not* have a fiduciary duty to refuse to pay state taxes out of funds held by the United States for an Indian estate, when the validity of the tax had been sustained by this Court's precedent but the continued vitality of that precedent had been questioned. U.S. Br. 12-13, *Mason*, *supra* (No. 72-654). The government therefore can hardly be characterized as arguing in favor of

broad "common law trust obligations to Indians" (Resp. Br. 32) in that case.[10]

3. The Tribe misapplies *Nevada* v. *United States*, *supra*. See Resp. Br. 22-24. *Nevada* states that the government cannot be held to "the fastidious standards of a private fiduciary" with respect to Indian affairs because its role as a sovereign may require it to balance potentially competing interests or duties. 463 U.S. at 128; see U.S. Br. 41-42. The Tribe's contention that the government "has no other duties that compete with its obligation to manage Indian trust funds solely for the benefit of the Indians" (Resp. Br. 8) is both legally irrelevant and factually incorrect. As a legal matter, requiring the government to demonstrate that it has or had competing duties in a particular instance before it may invoke the attorney-client privilege would severely undermine the predictability and utility of the privilege. U.S. Br. 43-44. As a factual matter, the Tribe fails to address the fact that Interior often faces conflicts

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[10] Amici Navajo Nation and Pueblo of Laguna rely (Br. 20-21) on a Letter from Leo M. Krulitz, Solicitor, U.S. Dep't of Interior, to James W. Moorman, Asst. Att'y Gen., U.S. Dep't of Justice (Nov. 21, 1978). In light of subsequent precedents of this Court (including the *Navajo Nation* decisions, *supra*) and Attorney General Bell's 1979 letter (Pet. App. 121a-125a), among other developments, that 1978 letter does not represent the Interior Department's current view of the scope of legally enforceable trust obligations. In any event, although the Krulitz letter suggested that the government had a trust obligation apart from statutes and treaties, it stated that the content of that obligation "is limited to dealing fairly, not arbitrarily, with the Indians both with respect to procedural and substantive issues." Resp. App. 14a, *Mitchell I*, *supra* (No. 78-1756) (reproducing letter). Such a limited fair-dealing obligation, which "form[s] a backdrop for the construction and interpretation of the statutes, treaties, and agreements respecting the Indians," does not support imposition of the type of untethered and far-reaching disclosure duty the court of appeals recognized here. *Ibid.*; see pp. 12-15, *supra*.

among Indians themselves, whether as groups, tribes, or individuals. U.S. Br. 25-26; see also U.S. Br. 43 (discussing Doc. No. 37).[11]

In any event, the Tribe's argument extends well beyond the scope of *Nevada* and the limits of the Federal Circuit's decision. In its view, notwithstanding *Nevada*, "the existence of a competing duty would not undercut the fiduciary exception." Resp. Br. 8, 23. That assertion reveals the breadth of the Tribe's position and its disregard for this Court's precedents recognizing the unique position of the United States as a sovereign with respect to Indian affairs.

Finally, the Tribe's suggestion (Resp. Br. 8 n.1, 23 n.10) that the government has waived any contention that the documents at issue implicate potentially competing interests in managing tribal trust funds is incorrect. By providing an example of competing interests (Pet. 29; U.S. Br. 43),[12] the government does not seek to argue that any par-

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[11] For example, a group of Western Shoshone Indians purporting to represent the Timbisha Shoshone Tribe recently brought suit to enjoin the Secretary from distributing more than $26 million pursuant to the Western Shoshone Claims Distribution Act, Pub. L. No. 108-270, 118 Stat. 805, to individual Western Shoshones, as compensation from a 30-year-old Indian Claims Commission judgment for the taking of aboriginal title. See *Timbisha Shoshone Tribe* v. *Salazar*, No. 10-968, 2011 WL 691366 (D.D.C. 2011), appeal docketed, No. 11-5049 (D.C. Cir. Mar. 11, 2011). Had the plaintiffs in that case prevailed, they might have delayed or prevented several thousand individual Indians from receiving payments from the judgment fund at issue there. The Tribe's oversimplification of the Secretary's responsibility to manage trust funds for the benefit of "the Indians" fails to account for such intra- or inter-tribal conflicts.

[12] The Tribe's response on the merits of that example—that "permitting a lawful levy upon a trust account does not conflict with the fiduciary duty to manage and invest the trust account for the benefit of the beneficiary," Resp. Br. 23 n.10—overlooks the Secretary's responsibility to examine the validity of the levy closely enough to ensure the

ticular document be withheld on that basis. Rather, the government relies on that example to dispel the Tribe's and Federal Circuit's erroneous assumption that the possibility of competing interests arises only with respect to management of land or natural resources (as opposed to trust funds). Under the Court's decision in *Nevada*, the possibility of competing interests reinforces the inappropriateness of subjecting the government (without any statutory or regulatory mandate) to a duty of disclosure applicable to a private fiduciary at common law. U.S. Br. 42-43. Indeed, the government relied on *Nevada* before the Federal Circuit in support of that broader argument. Gov't C.A. Pet. 11-14, 23-25. Accordingly, that legal argument is not waived and stands fully briefed for consideration by this Court.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

APRIL 2011

Secretary's independent role in managing Individual Indian Money accounts but deferentially enough to provide comity to the tribe as a separate sovereign.