

FACTBOUND AND SPLITLESS

The Certiorari Process as a Barrier to
Justice for Indian Tribes

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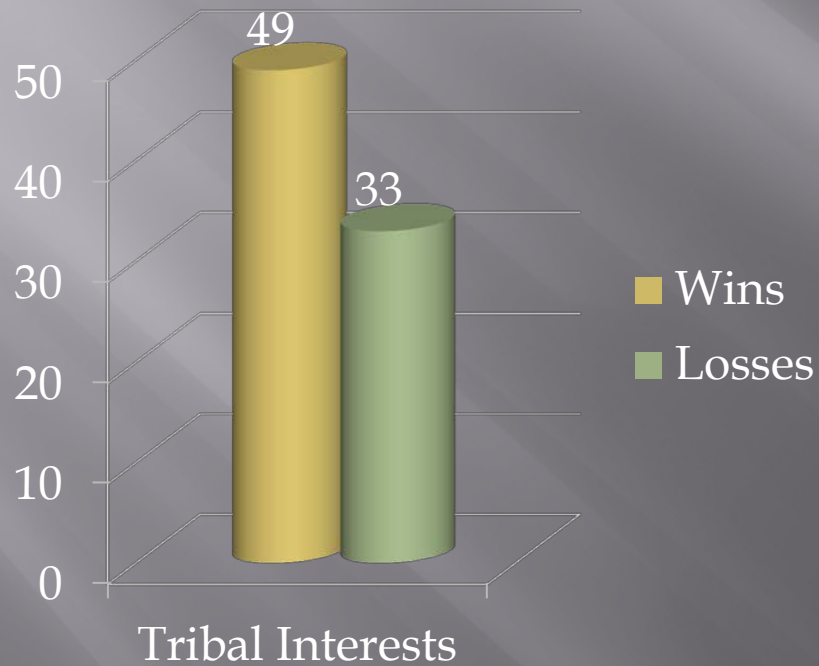
Michigan State University College of Law

Argument

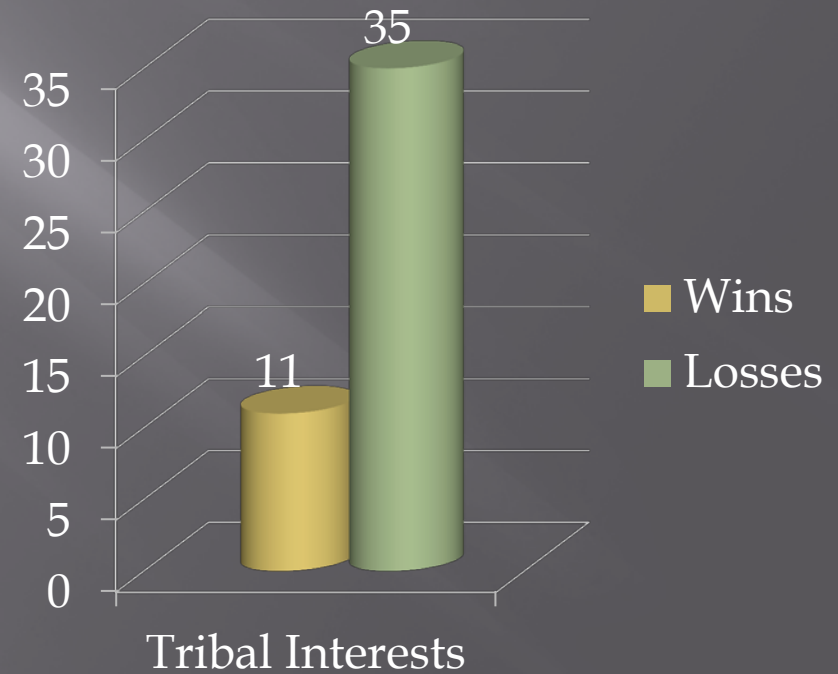
- ▣ The certiorari process and structure works against tribal cert petitions while overly favoring cert petitions of states, local units of government, and non-Indian individuals and private entities opposing tribal interests

Supreme Court Outcomes 1958-2008

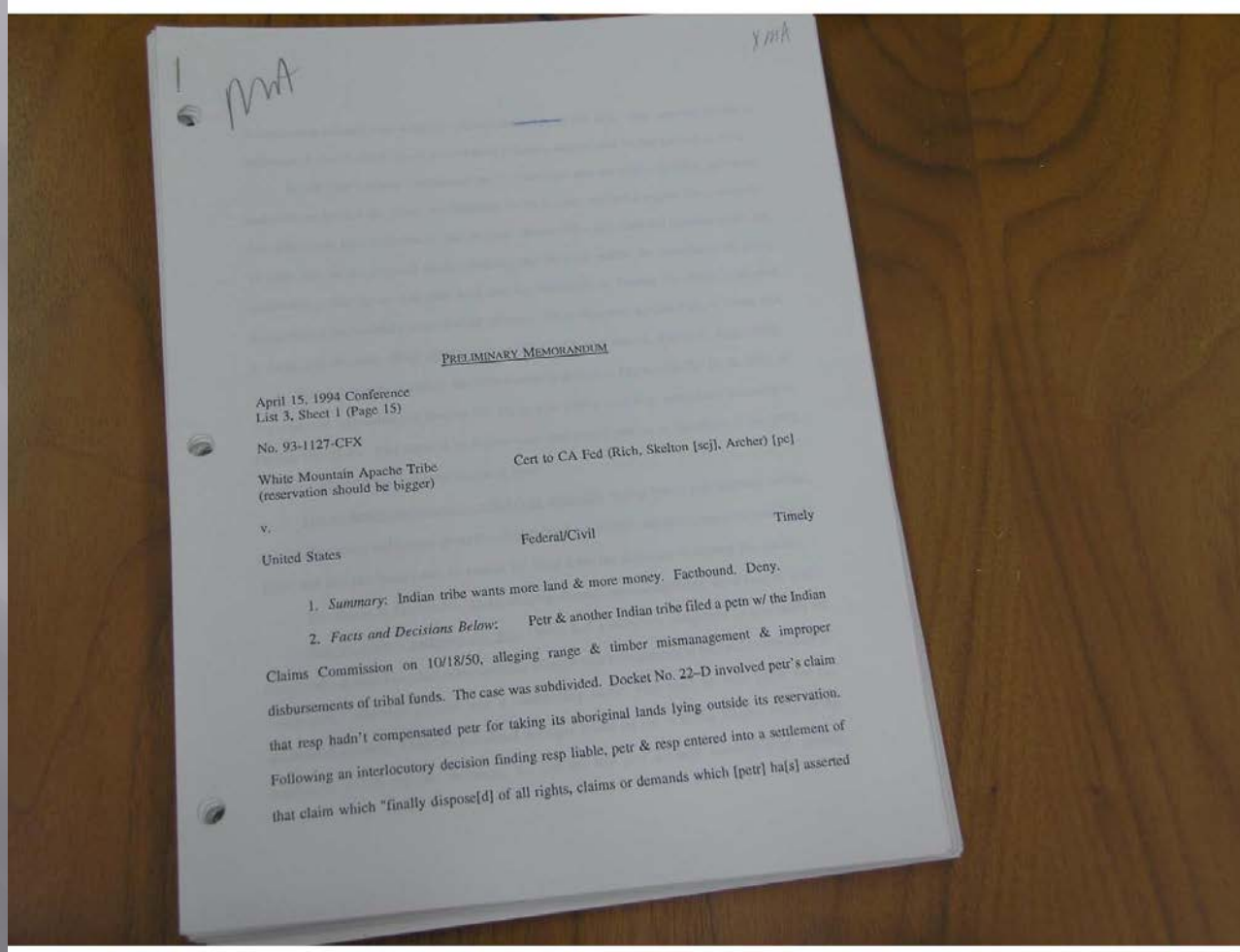
OT 1958-1986



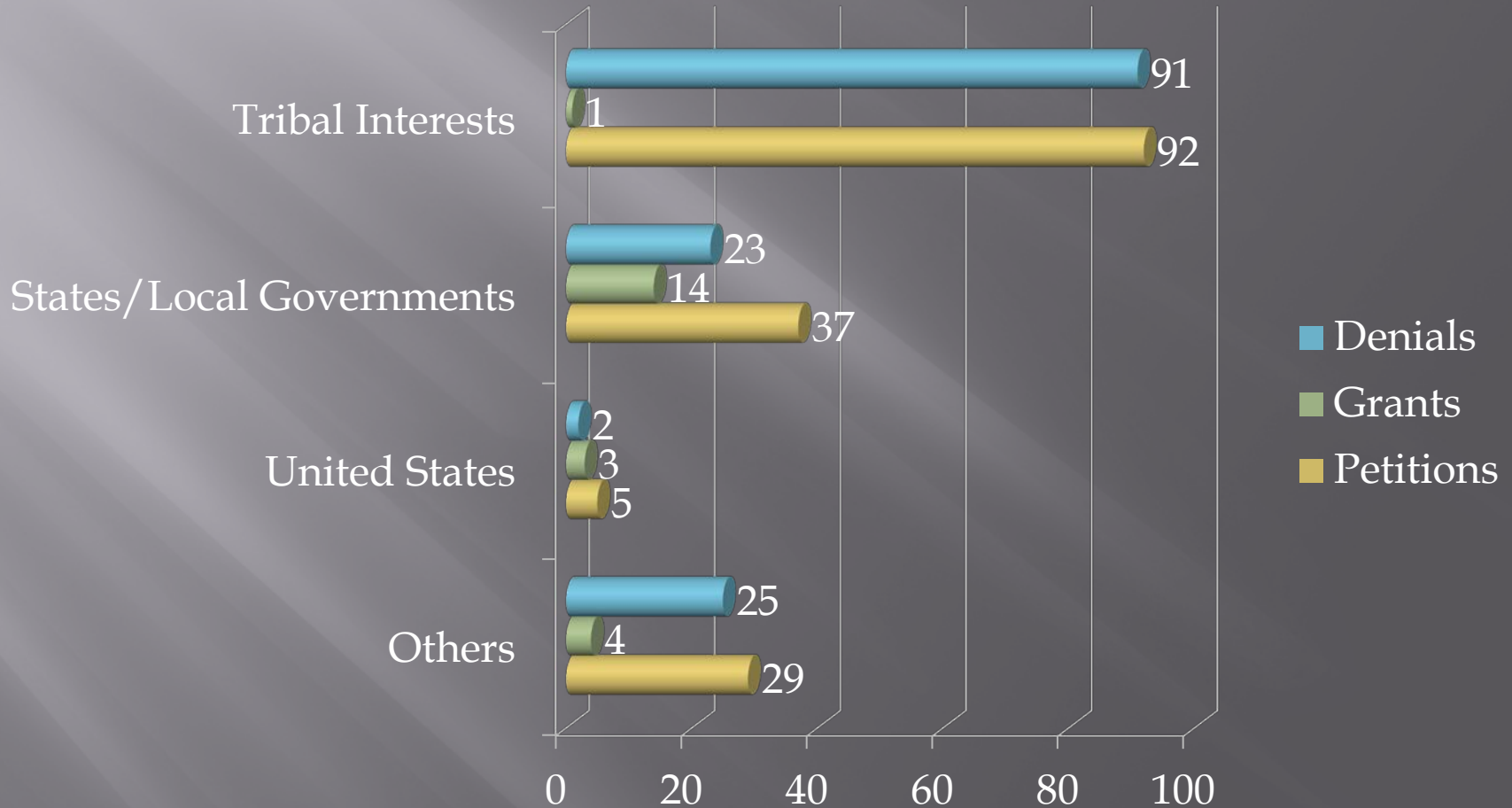
OT 1986-2008



The Sample: Blackmun Digital Archives (OT 1986-1994)



Cert Petition Success by Party: OT 1986-1994



Certiorari Criteria

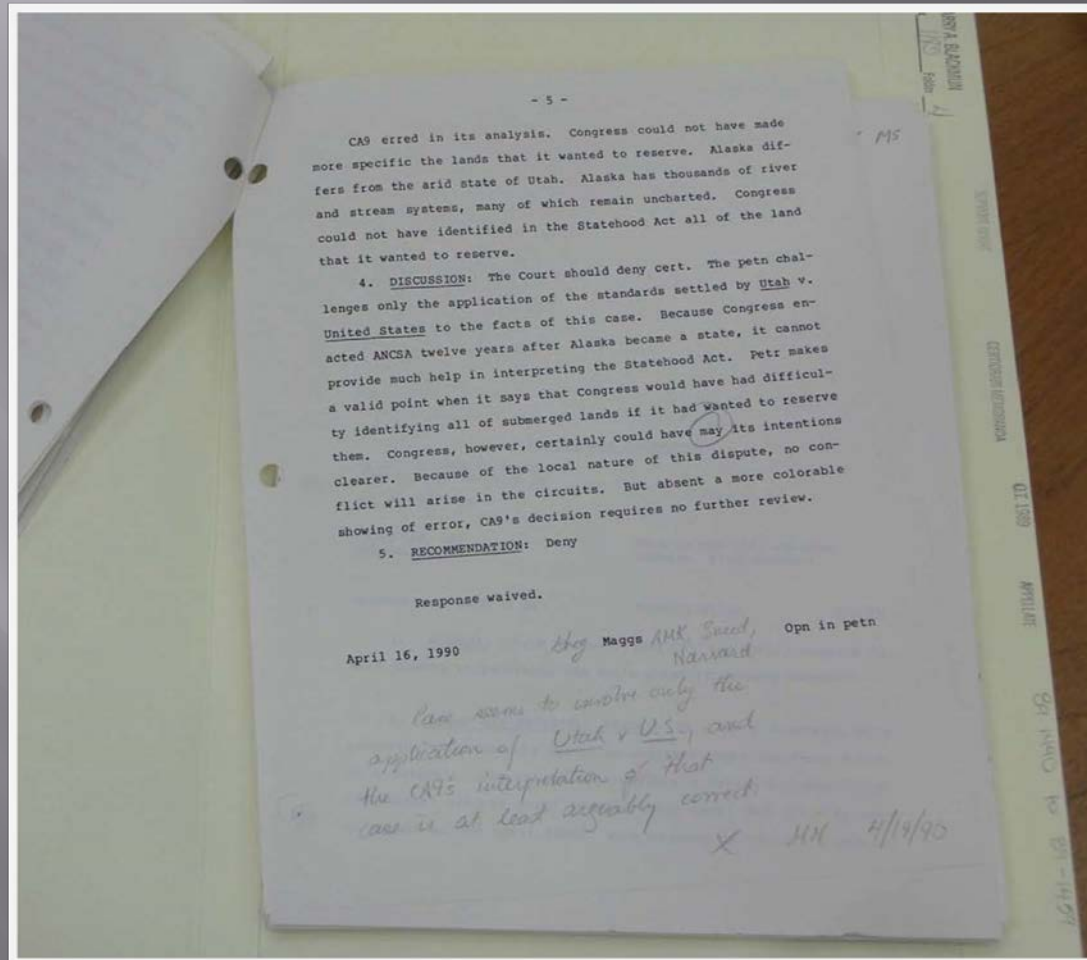
1. Splits in Authority among the Circuits or Direct Conflict with Supreme Court Precedents
2. Important Federal Question
3. Gross Error
4. Not Merely a Review of Lower Court Fact Determinations
5. Other Informal Criteria (procedural posture; cleanliness of the vehicle; competence of counsel)

Certiorari Process

- ▣ Cert petition filed, followed by cert opposition (or waiver)
- ▣ Preliminary pool memorandum drafted by cert pool memowriter (seven Justices participating, excluding Stevens and Alito)
- ▣ Discuss List prepared (Chief Justice prepares initial list, other Justices can add cases to list)
- ▣ If petition not on Discuss List, cert denied
- ▣ Conference resulting in grant, deny, CVSG, GVR, Hold, CFR, etc.

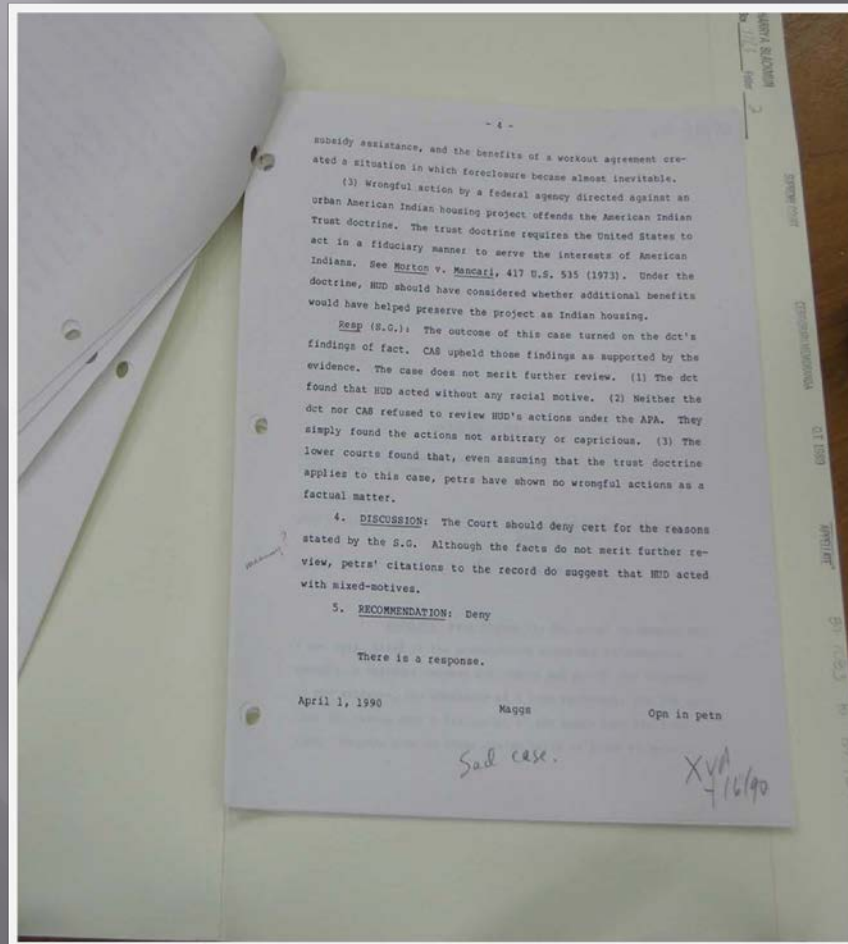
Splitless

Ahtna, Inc. v. Alaska (89-1446)



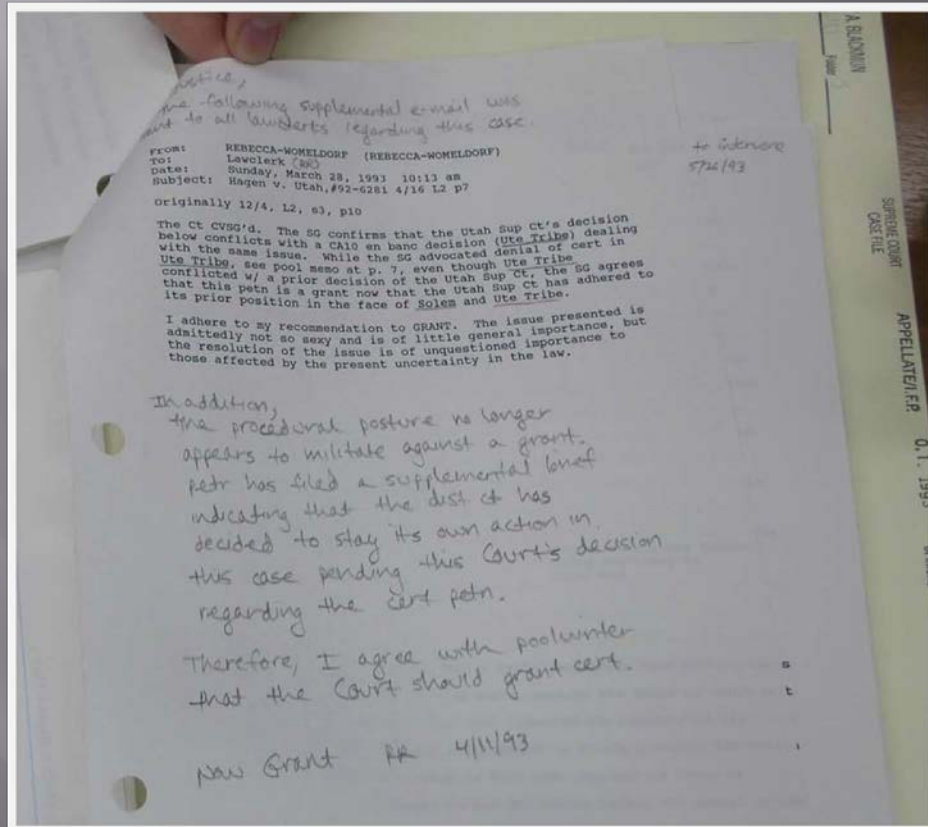
Factbound

Little Earth of United Tribes, Inc. v. Kemp (89-1094)



Sexiness

Hagen v. Utah (92-6281)



Structural Prejudice against Tribal Interest

- ▣ Few circuit splits in Indian law – vast majority of cases come out of CA8, CA9, and CA10
- ▣ Treaty rights cases geographically limited (one state, one circuit)
- ▣ Federal Indian law doctrines amorphous
- ▣ Lower court fact determinations on treaties untouchable
- ▣ Indian law cases not important (do not inspire the “judicial libido” in words of Scalia, J.)
- ▣ Confusing and complicated

Treaty Rights: A Case Study

- ▣ Yankton Sioux v. South Dakota (86-1436) – “I am not sure that this particular factual situation will arise often enough to merit cert”
- ▣ Oneida Indian Nation v. New York (88-1758 & 88-1915) – “There is no indication that these issues have arisen before or that they will arise again.”
- ▣ Dann v. United States (89-24) – “Case presents narrow, intricate issues that are not asserted to have any general importance.”

Structure Favors States and Opponents of Tribal Interests

- ▣ Criminal or civil jurisdictional limits on states are “important” by definition
- ▣ Demographics often proxy for “importance”
- ▣ Cert Pool presumption against grants
- ▣ Cert Pool presumption against unusual claims
- ▣ Cert Pool audience – mostly federalism Justices (Rehnquist, White, Scalia, O’Connor, Kennedy)
- ▣ Discuss List Set by Chief Justice (Burger, then Rehnquist, now Roberts)

Oklahoma Tax Commission: A Case Study

- ▣ Repeat player: 5 cases as petitioner and 4 as respondent
- ▣ 4 of 5 OTC petitions granted; 0 of 4 tribal petitions granted
- ▣ Cert Pool Memo in OTC v. Citizen Potawatomi (89-1322) – “important concerns of federalism”
- ▣ Cert Pool Memo in United Keetoowah Band v. OTC (93-616) – “of no general significance”

Other Potential Explanations

- ▣ Agenda Setting by Justices
- ▣ Defensive Denials by Liberal Wing