

TRIBAL SUPREME COURT PROJECT

TEN YEAR REPORT^{*}OCTOBER TERM 2001 – OCTOBER TERM 2010
(OT01 – OT10)Richard Guest^{**}

INTRODUCTION

In his seminal article, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, noted Indian law scholar David Getches provided an in-depth analysis of the U.S. Supreme Court's re-writing of federal Indian law.¹ In his analysis, Getches noted that Indian tribes were without an intellectual leader on the Court and were losing approximately 80% of their cases argued before the Court. In 2001, in response to another round of devastating losses,

^{*} At the time of publication, the Court had completed the October Term 2011 (OT2011) which is outside the Ten Year Report. However, this brief statistical overview of the Indian law decisions issued and the petitions filed during the OT2011 may provide some new perspectives to the Ten Year Report. In all, twenty-seven Indian law petitions were filed of which four petitions were granted *certiorari*: *Arctic Slope Native Association v. Sebelius* (11-83), *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak* (11-246), *Salazar v. Patchak* (11-247), and *Salazar v. Ramah Navajo Chapter* (11-551). However, the Court only issued two Indian law decisions, consolidating the petitions filed in the *Patchak* case and issuing a GVR (grant, vacate, and remand) in *Arctic Slope Native Association* for consideration in light of its decision in *Salazar v. Ramah Navajo Chapter* (in which tribal interests prevailed for the first time before the Roberts Court).

The case categories for Indian law petitions remained fairly constant: Civil Jurisdiction (5); Criminal Jurisdiction (4); Lands (4); Sovereign Immunity (4); Political Status (3); and Other (3). The largest groups of petitioners remain Tribes (9) and individual Indians (7), followed by Non-Indians (5) and the federal government (4). The largest group of respondents was State and Local Governments (8) followed by the Tribes (6) and the federal government (5). All of these numbers are relatively close to the averages in the Ten Year Report. The lower courts where the petitions originated varied from the data in the Ten Year Report: 30% of the petitions came from State courts; 22% from the Ninth Circuit; and 19% from the Tenth Circuit. Further, the breakdown of wins and losses at the lower court level remained fairly constant with the figures in the Ten Year Report. Tribal interests prevailed in State courts 57% of the time, evenly split in the Ninth and Tenth Circuits, and lost both cases in the D.C. Circuit.

^{**} The Tribal Supreme Court Project's Ten Year Report would not have been possible without the able assistance of NARF's wonderful law clerks and staff. In particular, I would like to thank Gregory Ablavsky (J.D. 2011, University of Pennsylvania Law School; Ph.D. Candidate, 2015, University of Pennsylvania) for all his hard work in creating the analytical and structural foundation for the Report. In addition, I would like to thank Ryan Ward (Cowlitz Indian Tribe; J.D. 2012, University of Washington School of Law); and Colby Duren (J.D. 2012, American University Washington College of Law) for all their work on updating and editing the final drafts of the Report. Finally, I would like to thank my colleagues Riyaz Kanji, Kanji & Katzen, PLLC, and John Dossett, General Counsel, National Congress of American Indians, who have helped steer the work of the Tribal Supreme Court Project since its inception.

¹ David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

tribal leaders met in Washington, D.C. and established the Tribal Supreme Court Project as part of the Tribal Sovereignty Protection Initiative.

The Tribal Supreme Court Project (“Project”) is a joint project staffed by the Native American Rights Fund (“NARF”) and the National Congress of American Indians (“NCAI”). The Project is based on the principle that a coordinated and structured approach to Supreme Court advocacy is necessary to protect tribal sovereignty—the ability of Indian tribes to function as sovereign governments—to make their own laws and be ruled by them. Early on, the Project recognized the U.S. Supreme Court as a highly specialized institution, with a unique set of procedures that includes complete discretion on whether it will hear a case or not, with a much keener focus on policy considerations than other federal courts. The Project established a large network of attorneys who specialize in practice before the Supreme Court along with attorneys and law professors who specialize in federal Indian law. The Project operates under the theory that if Indian tribes take a strong, consistent, coordinated approach before the Supreme Court, they will be able to reverse, or at least reduce, the on-going erosion of tribal sovereignty by Justices who appear to lack an understanding of the foundational principles underlying federal Indian law and who are unfamiliar with the practical challenges facing tribal governments.

One of the key tasks for the Tribal Supreme Court Project has been educating the Justices and other federal judges on key aspects of federal Indian law. In the summer of 2001, Justices O’Connor and Breyer took part in a historic visit to Indian country to observe tribal justice systems. Since that time, federal judges from the U.S. Courts of Appeals for the Ninth Circuit, Tenth Circuit and Eighth Circuit have attended the NCAI Conferences held in Sacramento, Denver and Rapid City, respectively. In August 2011, Chief Judge Riley was joined by Justice Alito during the Eighth Circuit Judicial Conference for a tour of the Pine Ridge Indian Reservation—a visit coordinated by NCAI and the South Dakota Tribes. And in September 2011, Justice Sotomayor visited the Jemez Pueblo, the Santa Domingo Pueblo, the Leadership Institute at the Santa Fe Indian School and the University of New Mexico. During her stay, she expressed her view that a Justice needs to focus on a few key priorities if they want to make a difference beyond their formal work on the Court. As pet projects, Justice Sotomayor was quoted as saying that she has prioritized education and American Indian law.

Another key task of the Project has been the development and coordination of the amicus brief strategy at various stages of litigation: (1) in each Indian law case heard on the merits by the Court; (2) in support of a discrete number of petitions for writ of certiorari filed by Indian tribes or by the United States on behalf of tribal interests; and (3) in support of tribal interests in a limited number of Indian law cases pending in the lower courts. Given the reversal strategy employed by the Court, the Project has often utilized the amicus strategy as an attempt to educate the Court on the wide-ranging negative policy implications and adverse practical impacts their broad rulings can have in Indian country. The Project has experienced some success in limiting the damage the

Court could do to tribal sovereignty in certain cases, such as *Plains Commerce Bank*, but has experienced little success in other cases, such as *City of Sherrill*.²

Another key area where the Project has focused resources is the preparation of the brief in opposition. The Project has come to embrace the fact that perhaps the most important and effective brief filed with the Supreme Court is this specialized brief which explains to the Court why review of a lower court decision favorable to tribal interests is not worthy of review. The Project has worked with dozens of attorneys representing Indian tribes to prepare their briefs in opposition to successfully secure their lower court victories.

Now in existence for ten years, the Tribal Supreme Court Project can look back to review the degree to which its work has been effective. From OT01 through OT10, several developments are notable. First and foremost is the win-loss record for Indian tribes before the Court. Figure 1 of the Report is a table of the Indian Law Cases Where Certiorari Was Granted. Overall, the win-loss percentage has remained the same with the Tribes winning only about 25% of their cases. However, under the Rehnquist Court (OT01-OT04), Indian tribes increased their winning percentage to greater than 50%—winning 4, losing 3, and 2 draws in 9 Indian law cases heard on the merits. This winning percentage was a vast improvement from a deplorable winning percentage of 20% in the past. The work of the Tribal Supreme Court Project appeared to be paying major dividends. But in the past six Terms of the Roberts Court (OT05-OT10), Indian tribes have witnessed their winning percentage plummet to 0%—losing all 7 cases argued on the merits.

What happened? What changed? The Project did not alter its strong, consistent, coordinated approach begun before the Rehnquist Court. The Project continued to dedicate significant resources to improve the quality of tribal advocacy before the Roberts Court. The easy answer may be to simply attribute the losses to changes on the Court with the retirement of Justice Sandra Day O'Connor, the rise of John Roberts to be the new Chief Justice, and the addition of Justice Samuel Alito to replace Justice O'Connor. Although the loss of Justice O'Connor's vote and her influence with other Justices should not be downplayed, there must be more to what is happening in Indian law cases before the Roberts Court.

A second development over the past thirty years may shed some light on our query. During the past six Terms of the Roberts Court, only seven petitions for writ of certiorari in Indian law cases were granted and argued on the merits (1.2/Term average), compared to nine petitions in the prior four Terms under the Rehnquist Court (2.25/Term average). In fact, the total number and average number of Indian law cases decided by the Supreme Court have been on the decline over the past 30 years. From OT81 to OT90, the Court decided 41 Indian law cases (4.1/Term average). From OT91 to OT00, the Court decided 28 Indian law cases (2.8/Term average). And from OT01 to OT10, the Court decided 16 Indian law cases (1.6/Term average). Thus, the number of

² For a full discussion of the strategy in *Plains Commerce Bank*, see Richard A. Guest, "Motherhood and Apple Pie": *Judicial Termination and the Roberts Court*, 56 APR FED. LAW. 52 (2009).

petitions granted review and argued on the merits in Indian law cases has declined significantly. This trend follows, but is steeper than, the general decline in the Court's overall plenary docket—from the Court deciding an average of 150 cases each Term before 1990, to deciding an average of 80 cases each Term more recently.

These and other important trends are identified within the Ten Year Report. Part I of the Report describes the methodology for gathering the data. Of the 259 petitions for writ of certiorari filed in Indian law cases before the Court, the Report breaks down and analyzes each case into four categories: (1) Petitioner and Respondent Type; (2) Question Presented or Subject Matter; (3) Cert Granted/Denied; and (4) Outcome for Tribal Interests. The Appendix to the Report contains a chart encompassing all 259 Indian law petitions broken down by category.

Part II of the Report looks at the 16 Indian law cases decided by the Court on the merits and examines the work of the Project during each Term. Apart from the win-loss record noted above, other facts emerge from a review of the data. From OT01-OT04, of the 9 Indian law cases decided by the Rehnquist Court, 5 cases involved tribal interests as respondents (won in court below), and 4 cases involved tribal interests as petitioners (lost in court below). However, from OT05-OT10, of the 7 Indian law cases decided by the Roberts Court, all 7 cases involved tribal interests as respondents. In other words, tribal interests had prevailed in the lower courts in all 7 cases only to be reversed by the Roberts Court. The Roberts Court has granted fewer Indian law cases, has not granted the petitions filed by Indian tribes or by the United States on behalf of an Indian tribe, and has granted review to reverse lower court decisions favorable to tribal interests. These are indeed disturbing trends.

Several other trends emerge when the data are analyzed. Figure 2 and Figure 4 of the Report summarize the Petitioner Types in Cases Heard by the Court and Case Categories When Certiorari Was Granted. First, the Court's propensity to grant review to the federal government as petitioner usually involves a question of the nature and scope of the trust responsibility, while its propensity to grant review to state and local governments usually involves a lower court decision affirming a tribe's right to be free from state regulatory authority (e.g. taxation) on its reservation. Second, the data suggest that the Court had little interest in reviewing cases involving tribal civil jurisdiction or tribal sovereign immunity, especially in cases brought by individual Indians or non-Indians. *Plains Commerce Bank* was the exception with a corporation as the petitioner. And third, although Indian and non-Indian individuals constituted over 50% of the petitions filed in Indian law cases, the Court did not grant a single one of their petitions regardless of the question presented.

Part III of the Report fully examines all 259 Indian law petitions for writ of certiorari filed before the U.S. Supreme Court from the OT01 through OT10. These data provide an opportunity for a broader analysis of what is happening in Indian law cases overall in the federal and state courts. Figure 5 of the Report illustrates the Categories of Certiorari Petitions by question presented and Figure 6 of the Report creates a table to view those Cases by Category and by Term. These data reveal that no one category

of Indian law dominated the question presented. But civil jurisdiction and tribal sovereign immunity—critical areas monitored by the Project from the beginning—are the leading categories with 15% and 14%, respectively, of the Indian law petitions filed, followed by lands (11%), taxation (10%) and Indian gaming (10%). Figure 6 shows a tendency for certain categories of cases to “spike” during a given Term, such as 11 petitions involving civil jurisdiction in OT02, the Term following adverse rulings by the Court regarding tribal jurisdiction over non-Indians, or the 7 petitions involving localized gaming disputes between states and tribes filed in OT03 and OT08.

The data regarding outcomes for tribal interests reveal that Indian tribes generally win as many cases in the lower courts as they lose. As Figure 9 of the Report Outcomes for Tribal Interests by Category shows, Indian tribes win more civil jurisdiction and sovereign immunity cases than they lose, but lose more taxation and trust responsibility cases than they win. And when the data are examined by petitioner and respondent type, it becomes clear that tribes win the former set of cases against non-Indian and Indian individuals and lose the latter set of cases against state and local governments and the federal government.

Finally, as Figure 13 and 14 of the Report illustrate, the vast majority of the petitions in Indian law cases are coming from the Ninth Circuit (28%), Tenth Circuit (14%) and the state courts (25%), where Indian tribes have a good track record of winning more cases than they lose. However, in the other Federal Circuits, including the D.C. Circuit and Federal Circuit, Tribes lose a disproportionate number of cases. This may be derived from the fact that the D.C. Circuit and Federal Circuit hear a disproportionate number of cases involving the federal government as an adversary, the limited types of questions presented in those cases (trust responsibility, lands, etc.), and/or a lack of familiarity with federal Indian law.

PRELIMINARY CONCLUSIONS AND SUGGESTIONS FOR FURTHER STUDY

The Ten Year Report provides just a snapshot of the data relating to the 259 Indian law petitions filed with the U.S. Supreme Court. Tribal interests have met with some success in many areas in the lower federal and state courts, winning nearly 50% of their cases. But Indian tribes have failed to match the same level of success in the Supreme Court and continue to lose nearly 80% of their cases. And when an Indian tribe loses at the Supreme Court, all of Indian country loses.

The trends identified in the Ten Year Report should assist the Tribal Supreme Court Project in its work moving forward. The Project must continue its coordinated and structured approach to Supreme Court advocacy, in particular the preparation of briefs in opposition. The Project should begin to identify additional opportunities to participate in Indian law cases in the lower federal and state courts, and should develop relationships with more Supreme Court practitioners who may assist Indian tribes in the lower courts. Apparently, the best way to win an Indian law case is to keep the case, in particular, one involving the federal, state and local governments as an adversary, from ever going up to the Supreme Court.

The current composition of the Roberts Court presents its own unique challenge. In the 7 Indian law cases decided by the Roberts Court, tribal interests had prevailed in the lower courts, but generally lost by wide margins in the Supreme Court (9-0, 7-1, 8-1 and 7-2 decisions). The only exception is *Plains Commerce Bank* in which the tribal interests lost 5-4 in a majority decision written by the Chief Justice. In all seven losses, Chief Justice Roberts, along with Justices Scalia, Thomas and Alito, voted against tribal interests. In those seven losses, Justices Kennedy and Breyer only dissented one time, with Justice Stevens dissenting twice and Justice Ginsberg dissenting three times.

The steep decline in the number of Indian law cases being decided by the Roberts Court may be an area ripe for further research and analysis beyond the data supplied in this Report. Additional research on the Indian law jurisprudence of the individual Justices along with their voting patterns as a Court might also prove to be helpful. Such information may assist the Project in analyzing each Indian law case on the basis of how do we count votes to get to the magic number of “five.” This Report also treated all cases and petitions equally. However, the majority of petitions, particularly those involving individuals, stemmed from relatively weak cases, where the petitioners were unlikely to succeed. From the general constellation of certiorari petitions, therefore, more attention should be given to cases that presented substantial unresolved legal issues, particularly in the context of intergovernmental litigation. This might provide a more representative sample of how the majority of Indian law doctrine is being crafted.

I. METHODOLOGY

The 259 petitions examined here were drawn from the Supreme Court Bulletins of the National Indian Law Library (“NILL”), as well as from the briefs and documents available on the Tribal Supreme Court Project website (<http://www.narf.org/sct/index.html>).³ The petitions were classified based on the Term when the Court decided the case or denied certiorari, and not the year the petition was filed. In all, six factors were considered: (1) the petitioner type; (2) the respondent type; (3) case category; (4) whether certiorari was granted; (5) the outcome for tribal interests; and (6) the deciding court.

A. *Petitioner and Respondent Type*

The petitioner and respondent in each case were placed in one of six categories: (1) Indian Tribes; (2) State and Local Governments; (3) Federal Government; (4) Individual Indians; (5) Non-Indian Individuals; and (6) Corporations. Tribal corporations and other tribal entities were classified as Indian tribes. In instances where an individual’s Indian status itself was the legal issue, the outcome of the case determined the individual’s classification.

³ Native American Rights Fund, Tribal Supreme Court Project, *available at* <http://www.narf.org/sct/index.html> (last visited Oct. 31, 2012).

B. Case Category

Cases were classified into twelve categories based on the Indian law question presented in the case:

- (1) *Civil jurisdiction* (including both adjudicatory and regulatory jurisdiction)
- (2) *Criminal jurisdiction*
- (3) *Indian gaming*
- (4) *Lands*
- (5) *Political status* (including questions of tribal recognition, Indian hiring preference, and arguments over equal protection)
- (6) *Religious freedom*
- (7) *Sovereign immunity*
- (8) *Taxation*
- (9) *Treaties*
- (10) *Trust responsibility*
- (11) *Water rights*
- (12) *Other*

While many cases addressed multiple areas of Indian law, they were categorized based on the primary question presented on appeal which may not reflect the particular facts underlying the dispute or the procedural posture of the case. For example, many cases that arose over Indian gaming disputes hinged on legal issues implicating the doctrine of tribal sovereign immunity or tribal civil jurisdiction. And cases that arose under the Indian Civil Rights Act were generally classified either as civil jurisdiction or sovereign immunity cases, depending on the precise question presented.

C. Certiorari

Cases were classified as either certiorari granted, denied, or petition withdrawn. Instances where the Court granted certiorari, vacated, and remanded (“GVR”) for further proceedings consistent with a recent ruling were classified as instances where certiorari was granted, but not heard on the merits, and thus not included within the win-loss record before the Supreme Court.

D. Outcome for Tribal Interests

Each case was classified as either a “win,” or “loss” or “draw” for tribal interests based on the *final* determination, except when tribal interests were represented by both petitioner and respondent (as in litigation between tribes). Tribal interests were defined as the interests of the tribe, and not individual Indians. Instances where individual Indians unsuccessfully challenged tribal decisions, for instance, were classified as a “win” for tribal interests. Instances where the United States represented tribal interests were classified as a “win” for tribal interests.

II. INDIAN LAW CASES WHERE CERTIORARI WAS GRANTED AND THE WORK OF THE TRIBAL SUPREME COURT PROJECT

A. An Analysis of Indian Law Cases Before the Supreme Court of the United States

From OT01 through OT10, the U.S. Supreme Court granted certiorari in 21 out of 259 Indian law petitions, or in 8.1% of the petitions filed. This is higher than the average 4% for all paid petitions versus an average of less than ½ of 1% for *in forma pauperis* petitions filed by indigent parties (which make up the vast majority of petitions). Of the 21 cases granted review, the Court heard argument and issued an opinion deciding the outcome in 16 cases. The Court granted, vacated and remanded the petitions in the other five cases.

Figure 1: Indian Law Cases Where Certiorari Was Granted, 2001-2010

Roberts Court	Case Name	Question Presented	Outcome
OT 2010	<i>United States v. Jicarilla Apache Nation</i>	Trust Responsibility	Lost
	<i>United States v. Tohono O'odham</i>	Trust Responsibility	Lost
	<i>Madison County v. Oneida Indian Nation</i>	Sovereign Immunity	GVR
	<i>United States v. Eastern Shawnee Tribe of Oklahoma</i>	Trust Responsibility	GVR
OT 2009	No Cert Grants		
OT 2008	<i>United States v. Navajo Nation</i>	Trust Responsibility	Lost
	<i>Hawaii v. Office of Hawaiian Affairs</i>	Lands	Lost
	<i>Carcieri v. Salazar</i>	Lands	Lost
OT 2007	<i>Plains Commerce Bank v. Long Family</i>	Civil Jurisdiction	Lost
OT 2006	No Cert Grants		
OT 2005	<i>Wagnon v. Prairie Band of Potawattomi Indians (Fuel Tax)</i>	Taxation	Lost
	<i>Wagnon v. Prairie Band of Potawattomi Indians (License plates)</i>	Civil Jurisdiction	GVR
	<i>Lingle v. Arakaki</i>	Political Status	GVR
Rehnquist Court	Case Name	Question Presented	Outcome
OT 2004	<i>City of Sherrill v. Oneida Indian Nation of New York</i>	Taxation	Lost
	<i>Cherokee Nation v. Leavitt</i>	Other	Won
	<i>Leavitt v. Cherokee Nation</i>	Other	Won

OT 2003	<i>United States v. Lara</i>	Criminal Jurisdiction	Won
	<i>South Florida Water Management District v. Miccosukee Tribe of Indians</i>	Other	Draw
OT 2002	<i>Inyo County v. Paiute-Shoshone Indians</i>	Sovereign Immunity	Draw
	<i>United States v. Navajo Nation</i>	Trust Responsibility	Lost
	<i>United States v. White Mountain Apache Tribe</i>	Trust Responsibility	Won
OT 2001	<i>Chickasaw Nation v. United States</i>	Taxation	Lost
	<i>United States v. Little Six, Inc.</i>	Taxation	GVR

The total number and average number of Indian law cases granted and decided by the Court have declined dramatically over the past 30 years. From OT81 to OT90, the Court decided 41 Indian law cases (4.1/yr average). From OT91-OT00, the Court decided 28 Indian law cases (2.8/yr average). As noted above, between OT01 and OT10, the Court decided just 16 Indian law cases (1.6/yr average). This trend may be explained, in part, by the Court's declining plenary docket overall. Prior to 1990, the Court decided about 150 cases each Term. That number declined to about 90 cases each Term between 1990 and 2000, and hit a low of 71 cases during October Term 2007. The decline in the Court's plenary docket may be due to a "reversal strategy" being employed by the Court, a theory which posits that the Court may only be granting those cases it thinks it will reverse.

Such a reversal strategy may help explain, in part, the outcomes in relation to the Court's Indian law docket over the past decade. Of the 16 Indian law cases heard by the Court, 13 lower court decisions were reversed with 11 cases being complete reversals and 2 cases being partial reversals (*Inyo County*⁴ and *South Florida Water Mgmt Dist.*⁵). In *Chickasaw Nation v. United State*,⁶ *White Mountain Apache*⁷ and *Cherokee Nation v. Leavitt* the Court affirmed the lower court decisions. However, the Tribe was the petitioner (not the respondent) in *Chickasaw Nation*, *White Mountain Apache* was a companion case to *Navajo Nation I*, and *Cherokee Nation v. Leavitt* was consolidated, argued and decided with *Leavitt v. Cherokee Nation*.⁸

In general, the Supreme Court was hostile to tribal interests in its decisions. Of the 16 cases heard by the Court over the past ten Terms, tribal interests won four (25%), while their opponents won ten (62.5%), with two draws (12.5%). Further analysis of the cases suggests several possible structural reasons for this outcome. First, although individual Indians and non-Indians constitute over 50% of the total petitioners

⁴ *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003).

⁵ *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

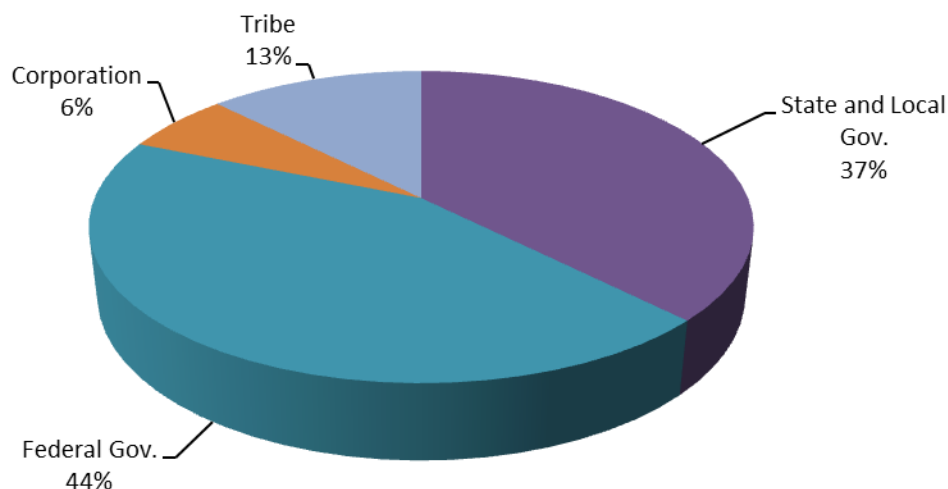
⁶ *Chickasaw Nation v. U.S.*, 534 U.S. 84 (2001).

⁷ *United States v. White Mountain Apache Tribe*, 535 U.S. 1016 (2002).

⁸ *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005).

in Indian law cases (see Figure 10, *infra*), the Court did not grant review of any of their petitions. Instead, as Figure 2 highlights, the federal, state, and local governments were the petitioners in over 80% of the cases heard by the Court (13 of 16 cases) even though they were the petitioners in only 19% of the total cases (see Figure 10, *infra*). In the remaining three Indian law cases decided by the Court, a corporation was the petitioner in one (*Plains Commerce Bank*) and an Indian tribe was the petitioner in the other two (*Chickasaw Nation* and *Cherokee Nation v Leavitt*).

Figure 2: Petitioner Types in Cases Heard by the Court, 2001-2010



This propensity of the Court to grant petitions filed by federal state, and local governments has significantly impacted the development of federal Indian law to the detriment of Indian tribes. As Figure 3 makes clear, although Indian tribes were 33% of respondents in the 259 petitions filed between OT01 and OT10, tribes were respondents in 65% of the cases the Court agreed to hear. By contrast federal, state, and local governments were respondents in over 50% of the petitions filed during the same period, but were the respondents in only 25% of the cases heard by the Court. In short, the data confirm that the Court disproportionately granted certiorari in instances when tribal interests prevailed in the lower court against the federal government or state and local governments.

Figure 3: Respondent Types in Cases Heard by the Court, 2001-2010

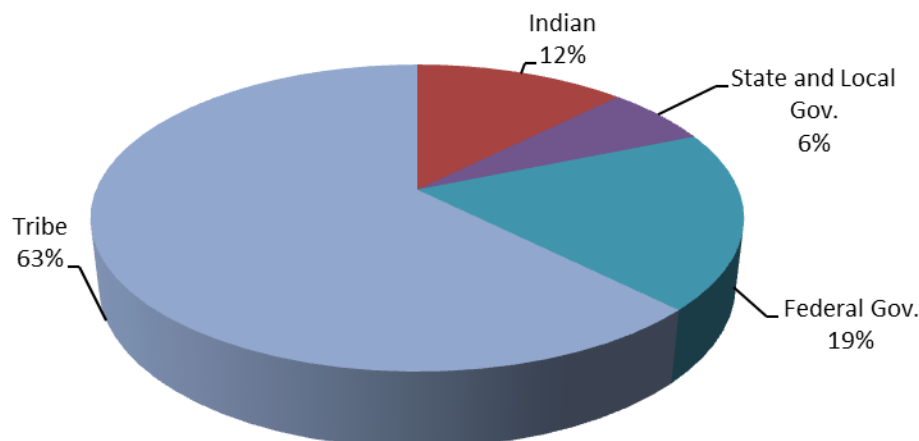
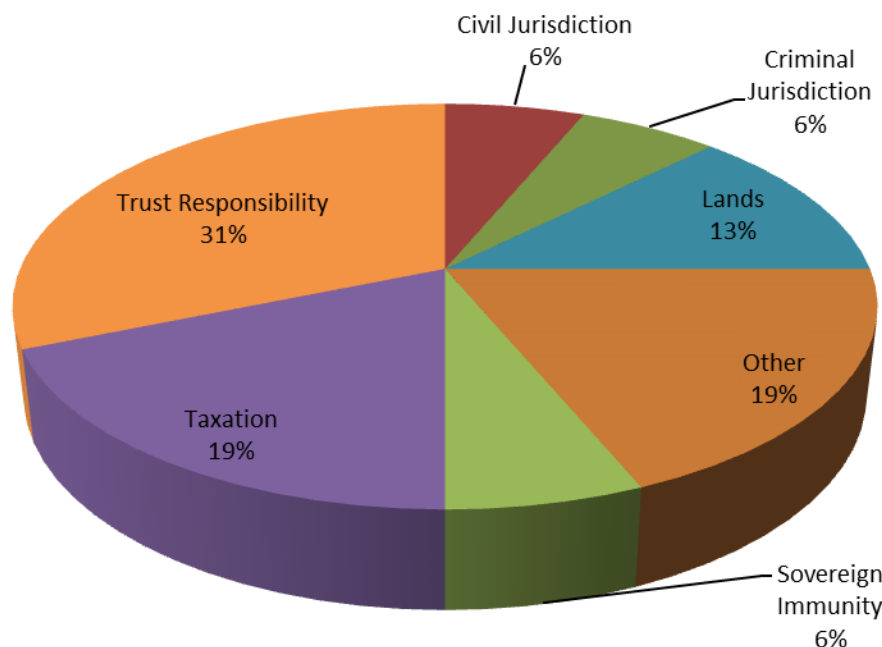


Figure 4 suggests another possible factor that disfavored tribal interests at the Supreme Court: the categories of cases in which review was granted. While the Court did hear a variety of Indian law cases, over 50% of the cases heard by the Court involved one of two issues: the nature and scope of the trust responsibility of the United States to Indian tribes; or taxation of activities occurring on Indian reservations. These two issues only constituted 18% of the total petitions filed with the Court but, as demonstrated in Figure 9, *infra*, these were precisely the categories of cases tribal interests were most likely to lose. In fact, Indian tribes lost every trust responsibility case by a wide margin (9-0, 7-1 and 6-3 decisions), except for *White Mountain Apache* in which the tribe narrowly prevailed in a 5-4 decision.⁹ And Indian tribes lost all three taxation cases by wide margins (8-1 and 7-2 decisions).

By contrast, on the issues of civil jurisdiction and sovereign immunity which constituted 29% of the total petitions filed—the categories where tribes have prevailed in the lower courts on a consistent basis—the Court granted review of two petitions challenging sovereign immunity, but did not decide the question presented in either *Madison County v. Oneida Indian Nation* or *Inyo County v. Paiute-Shoshone Indians*. The Court also granted two petitions involving challenges to tribal civil jurisdiction but only decided the question presented in *Plains Commerce Bank v. Long Family*.

⁹ *United States v. White Mountain Apache Tribe*, 535 U.S. 1016 (2002).

Figure 4: Case Categories When Certiorari Was Granted, 2001-2010

In general, therefore, the certiorari process hurt tribal interests. The Court tended to grant review in cases where Indian tribes had prevailed against federal, state and local governments, and often in categories which disfavored tribal interests. The poor track record of Indian tribes in the Court over the past ten years appears to reflect these systemic patterns in the process of granting certiorari and deciding outcomes in Indian law cases.

B. The Early Work of the Tribal Supreme Court Project (OT01 – OT02)

October Term 2001. Following the establishment of the Tribal Supreme Court Project in September 2001, resources were expended in the creation of a large network of Indian law attorneys, Indian law professors, tribal leaders and Supreme Court practitioners to assist in the coordinated and structured approach to Indian law advocacy before the Court. This network became known as the “Project Workgroup.” But before the Project Workgroup was organized to begin its substantive work, the only Indian law case of OT01, *Chickasaw Nation v. United States*, had already been fully briefed and was argued early in October 2001.¹⁰ Since no other Indian law cases were being argued during OT01, the Project organizers focused on the creation of a website, the development of operating procedures and the preparation of Indian law case summaries, the latter work being performed, in large measure, by the staff of the National Indian Law Library.

October Term 2002. As OT02 approached, the Project Workgroup hit its initial stride in response to the Court’s grant of review in *United States v. Navajo Nation*¹¹ and

¹⁰ *Chickasaw Nation v. United States*, 534 U.S. 84 (2001).

¹¹ *United States v. Navajo Nation*, 537 U.S. 808 (2002).

United States v. White Mountain Apache Tribe.¹² These two cases raised issues regarding whether the United States may be held liable in damages for mismanagement of the tribal trust resources. The Project Workgroup recognized that the decisions would likely affect the future ability of all Indian tribes to hold the United States accountable for their mismanagement of tribal trust property. Early correspondence indicated that “given the Court’s terrible record in Indian law cases, the fact that the Court has this opportunity to rule on the fundamental issue of the federal/tribal trust relationship is frightening and must be actively addressed.” The Project Workgroup prepared an amicus brief on behalf of NCAI in support of White Mountain Apache Tribe, the only amicus brief submitted in that case. Although NCAI also submitted an amicus brief in support of the Navajo Nation in its case, several individual Indian tribes also submitted separate amicus briefs in support. Thus, the Project was faced with the task of coordinating several tribal-side amicus briefs and learned an important lesson in Supreme Court advocacy regarding the Court disfavoring redundancy within and among amicus briefs, especially so-called “me too” briefs.

On December 2, 2002, the same day that the Court heard oral argument in *White Mountain* and *Navajo Nation*, the Court granted review in *Inyo County v. Paiute-Shoshone Indians*.¹³ In *Inyo County*, the Ninth Circuit held that a search warrant issued by a state court against an Indian tribe on tribal property violated the Tribe’s sovereign immunity, and that the execution of the search warrant by county officials violated the Fourth Amendment of the U.S. Constitution which is actionable under 42 U.S.C. § 1983. In this case, the Project was confronted with four amicus briefs filed in support of Inyo County seeking reversal, including an amicus brief of the State of California joined by nine other states and an amicus brief filed by the National Sheriffs Association. In response, the Project coordinated the preparation of three amicus briefs in support of the tribal position: (1) a remarkable amicus brief filed by the states of New Mexico, Arizona, Montana and Washington to rebut the characterization of Indian reservations as enclaves of lawlessness and to recast Indian tribes as effective partners in law enforcement; (2) the NCAI and National Indian Gaming Association (NIGA) amicus brief joined by seventeen individual tribes which provided the Court with information regarding cooperative law enforcements agreements as the appropriate mechanism for resolving jurisdictional disputes; and (3) the United South and Eastern Tribes (USET) amicus brief which focused exclusively on the doctrine of tribal sovereign immunity.

At the end of OT02, the Project had one win (*White Mountain Apache*),¹⁴ one loss (*Navajo Nation*)¹⁵ and a draw (*Inyo County*).¹⁶ This early success was encouraging, but the limited resources of the Project were spread pretty thin. Fundraising became a priority as the early work of the Tribal Supreme Court Project came to a close. The ongoing ability of NARF and NCAI to provide attorney time and resources to the Project,

¹² *United States v. White Mountain Apache Tribe*, 535 U.S. 1016 (2002).

¹³ *Inyo County, California v. Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony*, 291 F.3d 549 (9th Cir. 2002), *cert. granted*, 537 U.S. 1043 (2002).

¹⁴ *United States v. White Mountain Apache Tribe*, 535 U.S. 1016.

¹⁵ *United States v. Navajo Nation*, 537 U.S. 808 (2002).

¹⁶ *Inyo County, California v. Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony*, 537 U.S. 1043.

and the need to recruit and retain Supreme Court practitioners to assist the Project, were all subject to the amount of funding generated. Project staff wrote articles describing the work of the Project, made presentations to foundations, and developed brochures and other materials to solicit funds from individual Indian tribes.

C. *The Expanding Work of the Tribal Supreme Court Project (OT03-OT04)*

October Term 2003. As OT03 approached, the Project recognized the extraordinary value of the lower court case summaries provided by NILL in monitoring and identifying Indian law cases that have a real potential to reach the Supreme Court. Early identification offers an opportunity to provide assistance to Indian tribes or, in certain cases to the United States, on whether to file a petition seeking review. This early identification proved helpful in *United States v. Lara* when Project staff attorneys met with the U.S. Solicitor General to present the views of Indian country regarding whether the United States should file a petition for a writ of certiorari and the content of that petition.¹⁷ The Court granted review, reversed the decision of the Eighth Circuit, and affirmed the inherent authority of Indian tribes to prosecute non-member Indians for crimes committed on their reservations.

In *Lara*, the Project staff attorneys had prepared two amicus briefs and coordinated the preparation of two other amicus briefs: (1) the NCAI amicus brief which discussed the scope of congressional power in Indian affairs; (2) an amicus brief on behalf of eighteen individual Indian tribes which focused on the jurisdictional void created by the Court in *Duro v. Reina*¹⁸ which was addressed by Congress with an amendment to the Indian Civil Rights Act; (3) the State of Washington amicus brief joined by seven other states providing their views of the benefits of an Indian tribe exercising criminal jurisdiction over all Indians with the reservation; and (4) the State of Idaho amicus brief joined by five other states which focused on the double jeopardy issue. The Project viewed each amicus brief as an opportunity to support the United States position while providing the Court with a detailed presentation of the varied landscape of criminal jurisdiction issues in Indian country. The *Lara* case offered another unique opportunity for the Project. In preparation for oral argument in *Lara*, the Solicitor General invited attorneys from the Project Workgroup to participate in two separate moot court sessions to assist the United States in its presentation to the Court. Moot courts, including opportunities to conduct moot court arguments before the prestigious Georgetown Law Center Supreme Court Institute, became another key tool for the Project to utilize to improve tribal advocacy before the Court.

In OT04, the Court also granted review in *South Florida Water Management District v. Miccosukee Tribe of Indians* in which the Tribe had brought a citizen suit under the Clean Water Act contending that the District's pumping facility is required to obtain a discharge permit under the National Pollutant Discharge Elimination System.¹⁹ The district court and Eleventh Circuit held in favor of the Tribe concluding that the

¹⁷ *United States v. Lara*, 539 U.S. 987 (2003).

¹⁸ *Duro v. Reina*, 495 U.S. 676 (1990).

¹⁹ *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

canal and reservoir were two different bodies of water. Project staff attorneys filed an amicus brief on behalf of NCAI and the National Tribal Environmental Council to protect tribal water rights. The Supreme Court held that although the Clean Water Act applies to a transfer of polluted water from one body of water to another, it remanded the case to further develop the factual record on whether the canal and reservoir are two different bodies of water.

During this time, another important Indian law petition was being considered by the Court in *City of Sherrill v. Oneida Indian Nation*.²⁰ The Court issued a “CVSG” (Call for the Views of the Solicitor General). This practice by the Court generally occurs when the views of the federal government are relevant to a case in which the United States is not a party. In this case, the Court issued a CVSG asking the United States for its view as to whether the Court should grant review of a decision by the Second Circuit which held that certain lands purchased in fee by the Oneidas within their historic reservation were not subject to taxation by the City of Sherrill. Although the United States recommended denial, the Court granted review in *City of Sherrill* at the end of OT03. The Court had just granted review and consolidated the petitions in *Cherokee Nation v. Leavitt* and *Leavitt v. Cherokee Nation* in which the Tenth Circuit and Federal Circuit, respectively, had reached conflicting results on the same question—whether the United States is liable for its failure to fully pay contract support costs under the Indian Self-Determination and Education Assistance Act.²¹ The OT04 would prove to be one of the busiest periods for the Project and its expanding workload.

October Term 2004. In *City of Sherrill*, the Project staff attorneys worked with the Solicitor General, attorneys for the Oneida Nation, attorneys for other Indian tribes in New York, and tribal attorneys from around the country to coordinate a tribal amicus brief strategy.²² In addition to the amicus brief filed by the United States, four tribal amicus briefs were filed in support of the Oneida Nation: (1) the NCAI amicus brief on the principles of federal Indian law regarding the definition of Indian country, the standards regarding reservation disestablishment, and the rules of property taxation in Indian country; (2) a New York Tribes’ amicus brief that addressed the Non-Intercourse Act and its application to Indian tribes within New York; (3) an USET amicus brief that addressed the issue of federal recognition and tribal continuity; and (4) a “Brandeis” brief which addressed the “flood-gate” argument by the City of Sherrill and informed the Court regarding numerous cooperative agreements between Indian tribes, states, and local governments regarding issues related to taxation, land use and other jurisdictional matters. Unfortunately, the Court reversed the Second Circuit in an 8-1 decision.

In the *Cherokee Nation* cases, the Project staff attorneys worked together with the attorneys representing Cherokee Nation, Shoshone Paiute and other Indian tribes in the preparation of three amicus briefs to ensure that the U.S. Supreme Court would rule that Indian tribes are entitled to enforce their contracts in federal court when federal agencies breach the Terms of those contracts. The resolution of such disputes by the

²⁰ *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).

²¹ *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005).

²² *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).

U.S. Supreme Court had potentially far-reaching implications for Indian tribes administering programs pursuant to self-determination contracts or self-governance compacts. At that time, the United States had taken the position that since self-determination contracts are not government procurement contracts, Indian tribes are not entitled to the same protections afforded other government contractors. The Tribes prevailed in both cases, improving the overall win-loss record (OT01-OT04) to 4 wins, 3 losses, and two draws.

During OT04 the Project was asked to expand its substantive work in two new directions. First, in *South Dakota v. Cummings*, the State of South Dakota had filed a petition seeking review of decision by the South Dakota Supreme Court which had suppressed evidence seized by state law enforcement from a tribal member on the reservation.²³ The state sought to expand the *Nevada v. Hicks* decision to vastly increase the jurisdiction of states to enter Indian reservations in connection with crimes committed off-reservation.²⁴ The Project attorneys secured the pro bono assistance of a Supreme Court practitioner to work directly with the attorneys for the tribe and tribal member on the brief in opposition to the petition. The Project staff attorneys learned that a well-crafted brief in opposition is a potent weapon in demonstrating to the Court why the petition should be denied, thus securing the tribal victory in the court below. This experience paid immediate dividends in the denial of review in *South Dakota v. Cummings*, and continues to serve the Project well in the denial of review of a numerous petitions, in particular, those involving challenges to tribal criminal jurisdiction over non-member Indians, tribal civil jurisdiction over non-Indians, and tribal sovereign immunity.

Second, Project staff attorneys had been monitoring a case pending in the First Circuit in which the State of Rhode Island was challenging the authority of the Secretary of Interior to take land into trust for the Narragansett Tribe under Section 5 of the Indian Reorganization Act (IRA). In *Carcieri v. Norton*, a group of ten state Attorney Generals, led by South Dakota and Connecticut, submitted an amicus brief making several broad arguments that, if successful, would adversely affect tribes throughout Indian country. For the first time, the Project determined that it would be beneficial to become directly involved in an Indian law case pending in the lower courts. With the pro bono assistance from two law firms, the Project attorneys coordinated the writing of two amicus briefs on behalf of NCAI and USET, as well as 40 individually-named Indian tribes. In addition, NCAI requested and was granted shared oral argument time with the United States. This direct involvement in important Indian law cases at the lower court level, especially those likely to reach the Supreme Court, has been utilized strategically but sparingly due to the limited resources of the Project.

²³ *S. Dakota v. Cummings*, 679 N.W.2d 484 (S.D. 2004), *cert. denied*, 543 U.S. 943 (2004).

²⁴ *Nevada v. Hicks*, 533 U.S. 353 (2001).

D. The Tribal Supreme Court Project and a Changing Supreme Court (OT05-OT10)

October Term 2005. As the Project looked ahead to OT05, two major personnel changes on the Court were underway. Justice Sandra Day O'Connor had announced her resignation prior to the death of Chief Justice Rehnquist. Project staff attorneys had reviewed the qualifications and experience of the Chief Justice's eventual successor, Judge John G. Roberts, and had prepared a written report of their findings. The Project also began evaluating the impact created by the resignation of Justice Sandra Day O'Connor and was reviewing the qualifications of potential nominees to replace her on the Court. When Judge Samuel Alito was nominated by President Bush, Project staff attorneys reviewed his qualifications and experience and prepared another written report of their findings. Similar written reports were prepared for Judge Sonia Sotomayor as the nominee to replace Justice Souter in OT09, and for Solicitor General Elena Kagan as the nominee to replace Justice Stevens in OT10. The Rehnquist Court, which had the same nine Justices from OT94 to OT05, is now the Roberts Court with a young Chief Justice and three new, relatively young Justices. And as noted above, fewer and fewer Indian law cases are being heard and decided by the Roberts Court. Given the 0 for 7 win-loss record for tribal interests before the Roberts Court, this new development may not be all bad, but it certainly raises new challenges.

During the OT05, the Court only heard one Indian law case, *Wagon v. Prairie Band Potawatomi Indians*, in which the State of Kansas sought to apply its motor fuel tax against the Tribe for on-reservation sales to non-Indian motorists.²⁵ The machinery of the Project was put to work once again to coordinate and prepare four tribal amicus briefs: (1) the NCAI amicus brief which focused on the major tax principles in federal Indian law; (2) the National Intertribal Transportation Alliance amicus brief which discussed the importance of motor fuel taxes to Indian tribes due to the poor quality of road systems in Indian country and the disparity in funding between states and tribes for transportation infrastructure; (3) the National Intertribal Tax Alliance amicus brief which provided the Court with an overview of the numerous tax compacts entered into by tribes and states; and (4) the Kansas Tribes' amicus brief which discusses the violation by Kansas of its Act for Admission and its abandonment of prior state-tribal tax agreements. In all, over 30 individual Indian tribes signed on to the tribal amicus briefs. The Supreme Court reversed the Tenth Circuit in a 7-2 decision holding in favor of the State of Kansas.

The Project continued to work with tribes on the preparation of their briefs in opposition in cases they had won in the courts below, and to evaluate whether to file petitions in the cases lost. The Project staff attorneys also continued to monitor several major Indian law cases pending in the lower courts, with one extremely important case requiring direct involvement. In a significant reversal of longstanding precedent, the National Labor Relations Board (NLRB) issued a ruling in *San Manuel Indian Bingo & Casino* that the National Labor Relations Act (NLRA)—the federal law regulating

²⁵ *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

collective bargaining agreements between unions and employers in the private sector—would apply to tribally-owned businesses on Indian reservations.²⁶ The San Manuel Band of Mission Indians filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit in October 2005, and the Project staff attorneys, in close coordination with the Tribe's attorneys and attorneys throughout Indian country, prepared a tribal amicus brief which argued: (1) the NLRB's new interpretation is inconsistent with the historical context of the NLRA and with established rules that safeguard tribal self-government; and (2) the Board's new construction is unworkable and would, if accepted, abrogate tribal sovereignty. Following a disappointing outcome in the D.C. Circuit, the Project worked with the Tribe and its attorneys to recommend that, given the current composition of the Roberts Court, as well as the particular factual background and legal precedent of the case, the Tribe not file a petition seeking review by the Supreme Court.

October Term 2006. In OT06, for the first time in decades, the Court did not accept any Indian law cases for review. In all, 29 petitions for cert were filed in Indian law cases: 25 petitions were denied review; two petitions were dismissed under settlement agreements pursuant to Rule 46; and two petitions were carried over to the OT07. The Project staff attorneys worked with the attorneys in the two petitions dismissed under settlement agreements which were *Doe v. Kamehameha Schools*²⁷ and *Wright v. Coleville Enterprises*.²⁸ In certain cases, settlement and withdrawal of a petition is a good result when the question presented involves controversial subject matter before a very conservative Court. In coming to terms with this principle, Project staff attorneys began to collect data regarding the number and type of petitions being filed in Indian law cases which quickly led to tracking and summarizing cases based on subject matter. In OT06, most of the petitions in Indian law cases filed were grouped into one of five subject matter areas: tribal sovereign immunity (7 petitions); issues related to criminal jurisdiction (5 petitions); rights related to Indian lands (4 petitions); the trust responsibility of the United States (3 petitions); and issues related to taxing authority on-reservation (2 petitions). At the end of OT06, the First Circuit issued its opinion in *Carcieri v. Kempthorne* and upheld the Secretary's authority to take land into trust on behalf of the Narragansett Indian Tribe—what would prove to be a short-lived victory for Indian country.²⁹

In another development at the end of the OT06, the Agua Caliente Band of Cahuilla Indians announced that it had reached a settlement agreement with the California Fair Political Practices Commission (FPPC) wherein the Tribe agreed not to seek review of the California Supreme Court's 4-to-3 decision in which the court held against tribal sovereign immunity "[i]n light of evolving United States Supreme Court precedent and the constitutionally significant importance of the state's ability to provide a transparent election process with rules that apply equally to all parties who enter the

²⁶ *San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C. Cir. 2007).

²⁷ *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006), *cert. denied*, 550 U.S. 931 (2007).

²⁸ *Wright v. Colville Tribal Enter. Corp.*, 159 Wash.2d 108, *cert. denied*, 550 U.S. 931 (2007).

²⁹ *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007).

electoral fray.”³⁰ The Tribal Supreme Court Project had worked closely with the Tribe and its attorneys on these issues, including hosting a conference call to discuss the potential implications of a petition seeking review by the U.S. Supreme Court in this case.

October Term 2007. During OT07, the Court only granted review in one Indian law case: *Plains Commerce Bank v. Long Family Land & Cattle Co.*³¹ The Project staff attorneys had been asked to provide resources and amicus support for two Indian law-related cases, which had already been granted review early in the Term: *Exxon Shipping Company v. Baker* (punitive damages for oil spill harming Native fisheries)³² and *Crawford v. Marion County Election Board* (photo identification requirement for elections).³³ Although contact was made with the law firm representing the Long family shortly after the petition was filed, the Project did not follow up to assist in the preparation of the brief in opposition. This omission was a difficult lesson. The Project staff attorneys did respond quickly to the cert grant and were able to secure the pro bono services of a veteran Supreme Court practitioner and the resources of the University of Texas Law School’s Supreme Court Clinic. The Native American Rights Fund joined the litigation team as co-counsel representing the Long family. The question presented by the petitioner, Plains Commerce Bank, was: “Whether Indian tribal courts have subject matter jurisdiction to adjudicate civil tort claims as an ‘other means’ of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member owned corporation.”³⁴ In the tribal court proceedings, a unanimous jury had found in favor of the Long family on their breach of contract, bad faith and discrimination claims, and the general verdict was upheld by the Cheyenne River Sioux Tribal Court of Appeals. The federal district court and the Eighth Circuit upheld the tribal court’s jurisdiction.

On the merits, the Project Workgroup developed a tribal amicus brief strategy which included briefs submitted by the U.S. Solicitor’s General Office, the Cheyenne River Sioux Tribe, the National American Indian Court Judges Association, and others in support of tribal court jurisdiction. The bank was supported by several groups, including the State of Idaho (joined by eight other states: Alaska, Florida, Oklahoma, North Dakota, South Dakota, Utah, Washington, and Wisconsin), the American Bankers Association, the Association of American Railroads, and the Mountain States Legal Foundation. The Project worked closely with the attorneys representing the Long family and hosted a moot court oral argument at the University of Colorado School of Law. However, in another disappointing outcome, a sharply divided (5-4) Court took a significant step in diminishing the authority of Indian tribes over non-members conducting business on Indian reservations. One important footnote to the *Plains Commerce Bank* case is that Chief Justice Roberts chose to write the majority opinion

³⁰ Memorandum from Tribal Supreme Court Project on Update of Recent Cases (July 30, 2007) (on file at Tribal Supreme Court Project).

³¹ *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 552 U.S. 1087 (2008).

³² *Exxon Shipping Co. v Baker*, 554 U.S. 471 (2008).

³³ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

³⁴ Petition for Writ of Certiorari, *Plains Commerce Bank*, 552 U.S. 1087(No. 07-411).

himself and it was the first Indian law case since the addition of the Chief Justice and Justice Alito to the Court. Since then, they have both voted against tribal interests in every Indian law case to come before the Court.

October Term 2008. At the end of OT07, the Court granted review in *Carcieri v. Norton* following a decision by the en banc panel of the First Circuit which upheld the authority of the Secretary of Interior to take land into trust for the Narragansett Tribe.³⁵ Once again, the resources of the Project were maximized. The Tribal Supreme Court Project coordinated the preparation of four tribal amicus briefs in support of the United States: (1) the Narragansett Tribe amicus brief addressing issues arising under the Rhode Island Settlement Act; (2) the NCAI-Tribal amicus brief addressing issues arising under the IRA; (3) the Indian Law Professors' amicus brief providing information to the Court regarding the concept of "federal recognition" and development of the federal acknowledgment process; and (4) the Historians' amicus brief providing information to the Court regarding the history and development of federal policies leading up to the IRA. But writing for the majority, Justice Thomas, joined by Chief Justice Roberts, Justices Scalia, Kennedy, Breyer, and Alito, reversed the decision of the First Circuit with Justices Breyer, Ginsberg and Souter concurring in the judgment. The Court invoked the "plain meaning rule" and provided a strained, circular reading of a few sentences in the IRA to create different "classes" of Indian tribes. Given that the fundamental purpose of the IRA was to organize tribal governments and restore land bases for tribes that had been torn apart by prior federal policies, the Court's *Carcieri* ruling stands as an affront to the most basic principles underlying the IRA. However, Justice Breyer's concurrence, drawing directly from materials contained in the tribal amicus briefs, may well serve to limit the ultimate impact of the opinion, especially in relation to decisions being made at the administrative level.

During OT08, the Project also dedicated substantial resources in support of the petition in *Navajo Nation v. U.S. Forest Service* which sought review of a decision by an en banc panel of the U.S. Court of Appeals for the Ninth Circuit reversing a three-judge panel decision and holding that the U.S. Forest Service's approval of a permit allowing the use of recycled sewage waste-water to manufacture snow for a ski resort on the San Francisco Peaks—a sacred-site for many American Indian Tribes—does not violate the Religious Freedom Restoration Act ("RFRA").³⁶ The Project was able to secure the pro bono services of the Stanford Law School Supreme Court Clinic to prepare the petition in collaboration with the attorneys who represented the tribes before the Ninth Circuit. The Project also assisted in the development of an amicus strategy in support of the petition.

However, the Court did not grant review in *Navajo Nation v. U.S. Forest Service*, but did grant review in two other Indian law cases in which the reversal of lower court decisions favorable to tribal interests were highly likely: *United States v. Navajo Nation* (*Navajo II*), part of the on-going litigation between the Navajo Nation, Peabody Coal and the United States (as trustee) which reached the Supreme Court in 2003; and *State of*

³⁵ *Carcieri v. Norton*, 423 F.3d 45 (1st Cir. 2005).

³⁶ *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009).

Hawaii v. Office of Hawaiian Affairs in which the Supreme Court of Hawaii held that the State of Hawaii should be enjoined from selling or transferring “ceded lands” held in trust until the claims of the Native Hawaiians to such lands have been resolved. Although reversal appeared likely, the Project staff attorneys worked closely with the attorneys representing the Navajo Nation to prepare four amicus briefs in support of the Navajo Nation. And in *State of Hawaii v. Office of Hawaiian Affairs*, the Project worked with the attorneys representing OHA, and prepared an amicus brief on behalf of NCAI in support of Native Hawaiian interests.³⁷ Through the amicus strategy, the Project sought to limit the damage the Court might do to tribal interests in these cases—an emerging area of expertise. With little fanfare or surprise, the Court issued two unanimous decisions adverse to tribal interests.

October Term 2009. With the start of OT09, most of the attention and speculation was focused on the addition of Justice Sotomayor to the Court, as well as the possible retirement of Justice Stevens at the end of the Term. And for the second time in three years, the Court did not grant review in any Indian law cases during OT09. Nonetheless, the Project remained busy working on a few important Indian law cases at the cert stage, including *Harjo v. Pro-Football, Inc.*³⁸ and *Benally v. United States*³⁹—both involving racial bias, stereotypes and discrimination against Indians—and *Elliott v. White Mountain Apache* involving tribal court jurisdiction over non-Indians and exhaustion of tribal court remedies.⁴⁰ For example, in a very high-profile case, *Harjo v. Pro-Football, Inc.*, the D.C. Circuit had held that the doctrine of laches (*i.e.* long delay in bringing lawsuit) precluded consideration of a petition seeking cancellation of the “Redskins” trademarks owned by Pro-Football, even though the Trademark Trial and Appeals Board found that the trademarks disparaged Native Americans. The Project coordinated four amicus briefs in support of the petition seeking review by the Supreme Court: (1) the NCAI-Tribal Amicus Brief which summarized the efforts of the Native American community over the past forty years to retire all Indian names and mascots; (2) the Social Justice/Religious Organizations Amicus Brief which focused on the social justice and public interests present in the case; (3) the Trademark Law Professors’ Brief which supported and enhanced the trademark law arguments put forward by petitioners; and (4) the Psychologists’ Amicus Brief which provided an overview of the empirical research of the harm caused by racial stereotyping. Although the Court denied review, the Project had used the amicus briefs as an opportunity to further educate the Court on the issues related to racial bias, stereotypes and racial discrimination against Indians—issues which will return to the Court in the future.

In addition to its work before the Supreme Court, the Project continued to monitor Indian law cases pending before the lower federal courts and in the state courts. In certain cases, the Project became involved in the lower court litigation—coordinating resources, developing litigation strategy and/or filing briefs in support of tribal interests.

³⁷ *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009).

³⁸ *Harjo v. Pro-Football, Inc.*, 565 F.3d 880 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 631 (2009).

³⁹ *Benally v. United States*, 546 F.3d 1230 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 738 (2009).

⁴⁰ *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009).

During OT09, the Project assisted in the preparation of amicus briefs in a number of cases, including: *Patchak v. Salazar* (pending before the D.C. Circuit challenging trust land acquisition based on *Carcieri* and the status of the Tribe in 1934); *Water Wheel Camp v. LaRance* (pending before the Ninth Circuit on questions involving the scope of tribal court jurisdiction over non-Indian lessees); *Osage Nation v. Irby* (request for en banc review by Tenth Circuit on question of disestablishment of Osage Reservation denied); and *Colorado v. Cash Advance* (pending before the Colorado Supreme Court on the question of the sovereign immunity of tribal enterprises doing business outside the reservation). The Project renewed its efforts to monitor a substantial number of Indian law cases pending in the lower courts, and to update the cases by subject matter area, including: Post-*Carcieri* Litigation; Criminal Jurisdiction (Federal and State); Civil Jurisdiction (Tribal and State); Diminishment/Disestablishment; Indian/Tribal Status; Sovereign Immunity; Taxation; Treaty Rights; Religious Freedoms; and Trust Relationship. Hopefully, these continued efforts will help the Project identify trends or currents within distinct areas of Indian law that can be effectively addressed prior to reaching the Supreme Court.

October Term 2010. The start of OT10 included the induction of Justice Kagan to replace the retired Justice Stevens. As the former U.S. Solicitor General, Justice Kagan was recused in the two Indian law cases decided by the Court during OT10: *United States v. Tohono O'odham Nation*⁴¹ and *United States v. Jicarilla Apache Nation*⁴². At its opening conference, the Court considered eight petitions for writ of certiorari in Indian law cases, requesting the views of the Solicitor General in one Indian law case, *Thunderhorse v. Pierce* (state prison's enforcement of its grooming rules, including the prohibition of long hair on men with no exception for Native American religious practitioners), and denying review of the other seven Indian law petitions.⁴³ The denials of review preserved important victories in the lower courts in *Hoffman v. Sandia Resort & Casino* (tribal sovereign immunity) and *Hogan v. Kaltag Tribal Council* (recognition of tribal court judgments), cases in which the Project was able to work with the tribes and their attorneys on the briefs in opposition

Early in the Term, the Court granted review in *Madison County v. Oneida Indian Nation of New York* in which the Second Circuit had held that the Oneida Indian Nation is immune from suit in foreclosure proceedings for non-payment of county taxes involving fee property owned by the Tribe.⁴⁴ In a terse concurring opinion written by Judge Cabranes and joined by Judge Hall, two of the three judges on the Second Circuit panel agreed that they were bound by Supreme Court precedent upholding tribal sovereign immunity, but wrote that this decision “defies common sense” and “is so anomalous that it calls out for the Supreme Court to revisit *Kiowa* and *Potawatomi*.” In all, five amicus briefs, including an amicus brief on behalf of the State of New York joined by seven other states, had been filed in support of the petition.

⁴¹ *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723 (2011).

⁴² *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011).

⁴³ *Thunderhorse v. Pierce*, 364 F. App'x 141 (5th Cir. 2010), cert. denied, 131 S. Ct. 896 (2011).

⁴⁴ *Madison County, N.Y. v. Oneida Indian Nation of New York*, 605 F.3d 149 (2nd Cir. 2010), 131 S. Ct. 704 (2011).

To avoid another disastrous Supreme Court decision in the wake of *City of Sherrill*, the Project staff attorneys worked closely with the Nation's attorneys to determine whether a settlement could be reached or the case withdrawn. As a result of those discussions, a letter was filed informing the Court that the Nation had passed a tribal "Declaration of Irrevocable Waiver of Immunity" which waived "its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States." The Oneida Indian Nation recognized the inherent danger of the Court's review of the doctrine of tribal sovereign immunity under the particular facts in the case and informed the Court that it had taken this step "to clarify that, as contemplated by its prior posting of letters of credit covering taxes on all lands at issue in this case, it is prepared to make payment on all taxes that are lawfully due." Evidently, the Court was persuaded that the declaration and waiver moots the primary question presented. The Court vacated the opinion and remanded *Madison County v. Oneida Indian Nation of New York* to the Second Circuit.

Unfortunately, the Court had granted review and reversed the favorable lower court rulings in *United States v. Tohono O'odham Nation*; and *United States v. Jicarilla Apache Nation*. Both cases involved procedural aspects of litigation involving alleged breaches of the trust relationship between Indian tribes and the United States. The Project assisted with the development of the amicus strategy, the preparation of amicus briefs, and moot court oral argument in the cases. The overall win-loss record (OT01-OT10) had plummeted under the Roberts Court (0 wins) to 4 wins, 10 losses and 2 draws.

However, during OT10, another notable development occurred. The Court invited the Solicitor General to file a brief expressing the views of the United States in *Osage Nation v. Irby*, one of a number of cases the Project had been tracking involving disestablishment of Indian reservations, and one in which the Project staff attorneys had prepared an amicus brief in support of the petition. This practice by the Court is known as a CVSG. It is not unusual for the Court to CVSG in an Indian law case on occasion—once every two or three years—particularly when the petitioner is a state or local government challenging an Indian tribe. Thus, it was not unusual for the Court to CVSG in the case late last Term when the State of Alaska challenged the authority of the Tribal Court over a tribal member-child placement proceeding (cert denied).

But the Court issued a CVSG in a total of four Indian law cases during OT10 alone. In addition to *Osage Nation v. Irby*, the Court issued a CVSG in *Brown (formerly Schwarzenegger) v. Rincon Band* (IGRA "revenue" sharing); *Miccokuskee Tribe v. Kraus-Anderson* (enforcement of tribal court judgments); and *Thunderhorse v. Pierce* (Native American religious practices). In three of the four cases, Indian tribes and Indian interests have been on the top-side—the petitioners seeking review by the Court. Based in part on the recommendation of the United States, the Court denied review of all four petitions. Although it would be premature to draw any conclusions regarding these "requests" by the Court, these developments may be the result of the addition of Justice Sotomayor and Justice Kagan on the Court. Perhaps individual Justices are seeking a

better understanding of the issues being raised and the law being applied by the lower federal and state courts in Indian law cases.

What does all of this teach us? First and foremost, we have learned that the Roberts' Court is not friendly to tribal interests. Although the Project maintained its consistent, coordinated approach before the Roberts' Court, we lost all seven cases on the merits. Therefore, it is incumbent upon the Project and its supporters to re-examine the strategy, re-shift its approach and re-dedicate resources to meet the new challenges posed by the Court. One potential area ripe for consideration is the data from Part III. Indian Law Petitions and the Certiorari Process.

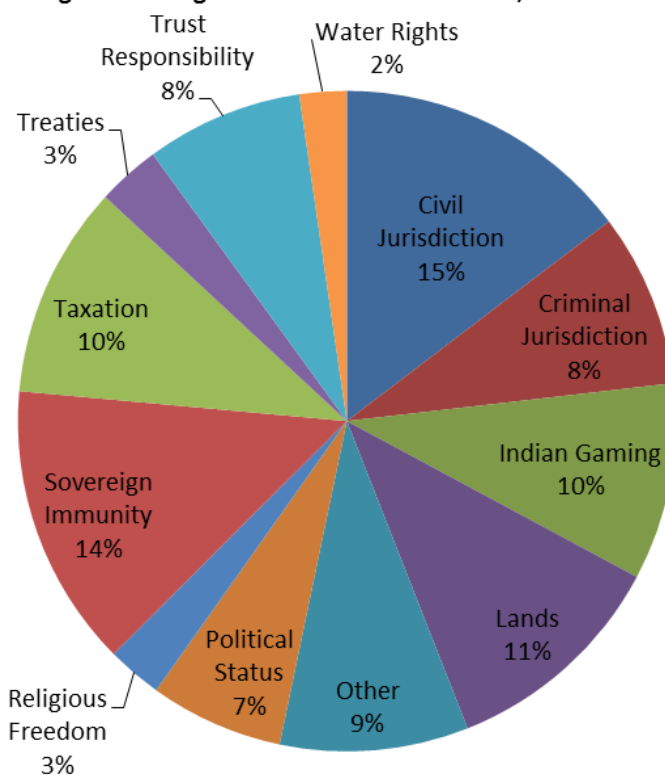
III. INDIAN LAW PETITIONS AND THE CERTIORARI PROCESS

A. Overall Results

1. Case Categories

As Figure 5 illustrates, no one category of Indian law dominated the question presented within the 259 petitions filed between OT01 and OT10. However, tribal jurisdiction—both criminal and civil jurisdiction—constituted an issue in nearly a quarter of the petitions (23%) coming before the Court. Challenges to the doctrine of tribal sovereign immunity were also abundant, the primary question presented in 36 of the 259 petitions, or nearly 14% of the time.

Figure 5: Categories of Certiorari Petitions, 2001-2010



Category	# of Cases
Civil Jurisdiction	38
Criminal Jurisdiction	22
Indian Gaming	25
Lands	29
Other	24
Political Status	17
Religious Freedom	7
Sovereign Immunity	36
Taxation	27
Treaties	8
Trust Responsibility	20
Water Rights	6
Total	259

Figure 6 breaks these numbers down and examines the categories of petitions filed year-by-year from OT01 to OT10. The numbers are generally too small to support any broad generalizations about the direction of Indian law. Still, there are some suggestive changes that point to possible trends. The spike in civil jurisdiction cases in 2001 and 2002—followed by a relative decline from over the rest of the period—might be the result of the Court's 2001 decisions in *Atkinson Trading Company v. Shirley* and *Nevada v. Hicks*, particularly since many of the cases hinged on the validity of tribal court judgments. There was no

spike in civil jurisdiction cases following the Court's 2007 decision in *Plains Commerce Bank v. Long Family*.

Figure 6 also reveals an increase in trust responsibility cases toward the middle and end of the period. This may be explained in part by two things: the first being the success in the lower courts in *Cobell*, which itself resulted in four separate petitions for certiorari, and the second being the drive by the United States to narrow the scope of the trust responsibility as evidenced in *Navajo Nation II* (OT08), *Jicarilla Apache* (OT10) and *Tohono O'odham* (OT10). The occasional spikes in Indian gaming cases, by contrast, seem to reflect local controversies that produced litigation. The OT03 petitions, for instance, included two cases resolving the legal status of pull-tab machines, and two cases stemming from Texas' prohibition on Indian gaming. Three of the OT08 cases stemmed from a California dispute over gaming license arrangements.

Figure 6: Cases Per Category By Term

	200 1	200 2	200 3	200 4	200 5	200 6	200 7	200 8	200 9	201 0	Tot al
Civil Jurisdiction	5	11	2	4	6	1	4	0	3	2	38
Criminal Jurisdiction	1	1	3	4	1	4	2	1	4	1	22
Indian Gaming	0	3	7	2	3	0	1	7	1	1	25
Lands	3	2	0	4	4	3	0	5	2	6	29
Other	0	3	3	3	0	0	1	2	4	8	24
Political Status	1	2	2	2	4	1	0	3	1	1	17
Religious Freedom	0	1	0	1	1	0	0	3	0	1	7
Sovereign Immunity	4	4	6	2	3	8	1	3	3	2	36
Taxation	5	2	1	4	2	4	1	2	3	3	26
Treaties	1	0	0	0	4	0	1	1	0	1	8
Trust Responsibility	0	2	0	3	0	4	1	3	4	3	21
Water Rights	0	0	0	0	0	2	0	1	1	2	6
Total	20	31	24	29	28	27	12	31	26	31	259

2. Outcome for Tribal Interests

As Figure 7 illustrates, the results for tribal interests in the lower courts were split nearly evenly over the period: tribes and their interests lost slightly more cases than they won in the lower courts, and only a small percentage of cases pitted tribes against each other.

Figure 7: Outcome for Tribal Interests, 2001-2010

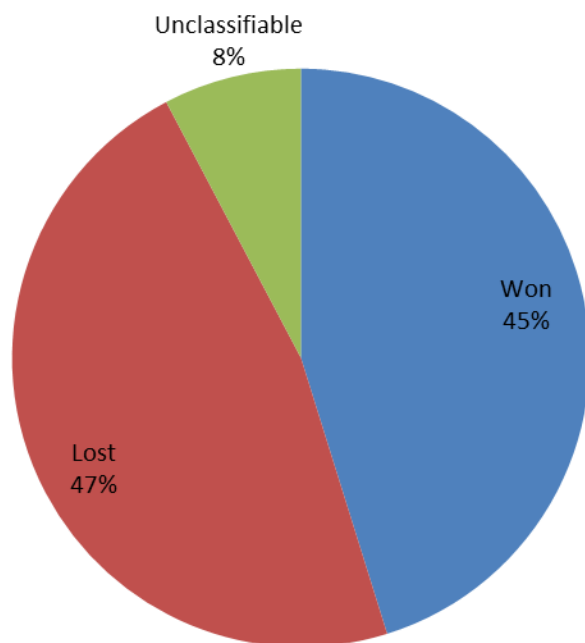
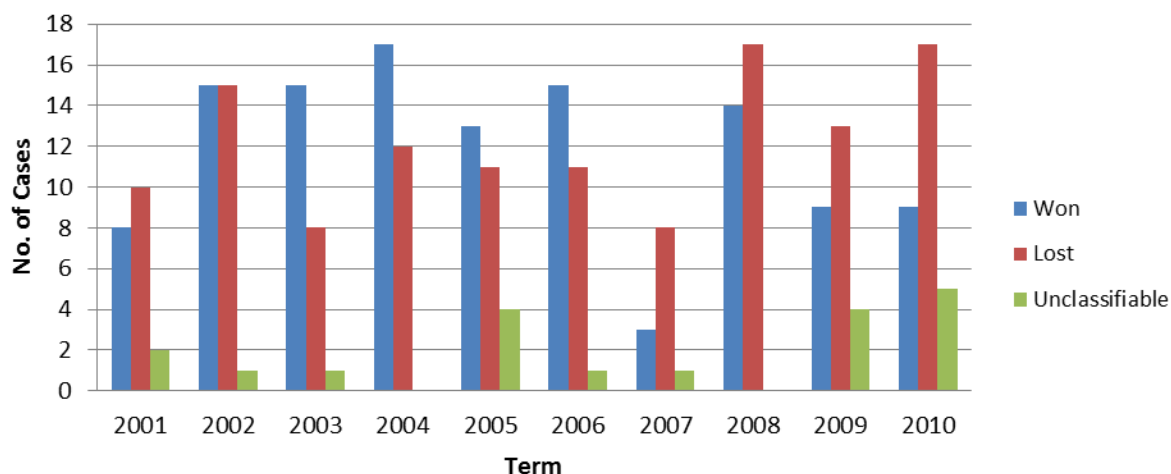


Figure 8 breaks down these results over time, but it does not provide any clear pattern. One notable development is that, in recent years, Indian tribes have fared worse than they did in the lower courts through the middle of the decade, when they won more cases. However, the numbers may be too small and the period examined too short to demonstrate an overwhelming trend.

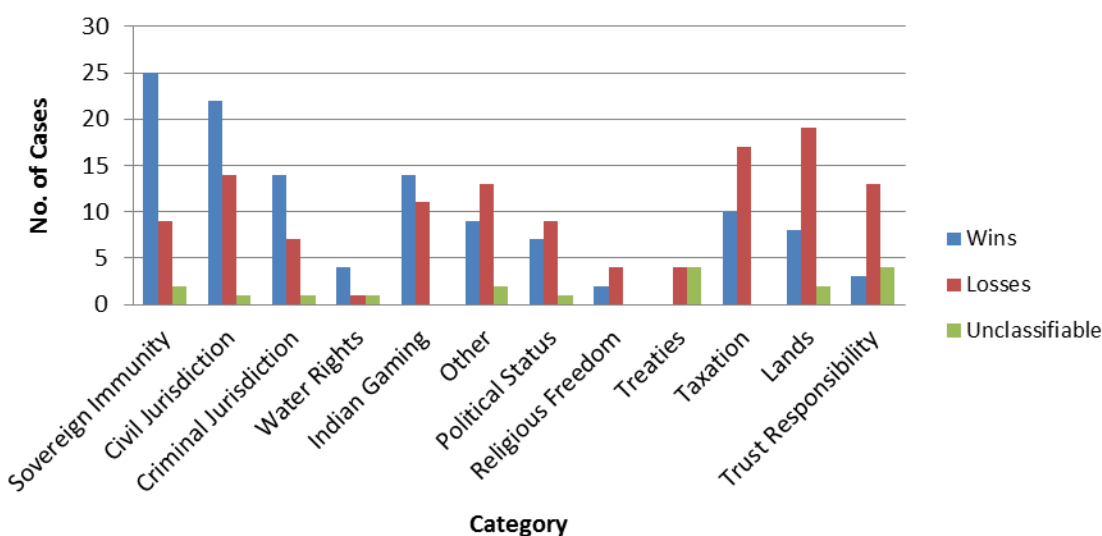
Figure 8: Outcomes for Tribal Interest by Term



Clearer trends are evident when the outcome for tribal interests in the lower courts is categorized by the question presented. As Figure 9 illustrates, tribal interests prevailed far more often in certain disputes, particularly those involving sovereign immunity, civil jurisdiction and criminal jurisdiction, and frequently lost in cases concerning taxation, lands, and trust responsibility. In part, this seems to reflect the state of doctrine. For example, during this period, the lower federal courts generally accepted tribal sovereign immunity as an absolute bar to suit, and declined to carve out any exceptions. This reflects, at least up to this point in time, a strong adherence to the Supreme Court's 1998 decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*.

Although the doctrine on tribal civil jurisdiction remains less settled, the Court's 1981 decision in *Montana v. United States* has emerged as the "pathmarking" case for lower federal courts to determine the scope of tribal authority over non-Indians. Surprisingly, many of the cases which challenged tribal civil jurisdiction involved suits by tribal members against the tribes themselves. These were disputes in which the federal and state courts largely refused to intervene. In the area of tribal criminal jurisdiction, the Court's OT03 decision in *United States v. Lara* helped clarify doctrinal ambiguities for the lower courts in relation to the question of inherent tribal authority to prosecute non-member Indians for crimes committed on their reservations.

Figure 9: Outcomes for Tribal Interests by Category



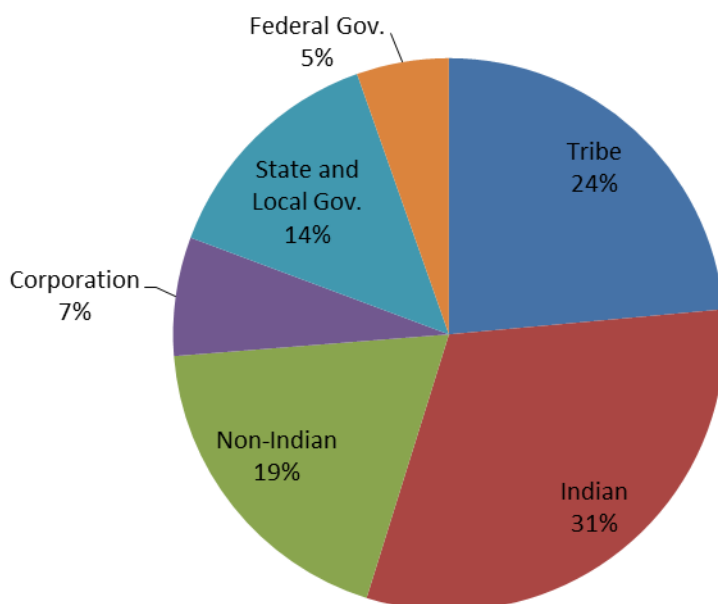
	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Total
Won	8	15	15	17	13	15	3	14	9	9	109
Lost	10	15	8	12	11	11	8	17	13	17	105
Unclassifiable	2	1	1	0	4	1	1	0	4	5	13
Total	20	31	24	29	28	27	12	31	26	31	259

Another factor probably played an even more significant role in determining outcome: the nature of tribes' opponents. As can be seen in Figure 12, *infra*, the opponents of tribal interests in suits involving sovereign immunity and civil jurisdiction were often individuals—usually non-Indians in cases involving tribal sovereign immunity, a mixture of Indians and non-Indians in cases involving tribal civil jurisdiction. By contrast, in cases involving taxation, status of lands, and the nature of the trust responsibility, tribes and individual Indians almost invariably confronted the federal government and state governments as opponents—usually the state and local governments in taxation and lands cases, and almost invariably the federal government in trust cases. As discussed below, the data bears out what common sense would suggest: tribal interests were considerably less successful against government-opponents than against individual litigants. The sophistication and effectiveness of the tribe's opponent, in other words, probably explains much of the variance in tribal wins and losses across the categories.

3. Party-Type

Based on the numbers, as one would expect, Indian tribes were the most common litigants in Indian law cases reviewed for certiorari (a party in 57% of the cases). They were followed by state and local governments (40%), individual Indians (36%), the federal government (32%), individual non-Indians (22%), and corporations (13%). However, these parties were not evenly divided between petitioner and respondent, nor were the proportions the same across all categories of cases.

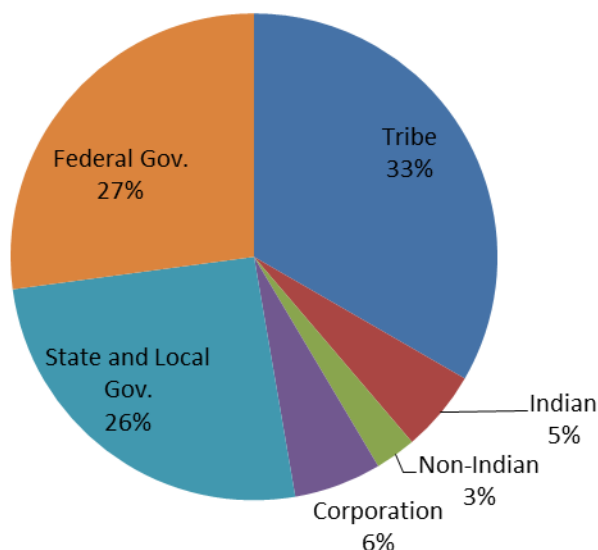
Figure 10: Petitioner Type, Cert. Petitions, 2001-2010



Instead, as Figure 10 shows, individuals, both Indian (31%) and non-Indian (19%), were much more likely to be the petitioner in a case. Clearly, over the past ten Terms, individuals filed 50% of all petitions—a fact which may reflect a lack of success

in the lower courts in challenging tribal jurisdiction or sovereign immunity. In fact, of the 21 Indian law petitions granted by the Court, not one involved a petition filed by an Indian or non-Indian individual.

Figure 11: Respondent Type, Cert. Petitions, 2001-2010



Individuals, by contrast, were very rarely the respondents to a petition for writ of certiorari (8%). Instead, the federal government (27%) and state governments (26%) together constituted more than half of the respondents in Indian law cases. Tribes were slightly more likely to be a respondent (33%) than a petitioner (24%), although in many of these cases the lower appellate court simply reaffirmed the grant of sovereign immunity by the lower trial court. Corporations were petitioners (7%) and respondents (6%) in roughly equal proportion.

Figure 12: Party-Type by Category 2001-2010

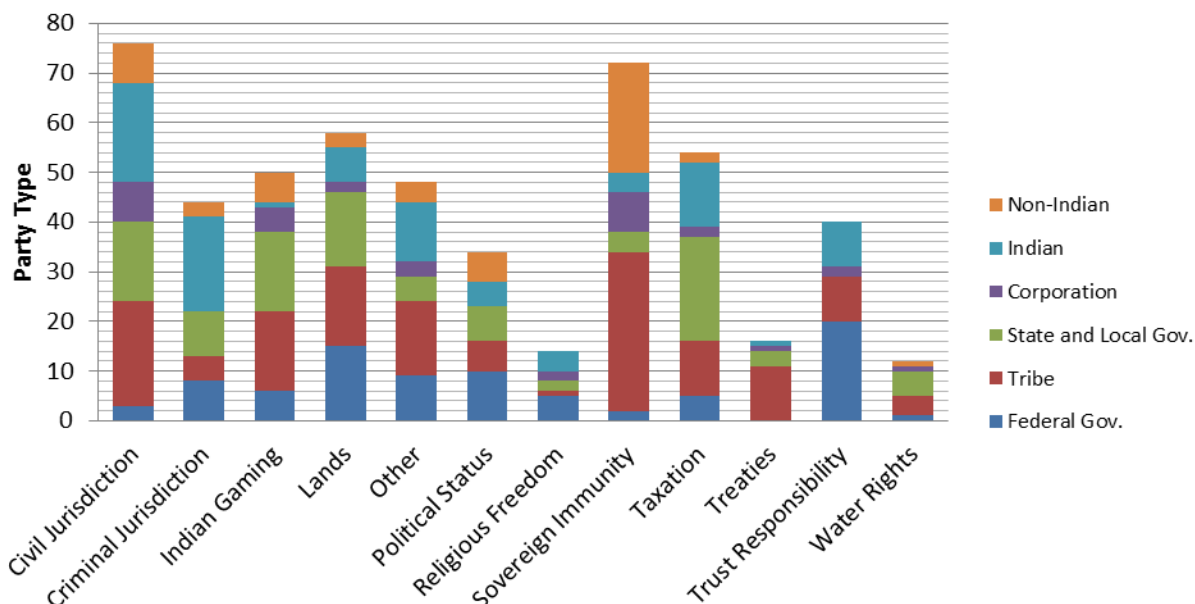


Figure 12 tracks the total number of each type of party in each case category, and demonstrates that parties were also unevenly spread among the various categories. Not surprisingly, tribes and non-Indians constituted the parties in the vast majority of sovereign immunity suits. Trust responsibility cases, by their nature, usually pitted the federal government against either tribes, or individual Indians. Taxation disputes primarily involved state and local governments contending with tribes, or, more frequently, individual Indians. Individual Indians were also the predominant litigants in cases concerning criminal jurisdiction, against either the state or federal government.

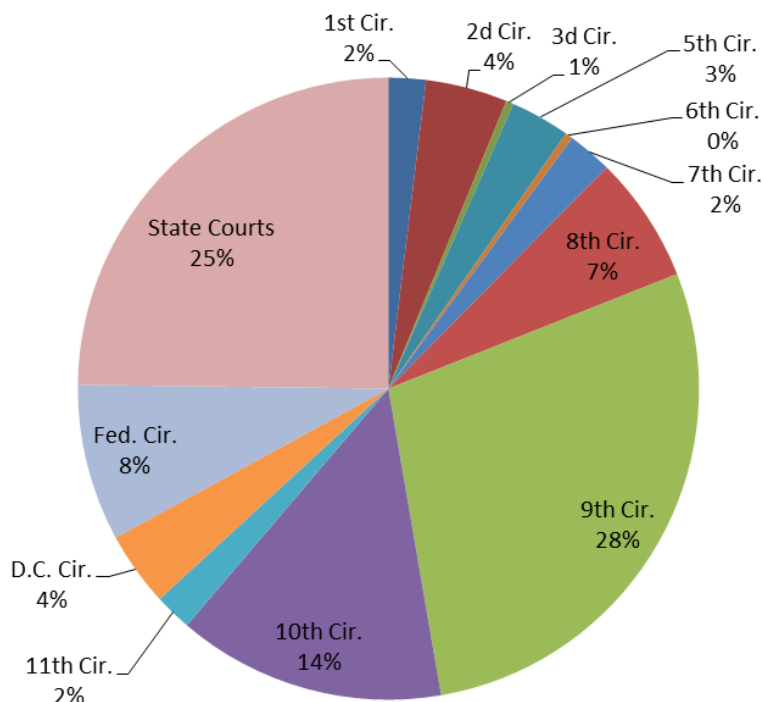
These data demonstrate that the type of litigant varied significantly between petitioners and respondents, and across case categories. Individual non-Indians and Indians were usually the petitioners, rarely the respondents, and often litigated issues of jurisdiction and sovereign immunity. By contrast, governments—state, local, and federal—usually prevailed in the lower court, and, while a significant party in many categories of dispute, played a particularly prominent role in questions of civil jurisdiction, Indian gaming, taxation, and trust responsibility. Part III.c, *infra*, will analyze the petitions by party-type more thoroughly.

B. Lower Courts

Of the 259 petitions for writ of certiorari filed in Indian law cases, 25% came from state court decisions. The other three-quarters came from the federal courts, which would be expected given the prevalence of federal question jurisdiction in Indian law disputes. Geography determined the prominence of certain circuits over others: 28% of the petitions came from the Ninth Circuit; 14% came from the Tenth Circuit; and 7% came from the Eighth Circuit. The Federal and D.C. Circuits together constituted 12% of petitions, many of which addressed trust responsibility or similar questions of tribal-federal relationship. By contrast, only one petition came from the Third Circuit (which

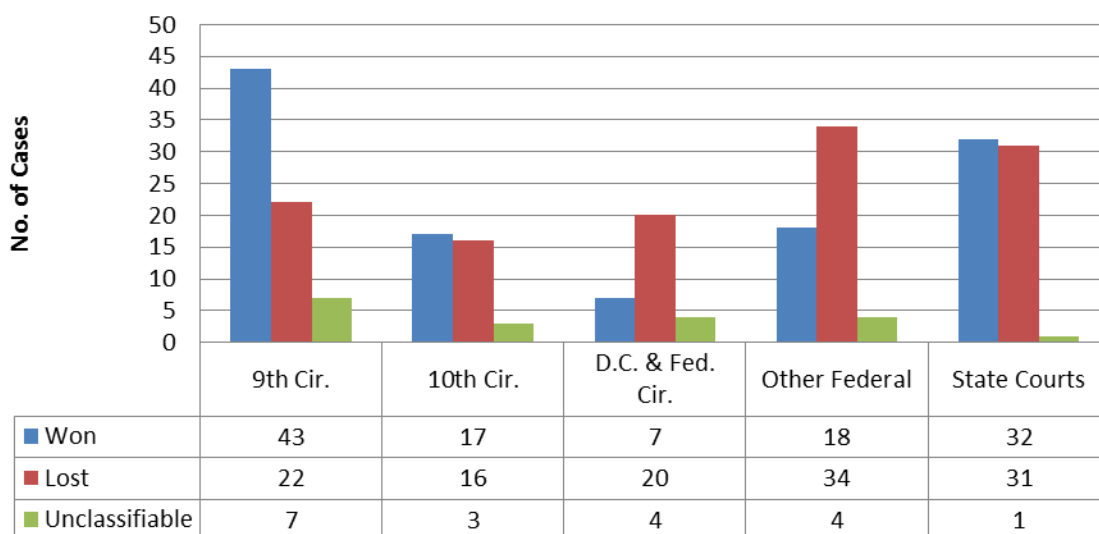
contains no federally recognized tribes) and none came from the Fourth Circuit (which contains two).

Figure 13: Indian Law Certiorari Petitions by Lower Court, 2001-2010



Based solely on petitions for writ of certiorari filed, Figure 14 demonstrates that tribal interests did not fare equally in all courts over the past ten years. In the Ninth Circuit, tribal interests were considerably more successful than in any other court, winning nearly twice as many cases than they lost (43 wins versus 22 losses). In the Tenth Circuit and in the State Courts, tribal interests won just slightly more than they lost. In the D.C., Circuit, the Federal Circuit and all other Circuits, tribal interests lost substantially more cases than they won. This probably does not reflect any intended bias on the part of the courts. Rather, the Ninth and Tenth Circuits are located within the heart of Indian country and hear substantially more Indian law cases involving a wider range of issues than the other courts. By contrast, the D.C. and Federal Circuits deal extensively with cases by tribes against the federal government on issues of trust responsibility and tribal recognition, in which tribes usually did not prevail.

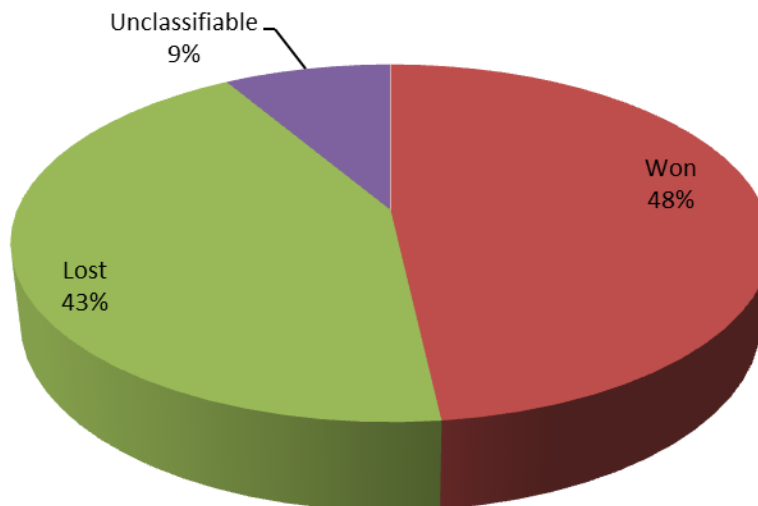
Figure 14: Outcome for Tribal Interests by Court



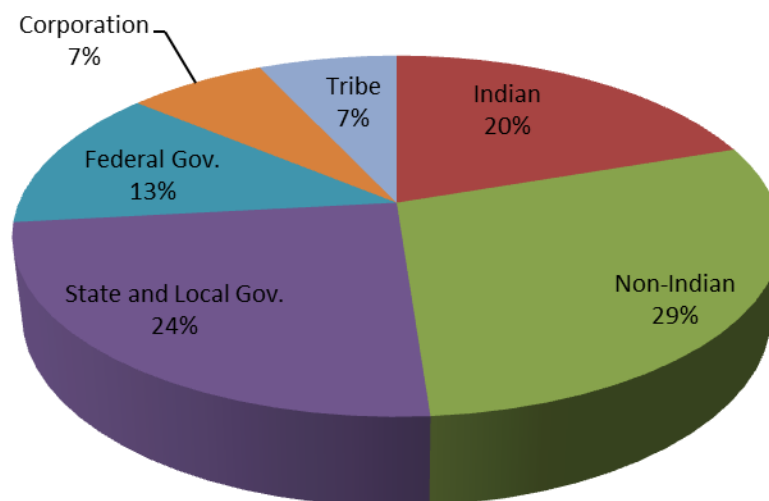
C. Analysis by Party

1. Tribe as a Party

As noted above, Tribes were parties in 57% of cases: 24% as petitioners and 33% as respondent. Since the Court only granted certiorari in 21 of the 259 Indian law petitions, the outcome in the lower courts was usually the final decision in the case. Based solely on petitions for writ of certiorari filed, the results for tribal interests generally tracked the proportion between instances where the tribe was a petitioner (lost below) and when the tribe was a respondent (won below): Figure 15 shows that tribes won (48%) slightly more cases than they lost (43%) in the lower courts.

Figure 15: Outcomes for Tribal Interests when Tribe was a Party, 2001-2010

However, as illustrated in Figure 16, tribes did not prevail evenly against all types of opponents. Tribes tended to be successful against individuals, and less so when their opponents were the federal, state, and local governments.

Figure 16: Opponent-Type when Tribe was Respondent, 2001-2010

By contrast, as Figure 17 highlights, when tribes were the petitioner, federal, state, and local governments constituted over two-thirds (67%) of respondents, reflecting tribes' general lack of success below. Corporations also constituted a sizeable proportion of respondents (16%), as did litigation involving other tribes (10%).

Individuals, by contrast, rarely prevailed below against tribes; non-Indians made up only 5% of respondents, and Indians made up only 2%.

Figure 17: Opponent-Type When Tribe was Petitioner, 2001-2010

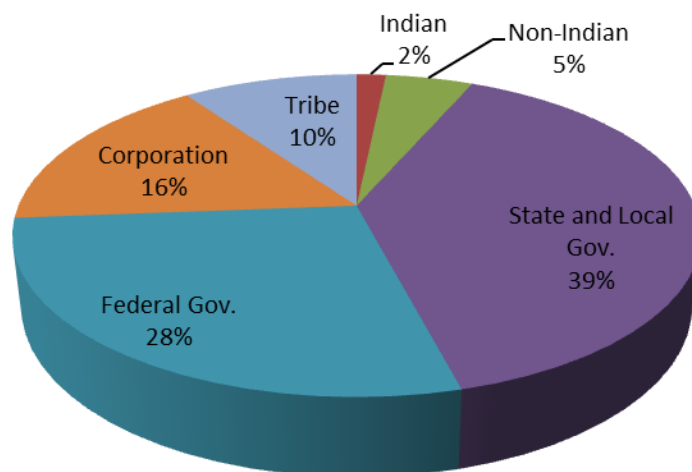
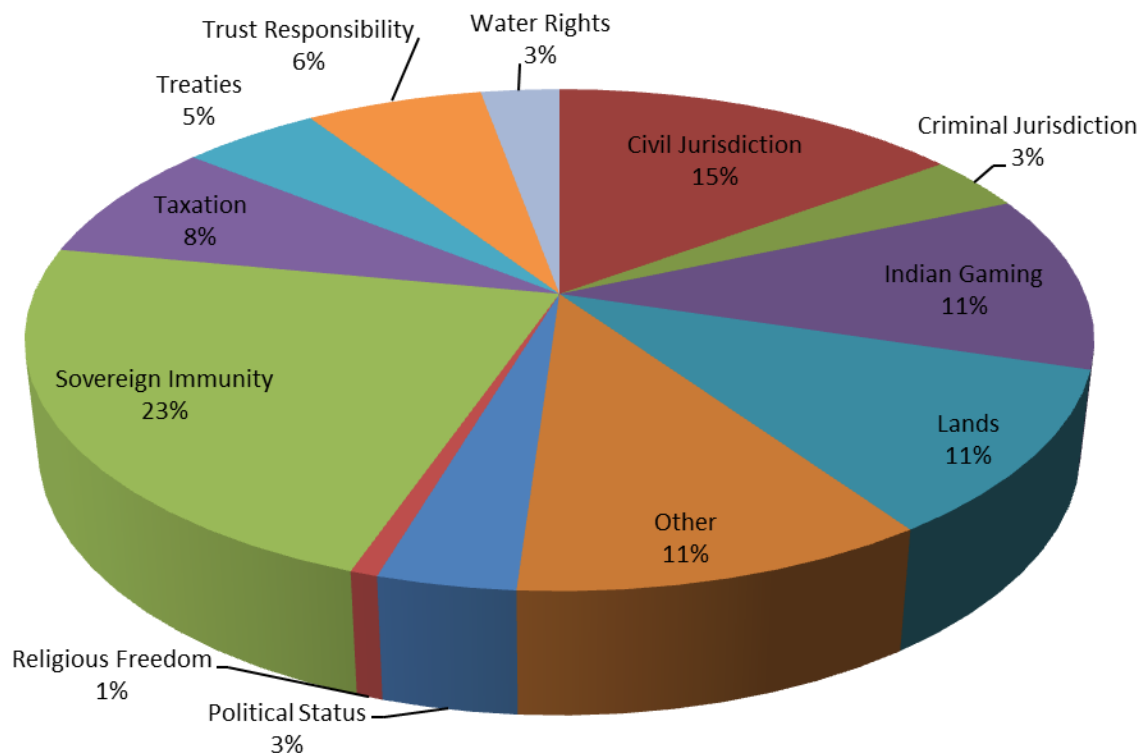
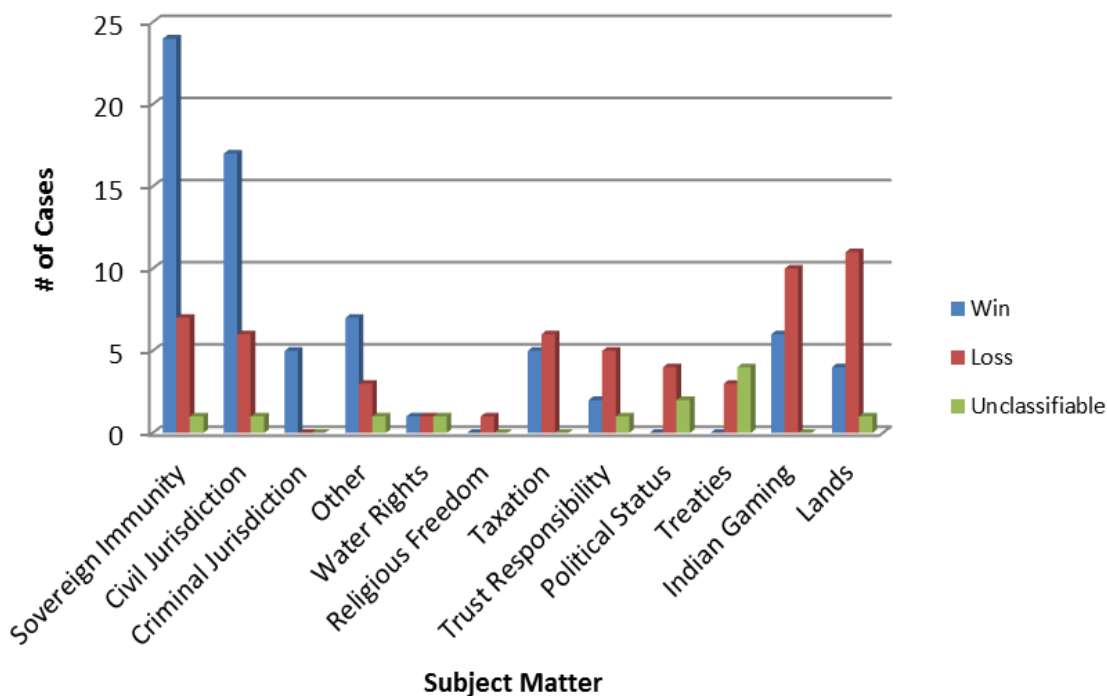


Figure 18 shows the case categories involved when the tribe was a party. Unsurprisingly, sovereign immunity constitutes the largest issue litigated, followed by civil jurisdiction, Indian gaming, and lands. Tribes were rarely parties in questions of criminal jurisdiction, since those cases usually involved disputes between individual Indians, the federal government, and state governments.

Figure 18: Case Categories When Tribe was a Party, 2001-2010

As Figure 19 demonstrates, Indian tribes were not equally successful in all categories of cases. It is illustrative to compare Figure 19 below, which shows the outcome for tribal interests by category in only cases where the tribe was a party, with Figure 9, *supra*, which shows the same information for all cases. As expected, tribes fared best in cases involving sovereign immunity and civil jurisdiction, and poorly in lands questions. They were more successful in taxation cases, however, than tribal interests generally, and less successful in cases involving Indian gaming.

Figure 19: Outcome For Tribal Interests When Tribe was a Party by Category

Explanations for these differences are suggested by the examination of the general constellation of these cases. Most of the other taxation cases were brought by individual Indians, whose claims were often weaker and were, perhaps, less sophisticated litigants. By contrast, most of the Indian gaming cases without tribal parties consisted of non-Indians attempting to challenge state or federal law authorizing Indian casinos. Courts generally disfavored these suits and routinely sided with tribal interests in upholding state and federal power to allow tribal gaming. In other words, Indian tribes were generally more successful in court than individual litigants, but were less successful than state and federal government parties.

To summarize, tribes as parties faced a dual role. As respondents, they, like the federal government and state governments, often defended the status quo against individual Indians and non-Indians. In these cases, they were usually successful. However, as petitioners, tribes behaved more like individual litigants, attempting to modify state or federal policy concerning taxation, gaming, lands, or treaty rights. In this latter category, courts generally sided against tribal interests and found for federal, state, and local governments in these cases.

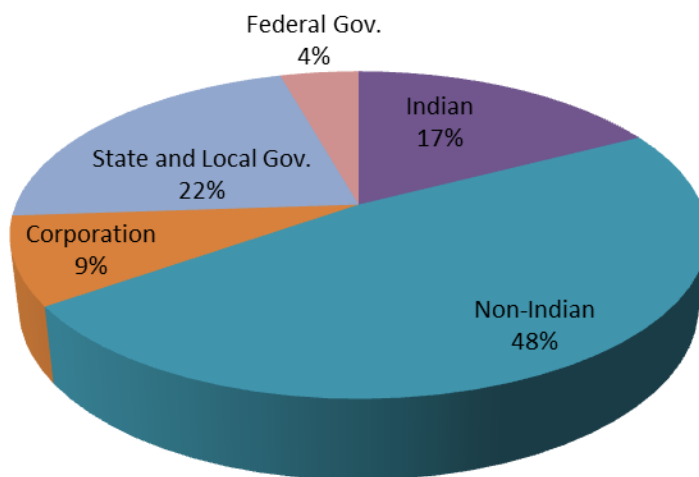
2. Federal Government as a Party

The federal government was a party in 32% of cases where Indian law petitions were filed: 27% as respondent and 5% as petitioner. It played, however, a dual role with respect to tribal interests. In nearly one-third of cases to which it was a party, the federal government litigated on behalf of tribal interests. But in over 60% of the cases, the

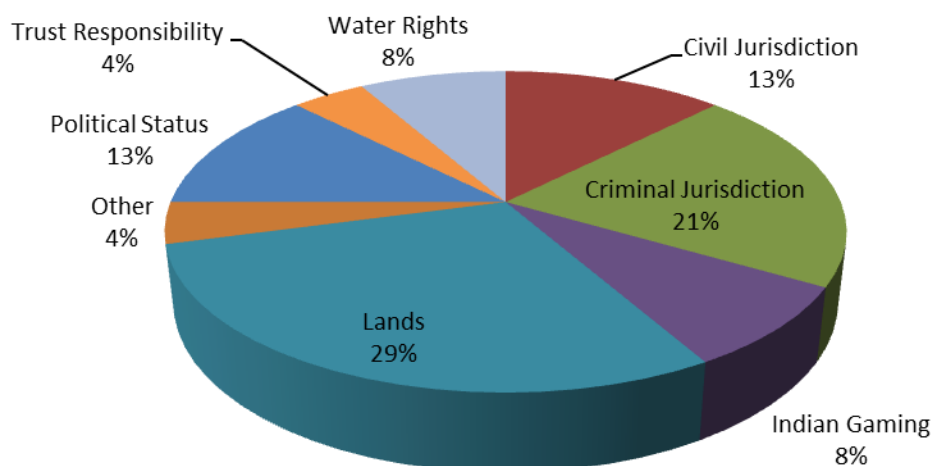
federal government was adverse to tribal interests. (The remaining cases represent disputes *between* tribes, and therefore no clear role can be assigned). To properly analyze the role of the federal government, therefore, it is necessary to separate these two types of cases.

Tribes generally did very well in the lower courts when the federal government litigated their interests. Of the Indian law cases decided by the lower courts, tribal interests prevailed in 21 out of 23 cases or 91% of the time. Figure 20 illustrates the petitioner-type in these cases. Individual Indians were the petitioners almost exclusively in criminal jurisdiction cases, as in *United States v. Lara*, when they challenged aspects of tribal sovereignty. Non-Indians and state and local governments, by contrast, challenged a variety of federal pro-tribal regulations, including hiring preferences, land-into-trust decisions, and authorizations of tribal gaming. The federal government was the petitioner in only two cases where it defended tribal interests: one, *Lara*, was decided favorably by the Supreme Court; the other, *United States v. Pataki*, pitted the federal government against New York over long-standing Indian land claims.

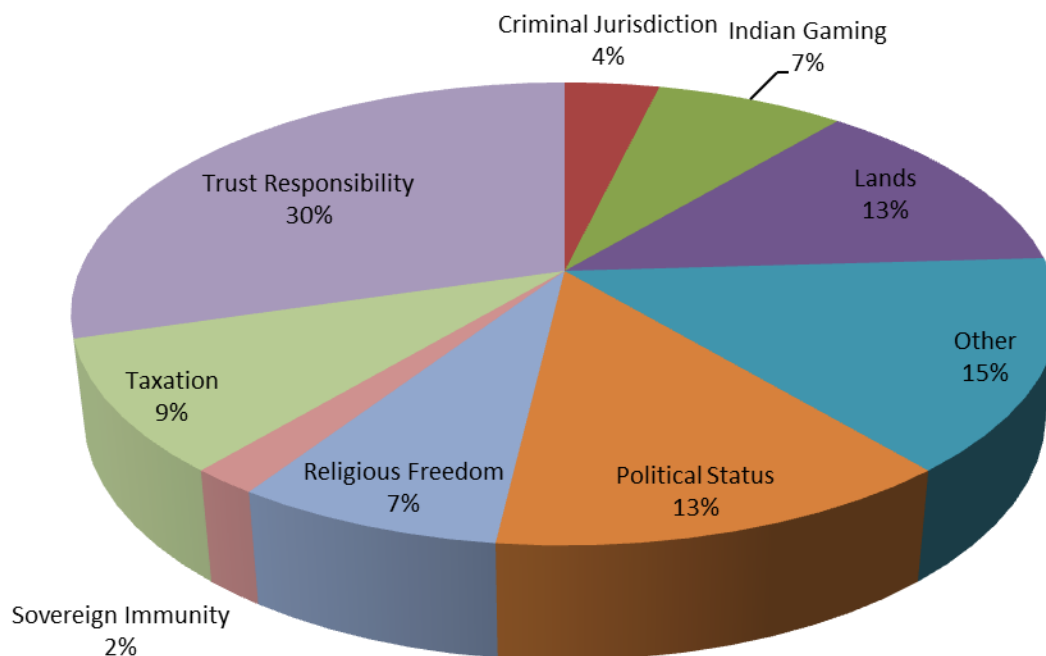
Figure 20: Petitioner-Type When Pro-Tribal Federal Party was Respondent



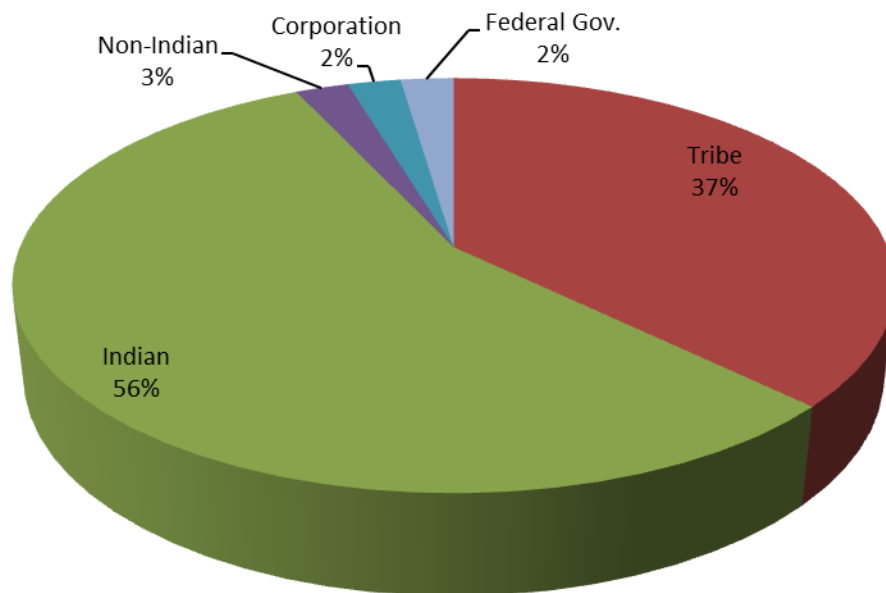
It is also interesting to note the variety of tribal interests represented by the federal government. As Figure 21 illustrates, lands and criminal jurisdiction were the largest categories, followed by civil jurisdiction and political status. The political status cases involved questions of federal recognition of tribal entities, voting rights, and Indian preference.

Figure 21: Cases with Pro-Tribal Federal Party by Category

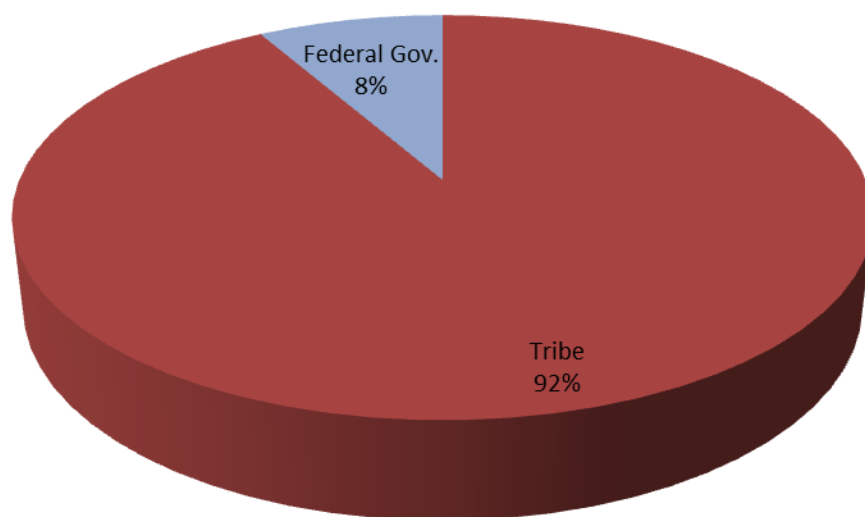
Tribal interests fared considerably worse when the federal government was the adverse party in the lower courts. Indian tribes only won 6 (11%) of these cases, and lost 45 (83%). As is evident in Figure 22, over a quarter of these cases (30%) involved the federal trust responsibility. A number of others addressed questions of political status, particularly tribal recognition, and religious freedom. The religious freedom cases generally involved individual Indians challenging federal laws that they alleged burdened their religious practice, such as the Bald and Golden Eagle Protection Act (challenged in three separate prosecutions).

Figure 22: Cases with Adverse Federal Party by Category

The federal government was usually the respondent when adverse to tribal interests. Figure 23 breaks down the government's opponents in such instances. Over half the petitioners were individual Indians, many of them challenging adverse decisions concerning trust responsibility, taxation, religious freedom, or political status; tribes made up over a third of petitioners, often in cases involving disputes over lands, recognition, trust responsibility, or contract support costs under government contracts.

Figure 23: Petitioner-Type When Adverse Federal Party Was Respondent

When it acted adversely to tribal interests, the federal government was the petitioner in only ten cases. As Figure 24 illustrates, the vast majority of these cases were against tribes. These particular cases were especially likely to be granted certiorari by the Court. Of the eleven cases with a federal petitioner and tribal respondent, the Court agreed to hear eight (73%, well above the 8% average). Tribes prevailed in two of the eight cases in the highest court: *United States v. White Mountain Apache* (OT04) and *Leavitt v. Cherokee Nation* (OT02).

Figure 24: Respondent-Type When Adverse Federal Party Was Petitioner

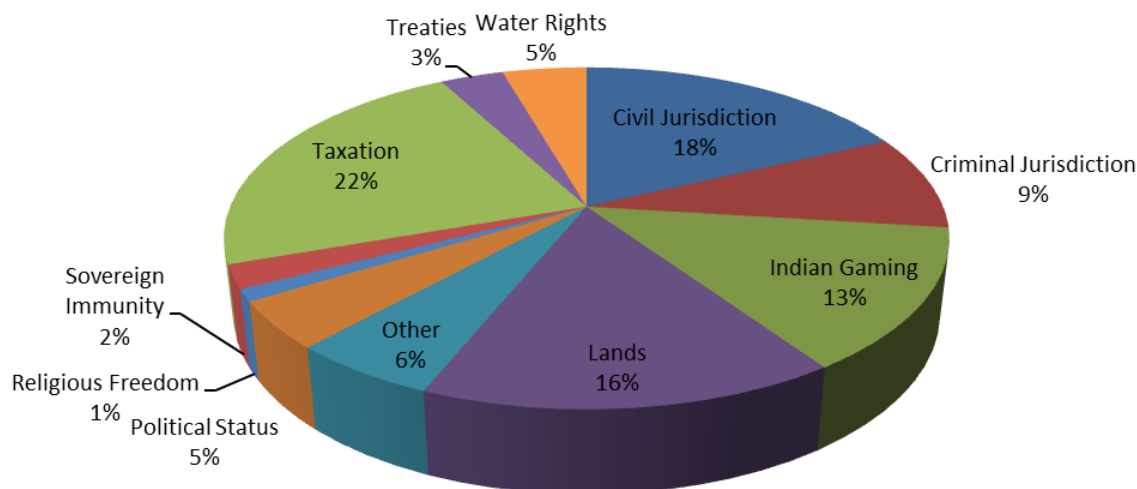
The data for the past ten years persuasively demonstrate that the federal government remains a formidable litigant, both for and against tribal interests. Not only did the federal government frequently prevail in the lower courts, but, in the instances when tribes managed to secure lower court victories, the federal government frequently obtained Supreme Court review. Of the six overall victories for tribal interests over an adverse federal party, three came through a Supreme Court decision.

3. State and Local Governments as a Party

State and local governments were also a major player in Indian law litigation during this period: they were parties in 40% of cases, 14% as petitioner, 26% as respondent. To a lesser extent than the federal government, they played a dual role in Indian law litigation. Occasionally, they appeared in court to defend tribal interests, as they did in 19% of the cases. These cases can be easily summarized. Most of them involved suits by non-Indians (although sometimes individual Indians or other local governments) challenging on equal protection grounds state policies that allegedly favored Indians. Indian gaming issues also contributed to many of the suits, as individuals challenged state decisions to enter into tribal-state gaming compacts. Tribal interests usually prevailed in these suits: of seventeen cases, the tribal interest prevailed in fifteen (88%).

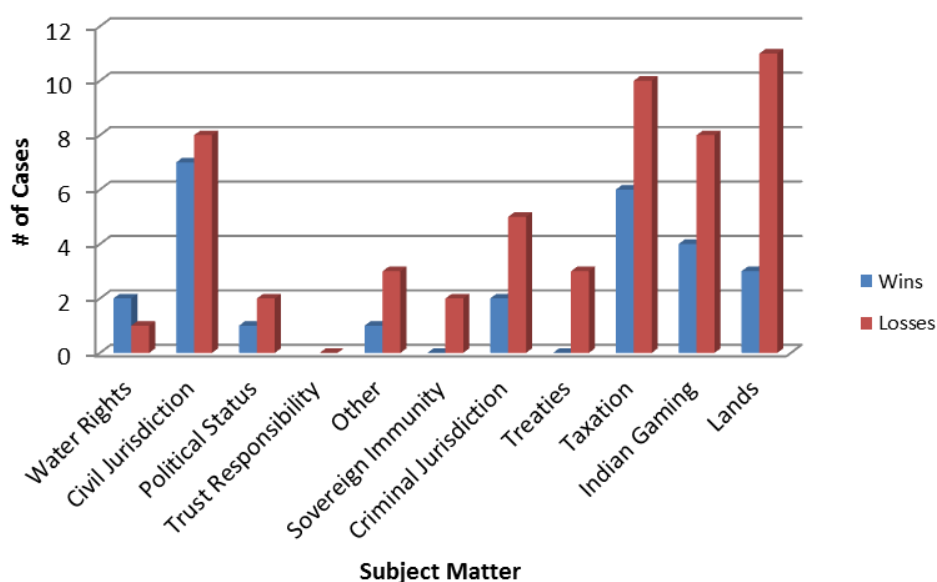
More frequently, though, state and local governments were adverse to tribal interests (in 82% of the cases in which petitions were filed). As a general matter, tribal interests did not fare well against state and local governments, although they fared better than against the federal government. In the ten-year period, tribal interests prevailed in almost one-third (31%) of the cases, but lost in two of every three cases (66%).

Figure 25: Cases with Adverse State/Loc. Gov't Party by Category



As Figure 25 illustrates, disputes between state and local governments and tribal interests focused on certain key areas. Taxation and civil jurisdiction were the most common; Indian gaming and lands also figured prominently. Figure 26 demonstrates that, while Indian interests did poorly against states in all categories, they prevailed most often in questions of civil jurisdiction. In cases centered on taxation, gaming, and lands, tribes and their interests lost by a wide margin. In the case of lands, courts generally disfavored the revival of long-standing claims and barred them on the basis of laches, statutes of limitation, or *res judicata*.

Figure 26: Outcome for Tribal Interests against Adverse State/Local Gov. Party by Category



As Figure 27 and Figure 28 illustrate, tribes and individual Indians were the most common opponents of state and local governments. The higher proportion of tribes and federal parties as respondents reflects their higher success rate in the lower court. States enjoyed considerable success as petitioners seeking review by the Supreme Court, although not to the same extent as the federal government. The Court granted certiorari in 35% of cases where a state and local government was the petitioner. In the five Indian law cases argued before the Court on the merits where state and local governments were adverse to tribal interests, the Court reversed rulings favorable to tribal interests and sided with the state and local government in three cases, with the other two resulting in a draw with no clear winner. By contrast, the Court did not grant review in a single case where a state or local government was the respondent. These trends helped produce the unfavorable results for tribes when litigating against state and local governments.

Figure 27: Respondent-Type When Adverse State/Local Government Was Petitioner

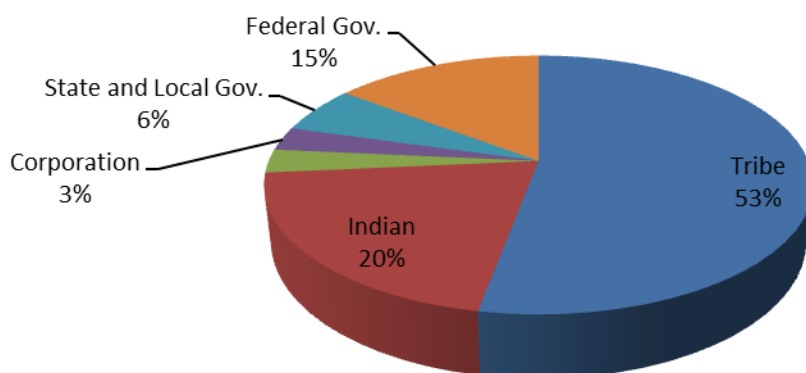
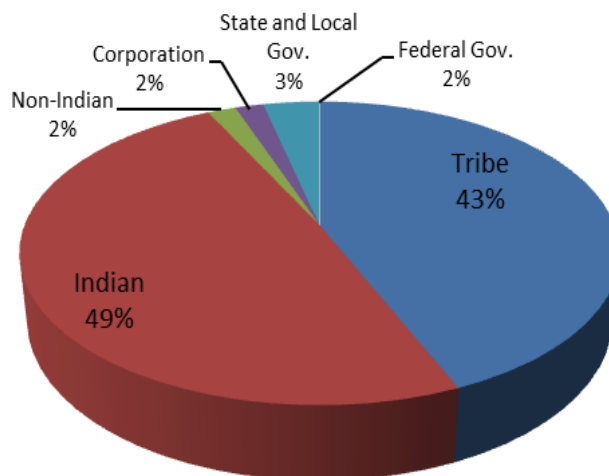


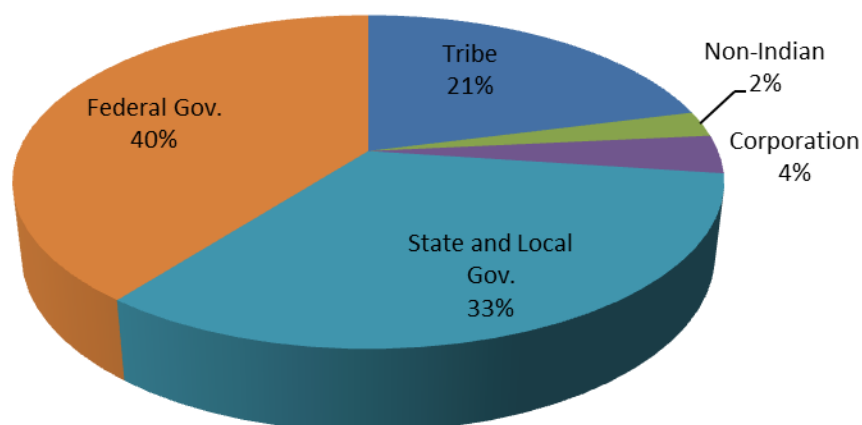
Figure 28: Petitioner-Type When Adverse State/Local Gov't Was Respondent



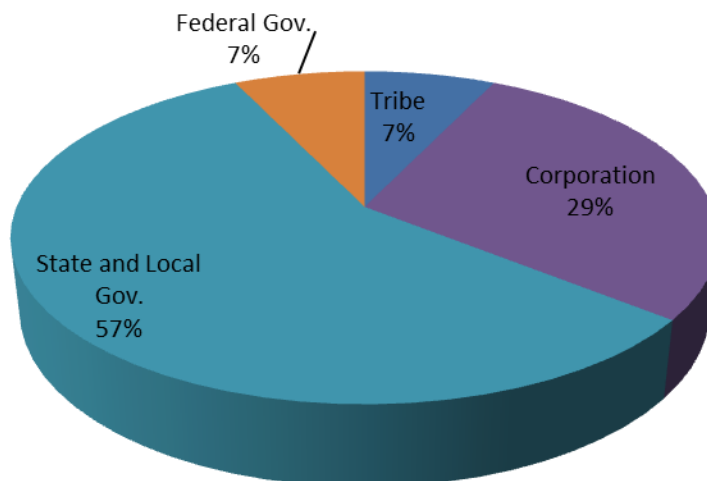
4. Individual Indians as a Party

Individual Indian litigants were a party in 36% of cases seeking review by the Supreme Court: 31% as petitioner, 5% as respondent. As Figure 29 illustrates, individual Indians played a complex role in Indian law litigation. Often, individual Indians went to court to vindicate general tribal interests: tribal immunity from taxation, Indians' rights to religious freedom, the federal trust responsibility, or the validity of tribal court judgments. (See Figure 31, *infra*). The federal, state or local governments were consistently their opponents (73% of the time as respondent), although tribal governments were also their opponent in a number of cases (21% of the time as respondent). Individual Indians as petitioners had a poor track record: the Court declined to grant review in any of the 95 petitions they filed.

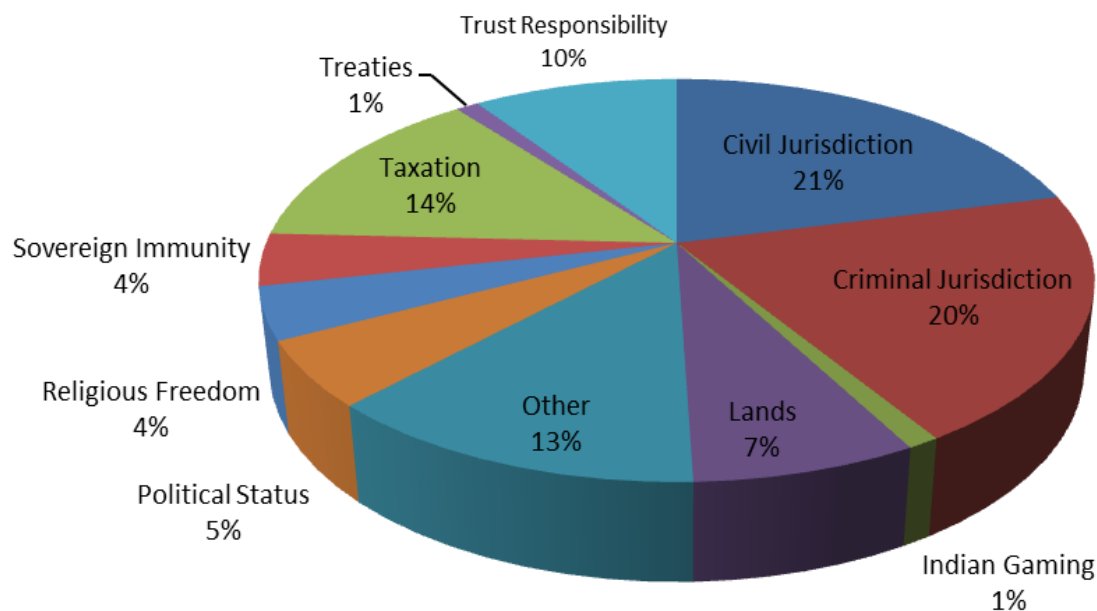
Figure 29: Respondent-Type When Indian Was Petitioner



Individual Indians infrequently prevailed in lower courts. When they did, as Figure 30 highlights, it was usually against the state and local government, or a corporation, but rarely against a tribe or the federal government. One of the petitions brought by a corporation against an individual Indian that was granted and decided adversely was *Plains Commerce Bank v. Long Family*. The other petition granted review involving an individual Indian as a respondent was *United States v. Lara*, where the Court vindicated tribal interests when it upheld the *Duro* fix and its affirmation of inherent tribal sovereignty.

Figure 30: Petitioner-Type When Indian Was Respondent

As highlighted in Figure 31, the dominance of governmental parties in cases involving individual Indians is not surprising given the predominance of certain case categories. Cases centered on civil jurisdiction, criminal jurisdiction, and taxation made up well over half of the petitions involving individual Indians.

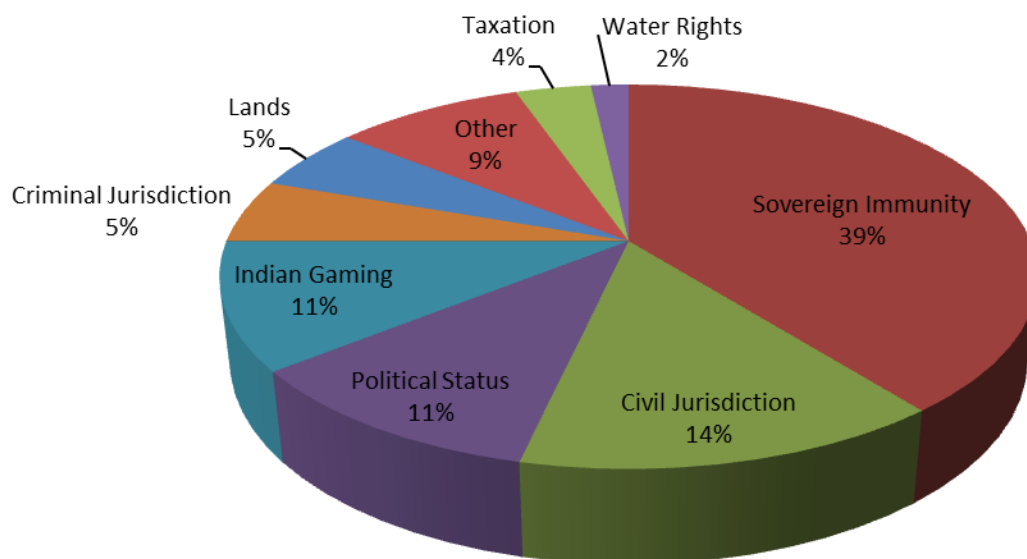
Figure 31: Cases with Individual Indian Party by Category

5. *Non-Indian Individuals*

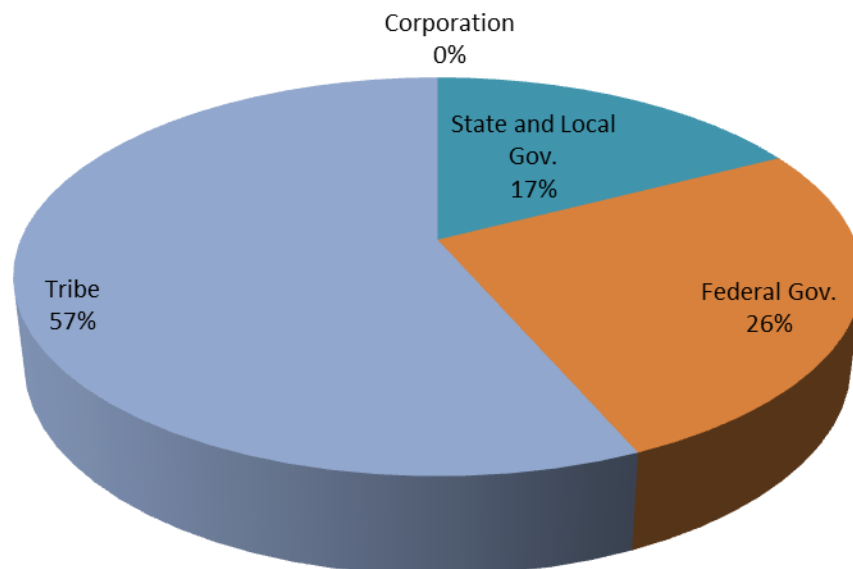
Individual non-Indians were parties in 22% of the petitions filed: 19% as petitioners, and only 3% as respondents. These figures demonstrate that, like individual Indians, non-Indians rarely prevailed in the lower courts. Unlike individual Indians, non-Indians were nearly always adverse to tribal interests: in only one case of 52 petitions filed could it be argued that a non-Indian litigant sought to defend tribal interests.

The low success rate of non-Indian individuals can be attributed, at least partly, to the categories of cases they brought. As Figure 32 illustrates, over a third of cases brought by non-Indians involved questions of tribal sovereign immunity, which tribes nearly invariably won. Civil jurisdiction, political status, and Indian gaming constituted over another third, in which non-Indians generally challenged federal and/or state grants of authority to tribes.

Figure 32: Cases with Non-Indian Individual Party by Category



The data in Figure 33 tracking respondent-type reinforce these observations. In just over half the cases non-Indians filed against tribes; the bulk of these were sovereign immunity cases, with a handful of civil jurisdiction cases brought by non-Indian employees of casinos or non-Indians involved in child custody disputes. The other half of cases involved non-Indians challenging federal, state, and local regulations that protected tribal sovereignty or secured gaming rights. Non-Indians were unsuccessful petitioners: the Supreme Court did not grant review of any petition with a non-Indian petitioning party.

Figure 33: Respondent-Type when Non-Indian was Petitioner

Non-Indians were respondents in only six cases: twice against individual Indian petitioners in disputes arising from personal relationships, twice against state and local governments, and twice against tribes in cases where the lower courts had abrogated tribal sovereign immunity.

6. Corporations

Corporations were the least frequent litigant in Indian law cases, appearing in only 13% of the petitions filed with the Court. It appears they met lower court success in a near equal measure—they were the petitioners in 7% of cases, and respondents in 6%. Corporations were generally adverse to tribal interests, except in certain rare instances involving disputes between corporations, or in couple cases where suits were brought against corporations to challenge tribal employment policies since a suit could not be brought against the tribes directly.

As Figure 34 illustrates, tribes and individual Indians were the frequent opponents of corporations. Corporations generally had more success against tribes than other litigants; they had very little success against the federal government, and roughly equal odds against individual Indians, other corporations, and state and local governments.

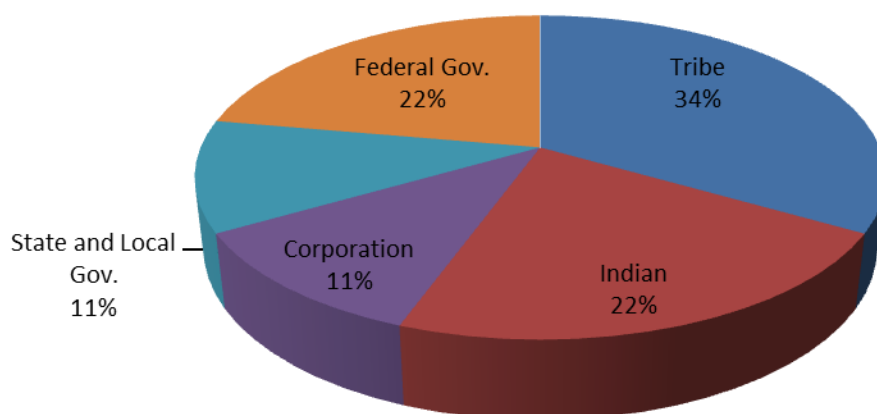
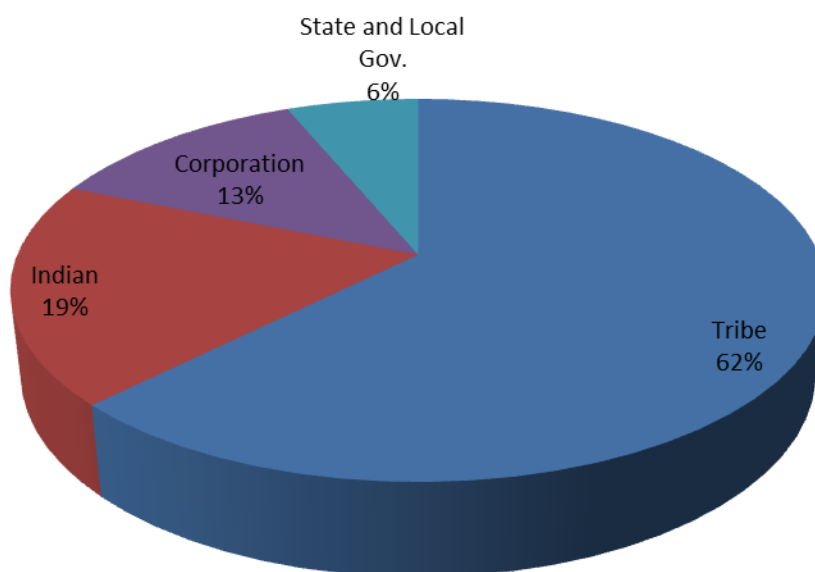
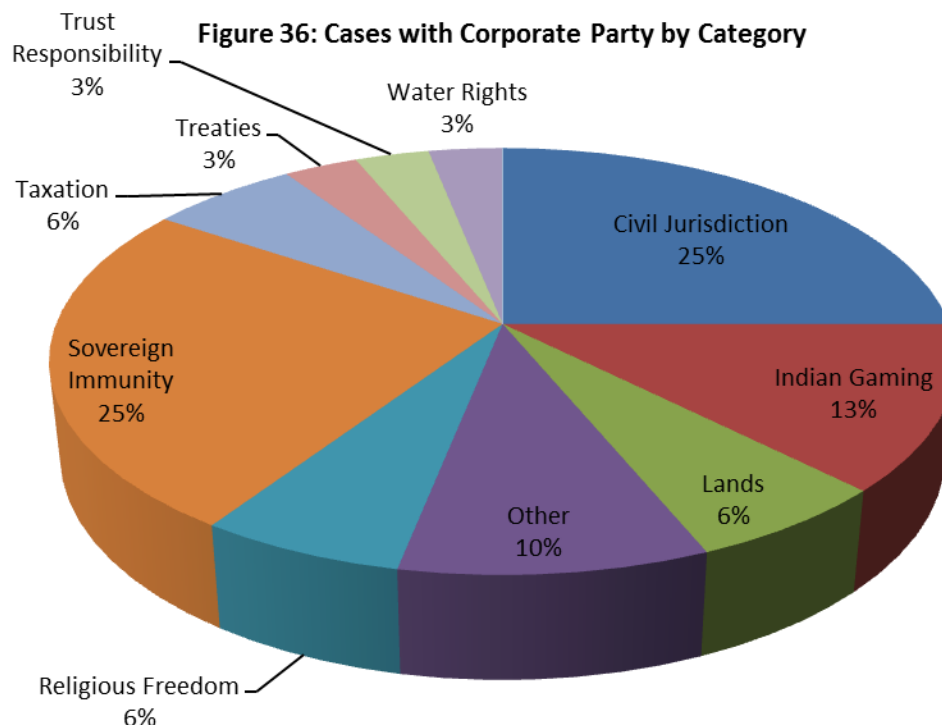
Figure 34: Respondent-Type When Corporation is Petitioner**Figure 35: Petitioner-Type When Corporation is Respondent**

Figure 36 highlights the subject matters of these disputes. Suits against tribes over tribal sovereign immunity constituted the largest category: corporations met with more success in these areas than individuals because they frequently had contracts that (allegedly) waived tribal sovereign immunity. Many disputes involving corporations arose from gaming contracts, including cases that hinged on civil jurisdiction or sovereign immunity as well as those which implicated Indian gaming law directly.



The Supreme Court granted certiorari to the only petition filed by a corporation in *Plains Commerce Bank v. Long Family*. This lower (8%) success rate in securing review by the Court was consistent with the average for all cases, and reinforces the conclusion that corporations, like Indian tribes themselves, had a mixed record of success.

PRELIMINARY CONCLUSIONS AND SUGGESTIONS FOR FURTHER STUDY

This snapshot of data relating to recent Indian law petitions before the U.S. Supreme Court shows mixed results. Tribal interests have met with success in many areas. Tribes have largely prevailed against Indian and non-Indian individuals in asserting their sovereign immunity and civil jurisdiction. When they have sought to preserve policies that benefit Indians against outside challenges, the federal and state and local governments have also been very effective defenders of Indian interests. Tribes and their allies, however, have been much less successful when contending *with* federal, state and local governments. Courts have generally, although not invariably, denied their trust responsibility, taxation and lands claims against the federal and state governments.

The role of the Supreme Court in this process has generally harmed tribal interests. During this period, the Court largely refused to grant certiorari to petitioning tribes and individual Indians. It did, however, frequently grant certiorari to federal and state governments who sought to overturn lower court rulings that favored tribes. The result was that tribal interests lost in the Supreme Court at a higher proportion than they did in the general population of cases.

The preliminary conclusions of this study are necessarily limited by its narrow chronological sweep. One potential avenue for future study lies in expanding the time period examined. Ideally, this approach would consider not only Indian law decisions at the Supreme Court level, but also the decisions in the circuit courts and state high courts. This would make it easier to identify Indian law trends over time regarding the types of cases, outcome for tribal interests, and parties involved, and contrast high court developments with lower court outcomes.

This study also treated all cases and petitions equally. However, the majority of petitions, particularly those involving individuals, stemmed from relatively weak cases, where the petitioners were unlikely to succeed. From the general constellation of certiorari petitions, therefore, more attention should be given to cases that presented substantial unresolved legal issues, particularly in the context of intergovernmental litigation. This might provide a more representative sample of how the majority of Indian law doctrine is crafted.