you. Anything that you have read that has struck you particularly as being reflective of the kind of a person you are? Or don't you read these things? Don't they interest you? How would you describe, just in general terms, the person that you would like us to know today on the eve of what may be your confirmation as a Supreme Court Justice? Recognizing that this is probably the last time that the American people will ever have a chance to glimpse you as a person and what you would like them to think most of all when they think of you.

Judge GINSBURG. I would like to be thought of as someone who cares about people and does the best she can with the talent she has to make a contribution to a better world.

Senator KOHL. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

We will now take a brief break and then come back, and we will finish with our three distinguished colleagues. We will take these in the order of three, and then we will close down for the day, Judge. So we will take now a 10-minute break. Let's try to come back at 25 after, maybe about 13 minutes, and then we will start with Senator Pressler when we come back, then Senator Feinstein, then Senator Moseley-Braun.

[A short recess was taken.]

The CHAIRMAN. The hearing will come to order. Judge, welcome back.

Senator Pressler, the floor is yours.

Senator PRESSLER. Thank you very much.

Judge, as I mentioned to you in the meeting in my office, in my State and in the Western part of the United States there are a lot of questions about Indian jurisdiction and problems between non-Indians and Indians on or near reservations. And I subsequently sent you a series of questions that I might ask.

I might say that I also wrote to all the lawyers in my State and asked them for suggested questions, and they sent back lengthy responses about what I should ask. I have stacks of their letters here somewhere. I am going to have to write all of them a thank-you note. If they watch this, they might be disappointed if I don't ask their question. But I don't think I can ask you all the questions they sent because some of them have been covered. But many of the questions they sent did involve tribal jurisdiction and some of the problems that affect Native American people.

Now, the Constitution in article I, section 8, gave Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Over the years the Federal Government has employed various policies to structure its relations with the tribes. Federal policy toward the tribes has run the gamut from waging war against them to viewing them as dependent beneficiaries of a Federal trust relationship, creating reservations for them, allotting individual tracts of land to their members, attempting to assimilate them into the dominant culture, terminating their tribal status, to the present time affording them greater self-determination.

Apart from the right or wrong of any of these policies, the fact of the matter is that my constituents, Indian and non-Indian, must live with the present-day realities descended from these policies.

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These realities lead to litigation that comes before the courts for resolution.

Let me say that it is not only in South Dakota, but I read in the paper that Connecticut even has a dispute over Indian lands, and I believe other east coast States have unresolved Indian questions. So it isn't strictly a Western issue.

But, first of all, do you take an expansive or restrictive view of tribal sovereignty?

Judge GINSBURG. I take whatever view Congress has instructed. Senator, Congress has full power over Indian affairs under the Constitution, and the Supreme Court has so confirmed, most recently in *Morton* v. *Mancari* (1974). Judges are bound to accord the tribes whatever sovereignty Congress has given them or left them, and as a judge, I would be bound to apply whatever policy Congress has set in this very difficult area. Control is in the hands of Congress, and the courts are obliged to faithfully execute such laws as Congress has chosen to enact.

Senator PRESSLER. Now, what type of analysis might you apply in deciding the legal boundaries of tribal sovereignty?

Judge GINSBURG. I am not equipped to respond absent information about the particular case. Without the benefit of briefs and arguments, all I can say is that I would attempt faithfully to follow the law as laid down by Congress, taking account of the precedent in point.

Senator PRESSLER. What weight would you give to each of the following when deciding cases involving disputes with the Indian tribes in view of what the Constitution says? Treaties between the tribes and the Federal Government that have been written over the years. We have a trust relationship between the Federal Government and the federally recognized Indian tribes. And, finally, the power of Congress to legislate matters relating to Indians and Indian tribes.

Judge GINSBURG. As far as treaties are concerned, Congress can abrogate treaties with the Indian tribes, and to the extent Congress has not done so, the treaties would be binding on the Executive.

And your next inquiry concerned?

Senator PRESSLER. There are treaties and there is the trust relationship. I believe the Secretary of the Interior is the trustee for the American Indians, and there is a special relationship between the Federal Government and federally recognized Indian tribes.

Judge GINSBURG. The Court made clear in the *Cherokee Nation* (1831) case that when Congress indicates in a treaty or a statute that the Government is to assume a trust relationship with a recognized tribe, the Court will then apply that policy. And with respect to the power of Congress to legislate, the Supreme Court has consistently recognized that Congress has full power over Indian affairs.

So my answer is that this is peculiarly an area where the courts will do what Congress instructs, recognizing that these are very difficult questions for the legislature to confront and resolve.

Senator PRESSLER. Perhaps the No. 1 complaint I hear from my constituents in Indian country, both Indian and non-Indian, is in the area of law enforcement. The Federal Government, while it has the authority in Indian country to prosecute minor crimes, chooses

not to do so given limited resources. Assaults, thefts, beatings, and vandalism, crimes falling outside the purview of the Major Crimes Act, which confers Federal jurisdiction, are routinely unpunished because of jurisdictional voids or checkerboard jurisdictions so complicated that it is impossible for the law enforcement officer to know who has jurisdiction to take action over any given crime. It varies given the type of crime, the legal description of the land it was committed on, and the Indian blood level or tribal affiliation of both the victim and the suspect.

Into this legal jungle, we have sent four different jurisdictional layers of law enforcement—local, State, Federal, and tribal—to keep order. The problem is that we have no set of rules with which to work. It is not practical to have a court hearing every time they need to determine who has the authority to take action. As a result, action is often not taken.

When I meet with tribal chairmen, which I do frequently, this frequently is cited as one of the most pressing problems facing Indian people today. They want tough law enforcement but cannot get it. I hear the same from non-Indians living in or near Indian country.

In a case which illustrates such problems, *Duro* v. *Reina*—it is a 1990 case—the Court held that Indian tribes could not exercise jurisdiction over Indians who committed misdemeanor crimes on the tribe's reservation if the violator was not a member of the tribe exercising jurisdiction. As the State had no jurisdiction over such individuals and Federal law enforcement generally declined to exercise jurisdiction in this area, many felt a jurisdiction void had been created by the Court. While Congress later abrogated *Duro,* the episode starkly highlights the jurisdictional problems that occur in law enforcement in Indian country.

I guess my questions are: Can you envisage a way State authorities might be able to exercise jurisdiction in Indian country in those instances where law enforcement voids appear to exist?

Judge GINSBURG. Congress can certainly give the States such authority. The example that you gave, the *Duro* v. *Reina* (1990), is a case on point. In Congress' judgment, the courts got it wrong and Congress corrected their error. And with respect to the question you just asked, if Congress so chooses, it can give the States that law enforcement authority.

Senator PRESSLER. Given the problems that the current patchwork jurisdiction nightmare presents for people living in Indian country, that is on or near reservations, do you feel it is possible to reconcile these disparate law enforcement situations through clearer Court rulings, or is specific congressional action required?

Judge GINSBURG. I can't address that question in the abstract. Clearer Court decisions are always desirable. But out of the context of a specific case, I am not equipped to give you a more precise answer.

Senator PRESSLER. Should there be limited Federal court review of tribal court decisions, as is the case with State courts?

Judge GINSBURG. Again, Congress has plenary authority over Indian affairs and it can authorize Federal courts to review tribal court decisions. Whether Congress should do so is a judgment the

Constitution commits to the first branch, not to the third branch, of government.

Senator PRESSLER. Now, Federal allotment policies around the turn of the century divided up Indian reservations, giving tracts of land to individual Indians. In many cases, these individual allotments were sold in fee to non-Indians. We now have the situation where many acres of non-Indian fee-own land lie within the borders of Indian reservations.

This has created a checkerboard ownership pattern, with non-Indians owning some land, Indians owning other parcels, and other land held in trust by the Federal Government for tribes. This situation has prompted many court cases which often must resolve the question of whether the State or the tribe has jurisdiction over non-Indians or non-Indian lands.

What is your view of how the courts can clarify issues arising out of the checkerboard jurisdictional patterns in Indian country?

Judge GINSBURG. Again, Congress prescribes the jurisdiction, and I would apply the law as Congress declares it. I can't offer any policy-based view on this issue, because the question is one that is committed to the Congress.

Senator PRESSLER. As you now, beginning in the late 1800's and continuing to the early 1900's, Congress and the President opened many of the reservations in the West to non-Indian settlement. In the process, non-Indians were granted patents in fee for their lands. According to the Supreme Court in the *Duro* case, the 1990 Supreme Court case, the population of non-Indians on reservations generally is greater than the population of all Indians, members and nonmembers.

This series of questions is intended to deal with the status of non-Indians on the reservations. Can you describe for me the importance of Indian self-government in the constitutional framework?

Judge GINSBURG. Congress has not been perfectly consistent in dealing with that question. Sometimes, as you pointed out in your opening statement, Congress has sought to eliminate or curtail tribal self-government, and other times, notably in more recent times, it has sought to strengthen tribal self-government. Fostering self-government seems to be the current trend, although some statutes still limit tribal sovereignty. Again, these are legislative decisions for the Congress to make.

Senator PRESSLER. Indian tribes do not allow non-Indians to participate in their elections, to serve in tribal office, or to serve on tribal juries, generally speaking. In view of these facts, do you see a principled basis for allowing an Indian tribe to impose civil fines and forfeiture against non-Indians who reside on the reservation with regard to activities on the land owned by non-Indians?

Judge GINSBURG. Again, this seems to me peculiarly a policy question committed to the judgment of Congress, and it is the function of judges to apply whatever solution the legislature chooses to enact.

Senator PRESSLER. Do you see a principled basis upon which Congress can delegate to tribes the power to exercise jurisdiction over non-Indians, especially non-Indians who are residents of the reservation?

Judge GINSBURG. This question, too, raises policy matter that calls for a judgment by the legislature. Judges would be obliged to apply whatever law Congress enacts, but I am not equipped to comment on a policy question that is so clearly committed to the legislative branch.

Senator PRESSLER. In the area of Indian civil rights, in the Supreme Court case of *Santa Clara Pueblo* v. *Martinez,* the U.S. Supreme Court held that suits against a tribe for violation of the Indian Civil Rights Act may not be brought in Federal court. As a result, individual tribal members, although citizens of the United States, are limited to relief, if any, in their respective tribal court systems. Many tribal governments do not provide for a court system independent of the executive, creating the possibility of intimidation by the executive leadership.

Several years ago, I cosponsored legislation with Senator Hatch which would have permitted individuals who had exhausted their remedies in tribal court for violation of the Indian Civil Rights Act to bring an action in Federal court. This measure did not become law. Thus, people turned to the Supreme Court. Should Native Americans be entitled to the same constitutional protections afforded to all Americans in our Federal courts?

Judge GINSBURG. Again, all I can say is that Congress has full power over Indian affairs, and the Federal courts will follow the policy Congress sets in this area.

Senator PRESSLER. Now, are you aware of any Supreme Court civil rights discrimination cases involving Indians? And what is your view of these cases?

Judge GINSBURG. In *Morton* v. *Moncari* (1974), it was argued that the category "Indian" was a racial classification. The Court held that, given the history of our country, the category "Indian" was not racial but political.

Senator PRESSLER. In a recent Supreme Court decision, *South Dakota* v. *Bourland,* decided a month ago, the Court held that Indian tribes did not have the power to regulate the hunting and fishing of non-Indians on fee-owned land within the boundaries of the Cheyenne River Indian Reservation that had been taken by the Federal Government when it constructed a flood control project. Do you have any comments on that case and its significance in the area of tribal jurisdiction?

Judge GINSBURG. That case is a precedent that may require interpretation in cases that will arise in the future. It would not be proper for me to comment on how that precedent will be interpreted in the next case, when the next case may be before a court on which I serve.

Senator PRESSLER. Do you feel the Court was correct in basing its analysis of the case of *Montana* v. *United States,* which is a 1981 case, which held that the tribal power did not extend to the regulation of hunting and fishing by nonmembers on reservation land owned in fee by nonmembers of the tribe?

Judge GINSBURG. Senator, I feel obliged to give the same response to that question. It calls for interpretation of a precedent likely to figure in a future case.

Senator PRESSLER. The ninth circuit, in *Washington Department of Ecology* v. *U.S. Environmental Protection Agency,* held that

States could not regulate the activities of an Indian tribe in operating a solid waste project, only the Federal Government can regulate the operation of such facilities on Indian reservations. Do you have any thoughts on whether an Indian tribe can be made to comply with environmental regulations of a State, whose regulations are more stringent than those of the Federal Government?

Judge GINSBURG. This is a matter that might come before me, if this nomination is confirmed. I would have to decide it in the context of a specific case, and I can't preview or forecast my decision.

Senator PRESSLER. The Indian Gaming Act mandates that the States negotiate in good faith with the tribes in establishing compacts regulating reservation gambling. The statute does not define good faith nor set out much direction for what is required by either party.

As you know, Indian gaming has become a controversial issue in many States. What are your views with respect to the ability of Congress to mandate that these two sovereigns negotiate in good faith, without providing significant direction to either?

Judge GINSBURG. The Indian Gaming Act is a new and much litigated law. Cases concerning that legislation may well come before me, so at this time I am not in a position to comment on it.

Senator PRESSLER. In the 1970's, when I was a member of the House, I was quoted by the Supreme Court, albeit in a footnote, because they wanted some legislative history. I had helped the Sioux Tribes by working for legislation that allowed them to go back into court enabling them to file suit in the Court of Claims for compensation for the Black Hills of South Dakota, the doctrine of res judicata and collateral estoppel notwithstanding.

After the passage of that legislation, the U.S. Supreme Court rendered a lengthy opinion, *United States* v. *Sioux Nation of Indians,* which held, in part that with passage of this legislation, Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers.

The Court went on to rule in favor of the Sioux Tribes on the basis for the case, holding that an 1977 Act of Congress effected a taking of tribal property, property which had been set aside for the exclusive use and occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation.

The money awarded for the Sioux claim to the Black Hills has been appropriated and placed in a trust account. The judgment, with interest, now amounts to more than $300 million. A plan to use and distribute the money must be agreed upon by the tribes, before the money can be put to good use by the Native Americans entitled to the judgment. I would like to see the award distributed, but the lack of unanimity on the part of the tribes as to whether to accept the award has prevented this from occurring.

What is your view of the importance of *United States* v. *Sioux Nation of Indians* in the area of Indian land claims?

Judge GINSBURG. Senator, *Sioux Nation* (1980) is a well-known and very significant case. As you mentioned, it resulted in one of the largest judgments for an Indian tribe in the history of our country, and it righted what many people considered to be a very

old and a very grave historical wrong. Also, it set down some clear guideline for handling Indian just compensation claims. It brought some clarity to an area that was notably murky.

With regard to the current situation—the distribution of the proceeds—that is a matter that may very well be back in the lap of the Court, so I can't comment on that part of it.

Senator PRESSLER. Do you regard monetary compensation as awarded by the Supreme Court as an equitable remedy to settle Indian land claims?

Judge GINSBURG. Again, that is the very issue that may be coming up. The adequacy of monetary relief is what some people are challenging.

Senator PRESSLER. Do you see any need to depart from the traditional approach the Court has used in deciding Indian land claims?

Judge GINSBURG. Again, that will be the very question at issue, if the case does come back to the Court. So I can offer no comment beyond recognizing the importance of that precedent, both in terms of the size of the award and the guidelines it laid down for just compensation.

Senator PRESSLER. Moving away from the Indian jurisdictional questions, another question that several lawyers in my State suggested I ask involves wetlands. The Federal Government frequently takes productive farmland out of production and classifies it as a wetland. Wetland determinations facilitate certain environmental and wildlife management objectives.

In my view, the application of wetlands regulations, the determination of what does and does not constitute a wetland approaches absurdity at times. However, the definition of what constitutes a wetland is not my concern today. Rather, the Federal Government's designation of wetlands causes farmers in my State to lose income due to the fact that their land has been taken out of production.

How do you square the Federal Government's regulation of wetlands with the fifth amendment's prescription against taking private property for public use, without just compensation?

Judge GINSBURG. Senator, we know that the Government cannot take, but it can regulate, and the point at which regulation becomes a taking is one of the hottest issues before the Court at the moment. The Supreme Court most recently said in the *Lucas* (1992) case that if the regulation effectively deprives the owner of the entire value of the land, then even though the law is phrased as a regulation rather than a taking, the owner would be entitled to just compensation.

There must be dozens or scores of cases in which litigants are seeking clarification of the line between regulation and taking. I can't offer now anything more than to say I appreciate that the issue is very much alive, and that the most recent decision, the *Lucas* decision is hardly the be-all-and-end-all. If confronted with such a case, I will do my best to prepare for it diligently and give it my best judgment.

Senator PRESSLER. In the area of small business, employer versus union rights, I know another Senator already has asked about this issue, but I will take it from a slightly different point of view. In the *Xidex Corporation* case, a 1991 decision, you voted in the

majority in a case involving a series of actions taken by Xidex Corp. following its purchase of a new plant that had been a union shop. The union alleged many of these actions constituted unfair labor practices.

An administrative law judge in the NLRB agreed with the union on several points, and you enforced their orders against Xidex, as I understand it. In *Xidex*, the circuit court relied on the holding in *NLRB* v. *Brown,* that antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice. Please elaborate on what you understand this standard to mean.

Judge GINSBURG. Senator Pressler, may I ask, since the name of that case is not immediately familiar to me——

Senator PRESSLER. It is a long name, *Microimage Display Division of the Xidex Corporation* v. *National Labor Relations Board;* it is a 1991 case, 924 F. 2d, 245.

Judge GINSBURG. I have just asked for some assistance in finding the opinion. It is not one I wrote.

Senator PRESSLER. We can come back to it or you can address it later, if you want to, after you get a chance to look at it.

Judge GINSBURG. Thank you.

Senator PRESSLER. I have several followup questions regarding that case involving the relationship between labor and management, particularly in small business, but I will save them and either ask them later or ask them for the record.

Judge GINSBURG. Sorry. Even though I have written over 700 decisions, I usually remember the names. But I do not recall *Xidex* (1991).

Senator PRESSLER. That is all right. How do you feel about arbitrary caps on damages?

Judge GINSBURG. Senator, I think you loaded that question by calling them arbitrary. [Laughter.]

Senator PRESSLER. That was from one of the lawyers to whom I wrote and asked for questions, so I will only take partial responsibility. Let's just talk caps on damages.

Judge GINSBURG. If the legislature sets a cap on damages, then the matter will come before the courts, and judges will attend to the record, briefs, and arguments that the parties make with respect to it.

Senator PRESSLER. But you can declare them excessive or you can——

Judge GINSBURG. I can't express a view on that, apart from the contours of a particular case.

Senator PRESSLER. I guess the most commonly asked question by attorneys in my State is—and you have addressed this to some extent, but to boil it down—does the nominee wish to interpret the Constitution as a static document, or does she wish the Court to initiate creative changes or creative new approaches?

Judge GINSBURG. I have said that I associate myself with Justice Cardozo who said our Constitution was made not for the passing hour but for the expanding future. I believe that is what the Founding Fathers intended.

My assistants just handed me the case you mentioned. I was on the panel, but the decision was by my colleague, Judge Karen Henderson. In addition to the 700-odd decisions I have written, if I

were to review every case in which I was on the panel, I would confront thousands of opinions. I haven't even attempted to do that, and this decision by Judge Henderson is not now in the front of my mind. I will be glad to refresh my recollection and attempt to answer any questions you have about it. But when one is a concurring judge and doesn't do the actual writing, the——

Senator PRESSLER. OK, good. I will ask you about that in a future round of questions, because the small-business community feels that is an important case from their point of view, and there are two or three other questions about it which I will give to you in writing, and I will try to ask them in a later round.

Judge GINSBURG. Now that I have the case, I will certainly read it and refresh my recollection.

Senator PRESSLER. My time is up.

The CHAIRMAN. Thank you very much.

Now, Judge Ginsburg, one of the few things you have not done in your career is serve in an elected capacity. Now you know how we feel when we are debating in the middle of a campaign, after having cast literally 18,000 votes and a press person or an opponent says, "What did you mean when you cast the vote on S. 274 in 1968?" And so we can sympathize with your inability to remember every single solitary decision. I am amazed you remember as many as you do. If we remembered that many votes we had cast, we would all be better for it.

Judge GINSBURG. I recall that a lawyer once asked me, "But, Judge Ginsburg, in the such-and-such case in which you concurred, footnote 83"—and it really was footnote 83—"said * * *. Are you backing away from footnote 83?" At that moment I decided that I don't concur in footnotes, especially when they get up over 50. [Laughter.]

The CHAIRMAN. Believe me, I share your concern, your position.

Senator Feinstein, thank you for waiting.

Senator FEINSTEIN. Thank you, Mr. Chairman. You have now turned to the equal protection side of the table. We appreciate it very much.

The CHAIRMAN. I want to explain, by the way, for all who are watching, if the Senator will yield. The two women on the committee are sitting at the end of the platform. That is not because they are women; it is because they are the most junior members of the Senate on the Democratic side. And so I just want to—I was thinking about that today. As we are going through all this discussion of the equal protection clause and women's rights, as we should, I kept thinking, but they are probably home saying why don't they let the women ask any questions? It is purely because of seniority, a rule that when I arrived here as No. 100 in seniority I thought was horrible, and I now think has merit. [Laughter.]

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Judge Ginsburg, not only have I found you a scholar, but you have also got incredible stamina. And I might say that one of the special things for me today has been to sit here and watch you, because I am not a lawyer, reduce things to kind of their basic, simple element and explain them so that they were much more easily