

Senator DECONCINI. Thank you, Judge. I will try another judge.  
[Laughter.]

I have enjoyed, Judge, your frankness, and I want to compliment you again for it as we conclude my second round. I appreciate your attempt to be open with us and convey your views as much as you can. That is important to this Senator. I find this process not just fun, but trying to get inside the mind of a nominee to the Supreme Court without violating their oath and their potential conflicts, what have you, is fascinating, intellectually challenging, and very rewarding when you are as candid as you have been. And Judge Souter and others have fallen into that category.

As you noted in your opening statement, we hold these hearings to aid us in the performance of our task. I take it very seriously. I really don't think there is anything more important that I do as a Senator than addressing nominees to the bench, and particularly to the Supreme Court. The advice and consent duties here are extremely important, and I think Chairman Biden and the ranking member have certainly demonstrated that we take it seriously. And I know the nominees do.

If confirmed, our Constitution will endow you with immense power, and there is no doubt in this Senator's mind that you are well aware of that, having served as long as you have, and there is no doubt in my mind that you will take it extremely seriously and in a very wise manner. And I anticipate, unless something comes out in these hearings or in other procedures prior to the report of this committee, that you will be confirmed. And you have certainly demonstrated, I think, to the public and to this committee your knowledge of the law, your ability to be straightforward, your consciousness and sensitivity toward delicate issues that might come before the Court. And I give you high praise, Judge, for whatever that may be worth.

Judge GINSBURG. Thank you.

Senator DECONCINI. Thank you.

Judge GINSBURG. Thank you so much, Senator. I appreciate those kind words.

Senator DECONCINI. The Senator from South Dakota is recognized. Senator Pressler? North Dakota, not South Dakota.

Senator PRESSLER. Thank you very much.

Judge Ginsburg, I will take up where I left off yesterday. I have reviewed the answers to some of your questions in the area of Indian Country law and have found them lacking, very frankly, in terms of what some of the tribal leaders are looking for.

Let me say that many States west of the Mississippi are very involved in litigation, whether it is California or any of the States that have reservations or tribes or whatever they are referred to, as California uses a different name. I am told that 10 percent of all the cases decided by the Supreme Court last year involved Indian law questions, and it is a matter of growing concern with Indian gaming issues throughout the country, with issues of tribal lands, with issues of civil rights of Indian people. And yesterday you frequently responded by saying that Congress is responsible. And, indeed, it is and I am a great critic of Congress for not acting more.

But on the other hand, 80 years ago Congress passed a law regarding property rights and deeded land, and courts have ruled on the issue. In the last 10 or 15 years, there has been probably more law made by the Supreme Court and the courts regarding tribal law than has been made by Congress. That is probably not appropriate, but it is the way things have been done. I am a great critic of Congress, and Congress should do more. But in some cases, Congress has taken action and passed legislation, such as regarding patented deeded land, but the courts have ruled otherwise.

Congress has taken steps regarding the codification of tribal court decisions. Except for the Navajos, there is no judicial codification of tribal court decisions and no judicial training involved. The *National Farmers Union Insurance* case in the Supreme Court created such a situation of confusion that tribal leaders tell me insurance is hard to obtain on the reservations.

The case in Wisconsin where a Federal judge decided against congressional actions regarding fishing rights, where there had never been any history of netting fish, suddenly a district judge ruled that certain areas had to be set aside for netting fish at great expense to the State of Wisconsin. And this is a judicial decision without Congress acting.

Many of these are social policy decisions made by district court judges and appealed, and they end up in the Supreme Court. It is amazing the number of tribal laws and tribal matters that end up in the Supreme Court. As I said, it appears the Supreme Court, you can correct me on this, only takes about 100 or so cases a year, and perhaps 10 percent of those decided each year deal with Indian law.

I guess tribal leaders want to know—they want to get some feeling, and you have expressed your feelings in other areas—what it is that you know about Indian law, your familiarity from your years of teaching and from your years on the bench. They want to get a feel for your thinking.

Can you give us some response?

Judge GINSBURG. Senator Pressler, I would bring to this area of the law the same care and the same thought I bring to the vast array of Federal law I have handled in the last 13 years on the District of Columbia Circuit. I did not have any familiarity with Indian law as a student. I didn't take any course on that subject in law school. I did not teach in that area. I have not written in that area. That is true of most of the business I have handled on the District of Columbia Circuit, and it is true of most of my colleagues. With the wealth of Federal law, none of us can possibly be specialists in most of the cases that come before us.

I have had to deal with many cases involving complex questions about the environment, about surface mining, for example, cases using terms I had never heard of before I got the particular case. But then I boned up as hard as I could, with the information from the record, the information supplied to me by the capable attorneys in each case. And although I felt very much at a loss at the start, by the time I reached the point of making a decision I felt confident that I knew what was necessary to make a sound decision. And I would bring that same approach and hard work to bear on this question.

In fact, one of my colleagues, who observed the questions you asked me yesterday; was it yesterday? When I got back to Chambers, had placed an article on my desk, with a note that said, "In view of the questions you have been asked, I regret that I did not send this to you earlier." And it is a fine article called "Criminal Jurisdiction on the North Carolina Cherokee Indian Reservation: A Tangle of Race and History." It is by my colleague, David Sentelle. So there are in many parts of the country, as you have indicated, these very complex problems.

I cannot pretend to any special knowledge in this area of the law, but I can undertake that I will approach it in the same way I have approached all other difficult areas I have had to confront in my 13 years on the District of Columbia Circuit.

Senator PRESSLER. I did raise this issue, so I am not surprising you with questions here. I did raise it when you were in my office, and I sent you a series of questions that I would ask in advance.

But, in any event, I have got two or three questions here, and then I will conclude this area of questions. It isn't that I expect you to know detailed things about Indian law, but it is the basics that concern me. It is what the tribal leaders, non-Indians, Western States, and the State attorneys general are concerned with. The Western States attorneys general have meetings on these issues frequently.

Yesterday in your answers to my line of questions in regard to Indian sovereignty, Indian civil rights, tribal jurisdiction, and law enforcement in Indian country, you were very consistent in stating your view that Congress has full power, or plenary power, over Indian affairs, and that the Federal courts will follow the policy Congress sets in this area.

I guess the point I am trying to make here is that in many cases where Congress has acted, the courts in the last few years have overruled, in such as the deeded and patented land cases, the Wisconsin case, the insurance case, and so forth. Indeed, the courts have felt an obligation to act.

I am interested in finding out what you believe to be the limits on Congress' power when dealing with Indian affairs or courts. While it is true that Congress has plenary power in this area, the Court has not been clear identifying the source of Congress' power in this area. Early cases attributed this power to the treaty clause of the Constitution, the property clause, and the war power.

In an 1886 case, *United States v. Kagama*, the Supreme Court attributed the power to enact a major crimes act to the trust relationship. The Court rejected the Indian commerce clause as a basis because crimes are not commerce.

However, in a 1973 case, *McClanahan v. State Tax Commissioner*, the Court acknowledged the confusion regarding the source of Federal authority over Indian matters. It rejected the trust relationship as a source of congressional power and instead recognized that such power derives from the language in the commerce clause dealing with Indian tribes and from Federal treaty-making authority.

Now, I guess my questions are: To what do you attribute Congress' plenary power over Indian matters? And does the source of the authority vary with the subject matter of the legislation?

Judge GINSBURG. The Supreme Court has said repeatedly that Congress has full power over Indian affairs. A major source of that authority is, of course, article I, section 8, where the power is lodged in Congress. It surely is not lodged in the courts. The one thing that is clear is that the courts are obliged faithfully to follow the treaties and laws in this area as set by Congress. The courts do not have any law-creation role to play. This is not a common law area. This is an area for Congress to control. It is a very difficult area, and the courts will have construction questions presented to them. But that the Congress has the lead role and not the courts I think is plain.

I have done my best, Senator, to answer your questions on this subject. As I have explained, a judge works from a specific case. I have said that in answer to a number of your questions. I can't answer abstract inquiries even in areas I have studied. I can't answer an abstract issue. I work from a specific case based on the record of that case, the briefs that are presented, the parties' presentations, and decide the case in light of that record, those briefs. I simply cannot, even in areas that I know very well, answer an issue abstracted from a concrete case. That is not the way a judge works.

Senator PRESSLER. It is the feeling of many tribal leaders that the courts currently make more law on reservations than does Congress, because of court rulings and the Congress' inaction. So they are very interested in what goes on in the court system, because that is where most of the new law comes from.

My second question—as you may know, many members of Indian tribes, in their relations with their tribes, do not enjoy the protections other Americans have through the Constitution's Bill of Rights. They have a statutory bill of rights which Congress enacted, but it is not as complete as the Constitution's Bill of Rights.

Yesterday, I asked you whether the Native Americans are entitled to the same constitutional protection in Federal courts afforded to all American citizens. You answered, "All I can say is that Congress does have the full power over Indian affairs, and the Federal courts will follow the policy that Congress sets in this area."

My question is, If you feel Congress has full power over Indian tribes, you must regard Congress' abrogation of the U.S. Supreme Court's decision in *Duro* as constitutional, even though it delegated criminal jurisdiction over nonmember Indians who do not have constitutional bill of rights protection against the authority of the tribe. Would that be a fair interpretation of your view?

Judge GINSBURG. I have no question about the authority of Congress to override the Supreme Court decision in *Duro v. Reina* (1990).

Senator PRESSLER. Are there any limits to Congress' power to delegate to the tribes criminal or civil jurisdiction over non-Indians?

Judge GINSBURG. I can only repeat the answer that I gave you, Senator Pressler, that Congress has full power over Indian affairs. There is no restriction on a Native American to live in any community that he or she chooses. So we are discussing only the difficult concept of tribal sovereignty and how Congress has chosen to treat that. I certainly didn't mean to suggest that a Native American

outside of a tribal setting doesn't have the same rights as you and I do.

Senator PRESSLER. Are you uncomfortable that the Constitution's Bill of Rights does not extend to Native Americans?

Judge GINSBURG. I can't express my personal view on that subject. I know that there are many people who care deeply about the concept of tribal sovereignty. I am not a member of one of those communities and, as a judge, I will do my best to apply faithfully and fairly the policy that Congress sets with respect to tribal governance.

Senator PRESSLER. I have been informed that Indian tribes, the tribal leadership—and this is complained about by some of the tribal members—successfully convinced the American Civil Liberties Union not to take cases regarding the civil rights of Indian tribal members in their relations with their tribes. As I said earlier, Indians in their relations with their tribes have only limited statutory bill of rights protections and do not have the full panoply of constitutional rights available to most Americans.

Given these circumstances and I believe your prior involvement with the ACLU in winning civil rights cases involving sex discrimination, are you aware of any ACLU policy or understanding regarding taking cases involving the civil rights of Indians in their relationships with the tribes, and, if so, what was that policy or understanding or your reaction to it?

Judge GINSBURG. Senator, I have no knowledge or recollection of any policy of the kind that you have just described.

Senator PRESSLER. My final question in this area: Yesterday, I asked you a question on an Indian tribe's ability to impose fines and forfeiture against non-Indians who reside on a reservation with regard to activities on the land owned by non-Indians. Again, you answered this was an area that is particularly committed to the judgment of Congress.

My questions are, do non-Indians have any due process rights or property rights which they can assert against the authority of the tribal government? And, two, similarly, what due process rights are guaranteed to Indians who are not members of the tribe against a tribal government?

Judge GINSBURG. The authority of the tribal courts is something for Congress to decide. I believe that was my answer yesterday. Those courts will have such authority as Congress chooses to give them, and judges are bound to respect the decisions Congress has made.

Senator PRESSLER. The problem is that the courts have frequently overruled or defined Congress' mandates. Of course, I suppose it is Congress' fault, in the sense that maybe it should pass another law. But much of this ends up in the Supreme Court and the Supreme Court makes the law. That is the way it seems to a lot of people living in the West.

Judge GINSBURG. But the Supreme Court, as any court, has an obligation to construe and apply the laws Congress passes faithfully, and on whatever court I serve that would be my endeavor, no matter what area of the law.

Senator PRESSLER. That concludes my questions. Thank you very much.