Senator KOHL. OK; I would like to talk for a minute about price-fixing because it is of particular concern to me. Since the *Dr. Miles* case in 1911, we have had in this country a rule that prohibits manufacturers from setting the retail price of their products by independent retailers. But some people have begun to argue that we should treat vertical price-fixing differently from horizontal price-fixing.

As Robert Bork wrote in "The Antitrust Paradox," it should be completely lawful for a manufacturer to fix retail prices. Do you agree with this sentiment?

Judge BREYER. I can say the debate was quite interesting. This was in the same debate. And basically, Judge Bork—in my recollection of the debate, we were talking about the Robinson-Patman Act, and he was arguing about that, and in that context I think I made fairly clear that if Congress had the intent of doing something that one might think was not necessarily according to price theory principles, well, then, it did, and it is our job to carry it out.

In that same debate, we discussed retail price maintenance, and it was my own view, that I believe I expressed fairly clearly, that the laws against resale price maintenance were good, sound antitrust law. I think the example that I used was that years and years ago when I was a student, there were economist professors—somebody, I think, at the University of London, a Professor Yamey, had written a book and had said here are the pros, and here are the cons; what it boils down to is laws against retail price maintenance help the consumer. They bring about lower prices.

And what I asked Judge Bork is what has changed; what has changed. Now, I understand people have different views on that issue, but I think I have expressed my own fairly clearly, quite some time ago.

Senator KOHL. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Pressler.

OPENING STATEMENT OF HON. LARRY PRESSLER, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

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

Judge Breyer, I am particularly happy to welcome you here. Having once been your student in law school, I take particular delight in seeing you.

Judge BREYER. Thank you.

Senator PRESSLER. And I very much appreciated your remarks during yesterday's hearing when you said that when you deal with cases, you listen to the party, and then try to repeat back the argument in your own words to the other side. I frequently do that in dealing with constituents—repeat back their position. I think it is a wonderful way to proceed.

We have in my State of South Dakota and throughout America, a subject that has not been brought up yet here today in this hearing. Many other subjects have been covered, but I do not believe we have talked about fee-owned land in Indian country.

I know that Indian jurisdictional questions are very complex, and a lot of these matters come to the Supreme Court; in fact, someone

told me that there are more cases involving Indian tribes, jurisdiction, and water rights than any other subject category that comes to the Supreme Court.

Putting it in layman's language, as you said, you put yourself in each person's shoes. I recently was at the Standing Rock Indian Reservation and the Cheyenne Indian Reservation in South Dakota. You can talk to a white rancher, and he will tell you that his grandfather bought this land after the U.S. Government advertised it, and he bought it from the U.S. Government, and maybe it has been resold since, but the chain of title traces back, and it is very legal and logical. You can talk to the Indian citizen, and he will say that his great-grandfather was given this land by the U.S. Government, and he feels that it has been illegally taken, and he seeks compensation.

In fact, I have tried to settle a lot of this, or I thought I was making a contribution, back when I was in the House of Representatives in the mid-1970's, and I was quoted by the Supreme Court—only in a footnote—because I had sponsored legislation to open up the question to waive res judicata. And in 1980, the Court made a ruling in *U.S.* v. *Sioux Nation of Indians,* in which it gave a substantial amount of compensation to the Sioux Nation, which they have not accepted because they do not feel it is adequate.

But in any event, I have a long question here about fee-owned land in Indian country where the white ranchers or the white businessmen who have been there are essentially regulated by the laws of the reservation, and they are sometimes taxed by the reservation, and they feel that this is a violation of what they had agreed to or what the agreement is, and they come to me with that problem. If you put yourself in both shoes, you can find many legal arguments and many emotional feelings depending upon whose shoes you are in.

I know at Harvard Law School there have been a number of professors—I think a couple right now are helping one of the tribes out there with a water rights case where they are seeking hunting and fishing rights, but in addition to that they are also seeking payment for hydropower. And it is not just in South Dakota; in California, for example, the Indian tribes have asserted a claim on 25 percent of all the hydropower that has been generated, and back payments. These types of issues are coming into the courts.

May I ask you, first of all, what is your perception of all of this? Have you worked on some of these cases? Have you a perception of this issue?

Judge BREYER. Let me divide it into two parts—more basic and more recent. The more basic, which I have mentioned—and I hope you would be the expert on this—is that I do remember, of course, when you were a student, and I do not know if you remember in the course that Charlie Nessen and I developed, we spent about 20 percent of that course tracing the history of the Cherokee Indians in Georgia. And as you may remember, the Indians in the 1930's and 1940's were given by treaty—they were given by treaty—a section of that State, and when gold was discovered, the Georgians basically ignored them and said goodbye. And the Indians did an unusual thing—they hired a lawyer who was called William Wirt, something like that, I think. And they said we will bring a law

case; the treaty protects us. And they went to the Supreme Court, and they were first thrown out on what I would think of as a technicality. And then somebody from Massachusetts went down and was put in jail and forced the issue to be raised. They went back to the Supreme Court in a case called *Wister* v. *Georgia,* and the Supreme Court said Indian tribe is right; they are right under the law. And though it may be apocryphal, I think that was the case in which Andrew Jackson said, well, John Marshall has made his law; now let him enforce it. And it really was not enforced. And that I call former, not recent, because I think luckily, recent law is that the Indian tribes and others can go into the court, and the courts respect their claims, and the Government enforces them.

Now, what I have seen in this area, which is only a peripheral connection, is that a number of different difficult issues tend to arise. Sometimes, there is a treaty. Of course, Congress has the legal authority to abrogate a treaty, like any treaty. But sometimes there are cases because the Indian tribe says we had a treaty, and Congress did not really abrogate it. And then you have a difficult question, looking into the history about what Congress intended, but basically, the rule is that the Indians have their treaty, and where that treaty is there, the courts will assume that it is not abrogated unless they are very strongly convinced to the contrary.

Then, another kind of case arises which you begin to talk about, which is terribly difficult, and that, of course, is a case where there was tribal land, and then some of that land has passed through a history and story of different connections into people who are not members of the tribe. And then the issue is what kind of authority does the tribe exert. And it is particularly difficult where that could include, say, some kind of criminal prosecution, where then the person who was not a member of the tribe would say: What about my basic rights guaranteed under the Constitution?

Those are the kinds of issues that arise, and on the one hand, you have to respect very much the sovereignty of the tribe; and on the other hand, you have to recognize the claim to say basic rights of protection. And I am very glad to hear you say that indeed, you often look to other ways than solely court ways of resolving these things, because I do think, for example, that sometimes, say, the tribal authorities and the other authorities might decide to have tribal powers that are the same in terms of protection as other powers. If that is so, that would be a matter worked out through Congress or worked out through your good offices, or worked out through meetings; it would not necessarily be worked out in the courts.

Senator PRESSLER. One issue that will probably wind its way to the Supreme Court in future years involves fee-owned land in Indian country. I will just state this question because I think it summarizes much of the conflict.

Under the General Allotment Act of 1987, known as the Dawes Act, Congress began to allot to individual Indians tracts of land on the reservations. Title to the land was to be held in trust for 25 years, after which the land would be conveyed to the Indian allottee by means of a patent. Originally, Indian individuals had to apply for these allotments, but later the law was changed to allow the Secretary of the Interior to issue fee patents to Indians regard-

less of whether they had applied for an allotment. These were known as forced fee patents.

Over the years, many of these Indian allotments were then sold to non-Indians, advertised by the Federal Government in some cases; maybe they were trying to raise revenue—I do not know—but they sold them to white settlers.

Furthermore, various acts of Congress, such as the Cheyenne River Act of 1908, opened the reservations to non-Indian settlers, which actually was a reversal of what Congress had originally done.

We now have the situation where there are many acres of non-Indian fee-owned land lying within the borders of the 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 the 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.

Now, some tribes assert a complete right to regulate the lives of all people living within the boundaries of their reservation, even when the reservation encompasses all this checkerboard land and regardless of whether they are Indian or non-Indian.

Last year, the Supreme Court decided in *South Dakota* v. *Bourland* that the Cheyenne River Sioux Tribe could not regulate the hunting and fishing rights of non-Indians on Federal lands previously owned by the tribe. And I think some of your colleagues at Harvard Law School were on one side of that brief; I cannot remember for sure.

Now, Indian tribes do not allow non-Indians to participate in their elections, to serve in tribal office, or to serve on tribal juries. So you have this situation of non-Indians living and owning property within a reservation subject to the jurisdiction of the tribal courts and the tribal police and so forth, but they cannot vote in the tribal elections. So they come to me, and they will come to you in the courts, seeking some kind of relief.

Nonetheless, tribes in my State have imposed licensing fees on liquor stores owned by non-Indians on fee-owned land located within the boundaries of the Indian reservation.

Well, anyway, that is the complete bundle of the problem, and I have struggled with this as a Congressman and as a Senator from South Dakota over the years, and later, I am going to ask you about one piece of legislation that we have tried, but I guess my question—if I have one, because you could answer so many different aspects of it—is given the fact that non-Indians have no right to participate in tribal governments, do you see any constitutional problem when a tribe taxes a business owned by a non-Indian located on fee-owned land but within the boundaries of the reservation? Or, stated another way, is it constitutional for tribes to tax and regulate those who have no ability to influence how their taxes will be acquired and spent?

Judge BREYER. I think that is an aspect of the broader problem that you state. And I think that could well be a matter in litigation, and it is not a matter that I am really expert on. It seems to me the most difficult part of what you say is where, on the one

hand, the tribe has sovereignty, and that sovereignty must be respected.

On the other hand, those people who now perhaps unwillingly are subject to the tribe sovereignty feel they lack a basic right that they would have, if that sovereignty were not there. And there it sounds to me as if what you are trying to do is to encourage people to get together to the point where, at least from the point of view of the person who is there, he gets the rights either way. Of course, that is the best situation.

If whether the Indian tribe has the sovereignty or whether the State has the sovereignty, that person is basically just as well off. I don't know if you can bring that about. That is really a political matter and a matter of negotiating and learning and meetings of all kinds that aren't necessarily judicial meetings. I understand that that is what you try to do, and I can just say, from the point of view of the judicial aspect of the problem, it sounds very difficult, with important interests on both sides.

Senator PRESSLER. Now, the Indian tribes have found a great source of revenue in gambling, and reservation gambling is provided for by the U.S. Congress. Several States have tried to find a way to tax or get a portion of gaming proceeds, and several tribes have gotten very wealthy. There is a sort of irony in all of this. Indeed, some of the smaller tribes on the east coast have become very wealthy.

The point is that the States in which these gambling casinos are located cannot tax tribal gaming proceeds. Do you have any feeling about that subject?

Judge BREYER. I know that is the subject of a congressional statute, and I know the statute tries to create a situation where certain defined tribes—and there is a definition, and I know there are sometimes arguments about where tribes and which tribes and under what circumstances tribes—but where you pass that problem, I think the statute requires a negotiation, and then the negotiation between the State and the tribe over the details of the gambling that the statute permits is designed to work that out in part. That is my guess and understanding.

I also understand that issues can arise about whether or not negotiation is in good faith, the extent to which the court gets involved in supervising the negotiation. In other words, I see the issues and I understand the importance of it, and I am not certain legally really how they actually work out. That would depend upon a particular case.

Senator PRESSLER. In *Santa Clara Pueblo* v. *Martinez,* a 1979 U.S. Supreme Court case, the Court held that suits against a tribe for violation of the Indian Civil Rights Act may not be brought in Federal court, that is they have to be brought in the tribal courts. As a result, individual tribal members, although citizens of the United States, are limited to relief, if any, in their respective tribal court system. 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, which was not successful, with my friend Senator Hatch, who is not here now, and others, I believe in the early 1980's, which would have permitted

individuals who had exhausted their remedies in tribal courts for violations of the Indian Civil Rights Act to bring an action in Federal court. Now, that measure did not become law, so today people exhaust their rights under the Indian Civil Rights Act in tribal courts.

Now, do you believe the Federal courts should be immediately open to anyone who alleges an Indian tribe has deprived him or her of a Federal constitutional right? And should Native Americans be entitled to the same constitutional protection afforded to all Americans in our Federal courts? On this question of jurisdiction, may an Indian tribe require non-Indians living on a reservation to exhaust their remedies in the tribal court system, before appealing in Federal court, even though non-Indians do not enjoy the constitutional protection in tribal courts? Wouldn't such a requirement deprive non-Indians of their due process rights?

To throw all those questions together, should litigants in Indian Country be able to appeal to the Federal district court at the end of their journey through the tribal courts? There is a case I think that will come up to the Supreme Court again on that, or it will try to come up. Do you have any feeling on that?

Judge BREYER. Well, my substantive instinct is, of course, that if the procedures and protections in the tribal court can be brought to match those in the Federal court, the problem will tend to go away, because then, of course, you would have the same protection in both places. And that is not a judicial question. That is a question of people meeting and understanding and talking to each other and trying to work out appropriate procedures.

When you turn to the legal question, which is premised on that not having been done, as you point out, that might come up to the Supreme Court, and I am on that Court, I would have to decide that question and, therefore, I couldn't really express as view about it.

I think that your instinct that if it comes out the way that you think is not appropriate, the solution would be legislative. I think that is a correct instinct.

Senator PRESSLER. That concludes my questions on Indian jurisdiction. But as I read your statement again, your statement yesterday, saying that you try to repeat the argument back in your own words to the other side, I thought that was very much what we have to do with the Indian/white problems, to work for reconciliation. And, indeed, as you do change shoes, you can find arguments just about as strong on each side, and you will have to deal with a lot of those.

Back in that class you taught me a long time ago, your mentioning Andrew Jackson and the Cherokee Indians march to Oklahoma leads me to this question. When was the last time the President of the United States refused to back up the Supreme Court in a matter that the Supreme Court ordered? I mean our whole constitutional system could have broken down.

Judge BREYER. Yes.

Senator PRESSLER. The second part of the question is do you feel that the executive and legislative branches back up the court system today? I mean that is almost unheard of. Our whole system

would not work, if we did what Andrew Jackson did in that instance, is that not correct?

Judge BREYER. Absolutely; that is why I said in response to Senator Kohl that I thought *Cooper* v. *Aaron* was such an important decision, because it is the absolute verification of what you said, that the executive and legislative branches would stand behind the decisions of the Federal courts.

Senator PRESSLER. I think one of the concerns that some of us have in the antitrust area and the deregulation area can be summarized this way: In inner cities and in small cities and rural areas, a lot of big companies don't want to provide service. They would rather provide it in the wealthy suburbs. For example, telecommunications is something I work on a great deal, and we find that the new information highway is going to be abundantly available in wealthy suburbs and larger cities, but not necessarily in inner cities or in small cities or rural areas. The same is true of air service. The same is true of railroad service.

I know you have done a lot of work on deregulation. But I have found myself representing a small city rural State constantly struggling to preserve air service or train service or trucking services, or indeed long-distance telephone rates that are reasonable.

Now we are on the verge of fiber optics cable and broad-band and providing computerized information in the home. If somebody is not on this informational superhighway by the time they are 15, they are never going to be on it, if they are not into putting information into the computer and getting information back out.

You will be making a lot of rulings on antitrust and responsibilities of companies. Of course, we do not have the 1934 act any more that said if you take some rich routes, you have to take some poor routes, and so forth. But, in general, how do you see the Humboldt, South Dakotas, and indeed every State, upstate New York and Massachusetts, smaller cities and towns, not so much on the east coast, because you have so many people, but, indeed, parts of California—Fresno and those small towns that stretch from there to Bakersfield—getting serviced by companies not eager to provide as much air service or as much fiber optic cable or all the miraculous developments in telecommunications.

My basic concern is your philosophy of deregulation is going to leave a lot of people out of the superhighway of information and knowledge and all the good things that are coming. What are your thoughts on that?

Judge BREYER. I think you are addressing really my thoughts as a matter of policy, rather than my thoughts as a judge. Of course, as a judge, one tries to follow the law as it is written.

When I was involved in airline deregulation, this problem arose. It is true that the general thrust of airline deregulation was that prices would go down for the vast majority of Americans. At the same time, I believe when that statute that was written, your point was a valid point, that in terms of infrastructure, it is important that the entire Nation be seen as a single nation and people not be left out.

Therefore, written into that statute was a subsidy that Congress at the time believed would be adequate to maintain service at smaller rural airports, the idea being that no rural community cur-

rently at that time having scheduled service would lose all its service. There would be some lifeline there.

Now, whether that subsidy was adequate, whether it worked out in practice, that is a matter for history and possibly criticism. But the intent of the movement was not totally to sacrifice the needs of those who are not in the populous communities. It was to recognize those needs and to try to provide for them, especially so that there would be interconnections everywhere. That is basically the principle, though one could criticize from that point of view the execution.

Senator PRESSLER. Let me ask a question on the exclusionary rule. I know you covered this to some extent. There was a crime bill written here in the Senate that would have made more evidence admissible to the jury. One perhaps good thing coming out of the O.J. Simpson publicity is that a lot more people across the country are thinking about the exclusionary rule, and I think it is going to become an issue in future political debates, and maybe that's where it should be.

If legislatures were to pass a law saying that more evidence that police pick up at the scene of a crime without a search warrant can be given to the jury or the fruits of the search can be given to the judge or the jury, it is said this would be found unconstitutional, because the fourth amendment provides quite a bit of protection.

Yet, our citizens are getting angry at hearing stories, when you do have a search warrant and you find something else or the fruits of the search are not related to the search warrant, then it is thrown out, it cannot be brought before the jury. Or if policemen upon the scene of a crime go into other rooms or pick up evidence, the argument is it should not be admitted, because the policemen could have gotten a telephonic search warrant or something like that.

In other words, a lot of evidence never gets to the jury or the judge, in the feeling of the public, and I think this is going to be a very big issue in future campaigns in this country. I think we are going to focus on the exclusionary rule. But it is said that even if a statute enacted by Congress broadening what the police can pick up and present, it would be declared unconstitutional. What is your view of that?

Judge BREYER. My guess is it would depend upon the statute. You have to look into the detail.

Senator PRESSLER. Do you have any feelings about what the exclusionary rule should be? Do you think it is about where it should be, or do you think it is too restrictive?

Judge BREYER. I cannot say as a matter of policy, because that is so much a judgment for others. That is, the basic idea, of course, is that it is very puzzling to people, very puzzling, what Cardozo said. He said, "Well, why should the criminal go free, because the constable has blundered?" And the answer to that is, over the course of time and a long period of time, people learned that the protection in the fourth amendment, totally innocent people wouldn't be broken into in the middle of the night, that confessions wouldn't be extracted through violence, that the only way to make those meaningful in practice was to have this exclusionary rule. And it has become I think fairly widely accepted.

The exact contours of it and the shape and size and on the border how it should look, and so forth, I recognize, but that is a matter of considerable controversy and debate, and Congress or others might well criticize or want to do it this way or that way or the other way.

Senator PRESSLER. On the issue of habeas corpus, the average citizen looking at this system sees appeal after appeal sometimes. Would you be satisfied with one thorough appeal that a judge took a look at and said that was a thorough complete appeal? Would that be satisfactory to you?

Judge BREYER. When you say satisfactory to me, the great debate, as you recognize in this area, particularly with the death penalty, is involved, is habeas corpus tells us we don't want to have this or any person have a penalty particularly of this sort, if the trial was fundamentally unfair. Of course, people keep coming on again and again and they say, well, it was fundamentally unfair, and then the courts say no, it was OK, and then they have a new reason and a new reason, and so the problem is this problem of delay.

At the same time, people might sometimes come up with reasons that they for good cause couldn't present before. So I understand how you are trying to balance those two things, the need for fundamental fairness and the need to avoid unreasonable delay. How it works out in the statute again is going to be up to Congress. My guess is you will get one final procedure and some cases will come along where something was discovered later, and you will say, well, the procedure couldn't have taken that into account. So I think you will improve the situation. I am sure there are all kinds of ways of improving it. This is such a fundamental tension, that I doubt it will ever be perfectly solved.

Senator PRESSLER. My final question involves tort reform. Again we hear much argument. We are told that our revolutions in this country have been in the courtroom and not in the streets with guns. Through suing, a small person or a poor person can get at a large corporation that has wronged them. On the other hand, we have so many lawsuits, we are told that the cost of our products has risen substantially.

If you could implement tort reform for the United States tomorrow, what would you do?

Judge BREYER. I am glad sometimes that I am not in the Congress of the United States, and this is not a matter on which I am expert and I am really very pleased to leave that for you to decide.

Senator PRESSLER. It may well be that the Supreme Court will have to decide some of it, especially on punitive damages and issues of that kind. You are not going to give us any glimpse of——

The CHAIRMAN. Do you want to go back to being chief counsel of the committee? [Laughter.]

Judge BREYER. It was a wonderful job.

Senator PRESSLER. Thank you very much, and congratulations.

Judge BREYER. Thank you.

The CHAIRMAN. Judge, I might point out for the record what my recollection is, and this is not correcting you or anyone else, that, on habeas corpus, in 40 percent or thereabouts of the petitions filed