

# Tribal Sovereignty, Natives, and the Courts

Mary Kathryn Nagle, Attorney at Law



ILLUMINATIVE



# Methodology

More than two dozen individuals were interviewed including:

- U.S. Supreme Court law clerks
- Federal district court judges
- Federal appellate judges
- Law clerks at both federal and appellate federal courts
- State court judges
- Individuals working in U.S. Attorney Offices
- Individuals working in Federal Public Defenders Offices
- Law Professors
- Practitioners who argue before the U.S. Supreme Court and other federal courts.

They varied in age, experience, and geographic location.

The majority of individuals interviewed are not tribal citizens and do not identify as Native.

Although most questions of federal Indian law and tribal sovereignty are questions of federal law subject to adjudication in federal court, state courts preside over the majority of cases governed by the Indian Child Welfare Act. There is no question that the perspectives of state court judges are relevant.





# American Elementary Schools Must Teach That the U.S. Has Three Sovereigns

- Respect for the federal and state governments is learned in elementary school.
  - Presumably because most children are citizens of the states where they attend school and the United States, but they are likely not citizens of Tribal Nations.
- If the goal is to encourage federal court decisions that respect Tribal Nations, sovereignty, and jurisdiction– then this respect needs to be taught in elementary school alongside respect for the federal and state governments.
- We cannot expect non-Native federal Judges and Justices to acquire this respect for Tribal Nations on their own.
- They are not going to acquire this respect if their only encounter in elementary school with Tribes is dressing up as a Pilgrim or an Indian at Thanksgiving.
- We are naturally skeptical of things we are unfamiliar with.





# Having Native Law Clerks and Natives on the Federal Bench Makes a Difference



**Judge Sara Hill**  
Cherokee Nation



**Judge Sunshine Sykes**  
Navajo Nation



**Judge Lauren King**  
Muscogee (Creek) Nation



# Federal Indian Law Must be Taught, and it Must be Mainstreamed

- Federal Indian law is a federal matter because Tribes are recognized as sovereigns in the United States Constitution.
- Congress, not individual States, has the authority over relations with federally recognized Indian Tribes.
- Tribes maintain a sovereign-to-sovereign relationship with the United States, meaning the majority of legal questions involving Tribes relate to federal law.
- Federal judges presiding over areas with federally recognized Tribes often handle Indian law cases. Many of these judges likely lack education on Indian law.
- Decisions on federal Indian law are often made by individuals with no formal education in the subject.
- This contributes to the perception of federal Indian law as intellectually inconsistent and detached.



# Indian Gaming is Critical to Tribal Sovereignty but is Poorly Perceived

**Sympathy Disparity:** Non-Natives exhibit empathy towards impoverished Native Americans but lack sympathy for 'rich Indians'

**Wealth Perception:** Negative sentiments peak towards affluent Tribes, particularly when one of the litigants is a wealthy Tribe whose wealth is derived from successful gaming– fostering misconceptions and perceived corruption.

**Prejudice in Legal System:** Prejudices against Indian gaming permeate legal institutions, influencing perceptions of federal Indian law and tribal sovereignty.

**Uninformed Opinions:** Many individuals have an opinion about Indian gaming despite having never set foot in an Indian gaming casino and never having worked on an actual court case concerning a question of law pertaining to Indian gaming.

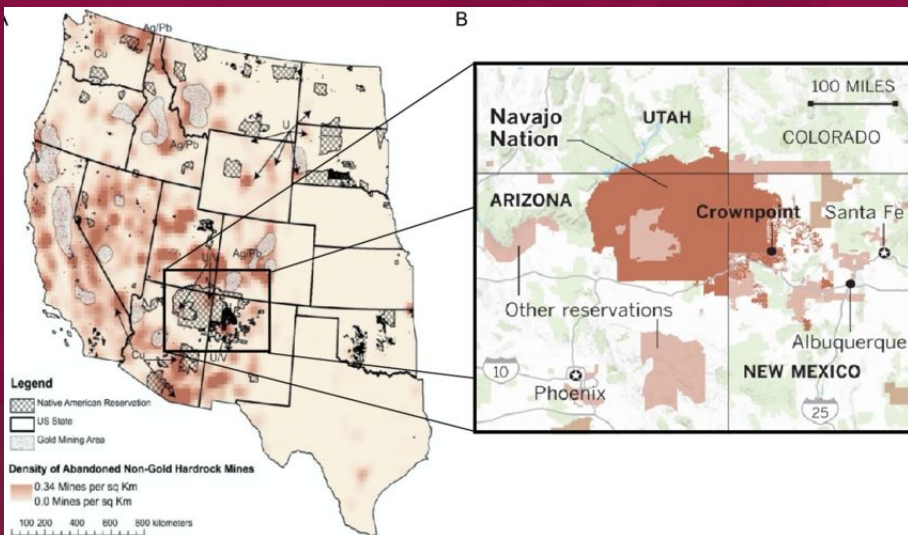
**Impact on Legal Discourse:** Negative perceptions permeate how individuals think of tangential issues of federal Indian law, from Tribal sovereignty immunity to the impacts of federal employment law on tribal lands.



# Judges From West of the Mississippi Tend to Have a Greater Understanding of Tribal Sovereignty and Federal Indian Law

**Regional Understanding:** Judges in districts and appellate courts West of the Mississippi demonstrate a deeper comprehension of federal Indian law and a greater respect for tribal sovereignty, as noted by interviewees.

**Historical Context:** The geographical distribution of Tribes, stemming from 19th-century policies of forced removal and genocide, contributes to this phenomenon, with more Tribes located West of the Mississippi River today.



**Direct Experience:** Judges in Western regions are more likely to have firsthand encounters with Indian law cases, tribal leaders, tribal courts, and Tribal Nations, owing to the concentration of Tribes in these areas.

**Implications:** This disparity in experience influences judicial perspectives and decisions regarding federal Indian law, tribal sovereignty, and authority, shaping legal discourse and outcomes in Western courts.





# Federal Indian Law Jurisprudence in Supreme Court Justice Selection

## **Justice Selection:**

Justices are not selected for the Nation's highest court based on their federal Indian law experience. While this conclusion may seem justified—indeed, federal Indian law makes up a small percentage of the Court's docket

## **Constitutional Implications:**

Federal Indian law receives the least attention during the selection and confirmation process of Supreme Court justices, despite its constitutional implications.

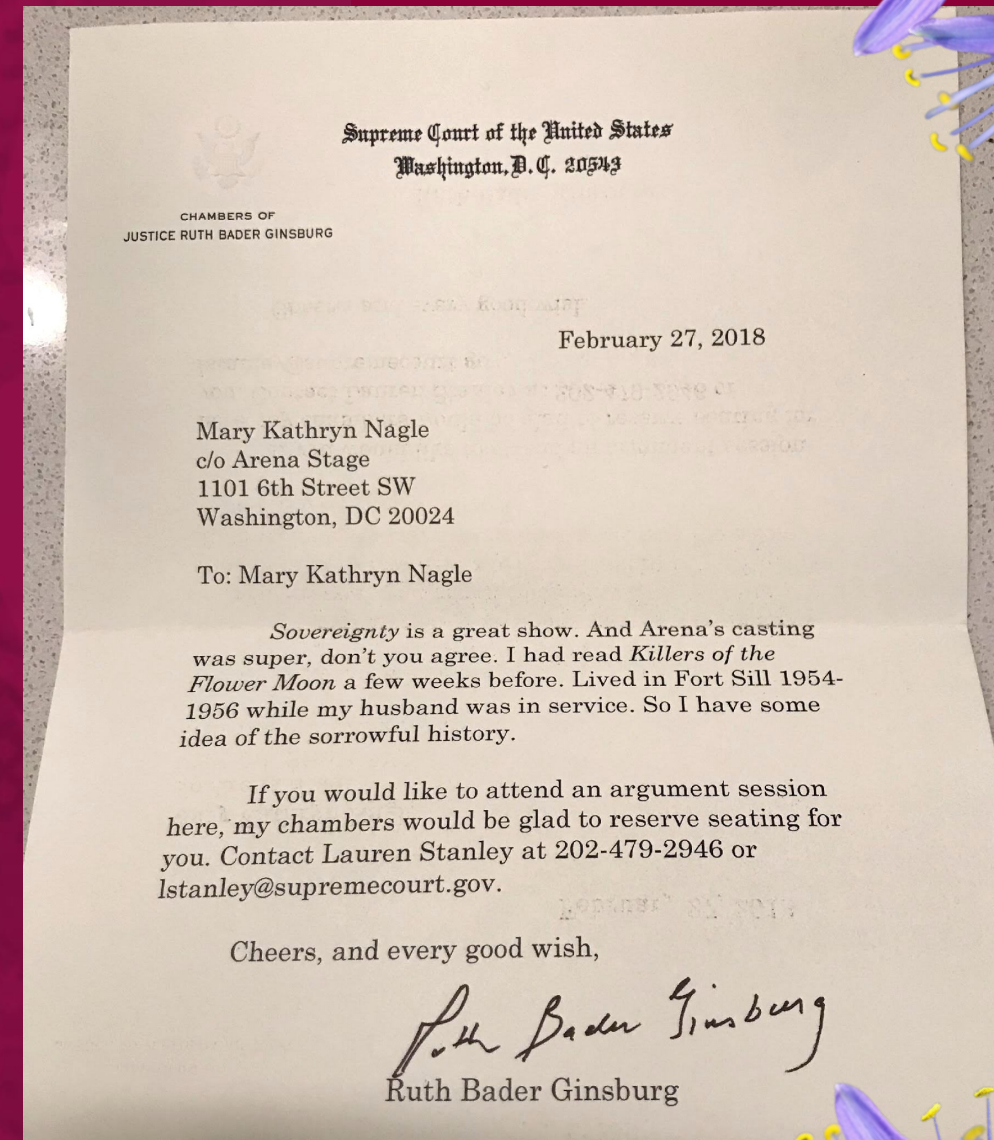
**Example:** Justices like Brown Jackson, Thomas, and Alito were not asked a single question about federal Indian law during their confirmation hearings.





# Federal Judges are Influenced by Art, Entertainment, and Media

- Many interviewees confirmed that individual judges care greatly about public perception.
- Indian Country advocates often overlook the influence that the media's portrayal of tribal sovereignty and jurisdiction have on cases in federal courts
- Example: Oklahoma v. McGirt – despite Tribal Nations' victory, the OK Governor's multi-million dollar PR campaign aimed to discredit the decision, influencing subsequent case outcomes.
- In Oklahoma v. Castro-Huerta the Court aligned with the Governor's concerns raised in media, highlighting media's impact on judicial decisions.



# Poor Outcomes for Tribal Nations Can Result From Erroneous Factual Assumptions

- Instances occurred where interviewees decided cases against Tribal Nations based on incorrect factual assumptions.
- Assumptions ranged from misconceptions about tribal court operations to misunderstandings of recent Congressional updates to statutes.
  - These errors were not alternative interpretations but rather instances of ignorance regarding updates made by Congress.
- It is clear that misunderstandings may not always be addressed in litigants' briefings.

Improving elementary and law school curricula and media narratives are crucial for enhancing outcomes for Tribal Nations in all courts.



# Perceptions of Native Americans Are Positive—Unless Cases Concern Land-use

- Several interviewees noted that the perception of Tribes and Native people as litigants is generally positive among non-Natives in the Judiciary.
- There is no overarching animus against Native people. The individuals that comprise the federal bench have a great appreciation for Native people.
- Several remarked that this positive perception of Native people and Tribes is altered when a case concerns land-use. There is a feeling in American society at large that Tribes should lose when the question is who should own or govern land within the United States.
- Perhaps this feeling is based on an unconscious fear that Indians are going to “take all the land back.” The cause of this feeling was not sufficiently researched to reach such a conclusion here in this report. But, it is an observation echoed throughout the various interviews undertaken.



# Wado!



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They varied in age, experience, and geographic location. The majority of individuals interviewed are not tribal citizens and do not identify as Native.

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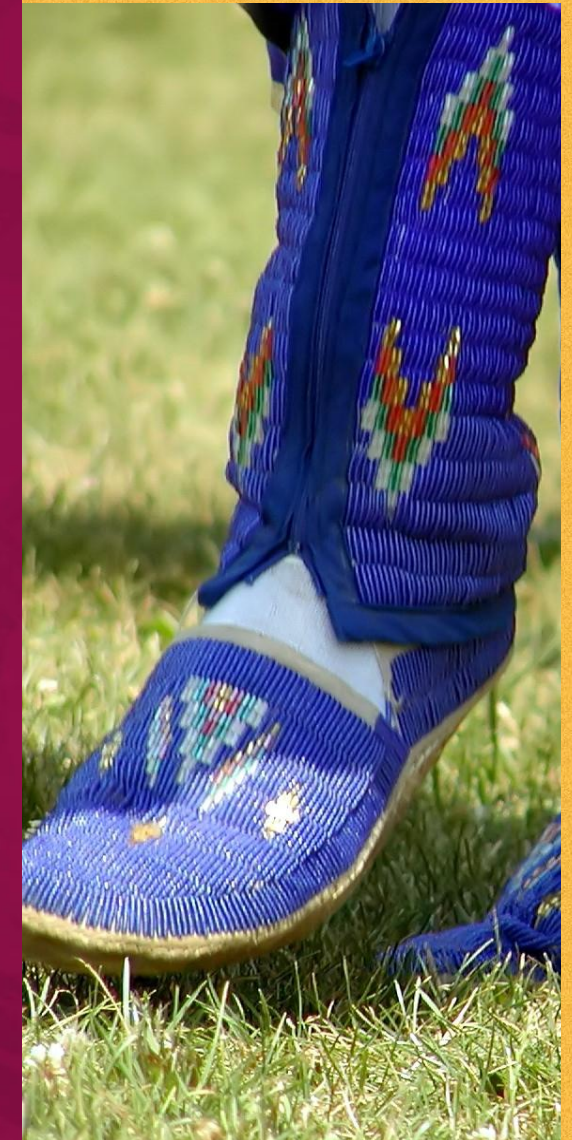
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## **Americans Need to Learn in Elementary School that There are Three Sovereigns in the United States.**

- Respect for the federal and state governments is learned in elementary school.
  - Presumably because most children are citizens of the states where they attend school and the United States, but they are likely not citizens of Tribal Nations.
- If the goal is to encourage federal court decisions that respect Tribal Nations, sovereignty, and jurisdiction— then this respect needs to be taught in elementary school alongside respect for the federal and state governments.
- We cannot expect non-Native federal Judges and Justices to acquire this respect for Tribal Nations on their own.
- They are not going to acquire this respect if their only encounter in elementary school with Tribes is dressing up as a Pilgrim or an Indian at Thanksgiving.
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**Americans Need to Learn in Elementary School that There are Three Sovereigns  
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We learn respect for the federal and state governments in elementary school. Presumably one might aver that the reason for this is that most children are citizens of the states where they attend school and the United States, but they are not likely to be citizens of Tribal Nations. Just the same, if the goal is to encourage federal court decisions that respect Tribal Nations, tribal sovereignty, and tribal jurisdiction, then this respect needs to be taught in elementary school alongside respect for the federal and state governments.

We simply cannot expect non-Native federal Judges and Justices to acquire this respect for Tribal Nations on their own. And they are not going to acquire this respect if their only encounter in elementary school with Tribes is dressing up as a Pilgrim or an Indian at Thanksgiving. As one interviewee put it, we are naturally skeptical of things we are unfamiliar with.

## Poor Outcomes for Tribal Nations Can Result From Erroneous Factual Assumptions

Although specific cases will not be mentioned (in order to protect the anonymity of all interviewees), there were several instances where an individual interviewed had decided a case against a Tribal Nation based, in part, on a factual assumption that is wrong. These assumptions range from the ways in which tribal courts do or do not operate, to misunderstandings of how Congress has recently updated certain statutes (which of course could be characterized as a “legal” misunderstanding, except the erroneous conclusion was not a different interpretation of the statute, it was simply ignorance to the fact that Congress updated it).

As a result of this research, it has become clear that these misunderstandings may or may not be discussed by the litigants in their briefing. Thus, this further supports the above-mentioned points that improving elementary and law school curricula, as well as narratives in the media at large, are imperative initiatives to improving outcomes for Tribal Nations in the Supreme Court, and all courts.





## **Federal Indian Law Must be Taught, and it Must be Mainstreamed**

Federal Indian law is a *federal* subject matter because Tribes are one of the three sovereigns listed in the United States Constitution, and further, because the Constitution assigns Congress—and not the individual States—the requisite authority to deal in relations with federally recognized Indian Tribes. Tribes maintain a sovereign-to-sovereign relationship with the United States, and as a result, the majority of legal questions that arise concerning Tribes and statutes relating to them involve questions of federal law. For any federal judge presiding over an area with one or more federally recognized Tribe, that judge is almost guaranteed to preside over an Indian law case. That judge, however, is very likely to have attended a law school that does not teach Indian law. The result of this is that most of the decisions concerning a key part of U.S. Constitutional law, specifically federal Indian law, are decided by individuals with no education on the subject matter. This is another reason why so many regard federal Indian law as

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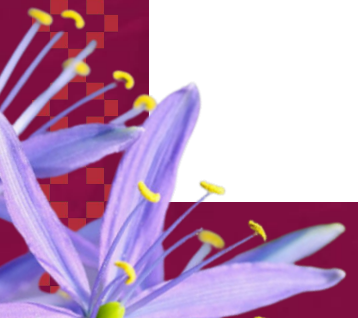




## Indian Gaming is Critical to Tribal Sovereignty but is Poorly Perceived

Several interviewees remarked that, among non-Natives, there is great sympathy for Native Americans who have little to no money. But there is a definite lack of sympathy for “rich Indians.” This lack of sympathy is at its zenith when one of the litigants is a wealthy Tribe whose wealth is derived from successful gaming. Misconceptions and perceived corruption abound when it comes to Indian gaming, and these prejudices permeate the United States’s legal institutions. While some Americans are against any kind of gambling full-stop (for religious or moral reasons), many others do not have a stand against gaming per se as much as they have a prejudice against *Indian* gaming. Many individuals have an opinion about Indian gaming despite having never set foot in an Indian gaming casino and never having worked on an actual court case concerning a question of law pertaining to Indian gaming.

And yet, this negative perception permeates how individuals think of tangential issues of federal Indian law, from tribal sovereignty immunity to the impacts of federal employment law on tribal lands.



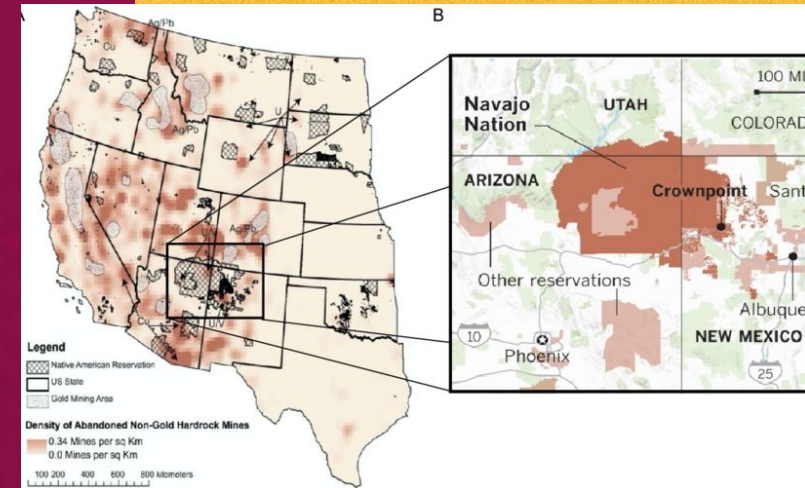
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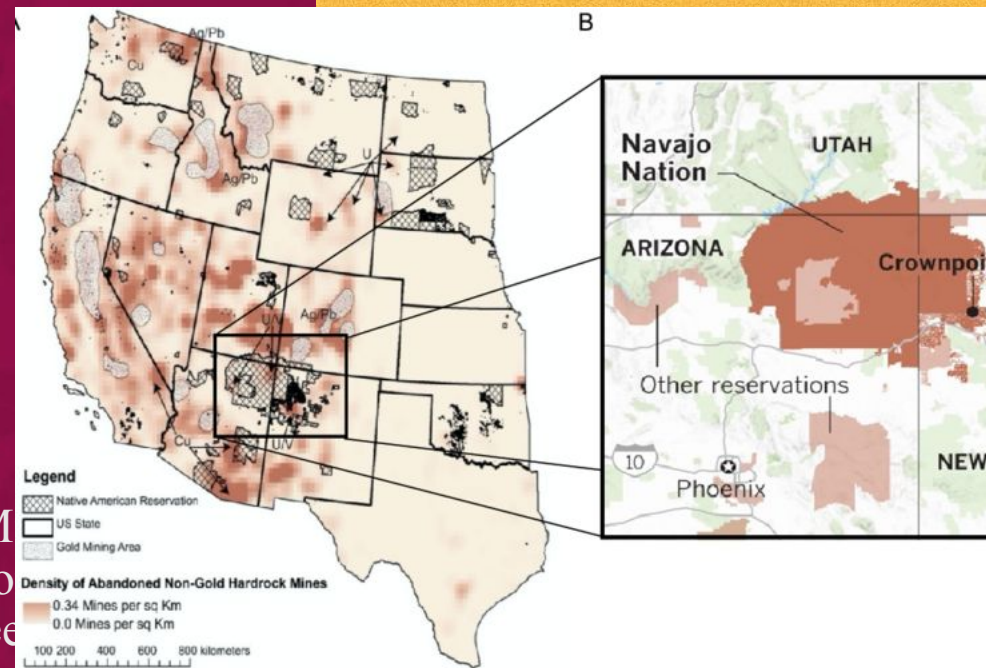
**Implications:** This disparity in experience influences judicial perspectives and decisions regarding federal Indian law, tribal sovereignty, and authority, shaping legal discourse and outcomes in Western courts.





## Judges From West of the Mississippi Tend to Have a Greater Understanding of Tribal Sovereignty and Federal Indian Law

In general, Judges from district and appellate courts West of the Mississippi tend to have a better understanding of federal Indian law, and a greater respect for tribal sovereignty and authority. Numerous interviewees confirmed this observation. This, of course, is not an accident. During the early Nineteenth Century, United States policy was to forcibly remove all Tribes to west of the Mississippi. As a result of these forced removals—as well as genocidal policies designed to wipe out Tribes altogether—there are far more Tribes west of the Mississippi today than in the east. As a result of this discrepancy, judges sitting on district and appellate courts west of the Mississippi are far more likely to have presided over an Indian law case, met a tribal leader, set foot in a tribal court, or have had experience with Tribal Nations and their citizens.







## Federal Indian Law Jurisprudence in Supreme Court Justice Selection

### **Justice Selection:**

Justices are not selected for the Nation's highest court based on their federal Indian law experience. While this conclusion may seem justified—indeed, federal Indian law makes up a small percentage of the Court's docket

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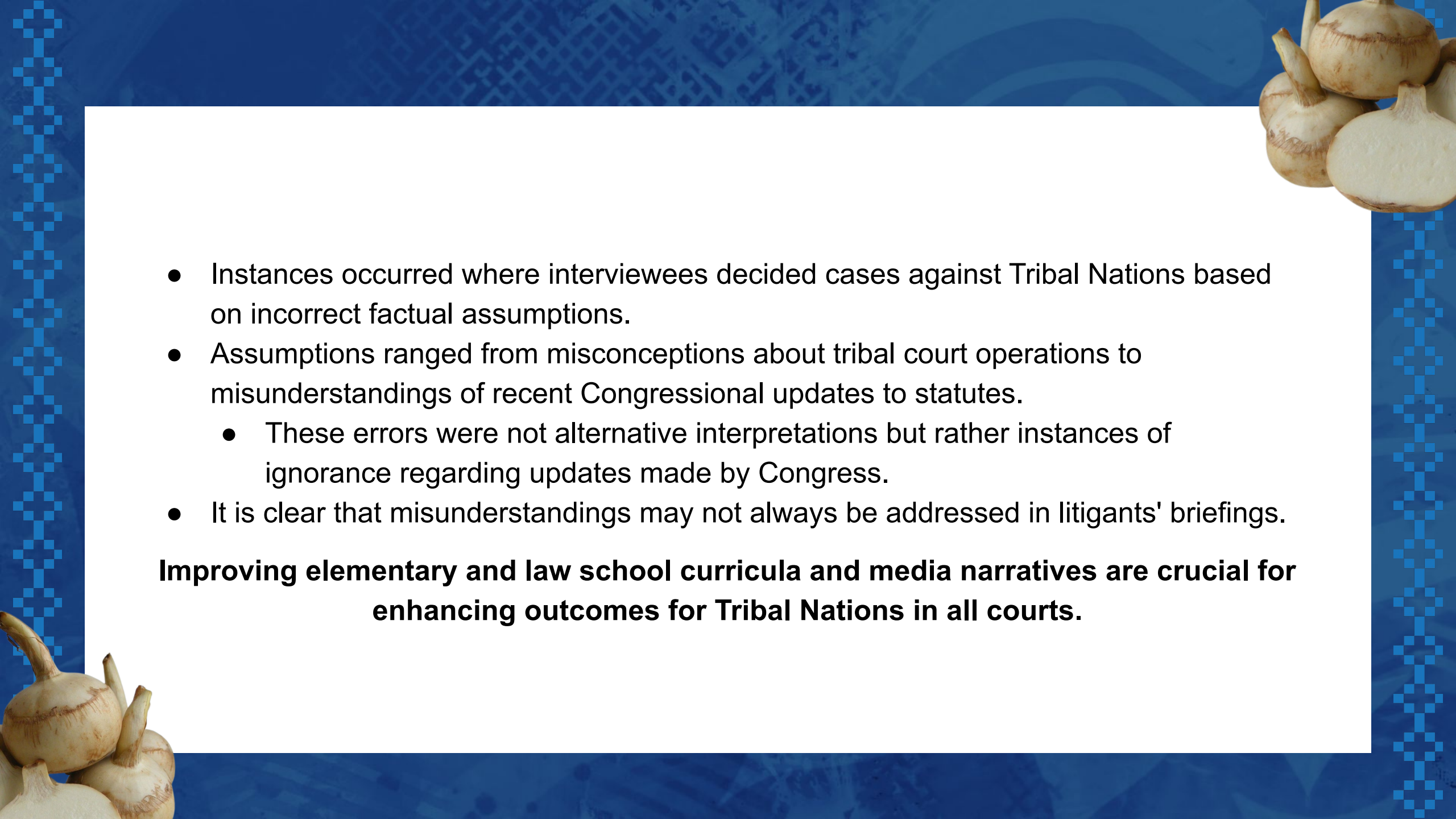
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## **Presidents and the Senate Judiciary Committee Do Not Pick Supreme Court Justices Based on Their Federal Indian Law Jurisprudence.**

Justices are not selected for the Nation’s highest court based on their federal Indian law experience. While this conclusion may seem justified—indeed, federal Indian law makes up a small percentage of the Court’s docket, and it is not like the President or the Senate have the ability to screen every candidate for every single legal issue they might ever face—it is clear that federal Indian law is the constitutional issue that receives the least amount of consideration in the selection and confirmation process. For instance, during her confirmation hearing, Justice Brown Jackson was not asked a single question about federal Indian law. Neither were Justices Thomas or Alito.

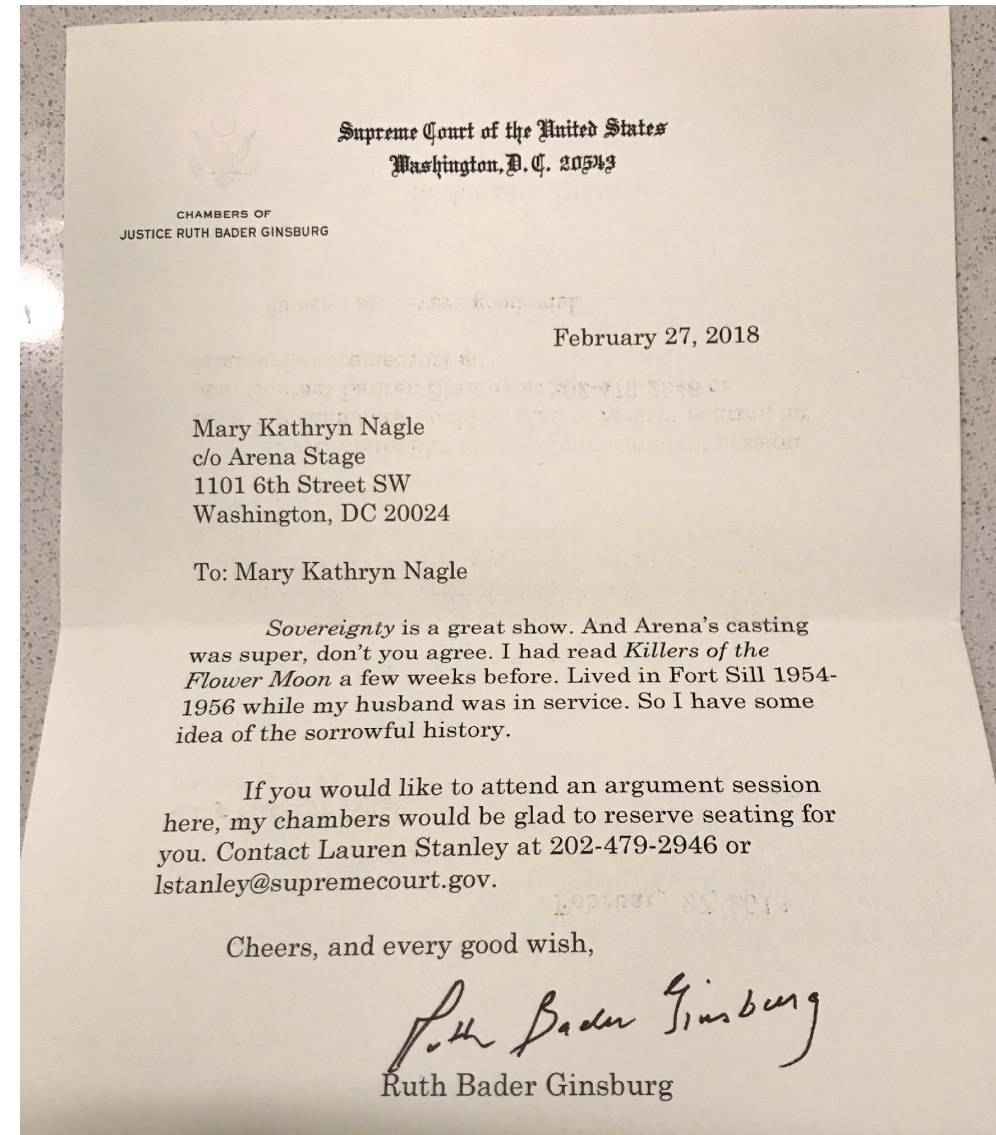
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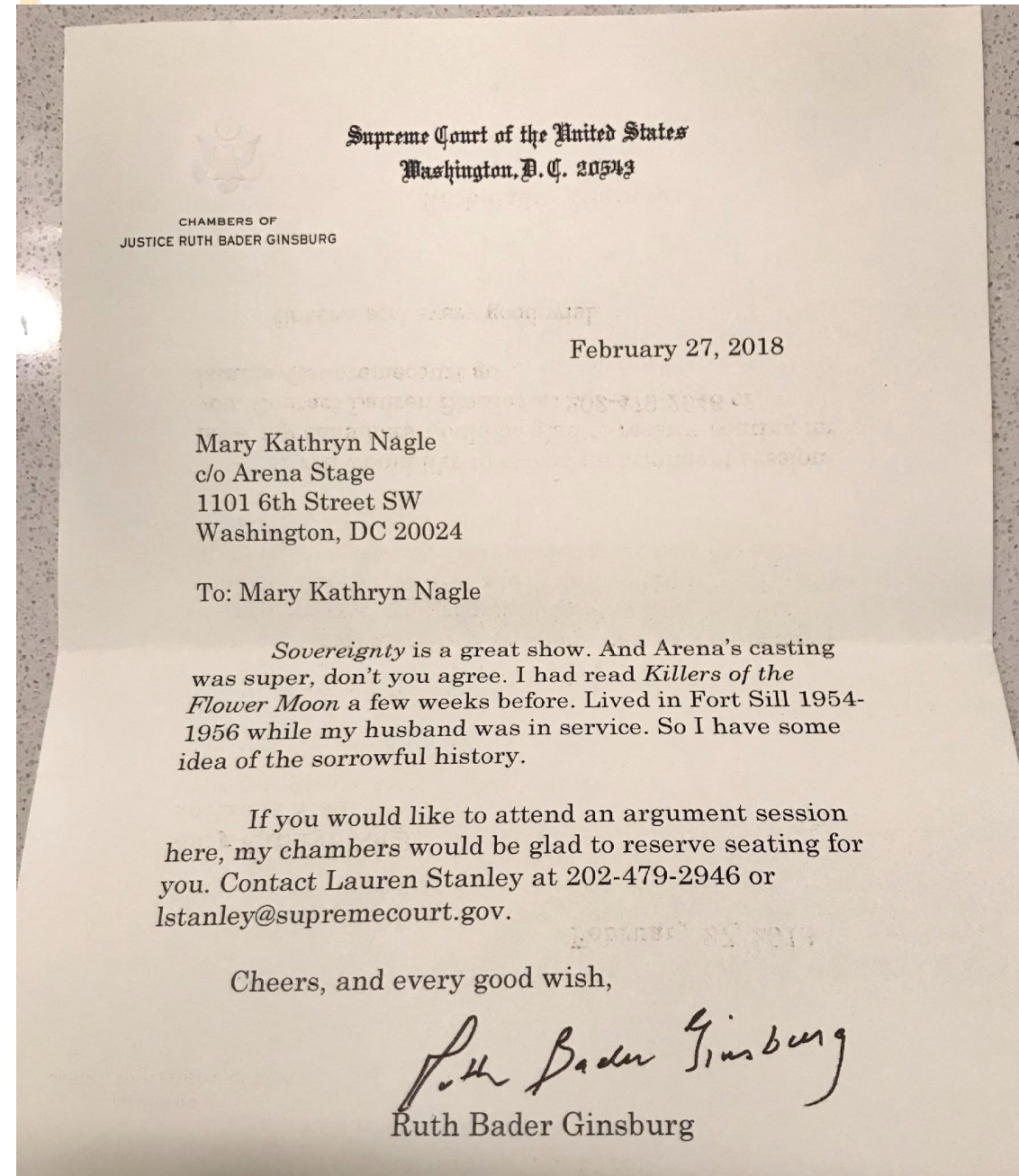
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# Federal Judges are Influenced by Art, Entertainment, and Media

Many interviewees confirmed that individual judges care greatly about public perception. Indian Country advocates often fail to make the connection between the ways in which issues of tribal sovereignty and jurisdiction are portrayed in the media and the outcomes in federal courts. The link, though, is clear. For instance, Tribal Nations were victorious in the case of *Oklahoma v. McGirt*. But following this decision, the Governor of Oklahoma spent millions of dollars paying for a PR campaign to discredit the decision, characterizing it as one that jeopardizes public safety in Oklahoma. Not too long after this media campaign, the Court issued its decision in *Oklahoma v. Castro-Huerta*. In that decision, the Court did not overturn its decision in *McGirt*, but, the Court sided with Oklahoma and the Court's rationale for doing so was clearly based on the concerns raised in the Governor's media campaign (i.e., public safety).

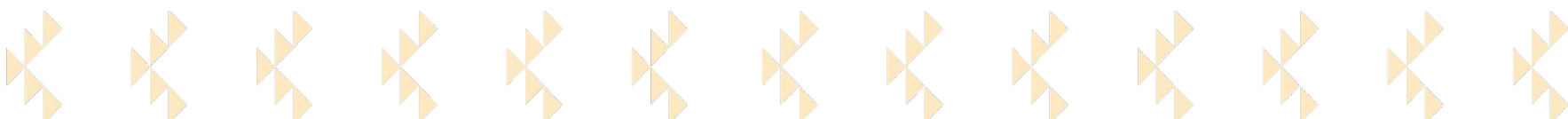






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## Perceptions of Native Americans Are Positive—Unless Cases Concern Land-use

Several individuals interviewed noted that the perception of Tribes and Native people, as litigants, is fairly positive among non-Natives in the Judiciary. That is, there is no overarching animus against Native people. The individuals that comprise the federal bench have a great appreciation for Native people. However, several individuals who were interviewed remarked that this positive perception of Native people and Tribes is altered when a case concerns land-use. That is, there is a feeling in American society at large that Tribes should lose when the question is who should own or govern land within the United States. Perhaps this feeling is based on an unconscious fear that Indians are going to “take all the land back.” The cause of this feeling was not sufficiently researched to reach such a conclusion here in this report. But, it is an observation echoed throughout the various interviews undertaken.





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