Tribal Law Journal

Volume 21 Article 2

1-2022

Case Note: Federal Indian Law – Tribal Criminal Jurisdiction – Indian Civil Rights Act – Tribal Sovereignty – United States v. Cooley

Sarah A. Sadlier, Mnikȟówožu Lakȟóta

Federal Indian Law — Tribal Criminal Jurisdiction — Tribal Sovereignty — United States v. Cooley

Sarah A. Sadlier

ABSTRACT

In United States v. Cooley, a Ninth Circuit panel denied a petition for rehearing en banc, holding that a tribal officer, who was not cross-deputized, could neither search nor detain a non-Indian on a federal or state highway right-of-way through the reservation unless that individual had committed an "apparent" crime in the officer's presence. Narrowly defining tribal police authority, the panel ruled that the officer conducted an extra-jurisdictional search and seizure. In arriving at this conclusion, the panel refused to recognize that the Tribe's sovereignty affords its law enforcement agencies the authority to investigate those who imperil public order on the reservation. Its standard for search and detention posed administrability challenges for tribal law enforcement and endangered the millions of non-Indians and Indians living on tribal lands in the process. Fortunately, the Supreme Court recently overruled the Ninth Circuit's decision. A unanimous Court held that a tribal police officer could temporarily detain and search non-Indian individuals using public rights-of-way crossing the reservation for violations of state or federal law. The decision reaffirmed that the Tribe retained its inherent sovereign authority to regulate non-Indian conduct that threatens the Tribe's welfare under the second exception in Montana v. United States. In doing so, it averted the disastrous consequences of the lower court's decision, prioritized workable standards for tribal officers, preserved the Tribe's ability to protect its members, and for the first time, offered insight into the Court's criteria for what fits Montana's second exception.

INTRODUCTION

Since the late 1970s, courts have consistently eroded tribal jurisdiction over non-Indians.[1] This trend is particularly prevalent in criminal proceedings against non-Indians in Indian country and civil suits against defendants who are not tribal members for conduct occurring on non-Indian fee land.[2] Due to historic land dispossession, an overwhelming percentage of reservation land is non-Indian fee land.[3] Seventy-seven percent of the 4.6 million people residing in tribal areas are non-Native.[4] This demographic shift has endangered not only tribal sovereignty but also tribal citizens' welfare.[5] Battling crime rates two and a half times higher than the national average,[6] tribal law enforcement agencies struggle to maintain public order given their restricted authority over non-Indians, who face minimal repercussions for perpetrating non-major crimes on the reservation.[7]

Recently, in *United States v. Cooley*,[8] the Ninth Circuit held that a tribal officer, who was not cross-deputized, could neither search nor detain a non-Indian on a federal or state highway right-of-way through the reservation unless that individual had committed an "apparent" crime in the officer's presence.[9] Narrowly defining tribal police authority, the panel ruled that the officer conducted an extra-jurisdictional search and seizure, thereby violating the Fourth Amendment principles made applicable to tribes under the Indian Civil Rights Act of 1968 (ICRA).[10] In arriving at this conclusion, the panel refused to recognize that the Tribe's sovereignty—which congressional plenary power alone may abrogate—affords its law enforcement agencies the authority to investigate those who imperil

[1] Written in May 2020 for the *Harvard Law Review* Writing Competition; revised to reflect developments in the law.

[2] *See* Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 555–56 (2009).

[3] Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 604–05 (2010).

[4] United States v. Cooley, 947 F.3d 1215, 1236 (9th Cir. 2019) (Collins, J., dissenting in the denial of reh'g en banc).

[5] *See id.*

[6] L. Edward Wells & David N. Falcone, *Rural Crime and Policing in American Indian Communities*, 23 S. RURAL SOC. 199, 200 (2008).

[7] Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, ATLANTIC (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/.

[8] 919 F.3d 1135 (9th Cir. 2019).

[9] *Id.* at 1142.

[10] *Id.*

public order on the reservation.[11] This decision's standard for search and detention posed administrability challenges for tribal law enforcement and endangered the millions of non-Indians and Indians living on tribal lands in the process.

In a unanimous decision, the Supreme Court overruled the Ninth Circuit.[12] It held that a tribal police officer could temporarily detain and search non-Indian individuals using public rights-of-way crossing the reservation for violations of state or federal law.[13] Importantly, it reaffirmed that the Tribe retained its inherent sovereign authority to regulate non-Indian conduct that threatens the Tribe's welfare under the second exception in *Montana v. United States*.[14] In doing so, it averted the disastrous consequences of the lower court's decision, prioritized workable standards for tribal officers, preserved the Tribe's ability to protect its members, and for the first time, offered insight into the Court's criteria for what fits *Montana*'s second exception.

A. Facts

At around 1:00 a.m. on February 26, 2016, Highway Safety Officer for the Crow Police Department, James D. Saylor, pulled up behind a parked truck on a treacherous stretch of road, United States Route 212.[15] Saylor approached the vehicle to complete a welfare check and asked its driver, Joshua James Cooley, to lower the window.[16] Instantly, Saylor observed that Cooley exhibited "watery, bloodshot eyes" and appeared "to be non-Native."[17] Cooley claimed that he had stopped because of fatigue; however, Saylor suspected that Cooley was impaired and continued his questioning.[18] Cooley offered contradictory answers about his dealings with a man presumed to be affiliated with drug trafficking, and Saylor requested identification.[19] Cooley began breathing rapidly, and his hand hovered above his pocket.[20] Saylor believed this movement signaled his intention to use

[11] *See* United States v. Lara, 541 U.S. 193, 200 (2004) (quoting Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463, 470–71 (1979)).
[12] *See* United States v. Cooley, 141 S. Ct. 1638, 1646 (2021).
[13] *Id.* at 1642–45.
[14] 450 U.S. 544 (1981).
[15] *See* United States v. Cooley, No. 16-42-BLG-SPW, 2017 WL 499896, at *1 (D. Mont. Feb. 7, 2017).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *See id.* at *2.
[20] *Id.*

force.[21] In response, Saylor drew his pistol and ordered Cooley to show his hands. Cooley complied and produced his driver's license, which Saylor attempted to radio into the station, though poor cell reception interfered.[22] Instead of returning to his patrol unit, Saylor searched the vehicle and spotted a loaded semiautomatic pistol near where Cooley's right hand had been, as well as two semi-automatic rifles.[23] Subsequently, Saylor performed a pat down and located bags commonly used to package methamphetamine in Cooley's pockets.[24] After detaining Cooley in the patrol car, Saylor radioed for additional assistance from Crow Reservation law enforcement and from the state's Bighorn County officers, who could arrest Cooley if they confirmed his non-Indian status.[25] While waiting for back-up, Saylor went to cut Cooley's engine and came across a glass pipe and plastic bag that appeared to contain methamphetamine.[26] When the Bureau of Indian Affairs and county officers arrived, the BIA officer directed Saylor to execute another search of the vehicle, which yielded more methamphetamine.[27]

The District of Montana charged Cooley with one count of possession with intent to distribute methamphetamine and one count of possession of a firearm in furtherance of a drug-trafficking crime.[28] Cooley moved to suppress evidence from Saylor's investigation, asserting that Saylor violated ICRA when he seized Cooley because he was acting outside the scope of his jurisdiction as a Crow Tribe law enforcement officer.[29] The district court granted the motion.[30] First, the court held that ICRA requires federal courts to exclude evidence that tribal officers obtain in violation of the act's Fourth Amendment counterpart.[31] Secondly, invoking *Bressi v. Ford*,[32] it held that tribal officers cannot detain a non-Indian on state or federal rights-of-way unless it is "obvious" or "apparent" at the time of detention that the non-Indian suspect has violated a state or federal law.[33]

[21] *Id.*
[22] *See* United States v. Cooley, 2017 WL 499896, at *2.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at *1.
[29] *Id.*
[30] *Id.* at *4–5.
[31] *See id.* at *3–4.
[32] *See* 575 F.3d 891 (9th Cir. 2009).
[33] United States v. Cooley, 2017 WL 499896, at *4.

B. The Ninth Circuit's Panel Opinion

The Ninth Circuit affirmed the district court's ruling and remanded with Judge Berzon writing for the panel.[34] It noted that the exclusionary rule—which deters law enforcement from unconstitutional search or seizures[35]—applies in federal court prosecutions that use evidence accumulated in violation of ICRA's Fourth Amendment analogue.[36] The panel acknowledged that the reasonableness of Fourth Amendment search or seizure turns on whether the officer either had probable cause for a search or arrest or possessed reasonable suspicion for an investigatory detention.[37] Yet, it proposed that tribal officers should be held to a higher standard when interacting with non-Indian suspects.[38] Whether "a tribal officer's actions violate ICRA's Fourth Amendment analogue does not turn on whether his actions are lawful under current statutory law."[39] Rather, the panel reasoned that because the Tribe's inherent sovereign authority does not permit authority over non-Indians, search or seizure may be unreasonable even if the tribal officer has substantive reasons for conducting it.[40]

The panel held that Saylor's extra-jurisdictional acts violated ICRA's Fourth Amendment counterpart, triggering the suppression of evidence from the two searches of Cooley's vehicle.[41] It found that tribes lack ancillary power to investigate non-Indians on public rights-of-way crossing reservations for reasonably suspected violations of state or federal law that transpire there.[42] The panel endorsed the district court's conclusion that during a traffic stop, a tribal officer only has the authority to identify whether the motorist is Indian.[43] In the brief period encompassing that single question, if the officer spots an "apparent" violation, then that officer may continue to detain the non-Indian suspect until the appropriate state or federal authorities arrive.[44] In all other situations, the officer would be outside the scope of tribal law enforcement authority.[45]

---

[34] United States v. Cooley, 919 F.3d at 1148.
[35] *Id.* at 1144.
[36] *Id.* at 1145.
[37] *See id.* at 1145.
[38] *Id*. at 1147.
[39] *Id.*
[40] *See id.* at 1148.
[41] *Id.*
[42] *Id.* at 1141.
[43] *Id.* at 1142.
[44] *Id.*
[45] *Id.* at 1143.

The panel also added the caveat that "a tribal officer does not *necessarily* conduct an unreasonable search or seizure for ICRA purposes when he acts beyond his tribal jurisdiction" to the district court's ruling.[46] The panel proposed a narrow common law exception: a tribal officer's extra-jurisdictional acts would not constitute a violation if a private citizen lawfully could have taken those actions under the law of the Founding Era.[47] Since Saylor's actions did not conform to this criterion, the panel ruled that Saylor had no authority either to detain Cooley in his patrol car until state and federal officers arrived or to search Cooley's truck.[48]

C. The Ninth Circuit's Denial of Rehearing En Banc

The Ninth Circuit denied the petition for a panel rehearing, as well as the petition for a rehearing en banc.[49] Judge Berzon and Judge Hurwitz co-authored a concurrence in the denial of rehearing en banc, stating that the panel's ruling did not conflict with past circuit and Supreme Court jurisprudence.[50] In particular, the concurrence argued that Supreme Court case law supplies two sources for tribal law enforcement's authority.[51] First, under *Oliphant v. Suquamish Indian Tribe*,[52] tribes have an inherent power as sovereigns to enforce criminal law against tribal members or nonmember Indians, though they exert no criminal jurisdiction over non-Indians in Indian country and beyond.[53] Second, the concurrence conceded that tribes' sovereign power includes tribal officers' authority to investigate and "eject" non-Indians who "disturb public order on the reservation" from tribal lands.[54] The panel likewise recognized *United States v. Becerra-Garcia*'s holding that "[i]ntrinsic in tribal sovereignty is the power to exclude trespassers from the reservation, a power that necessarily entails investigating potential trespassers."[55] Citing *Strate v. A-1 Contractors*,[56] Judge Berzon and Judge Hurwitz posited that the Supreme Court had "definitively ruled, however, that this power to

[46] *Id.* at 1145.
[47] *See id.* at 1148.
[48] *Id.*
[49] United States v. Cooley, 947 F.3d 1215, 1216 (9th Cir. 2019).
[50] *Id.* (Berzon & Hurwitz, JJ., concurring in the denial of reh'g en banc).
[51] *Id.* at 1217.
[52] 435 U.S. 191 (1978).
[53] United States v. Cooley, 947 F.3d at 1216 (Berzon & Hurwitz, JJ., concurring in the denial of reh'g en banc).
[54] *Id.* at 1217.
[55] *Id.* (citing United States v. Becerra-Garcia, 397 F.3d 1167, 1175 (9th Cir. 2005)).
[56] 520 U.S. 438 (1997).

exclude—and so the authority to investigate non-Indians—does not extend to land within the borders of Indian reservations that is non-Indian," such as state or federal highways.[57] In doing so, the judges dismissed potentially contradictory precedent in *Ortiz-Barraza v. United States*,[58] proclaiming that *Strate* had overruled it.[59] According to the concurrence, Saylor was operating outside of his jurisdiction when he detained and investigated Cooley, a non-Indian on non-Indian land.[60]

Judge Collins dissented.[61] The dissent lambasted the panel's contravention of long-established Ninth Circuit and Supreme Court precedent, as well as state and federal appellate courts' contrary authority.[62] Tracing over forty years of case law, Judge Collins highlighted the panel's ground-breaking decision to deprive tribal law enforcement of its authority on non-Indian lands within the reservation both to conduct on-the-spot investigations of non-Indians if probable cause exists and to detain a non-Indian suspect until state or federal law enforcement's arrival.[63] To demonstrate this departure from precedent, the dissent wrote that *Ortiz-Barraza* supported tribal officers' authority to perform traffic stops for nonmember violators of state law on all roads within the reservation, including rights-of-way that are part of the highway system.

The concurrence contended that *Strate* overruled *Ortiz-Barraza*, but the dissent distinguished the facts of the two cases.[64] *Strate*'s holding pertained to a tribe's *civil* jurisdiction and broad tribal detention authority related to highway roadblocks rather than tribal officers' limited authority to stop suspected criminal offenders on state or federal rights-of-way.[65] Relying on *State v. Schmuck*,[66] Judge Collins showed that the courts have concluded that tribal law enforcement's authority to stop and detain non-Indian suspects does not rest exclusively on the power to exclude non-Indians, as the

[57] United States v. Cooley, 947 F.3d at 1217 (Berzon & Hurwitz, JJ., concurring in the denial of reh'g en banc).
[58] 512 F.2d 1176 (1975).
[59] United States v. Cooley, 947 F.3d at 1219 (Berzon & Hurwitz, JJ., concurring in the denial of reh'g en banc).
[60] *Id.* at 1218.
[61] Judges Bea, Bennett, and Bress joined the dissent.
[62] United States v. Cooley, 947 F.3d at 1215 (Collins, J., dissenting in the denial of reh'g en banc).
[63] *Id.* at 1220.
[64] *Id.* at 1221–22.
[65] *Id.*
[66] 850 P.2d 1332 (Wash. 1993).

concurrence claimed.[67] It lies in tribes' sovereign right to maintain public order on the reservation: a power that necessarily involves an ability to investigate reasonably suspected non-Indian violators of that order.[68]

Both the dissent and concurrence debated the consequences of the panel's decision. Judge Berzon and Judge Hurwitz's concurrence proclaimed that this case "certainly does not present a 'question of exceptional importance' meriting en banc consideration."[69] Insisting that the practical implications were limited, the judges denounced the dissent's characterization of the case's legal context as a misrepresentation, which "wildly exaggerates the purported consequences of the panel opinion."[70] In contrast, the dissent stressed that a rehearing of the legal issue was essential because the decision diminished tribes' ability to protect the "welfare of hundreds of thousands" living on reservations.[71] For the dissent, three factors underscored the critical importance of the case: the substantial quantity of reservation land held by non-Indians, the sizeable non-Indian population on reservations, and the considerable volume of criminal activity within reservations.[72] It suggested that in a large percentage of cases, the Ninth Circuit's decision would have effectively stripped tribal law enforcement of its on-the-spot ability to detain and investigate a reasonably suspected lawbreaker for a brief period.[73] As the dissent observed, the panel's private-citizen arrest authority applied to felonies alone, meaning that a tribal officer could not intervene in misdemeanors as soon as a suspect declared non-Indian status.[74] Judge Collins predicted that this decision would produce unsolvable problems, since states lack resources to monitor highways crossing reservation lands and tribal officers frequently are the first responders to investigate traffic offenses occurring there.[75]

[67] United States v. Cooley, 947 F.3d at 1232 (Collins, J., dissenting in the denial of reh'g en banc).
[68] *Id.*
[69] *Id.* at 1216 (Berzon & Hurwitz, JJ., concurring in the denial of reh'g en banc).
[70] *Id.*
[71] *Id.* at 1238 (Collins, J., dissenting in the denial of reh'g en banc).
[72] *Id.* at 1236.
[73] *Id.* at 1232.
[74] *Id.* at 1237.
[75] *Id.*

D. Analysis

The Ninth Circuit's denial of rehearing en banc would have caused disastrous outcomes for Indian country. It represented the latest in a string of cases which improperly infringed upon both tribal sovereign authority and Congress's power to establish federal Indian policy.[76] In instituting new constraints on tribal policing authority, the Ninth Circuit restricted tribal law enforcement's investigatory authority and shielded the alleged individual rights of non-Indians at the expense of tribal sovereignty.[77] The concurrence invented a confounding legal regime that did little to lessen criminal activity. As a result, it left reservation communities to suffer from crimes committed by non-Indians within tribes' borders. Fortunately, the Supreme Court's ruling in *Cooley* avoided these catastrophic consequences.[78]

The Ninth Circuit's decision in *Cooley* fits into a broader trend of courts seeking to reduce tribal authority. Strikingly, the Supreme Court decided 72 percent of Indian law cases against Indigenous interests from 1986 to 2007.[79] Since the Court's infamous 1978 ruling in *Oliphant*, the judiciary largely has sought to curb tribal sovereign jurisdiction by embracing what scholars have referred to as "common law colonialism."[80] Under this theory, the Court has maintained that even if Congress has not exerted its plenary authority, the Court may invalidate any tribal power that it deems to be "inherently lost to the overriding sovereignty of the United States."[81] However, this doctrine—implicitly at play in the Ninth Circuit's decision in *Cooley*—is inconsistent with precedent. In *Lone Wolf v. Hitchcock*, the Supreme Court held that Congress possesses plenary authority over

[76] *See* Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1263–64 (2001).
[77] *See* Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 488–89 (2000).
[78] *See* PTAN 123–33.
[79] Introduction, *Developments in the Law—Indian Law*, 129 HARV. L. REV. 1653, 1655 (2016).
[80] *See, e.g.*, Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1835 (2019) (citing Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 81 (1999) (coining the term "common law of colonization")); *see also* Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. STATE L.J. 77, 88–89 (2004).
[81] *Id.*

tribes and their lands and that this power was political.[82] This foundational case established that Congress rather than the courts should manage Indian affairs.[83] Because this precedent has not been overruled, the Ninth Circuit's holding contravened a governing tenet of federal Indian law by mandating new limitations on tribal law enforcement's investigatory authority over non-Indians on public rights-of-way through the reservation without indication from Congress.[84]

Courts also have postulated that the rights of non-Natives restrict the inherent sovereignty of Native nations.[85] The Ninth Circuit concurrence in *Cooley* asserted that ICRA's search and seizure provisions apply more stringently to Indian sovereigns than the Bill of Rights does to the United States.[86] The Ninth Circuit in the denial of rehearing en banc held that the tribal law enforcement officer violated Fourth Amendment principles made applicable under ICRA when he investigated a non-Indian who had not committed an "obvious" or "apparent[]" felony in his presence.[87] This "apparent" standard is an elevated one in comparison to the "reasonable suspicion" and "probable cause" standards that state and federal officials must abide by while conducting search and seizure.[88] Moving beyond the plain language of ICRA, the concurrence opined that such an elevation was necessary to protect the individual rights of non-Indians against

[82] *See* Ennis, *supra* note 2, at 573 n.116 (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one . . . .")).

[83] *See* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 827–28 (2007) (citing Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 196 (1984) (arguing that "[t]he judiciary's frequent invocation of federal plenary power over Indian affairs is curious since the Constitution does not explicitly grant the federal government a general power to regulate Indian affairs," *id.* at 827).

[84] *See* United States v. Cooley, 919 F.3d at 1148 (Berzon & Hurwitz, JJ., concurring in the denial of reh'g en banc).

[85] *See, e.g.*, Bethany R. Berger, *Williams v. Lee and the Debate over Indian Equality*, 109 MICH. L. REV. 1463, 1525 (2011) ("Thus the same ideas that led to the termination era—that tribal rights are unequal and unfair—are fueling a contemporary backlash against tribes.").

[86] United States v. Cooley, 947 F.3d at 1216 (Berzon & Hurwitz, JJ., concurring in the denial of reh'g en banc); *see also* Riley, *supra* note 83, at 830 (demonstrating how the judicial perception of tribes as illiberal has shaped jurisprudence in favor of non-Indian rights over tribal sovereign authority).

[87] United States v. Cooley, 947 F.3d at 1216 (Berzon & Hurwitz, JJ., concurring in the denial of reh'g en banc).

[88] *Id.* at 1237 (Collins, J., dissenting in the denial of reh'g en banc).

Indians.[89] This approach contradicted traditional canons of interpretation, which require the court to narrowly construe ambiguous provisions in federal statutes that otherwise might be read as invading tribal authority.[90] Tribes possess the right to ensure public safety within their reservations and to exclude those who disrupt that order—a power that, at minimum, mandates the modicum of investigatory authority that *Cooley* diminishes.

The Ninth Circuit's denial of rehearing en banc in *Cooley* perpetuated a perplexing legal regime that undermined maintaining public order. Despite soaring crime rates, rural reservations remain the most chronically under-policed regions in the United States.[91] Tribal officers are responsible for large swaths of land, and if a non-Indian commits a crime, back-up from state and federal officers may be hours or days away.[92] The panel's holding made tribal policing even more challenging by replacing tribal officers' formerly clear authority to stop any motorist based on a reasonable suspicion standard with a bewildering array of rules that depend upon the officer's knowledge of the driver's Indian status.[93] In several jurisdictions, if tribal law enforcement erroneously detain a non-Indian, officers may even expose themselves to liability.[94] Therefore, the panel's holding deterred tribal police from performing their duties and incentivized non-Indians to commit crimes on reservations.[95] Some homelands have become targets for non-Indian drug dealers like Cooley, confirming the dissent's real-world concerns.[96] By prohibiting an Indian Tribe from exercising its ability to preserve public order on rights-of-way through the reservation, the Ninth Circuit's decision in *Cooley* ensured that a perverse status quo endured.

---

[89] *See id.* at 1217 (Berzon & Hurwitz, JJ., concurring in the denial of reh'g en banc).
[90] *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 8–9 (1999).
[91] Wells & Falcone, *supra* note 6, at 202.
[92] *Id.* at 220.
[93] United States v. Cooley, 947 F.3d at 1220–21 (Collins, J., dissenting in the denial of reh'g en banc).
[94] *See, e.g.*, Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1633–34 (2016) (describing the intimidation and prosecution of tribal police for detaining non-Indian violators).
[95] *See id.* at 1634.
[96] *See, e.g.*, Ian MacDougall, *Should Indian Reservations Give Local Cops Authority on Their Land?*, ATLANTIC (July 19, 2017), https://www.theatlantic.com/politics/archive/2017/07/police-pine-ridge-indian-reservation/534072/ ("Drug traffickers, seeing an untapped market, have actively targeted Pine Ridge for meth distribution in recent years, law-enforcement officials say. Meth joined a list of factors that have driven high tribal crime rates in the past . . . .").

Due to judicially imposed jurisdictional constraints on tribal law enforcement and tribal courts, non-Indian illegal activity has skyrocketed in Indian country.[97] The legal loopholes for non-Indian offenders that *Cooley* exacerbates have inflicted injury on both non-Indian and Indian populations.[98] In particular, the jurisdictional crisis in Indian country disproportionately affects Native women.[99] One in three Native American women is raped during her lifetime, and in 86 percent of those instances, the assailant was a non-Indian.[100] Although state or federal authorities may prosecute offenders, they commonly lack the conviction and resources to do so.[101] In 2011, the U.S. Justice Department failed to prosecute sixty-five percent of the reported rapes on reservations.[102]

Congress has sought to fill the jurisdictional gaps that the courts have created but has achieved marginal success at best.[103] For example, the 2010 Tribal Law and Order Act[104] enhanced tribal sentencing authority and encouraged cross-deputization agreements so that tribal officers could arrest non-Indians under county jurisdiction.[105] Still, this solution has serious drawbacks: the county or state may rescind these agreements at will, and tribes may relinquish sovereign authority by allowing state law enforcement to arrest tribal members on the reservation.[106] For these reasons, congressional remedies alone may be insufficient to reverse the harmful effects of the judiciary's decision-making on reservation residents.[107]

The Ninth Circuit's denial of rehearing en banc in *Cooley* would have established new restrictions on tribal law enforcement's authority to investigate non-Indians. By placing novel limitations on tribes' sovereign authority to maintain public order on the reservation,[108] the Ninth Circuit infringed on the boundaries of tribal sovereignty.[109] The concurrence in the appellate court's denial of

[97] *Id.*
[98] *Riley*, *supra* note 94, at 1589.
[99] *Murdoch*, *supra* note 7.
[100] *Id.*
[101] *See id.*
[102] *Id.*
[103] *Id.*
[104] Pub. L. No. 111-211, 124 Stat. 2258 (2010).
[105] *Murdoch*, *supra* note 7.
[106] *MacDougall*, *supra* note 93.
[107] *Id.*
[108] United States v. Cooley, 947 F.3d at 1221 (Collins, J., dissenting in the denial of reh'g en banc).
[109] *See also Riley*, *supra* note 94, at 1591–92 (discussing the 2013 Violence Against Women Act Reauthorization, which recognized tribes' inherent sovereignty to

rehearing en banc in *Cooley* reflected the judiciary's profound bias against subjecting non-Indians to even minimal tribal sovereign authority.[110] Consequently, the opinion guarded non-Indian individual rights against tribal sovereignty by imposing a higher investigatory standard on tribal police than that required of state or federal law enforcement.[111]

The Ninth Circuit's denial of rehearing en banc sanctioned a legal regime that infringed on tribal sovereignty and created higher standards for tribal police officers than state and federal law enforcement.[112] Despite rampant non-Indian criminal activity on reservations,[113] the panel declined to consider the practical ramifications of its ruling. Without basic authority, tribal officers would have to abandon investigations of crimes if they were unable to ascertain the suspect's Indian status and immediately identify illegal activity, which criminal actors are unlikely to exhibit in police presence. As a result, non-Indians like Cooley could continue to wreak havoc on reservation communities.[114] The Ninth Circuit panel perpetuated the judiciary's piecemeal erasure of tribal sovereignty, potentially at the expense of the millions of Americans living in tribal areas. But the Supreme Court's intervention in the case forestalled this outcome.

E. Conclusion

When the Supreme Court granted certiorari, the Crow Tribe of Indians, thirteen other Native nations, the National Congress of American Indians, the National Indigenous Women's Resource Center, Indian law scholars and professors, tribal organizations, current and former members of Congress, and former U.S. Attorneys filed amicus curiae briefs on behalf of the United States.[115] Most amici

punish non-Indians for domestic violence offenses but not "stranger" sexual assault and rape).

[110] *See Riley*, *supra* note 83, at 799–800.

[111] *See* United States v. Cooley, 947 F.3d at 1217 (Berzon & Hurwitz, JJ., concurring in the denial of reh'g en banc).

[112] *See id.* at 1235 (Collins, J., dissenting in the denial of reh'g en banc).

[113] *Wells & Falcone*, *supra* note 6, at 199–201.

[114] *See Murdoch*, *supra* note 7.

[115] Brief for the Crow Tribe of Indians et al. as Amici Curiae Supporting Petitioner, United States v. Cooley, 593 U.S. _ (2021) (No. 19-1414); Brief for the Nat'l Indigenous Women's Res. Ctr. et al. as Amici Curiae Supporting Petitioner, United States v. Cooley, 593 U.S. _ (2021) (No. 19-1414); Brief for the Lower Brule Sioux Tribe et al. as Amici Curiae Supporting Petitioner, United States v. Cooley, 593 U.S.

emphasized that the 1868 Treaty with the Crow Tribe guarantees that the United States will arrest and punish "bad men among the whites or among other people, subject to the authority of the United States" who "shall commit any wrongs upon the person or property of the Indians."[116] However, the Treaty states that the United States will take these individuals into custody only "upon proof made" of wrongdoing, thus requiring the Tribe to supply this proof.[117] The ancillary power to investigate non-Indians is necessary to preserve that treaty right.[118] No express act of Congress extinguished that right. Even if the treaty right was ambiguous, per the four "Indian law canons of construction," the Court must resolve ambiguities in favor of tribes, interpret treaty provisions both as Indigenous peoples would have understood them at the time and to tribes' benefit, and safeguard sovereignty unless there is a clear statement by Congress to the contrary.[119] The current Court seemed like it would be receptive to an argument premised on textual and historical analysis of the 1868 Treaty. Tribes have won several major victories based on historical readings of treaties in recent opinions by Justice Sotomayor, Justice Breyer, and Justice Gorsuch,[120]

_ (2021) (No. 19-1414); Brief for Ute Indian Tribe of the Unitah and Ouray Reservation as Amici Curiae Supporting Petitioner, United States v. Cooley, 593 U.S. _ (2021) (No. 19-1414); Brief for Indian Law and Policy Professors as Amici Curiae Supporting Petitioner, United States v. Cooley, 593 U.S. _ (2021) (No. 19-1414); Nat'l Cong. of Amer. Indians as Amici Curiae Supporting Petitioner, United States v. Cooley, 593 U.S. _ (2021) (No. 19-1414); Brief for Current and Former Members of Cong. as Amici Curiae Supporting Petitioner, United States v. Cooley, 593 U.S. _ (2021) (No. 19-1414); Brief for the Cayuga Nation as Amici Curiae Supporting Petitioner, United States v. Cooley, 593 U.S. _ (2021) (No. 19-1414); Brief for Former U.S. Attn'ys as Amici Curiae Supporting Petitioner, United States v. Cooley, 593 U.S. _ (2021) (No. 19-1414).

[116] *See supra* note 115; *see also* Second Treaty of Ft. Laramie of 1868, U.S.-Crow Indians, May 7, 1868, art. 1, 15 Stat. 649 (1868) (ceding thirty million acres in exchange for its treaty provisions). For background on "bad men" clauses, see generally *A Bad Man Is Hard to Find*, 127 HARV. L. REV. 2521 (2014).

[117] *See* Second Treaty of Ft. Laramie of 1868, U.S.-Crow Indians, May 7, 1868, art. 1, 15 Stat. 649 (1868).

[118] *See, e.g.*, Brief for the Lower Brule Sioux Tribe, *supra* note 115, at 4.

[119] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Jessup Newton et al. eds., 2019). *But see* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 152 (2010) ("The Indian canon is unique among the substantive canons . . . because it began in the treaty context . . . . When courts began interpreting these statutes in the early 1900s, they assumed, without reflection, that the canon should continue to apply.").

[120] *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1700 (2019) (holding that Wyoming's admission to the Union did not abrogate the Crow Tribe's federal treaty right to hunt on "the unoccupied lands of the United States" without clearly expressed intent); Washington State Dep't of Licensing v. Cougar Den Inc., 139 S.

most notably in *McGirt v. Oklahoma*.[121] If the Court continued to "hold the government to its word" with respect to treaty promises,[122] as it has in these cases, it appeared likely that it would reverse the Ninth Circuit's decision *Cooley*.

Instead, in an unexpected decision, the Court reaffirmed the Tribe's retained inherent sovereign authority to address conduct that threatens the welfare of the Tribe under the second exception to *Montana v. United States*.[123] Justice Breyer wrote for the unanimous court.[124] In *Montana,* the Court held that tribes lack power to regulate nonmembers civil conduct within the reservation except in two instances.[125] *Cooley* was the first time that the Court found a second exception, allowing a tribe to regulate "the conduct of non-Indians on fee lands within its reservations when that conduct threatens or has some direct effect on . . . the health and welfare of the tribe."[126] The opinion noted that this holding was consistent with Supreme Court precedent concerning *Montana* exceptions.[127] In prior cases, the Court had stated unequivocally that it did not question the authority of tribal police to patrol roads within a reservation—even when it held that the *Montana* exception did not apply to other nonmember activity on highways running through tribal lands.[128] Likewise, in *Cooley*, the Court's application of the "second exception recognizes that inherent authority" of tribal law enforcement.[129]

But the applicability of the second exception to other fact patterns may be limited. The Court concluded that the *Cooley* facts and the second exception "fit[] almost like a glove." It observed that the circumstances of this case were a "close fit" with the second exception, implying that it was not widening the exception.[130] Justice Breyer

Ct. 1000 (2019) (upholding the Supreme Court of Washington's decision based on the text of the 1855 Treaty Between the United States and the Yakama Nation of Indians).

[121] 140 S. Ct. 2452, 2463 (2020) (holding that the Creek Reservation, which was established by treaty, remained intact because only Congress can "clearly express its intent to" diminish or disestablish a reservation, and it had not done so).

[122] *Id.* at 2459 (maintaining the U.S. government's 1832 and 1833 treaty promises to the Creek Nation).

[123] United States v. Cooley, 141 S. Ct. at 1641 (citing Montana v. United States, 450 U.S. 544, 566 (1981) and Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997)).

[124] *Id.* at 1640.

[125] *Id.* at 1639 (citing Montana, 450 U.S. at 566).

[126] *Id.* (quoting Montana, 450 U.S. at 566).

[127] *Id.* at 1644.

[128] *Id.* (citing Strate, 52 U.S. at 456 and Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651 (2001)).

[129] *Id.*

[130] *See id.* at 1645.

cautioned that to deprive a tribal officer of the ability to search and detain any person suspected of a crime for a reasonable time would expose tribes to threats such as "non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of the reservation."[131] This list of possible scenarios satisfying the exception only covers criminal conduct of non-Indians on roadways.[132] Furthermore, it took a criminal rather than civil case for the Court to conclude that non-Indian conduct imperiled the health and welfare of a tribe. Based on the Court's examples, it is unclear what civil conduct rises to this level of severity.[133]

Additionally, the Court suggested that this exception only applies if a tribal officer detained and searched a non-Indian for violating a state or federal law rather than tribal law.[134] To justify this distinction, the Court cited precedent discussing how it would be unfair to apply tribal law to non-Indians because they would have "no say in creating the laws applied to them."[135] A future case might grapple with inequity of this discrepancy: a Montanan motorist traveling through a reservation would not be subject to tribal law, yet if the same motorist drove through nearby Wyoming or Canada, they would be subject to state or federal laws that the motorist also had no say in creating. The Tribe, the State, and the country all have a vested interest in maintaining public order within their boundaries, but only one sovereign cannot do so on its terms.

Lastly, the Court prioritized the workability of court-created standards and considered the practical implications of its ruling. It criticized the Ninth Circuit's standard, which would have required an officer to ask or visually identify if a suspect was an Indian, leading to confusion and encouraging suspects to lie.[136] It underscored that the Ninth Circuit would allow the tribal officer to detain that person if the violation of the law was "apparent," a new and untested standard for search and seizure law.[137] The problems presented by this standard

[131] *Id.* at 1643.
[132] Justice Alito's concurrence also narrowed the holding to tribal police officers' stops on public rights-of-way through the reservation. *See id.* at 1646 (Alito, J., dissenting).
[133] *See id.* at 1643 (Breyer, J., majority opinion).
[134] *Id.* at 1645–46 ("As the Solicitor General points out, an initial investigation of non-Indians' 'violations of federal and state laws to which those non-Indians are indisputably subject' protects the public without raising 'similar concerns' of the sort raised in our cases limiting tribal authority.").
[135] *Id.* at 1644 (citing Duro v. Reina, 495 U.S. 676, 693 (1990) and Plains Commerce Bank v. Long Family Land & Cattle Co. 544 U.S. 316, 337 (2008)).
[136] *Id.* at 1645.
[137] *Id.*

would arise frequently given that 3.5 million of the 4.6 million people living in tribal areas are non-Indians.[138] Rather than jeopardize the safety of people living in Indian country, the Court made the fair and pragmatic choice to adhere to existing standards for tribal officers' search and detention of non-Indian suspects.

Overall, the outcome in *Cooley* presents a positive development in federal Indian law. The Court declined to strip sovereign powers from the Tribe as previous courts had done. Unlike the Ninth Circuit, it prioritized workable standards for tribal officers and maintained the Tribe's ability to protect its members by temporarily detaining and searching any person suspected of violating a state or federal law.[139] The future of the *Montana* second exception remains to be written, but hopefully, *Cooley* was merely the first chapter in the expansion of tribes' ability to regulate the conduct of non-Indians within the reservation when it threatens the Tribe, its members, and the broader public.

[138] *Id.* (according to the 2010 census).
[139] *See id.* at 1642–45.