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Legal Sidebar

High Court to Review Tribal Police Search and Seizure Case

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Update: On March 23, 2021, the Supreme Court heard oral arguments in the tribal police search and seizure case covered in this post, United States v. Cooley. *The case challenges a tribal police officer's authority to make a traffic stop, detain, and investigate a non-Indian on non-tribal land within a tribe's reservation in the absence of an "apparent" or "obvious" violation of federal or state law. During oral arguments, the Justices raised concerns about possible risks to public safety. Justices Breyer and Alito each pointed out the difficulty that tribal officers may confront in determining who is an Indian subject to tribal investigative authority. Justice Kavanaugh noted that dicta in Supreme Court cases have "guided … law enforcement for several decades" to act based on the following understanding (summarized in* Cohen's Handbook on Federal Indian Law*):*

> The Supreme Court has consistently reaffirmed the authority of tribal police to arrest offenders within Indian country and detain them until they can be turned over to the proper authorities, even if the tribe itself would lack criminal jurisdiction.

The Court also discussed the implications of relying on the cross-designation statute to deputize tribal law enforcement officers to perform federal law enforcement duties.

A decision in United States v. Cooley *is expected before the Court's summer recess.*

The original post from December 14, 2020, is below.

On November 20, 2020, the U.S. Supreme Court added *United States v. Cooley* to the cases it will hear this term. *Cooley* brings into focus the jurisdictional maze complicating criminal law enforcement on Indian reservations. The Court is to evaluate whether (or to what extent) a tribal police officer may detain and search a non-Indian on a public highway running through an Indian reservation. More specifically, the parties disagree about the scope of a tribal police officer's authority to investigate—through questioning or search—when criminal behavior is reasonably suspected, but is not "apparent" or "obvious." This case implicates the constitutional right to be free from unreasonable searches and seizures, but it also raises questions about the scope of tribal sovereignty and tribes' authority to protect their lands and members from criminal activity. Congress may wish to consider legislation to clarify the rights and responsibilities of tribal and non-Indian parties when conflicts like this arise.

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In *Cooley*, Crow Tribal Police Officer James Saylor noticed a vehicle stopped with the engine running on the shoulder of a public highway within the Crow Reservation. James Joshua Cooley and his young child were in inside. Although Cooley appeared to be "non-native," Officer Saylor questioned him about why he was stopped, and Cooley's answers and subsequent agitation raised the officer's suspicions. When Officer Saylor observed behavior he believed consistent with Cooley preparing to use force, Officer Saylor drew his weapon and ordered Cooley out of the vehicle. Officer Saylor noticed a loaded pistol near Cooley's seat and later spotted drug paraphernalia while securing Cooley's vehicle. After detaining Cooley in the patrol car, Officer Saylor called for both tribal and local (non-tribal) backup. An additional search of the vehicle revealed more drugs.

Cooley was charged in federal court with drug and weapons crimes, but successfully moved to suppress the physical evidence by challenging Officer Saylor's authority to detain him or to search his vehicle.

Before discussing the lower court decisions and Supreme Court petition, this Sidebar will briefly describe how the courts have distinguished tribal authority for conducting investigations of non-Indians within an Indian reservation from general non-tribal police authority to conduct searches and seizures.

The Fourth Amendment, Probable Cause, and Reasonable Suspicion

The Fourth Amendment to the U.S. Constitution generally prohibits "unreasonable searches and seizures" of people and their property. Judges may grant search or arrest warrants upon a showing of "probable cause," but some searches and seizures are permissible even without a warrant. One limited circumstance where a warrantless search or brief detention is permissible involves what is often called a *Terry* stop, in which a police officer develops a "reasonable suspicion of criminal activity" and may therefore (1) briefly detain (or "seize") a suspect for further questioning and (2) conduct a limited search for dangerous weapons to ensure the officer's safety.

If Officer Saylor had been a federal, state, or local police officer operating within his jurisdiction, the question would simply be whether his suspicion (based on training and experience) that Cooley was about to use force was sufficiently reasonable to make detaining Cooley a permissible *Terry*-like stop. If yes, then the evidence discovered during the stop would likely be admissible in Cooley's later trial. If not, the Fourth Amendment's exclusionary rule could operate to prevent that evidence from being introduced.

Tribal Police Authority over Non-Indians on a Reservation

A Closer Look: The Indian Civil Rights Act

Adding tribal sovereignty and reservation land to the equation complicates the analysis in a few ways. First, tribal nations are not directly subject to the Fourth Amendment, because their inherent sovereignty is independent from the U.S. Constitution. However, Congress passed the Indian Civil Rights Act (ICRA) in 1968, which contains a provision mirroring the Fourth Amendment. Several courts have therefore interpreted the ICRA's search and seizure limitations as identical to the Fourth Amendment's and have analyzed ICRA cases using Fourth Amendment precedent. The Supreme Court has neither endorsed nor rejected this approach.

> *At least one appellate court has remarked on the ICRA's "legislative history . . . and its striking similarity to language of the Constitution." The ICRA's Fourth Amendment analogue declares that "No Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures."*

Second, the jurisdictional questions are different. Since the 1830s, the Supreme Court has recognized Indian tribes as "domestic dependent nations" and characterized them as "possessing attributes of sovereignty over both their members and their territory." But in 1978, the Supreme Court ruled that tribes lack "inherent jurisdiction to try and to punish non-Indians." This means that crimes committed by non-Indians within an Indian reservation (other than domestic violence crimes Congress recently included in the Violence Against Women Act) are generally subject to state or federal jurisdiction, not to tribal jurisdiction. The Supreme Court acknowledged in *Duro v. Reina* that tribes retain "the power to restrain those who disturb public order on the reservation and, if necessary, to eject them," yet in *Strate v. A-1 Contractors*, cautioned that—aside from certain exceptional situations—such power does not extend to excluding non-Indians from public highways running through a reservation.

Thus, a non-Indian such as Cooley on a public highway within a reservation comes within what *Strate* described as the limited power of tribal officers "to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers [non-Indians] stopped on the highway for conduct violating state law."

The Ninth Circuit Decisions

The facts in *Cooley* have been evaluated at both the district court level and by a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit). According to the district court, the search and seizure did not meet the standard that applies to tribal police stops of non-Indians on reservation highways. In making that determination, the court relied on the Ninth Circuit's decision in *Bressi v. Ford (Bressi)*: "When obvious violations . . . are found, detention on tribal authority for delivery to state officers is authorized. But inquiry going beyond Indian or non-Indian status, or including searches for evidence of crime, are not authorized on purely tribal authority in the case of non-Indians." Quoting the Ninth Circuit's holding in *Bressi*, the district court opined that a

> tribal officer [who] reasonably suspects a person of violating tribal law on a public right of way that crosses the reservation must determine, shortly after stopping the person, whether the person is Indian. If the person is non-Indian, the tribal officer may detain the person for the reasonable time it takes to turn the person over to state or federal authorities only when "it is apparent that a state or federal law has been violated."

On appeal, a panel of Ninth Circuit judges unanimously agreed. According to the court, tribal police officers have no authority to conduct investigatory stops of non-Indians on non-Indian land, including public highways, in Indian reservations. Thus, according to the court, once a tribal police officer knows that a person stopped on a reservation public highway is a non-Indian, there may be no further questioning unless the officer is aware of an "apparent" or "obvious" violation of federal or state law. Because the tribal officer's questioning of Cooley extended beyond establishing whether he was an Indian and there was no "apparent" or "obvious" violation of law, the Ninth Circuit held that the officer's

lengthy questioning, vehicle search, and detention violated Cooley's rights under the ICRA's Fourth Amendment analogue. The court also held that evidence obtained in violation of ICRA is subject to the exclusionary rule, at least in federal court prosecutions.

The *Bressi* standard applied by these courts is "notably higher" than the Fourth Amendment standards of "reasonable suspicion" established in *Terry v. Ohio* and its progeny and "probable cause" that applies to warrants. Although the government elected not to press the point in its petition for certiorari, in choosing to rely on the *Bressi* standard, the lower courts in *Cooley* chose not to rely on other arguably relevant Ninth Circuit decisions. First, *Ortiz-Barazza v. United States* upheld a tribal officer's authority to perform investigatory stops and questioning of non-Indian motorists reasonably suspected of "any on-reservation violations of state and federal law, where the exclusion of the trespassing offender from the reservation may be contemplated." *United States v. Becerra-Garcia* additionally upheld a minimally intrusive stop of a non-Indian on a public right-of-way based on reasonable suspicion, similarly predicated on the tribe's authority to eject trespassers.

Ninth Circuit Denial of Rehearing en Banc and Dissent

On January 24, 2020, the Ninth Circuit declined to rehear the *Cooley* appeal en banc. Judge Collins filed a written dissent from the denial of rehearing, joined by three other judges. According to the dissent, "when a non-Indian is reasonably suspected of violating state or federal law anywhere within the boundaries of an Indian reservation," the

> conceded lack of criminal jurisdiction over such non-Indians . . . does *not* deprive the tribe of the authority to conduct *Terry*-style investigations of non-Indians and, if probable cause arises, to then turn the non-Indian suspect over to the appropriate . . . authorities for criminal prosecution.

To reach this conclusion, the dissent pointed to the Supreme Court's language in *Duro* and *Strate* describing the existence of tribal power to eject lawbreakers, and what it called the "controlling decision" of the Ninth Circuit in *Ortiz-Barazza*.

Two judges from the original panel filed an opinion concurring in the denial of rehearing en banc, asserting that *Ortiz-Barraza* was no longer good law. According to their reasoning, tribal officials have no authority for reasonable-suspicion-based questioning of non-Indians on non-Indian land, including a public highway within a reservation, because the "power to exclude" does not extend to such land.

Supreme Court Briefs

On November 20, 2020, the United States Supreme Court agreed to review the *Cooley* decision. Oral arguments will likely be scheduled for early 2021. In petitioning for review, the Department of Justice (DOJ) argued that the Ninth Circuit's decision in *Cooley*

> departs from traditional understandings of tribes' ability to maintain public safety within reservation boundaries. State-court decisions . . . have viewed the sort of normal law enforcement activity here as unproblematic, and both the States and the federal government depend on tribal law enforcement to police reservations in precisely this way.

DOJ also invoked "[h]istorical practice," including from treaty provisions, as "reinforc[ing] the tribes' retention of inherent authority to exercise certain police functions with respect to non-Indians within the reservation." It characterized the "apparent or obvious" standard as an "unsound" "newly minted standard" that "will sow confusion and inconsistency, leading (as in this case) to the exclusion of highly probative evidence of serious criminal conduct through no fault of a tribal officer."

Cooley had opposed DOJ's petition, arguing that the "decision below is entirely consistent with . . . [the] Court's jurisprudence" and required no review. According to Cooley, Indian tribes simply do not possess "broad authority to detain, investigate, search, and generally police non-Indians." Instead, the Supreme

Court "at most recognized a narrow circumstance in which a tribal officer possesses a limited authority to detain non-Indian offenders and transport them to the custody of state or federal authorities."

Two groups filed amicus briefs supporting DOJ's petition. The Crow Tribe of Indians and other tribal organizations argued that *Cooley* conflicts with Supreme Court precedent and tribal authority to conduct *Terry*-style stops on non-Indians. The National Women's Resource Center, along with other tribes and tribal organizations, asserted that *Cooley* significantly impedes tribal law enforcement's ability "to fully effectuate . . . tribal criminal jurisdiction" restored by the Violence Against Women Reauthorization Act of 2013. That legislation permitted participating tribes to exercise criminal jurisdiction over non-Indians in certain circumstances, such as domestic violence crimes against Indian victims.

Possible Outcomes and Considerations for Congress

The narrow facts of the case involve a Crow tribal police officer and one highway within the Crow Indian Reservation; however, the briefing indicates that DOJ and many tribes and tribal organizations anticipate broader implications. Aside from limiting tribal officers' opportunities for asking questions that may lead to the discovery of illegal conduct, *Cooley* could incentivize false denials of tribal affiliation. It is not clear to what extent a tribal officer would be entitled to question or investigate someone on a public highway who claims to be non-Indian, even if the officer suspected that claim was untrue.

If Congress concludes that tribal officers should be able to conduct *Terry*-style stops of non-Indians anywhere within reservation boundaries, it could enact legislation to that effect, similar to other bills expanding tribal jurisdiction or sentencing authority. Legislation to the opposite effect could also be enacted to expressly prohibit tribal officers from investigating non-Indians on non-tribally owned land. Congress could also choose to explicitly address whether or not the exclusionary rule should apply to evidence obtained in violation of ICRA.

Alternatively, Congress could offer funding or other incentives to promote cross-deputization of tribal officers, providing them jurisdictional powers equivalent to state or federal law enforcement officers. Currently, multiple states have entered into cross-deputization agreements with specific tribes that provide tribal officers with limited jurisdictional powers equivalent to state law enforcement officers. There is also a federal statute, 25 U.S.C. §2804(e), authorizing federal agencies to enter into such cooperative agreements with tribes for mutual enforcement of federal and tribal law.

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