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Legal Sidebar

Supreme Court Rules on Authority of Tribal Police to Stop Non-Indians

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On June 1, 2021, the Supreme Court unanimously held in *United States v. Cooley* (*Cooley*) that Indian tribal law enforcement officers may stop, search, and temporarily detain a non-Indian motorist traveling on a public highway within an Indian reservation if the officer has a reasonable suspicion that the motorist has violated or will violate federal or state law. The Court held that the source of this power is an Indian tribe's retained inherent authority to protect public safety. In reaching this conclusion, the opinion draws upon earlier decisions of the Court, particularly *Montana v. United States* (*Montana*). In *Montana*, the Court noted that, although tribes generally retain no authority over the conduct of non-Indians on fee land within a reservation, they do retain some authority over "conduct [that] threatens or has some direct effect on . . . the health or welfare of the tribe."

The Supreme Court's decision in *Cooley* reverses a decision of the U.S. Court of Appeals for the Ninth Circuit discussed in an earlier Legal Sidebar.

After a brief summary of background on tribal jurisdiction over non-Indians, this Sidebar discusses the Court's decision in *Cooley* and identifies possible considerations for Congress.

Tribal Police Authority over Non-Indians on a Reservation

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 (with a few exceptions such as domestic violence crimes, which Congress included in the Violence Against Women Act) are generally subject to state or federal jurisdiction, not 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." However, in *Strate v. A-1 Contractors*, the Court cautioned that—aside from certain exceptional situations—such power does not extend to excluding non-Indians from public highways running through a reservation.

In *Montana v. United States,* the Court held that an Indian tribe had no authority to regulate hunting and fishing on non-Indian fee lands within a reservation and articulated a "general proposition" that "the

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inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The Court added two exceptions to this general principle: (1) "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," and (2) the "conduct of non-Indians on fee lands within . . . [a tribe's] reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." The Supreme Court's decision in *Cooley* draws upon the second of these exceptions.

The Fourth Amendment and the Indian Civil Rights Act

Cooley involved a search and seizure of Joshua Cooley by Crow Tribal Police Officer James Saylor along a public highway within the Crow Reservation in Montana. Until *Cooley*, the Supreme Court had not ruled on whether and under what standard a tribal police officer may temporarily search and detain a non-Indian suspected of criminal violation of federal or state law while on an Indian reservation.

The Fourth Amendment to the U.S. Constitution limits searches and seizures by federal, state, and local law enforcement. Although the Fourth Amendment does not apply directly to tribal law enforcement officers, a provision of the Indian Civil Rights Act (ICRA) imposes similar restrictions.

The Fourth Amendment generally prohibits "unreasonable searches and seizures" of people and their property. Judges may grant search or arrest warrants upon a showing of "probable cause" that a crime is being or has been committed, but some searches and seizures are permissible even without a warrant. One limited circumstance in which 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 so, then the evidence discovered during the stop would likely be admissible at Cooley's trial. If not, the Fourth Amendment's exclusionary rule could operate to prevent that evidence from being introduced.

The ICRA provision mirroring the Fourth Amendment declares that "[n]o 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." Several lower federal courts have 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 Ninth Circuit's Decision

Cooley began when Officer Saylor noticed a vehicle stopped with the engine running on the shoulder of a public highway within the Crow Reservation and found Joshua Cooley, who appeared to be "non-native," inside. Noticing Cooley's "bloodshot and watery eyes" and two semiautomatic rifles on the front seat, Officer Saylor became suspicious that Cooley was potentially violating state or federal law. 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 and held Cooley for transportation to "nontribal authorities for prosecution." A federal grand jury indicted Cooley on federal drug and weapons offenses, but Cooley successfully moved to suppress the physical evidence by challenging Officer Saylor's authority to detain him or to search his vehicle. The government appealed the district court's order granting the motion to suppress.

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit held that tribal police officers have no authority to conduct investigatory stops of non-Indians on non-Indian land in Indian reservations, including public highways, unless the officer is aware of an "apparent" or "obvious" violation of federal or state law. Because the court of appeals concluded that Officer Saylor's questioning of Joshua Cooley extended beyond establishing whether he was an Indian and that there was no "apparent" or "obvious" violation of law, it held that the officer's lengthy questioning, vehicle search, and detention violated Cooley's rights under the Fourth Amendment analogue in the Indian Civil Rights Act. The court also held that evidence obtained in violation of ICRA is subject to the exclusionary rule, at least in federal court prosecutions.

The Supreme Court's Decision

On appeal, the unanimous Supreme Court vacated the Ninth Circuit's judgment and remanded the case for further proceedings, holding that a tribal police officer has authority to search and temporarily detain a non-Indian on a reservation's public highway whom the officer reasonably suspects of a potential violation of federal or state law.

The Court's opinion briefly reviewed the Court's jurisprudence on tribal sovereignty and authority over non-Indians, emphasizing that "[i]n all cases, tribal authority remains subject to the plenary authority of Congress." The Court noted that it recognized the political and sovereign nature of Indian tribes in 1832, in *Worcester v. Georgia*, and that in 1878, in *Wheeler v. United States*, the Court stated that retained Indian sovereignty is of "unique and limited character." The Court explained that its decision in *Oliphant v. Suquamish Indian Tribe* held that tribes have no "inherent sovereign power to exercise criminal jurisdiction over non-Indians," and that *Montana* extended that holding to civil jurisdiction, with two exceptions. The Court focused on the second *Montana* exception, which allows that an Indian tribe retains "inherent sovereign authority to address 'conduct [that] threatens or has some direct effect on . . . the health or welfare of the tribe.'" The Court noted that this exception "fits the present case like a glove," closely enough to avoid any danger of interpreting the exception so broadly as to swallow the basic rule that tribes have no authority over non-Indian activity on fee land within a reservation.

The Court reasoned that, without authority to safeguard "the health or welfare of the tribe," it would be "difficult for tribes to protect themselves against ongoing threats. . . . posed by . . . non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation." The Court cited state and federal cases that upheld tribal police power in analogous situations, including a Ninth Circuit decision holding that a tribal officer had authority to perform an investigatory stop and questioning of a non-Indian motorist 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." The Court characterized the power upheld in *Cooley* as "ancillary" to powers that other Supreme Court decisions had recognized, such as the power "to patrol roads within a reservation" and to detain offenders for transport to other authorities. In addition, the Court expressed doubt about the "workability" of the Ninth Circuit's standard for temporary detention and observed that the Court's holding in *Cooley* protects public safety without subjecting non-Indians to tribal laws in which they have no say.

The Court also rejected arguments that, by enacting statutory provisions authorizing cross-deputization of tribal officers to enforce federal law, Congress left no gaps for tribal sovereignty to fill. Rather, considering those statutes and examples presented in briefs filed by, among others, current and former Members of Congress, the Court concluded that existing legislation appears to "operate on the assumption that tribes have retained this authority."

Justice Alito wrote a short concurring opinion that one commentator has characterized as "noting that [Justice Alito] views the holding as a limited one." Justice Alito appeared to suggest that he understands

the Court's holding to be limited to applying Fourth Amendment-style standards to stops such as Cooley's. For example, the concurrence mentions that the tribal officer must have "reasonable suspicion that the motorist may violate or has violated federal or state law" and may detain the motorist pending transfer to non-tribal authorities "if the tribal officer has probable cause."

Considerations for Congress

Congress may consider looking into oversight of tribal policing operations. The Court's opinion relied on retained tribal authority under the second *Montana* exception, rather than a treaty or statute, to uphold tribal police authority to conduct temporary stops, searches, and detention of non-Indians on public rights-of-way through a reservation. This was the first time the Court upheld tribal power over non-Indians on the basis of the *Montana* exception, and the Court provided no guidance on its limits or how far it extends. One scholar has already asked "whether a global pandemic is enough of a 'threat' to tribal health and welfare to justify tribal police briefly stopping all non-Indian drivers." Thus, it is possible that the decision in *Cooley* might lead to a surge in encounters between tribal police and non-Indian suspected law breakers.

The opinion did not discuss whether ICRA's Fourth Amendment analogue, which applies to an "Indian tribe in exercising powers of self-government," is implicated by tribal police operations involving non-Indians. Nor did it discuss the extent to which standards similar to those applicable to *Terry* stops apply to such encounters. Congress may wish to investigate those issues. Congress may also consider such possibilities as enacting a statute that codifies the second *Montana* exception and provides legislative standards to guide tribes in exercising *Cooley* searches and seizures. In addition, because the Court pointed out some of the shortcomings of the federal cross-deputization statutes, this may be an appropriate time for Congress to examine these statutes, the process by which federal agencies negotiate them, and the functioning of similar agreements between tribes and state and local authorities.

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