

Extended Policy Brief: United States v. Cooley

Urban Indigenous Collective



Supreme Court Case *United States v. Cooley* and the Impact on the Missing and Murdered Indigenous Women, Girls, Trans, and 2 Spirit Folks Crisis

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Summary:

The eyes of Native nations fixated on the case of *United States v. Cooley* as it rose through the federal court system. Argued before the Supreme Court of the United States on March 23, 2021, the case was concerned with the authority of tribal police to search and temporarily detain a person who is not enrolled within a federally recognized Nation/tribe traveling on a public right-of-way through Indian territory. Without a favorable ruling, tribes would have to rely entirely on state and federal authorities to detain non-Indians within their territory, undermining the natural sovereignty with which tribes were endowed, and threatening an already vulnerable public health situation. Ultimately, the Supreme Court vacated the decision of the United States Court of Appeals for the 9th Circuit and remanded the case for further proceedings in a 9-0 ruling, affirming that tribes had the right to stop and briefly search anybody within their Native territory.

Significance of *United States v. Cooley*

- Tribal rights in *The United States v. Cooley* were affirmed through a game of exceptions. While the Supreme Court maintained that "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers," it found that the second exception allowing "authority over the conduct of non-Indians on the reservation" was sufficient using the exceptional circumstances promulgated by the decision in *Montana v. United States*. Notably, despite the connection between women's safety and tribal sovereignty, the United States argued that they were not urging "that tribes have full-blown arrest authority" but rather "limited detention and investigatory authority...for the purpose of allowing state or federal authorities at some point to take over and conduct an arrest." This limited the revolutionary potential of the case, as the U.S. was not making a legal argument against the hundreds of years of implicit divestiture that stripped tribes of their ability to protect themselves, but merely an argument in favor of giving tribes the ability to act as extensions of U.S. law enforcement when the conditions were favorable. Even though the outcome was favorable to Native nations, other cases will inevitably reveal rights that the U.S. has covertly removed from the retained sovereignty of tribes across Indian country.

- Much as the National Indigenous Women's Resource Center Amicus Brief asserts, "murdered and missing indigenous women and girls is a crisis that cannot be addressed properly unless tribal officers can perform investigatory stops of non-Indians within reservations." The retained sovereignty the Court determined the Crow Tribe has is a definitive win for public safety, especially with the majority of crimes against Native women being committed by non-Indians in areas containing vast geographies of both non-Indian people and fee lands. However, this is a decision that will enhance tribal police capabilities, not empower native women. Centuries of colonial death and destruction will not be remedied by allowing tribes to exercise bare-minimum criminal jurisdiction over non-Indians. It is critical to view the MMIWG2S+ crisis as not "isolated acts of violence," but "a continuation of the colonization process." Native communities have long understood the connection between the expansion of systemic gendered violence and the disintegration of indigenous legal systems. The Cherokee explicitly believed that "the sovereignty of Indian Tribes is connected to the safety of Native women." Addressing the MMIWG2S+ crisis will require structural and material change, tribal ability to investigate and arrest all offenders on Native land, and an ever expansive return to the sovereignty with which Native nations were always endowed.

The Problem

The journey to this landmark decision began in 2016, when Crow Tribe of Montana Officer James Saylor detained Joshua Cooley, who had pulled off to the side of the road in Indian Country on U.S. Route 212. Seizing firearms and drug paraphernalia from Cooley's car, Officer Saylor transferred Cooley to state law enforcement, who arrested him and indicted him with drug and weapons-related felonies. Cooley, endeavoring to lessen his sentence, moved to suppress the evidence obtained by Officer Saylor during the stop, arguing that Saylor was operating beyond the limits of his jurisdiction as a tribal officer. The U.S. District Court of Montana agreed, citing the Fourth Amendment of the Indian Civil Rights Act of 1968 prohibiting Indian tribes from conducting "unreasonable search and seizure," and granting Cooley's motion to suppress the evidence from Saylor's search. The Montana court explained that because Saylor was a tribal officer, he did not have strong enough probable cause to determine that Cooley had violated state or federal law, and therefore had no right to stop or search a non-Indian offender on a federal road running through the reservation. On appeal, the case was taken up by the U.S. Court of Appeals for the 9th Circuit, which upheld the ruling of the lower court, determining that "a tribal police officer could only stop and temporarily hold a non-Indian if, in the process of determining the suspect's Indian status, the officer detects an apparent violation of state or federal law." When the U.S. appealed again, the 9th Circuit denied a rehearing, and the U.S. successfully petitioned to bring the case to the Supreme Court.

This case concerned the "scope of tribal law enforcement officers' search-and-seizure authority," with the decision posing existential ramifications for the safety of reservations. The 9th Circuit's mandate that tribal officers immediately determine the Indian status of both the land and suspect before detaining effectively eliminated the ability to investigate potential threats to public welfare. This would create the conditions of a "safe haven" for non-Indian assailants of Native survivors, rendering the police unable to intervene for the "more than 95 percent of Native American and Alaska Native" survivors of sexual violence victimized by non-Indian perpetrators. Decisions regarding retained sovereignty of tribal law enforcement are critical, as "the third leading cause of death among American Indian and Alaska Native women is murder," with the murder rate being up to ten times higher than national average for Native women from particular tribes. With the new 9th Circuit standard, tribal law enforcement were deprived of the "authority to briefly stop and conduct a limited investigation of a non-Indian," on land owned by non-Indians within reservations, even when there was "reasonable suspicion they have committed a crime."

The 9th Circuit decision, if upheld, would challenge what little but necessary collaboration existed between tribal, state, and federal law enforcement critical for addressing violent crime against Native women. Roughly ninety million acres of land within reservations was acquired by non-Indians (non-Indian fee land) pursuant to the General Allotment Act of 1887, with reservations becoming home to significant populations of non-Indians. Not only would the threshold of probable cause for detention be consistently challenged in court, but the expanded sovereignty and jurisdiction Congress endeavored to give back to tribes through the Special Domestic Violence Criminal Jurisdiction (SDVCJ) via the Violence Against Women Reauthorization Act of 2013 would be eroded. The SDVCJ authorizes tribes to prosecute non-Indians for specific domestic violence crimes under specific conditions, as the "loss of tribal criminal jurisdiction over non-Indian crimes on tribal lands" was acknowledged as "a major contributing factor to the incredibly high rates of violence against Native women" in VAWA reauthorization. Only authorizing tribal law enforcement to intervene when domestic violence becomes "obvious" or "apparent" will fuel the MMIWG2S+ crisis, especially for the over 50% of all Native American women married to non-Indian men. A judge on the 9th Circuit noted the gravity of the decision, writing that to raise the bar for tribal investigations of non-Indian misconduct from one that requires reasonable suspicion to one that requires more than reasonable suspicion would be a decision that might "literally may have life-or-death consequences."

Historical Context

As an Assistant U.S. Attorney for the Northern District of Oklahoma lamented, making the determination of criminal jurisdiction in Indian country is akin to “solving a Rubik’s cube while blindfolded and underwater.” Long convoluted through settler colonial jurisprudence, the U.S. Supreme Court has espoused conflicting views regarding the inherent rights of the “conquered but surviving nations within the United States.” While concessions made by treaty and under the explicit auspices of the US government were considered clear, it was “the powers that a tribe must have lost implicitly” that defined the ambiguous legal landscape with which Cooley was argued. Before colonization, Native nations had fully developed systems of law and governance, and initially, the federal government regarded tribes as completely sovereign entities. This quickly devolved with the *Cherokee Nation v. Georgia* in 1831 wherein the Cherokee Nation fought for the right to “sue in federal court as a foreign state,” justified by the fact that “the tribe had exclusive rights to self-governance and control over their own land.” It was through this case that tribes were first determined to be nothing more than “domestic dependents,” as the Court ruled that tribes lost full sovereignty during colonization, laying the groundwork for a modern era of legal decisions furthering the colonial project.

In 1885, Congress passed the Major Crimes Act (MCA), which expanded the federal government’s control over Indian territory by granting the federal government concurrent jurisdiction over specific enumerated crimes committed by a Native person and on tribal land. As “one of the first dramatic legislative interruptions to tribal jurisdiction,” the jurisdictional complications of MCA began reducing the number of crimes against women adjudicated by tribes. The Major Crimes Act was followed by Public Law 280 in 1953, which allowed the federal government to delegate criminal jurisdiction over Indian territory to some states. Enacted without the consent of tribes and without additional funding to help states manage new burdens on law enforcement, state and local police were often unwilling or unable to fulfill their new responsibilities in Indian Country. In states without Public Law 280, especially ones lacking tribal police capabilities, federal law enforcement is responsible for responding to crimes of domestic violence perpetrated by non-Indians. However, federal agencies most often do not prioritize gender-based violence, as in fiscal years 2005 through 2009, the U.S. Attorney's Office declined to prosecute “46 percent of assault matters and 67 percent of sexual abuse and related matters.” When federal police do respond, an Assistant U.S. Attorney in Michigan explained, “crime must be severe to... confer federal jurisdiction under the Major Crimes Act” which, “requires stitches, almost a dead body” for prosecution. As such, reservations that lack tribal police, and with unresponsive federal authorities, have no way of responding to crimes against Native women, directly contributing to the MMIWG2S+ crisis.

Similarly, for tribes covered under Public Law 280 and without tribal law enforcement, if state and local law enforcement agencies choose not to respond in adequate capacity, with the lack of federal jurisdiction, there is no means of legally protecting women from the ongoing MMIWG2S+ crisis either. Given that “police response rates are worse in Public Law 280 states than in tribal lands under federal control,” it is critical for the tribal police that exist to retain their rights to arrest any and all perpetrators on the reservation. Indeed, there is evidence to suggest perpetrators are demonstrably aware of the jurisdictional gaps and weaknesses created by Public Law 280 and other decisions dismantling tribal sovereignty. There have been many documented instances in which perpetrators have laughed at tribal police as they crossed the reservation border, as well as chat rooms on the dark web full of suggestions for abusers to victimize Native women in Indigenous territory. Disturbingly, this evidence suggests that the reduction in sovereignty for Indigenous populations within Indian Country, caused by centuries of colonial jurisprudence, not only results in the failure to address the safety of Native women but contributes to the problem. For many Native communities, the limited tribal policing available is their only hope in protection, documentation, investigation, and ultimately, justice.

Cooley Argumentation and Decision

In *United States v. Cooley*, it was the argument of the United States, ironically, that tribes retained “inherent sovereign authority to exercise limited police powers over non-Indians on public rights-of-way within reservations.” In the hearing, the United States relied very heavily upon a previous Supreme Court case, *Montana v. United States*, in which the Supreme Court recognized that a tribe could exercise “civil authority over the conduct of non-Indians on fee lands within the reservation” threatening or effecting “the political integrity, the economic security, or the health or welfare of the tribe.” This was depicted as a “general principle” by the US, allowing tribes to protect themselves via the investigation and detention of non-Indians suspected of violating state or federal law. Notably, the United States argued that a decision in favor of *Cooley* would considerably “chill tribes’ ability even to enforce their own laws against their own members, and endangers everyone on Indian reservations” as it would force tribal police to “curtail otherwise reasonable policing activities.” Most importantly, however, Attorney Feigin, on behalf of the United States, argued that the authority to detain and investigate was rooted in “the inherent sovereign authority that tribes possessed before they were incorporated into the United States,” one that tribes had “never lost.”

The lawyer representing *Cooley*, the respondent, argued that “tribes do not possess inherent sovereign authority to investigate and detain non-Indians on public rights-of-way within reservations.” *Cooley*’s lawyer reasoned that “the exercise of tribal power beyond what is necessary to protect tribal self government or to control internal relations” was unnecessary, and “inconsistent with the dependent status of the tribes.” Utilizing *Oliphant v. Suquamish Indian Tribe*, a Supreme Court decision that restricted tribes’ inherent sovereign authority to matters of self-government, the respondent argued that the exception in *Montana* was inappropriately expanded. According to *Cooley*, only when non-Indian conduct “imperils the subsistence’ of the tribal community” can tribes protect themselves, which was not the case with *Cooley*’s idling vehicle.

Justice Breyer delivered the opinion of the Court. He posited that while long ago Indian tribes were “distinct, independent political communities” the advent of colonization and their incorporation into America, transformed their sovereignty into one of “unique and limited character.” Turning to precedent, Breyer cites the decision in *Montana v. United States* as highly relevant. While still supporting the conclusion of *Oliphant* that “a tribe could not exercise criminal jurisdiction over non Indians,” the Court ceded that “to deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats.” Nonetheless, the exception in *Montana*, in which the Court had agreed a tribe retains inherent sovereign authority to address conduct harmful to the health or welfare of the tribe, prompted the Court to determine that “the tribal officer possesses the authority at issue.”

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UIC Perspective

The Urban Indigenous Collective intends to contextualize the implications of the momentous decision made in the *United States v. Cooley* within the most pressing issues fueling the missing and murdered indigenous persons crisis today. As the battles for Indigenous land rights, water protection, and the welfare of Native communities rage onward, extractive industries such as fossil fuel, logging, and mining have been tied to enormous increases in violence against, trafficking, and murder of Indigenous women. As mass amounts of transient men seek well-paying oil and gas jobs along these extraction sites, refineries often set up “man camps,” situated largely in or near rural and Indigenous territory, straining resources that have already been stretched thin by generations of economic marginalization and underdevelopment. One of the most well documented instances of this in the U.S. was the Bakken “oil boom” in North Dakota. This oil boom concentrated thousands of men near sacred tribal lands, resulting in surges of violence and abuse. During the years of the boom alone, North Dakota had at least 125 cases of missing Indigenous women, a number suspected to be much higher given gaps in data collection and reporting to law enforcement.

The social and cultural manifestations of the violence of the extraction industry devastated an entire region. In an investigation, the U.S. Department of Justice found that from 2006 to 2012, “violent victimization, particularly of aggravated assault, increased 70%” in the Bakken oil region, with crimes such as homicide, non-negligent manslaughter, rape and sexual assault, amongst others, increasing 30%. During this same period of time the counties outside of the Bakken oil region did not experience a corresponding rise in crime, with findings showing that violent victimizations outside the Bakken oil region actually dropped 8% during the same period. Important in regard to the MMIWGT2S+ crisis, violent victimization perpetrated by strangers increased by 53% in the Bakken oil region, with the violence affecting Blacks and Native Americans at a rate 2.5 times higher than for whites. Other reports showed an astounding increase of 75% of sexual assaults on women and 168% increase in reported rapes on the neighboring Fort Berthold reservation alone. The fact that most workers at these “man camps” are non-Native poses a tremendous adversity to tribal police and courts that have already had their power severely restricted by the U.S. government.

In another study, “Drilling Down: An Examination of the Boom-Crime Relationship in Resource-Based Boom Counties,” researchers at the University of Regina and the University of North Dakota observed the startlingly similar characteristics of boom-towns. With these towns all sharing large influxes of young men with extra money, no connections to communities, and unvetted criminal records, these “man camps,” stimulated shadow economies where sex and drug trafficking experienced booms of their own. Overall, the “Drilling Down” study found that “violent crime in boom counties rose 18.5% between 2006 and 2012, while decreasing 25.6 percent in counties that had no oil or gas production.” Tribal law enforcement already suffers from material deprivation, and with pipelines disproportionately routed through areas where tribal police are tasked with jurisdiction over hundreds of miles of territory, the *United States v. Cooley* was important for the way the case preserved the very limited tools of which tribal law enforcement has to combat the MMIWGT2S+ crisis. The ability for tribal police to detain non-Natives is especially salient in this context, as employers of resource extraction jobs tend to be less discriminatory in hiring, contributing to a concentration of men seeking to capitalize on both economic opportunity and the impunity with which being non-Native within Indian country provides. The effect is particularly insidious for sex crimes, as almost “20% of convicted sex offenders living on the Fort Berthold Indian Reservation had failed to register,” as of 2015, compared to only 4-5% for the rest of North Dakota. The concentration of criminality, sexual violence, abuse, and illicit industry that “man camps” bring has been documented extensively throughout Canada as well, with disparate impacts on the Indigenous peoples on these ancestral territories. In 2019, Canada’s “National Inquiry into Missing and Murdered Indigenous Women and Girls” published a 1,200-page report after years of historical, community, and forensic research that demonstrated conclusive links between extraction zones and the missing and murdered indigenous women and girls crisis in Canada.

The overlap between the geography of pipelines and their “man camps,” and a mapping of where Indigenous women and children have gone missing is significant, and due to federal legislation such as the Major Crimes Act of 1885, hindering tribal ability to assert jurisdiction over crimes and expanding federal control over legal adjudication, the 1968 Indian Civil Rights Act which limited tribal sentencing authority to a “\$500 fine and up to six months incarceration regardless of the crime (felonies, misdemeanors, etc.),” and *Oliphant v. Suquamish* which stripped tribes of the ability to prosecute non-Indian offenders, tribes have been deprived of the ability to effectively respond to these enormous assaults on bodily autonomy even with tribal policing capabilities. The reauthorizations of VAWA have continually failed to acknowledge this, only expanding tribal jurisdiction to include cases related to domestic violence, dating violence, and violation of protection orders, but not offenses related to sexual violence such as trafficking. This is a major reason why the legal implications of *United States v. Cooley* are not revolutionary. On the Fort Berthold Reservation, a major epicenter of the violence of the Bakken “oil boom,” despite historical highs of “sexual assaults, child sex trafficking, gun threats and domestic abuses” and due to a constellation of adversity, including federal law protecting non-Native assailants from prosecution on reservations, more than 5,000 criminal cases were dismissed by the tribal court. Other interviews during this time attributed the legal justice system failure to a lack of tribal police ability to arrest non-Natives within Fort Berthold boundaries.

The capabilities of tribal law enforcement also deteriorate in cases of missing and murdered persons, as while tribal law enforcement can take a missing persons report, there are no mechanisms to ensure this report will be examined by the local, state, or federal level authorities tasked with the responsibility of investigating and adjudicating major crimes such as these.

With spikes in sexual and gender based violence being endemic to geographies hosting fossil fuel infrastructure, the epidemic of missing and murdered indigenous women, girls, trans, and 2 spirit persons, in particular, must be understood as the necessary collateral upon which the extractive industry is built and sustained. As Pamela Cəlaləkəmbond observed, the “black snake doesn’t just pollute the land and the water it’s on—it’s consuming indigenous people.” For effective progress against this crisis, tribal police must have the right to investigate, detain, and arrest to adequately protect tribes from the violence of outsiders. Tribal courts must also be provided with the material resources they need to investigate and adjudicate, so that thousands of cases are never again dismissed because of an inability to prosecute. More importantly, despite the limited capabilities the United States v. Cooley allows tribal officers to retain, it is critical to examine the importance of dismantling extractive systems that depend on the commodification and exploitation of land and women. The architecture of the MMIWG2S+ crisis is built of political decisions, their economic motivations, and the violence this inflicts upon marginalized ethnic groups of women, trans, and Two Spirit persons. Understanding how colonial industries and systems of production not only lead to the disparate harms of which Indigenous communities across the world endure, but necessitate the ongoing genocide of the very bearers and protectors of Native culture and community will be necessary to shift the winds of change in our favor. In this way, United States v. Cooley serves not to advance but placate a cause, leaving the MMIWG2S+ crisis back where it began.

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