No. 19-1414

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSHUA JAMES COOLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR INDIAN LAW AND POLICY PROFESSORS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are professors and scholars who teach, write, and/or practice in the area of federal Indian law and federal Indian policy. They file this brief to explain the history of tribal authority to temporarily detain non-Indians while investigating crimes within Indian country.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Cooley*, 919 F.3d 1135 (9th Cir. 2019), the Ninth Circuit held that tribal police officers lack authority to briefly detain and search a non-Indian on a public highway running through the Crow Reservation unless it is either "apparent" or "obvious" that the non-Indian has violated state or federal law. As the Petitioner and other amici have already explained, this ruling, if allowed to stand, will seriously jeopardize public safety within Indian country, and is contrary to decades of Congressional actions that have sought to ensure that tribes have the practical capacity and legal authority to fill gaps in criminal jurisdiction

[1] The parties have consented to the filing of this amicus curiae brief. No counsel for either party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.

and law enforcement that contribute to lawlessness in Indian country.

But the Ninth Circuit's decision is not simply contrary to modern policy, practice, and Congressional intent. It is also contrary to the history of policing Indian country in the eighteenth and nineteenth centuries. Early in this country's history, federal officials realized that the illegal activities of non-Indians on the frontier threatened to disrupt the fragile peace that often existed between the United States and Indian tribes, and that the U.S. military lacked the will and capacity to police Indian country. Consequently, federal officials acknowledged and relied upon the authority of Indian tribes, particularly in the southeastern United States, to identify wrongdoers and expel them from their territory.

In the middle of the nineteenth century, however, non-Indians were crossing the country to settle the newly opened west, and clashes with Indian tribes intensified. The United States found itself in a series of Indian wars at a time when the country was already consumed with the U.S. Civil War and its aftermath. Congress constituted several committees and commissions to investigate the causes of these Indian wars, and to identify a path forward that would achieve lasting peace while still enabling settlement of the western United States.

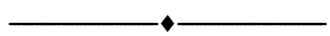
These Congressional investigations during the 1860's concluded that criminal acts committed by non-Indian settlers and military personnel, which often

went unchecked and unpunished, were one of the major causes of the Indian wars. To stop these wars, the United States negotiated treaties with thirteen western tribes. These treaties established reservations as permanent homes for the tribes, guaranteed safe passage for non-Indians across roads and railroads through various parts of the west, and created a mechanism for ensuring the punishment of non-Indian offenders and restitution to Indian victims. The Crow Tribe was a signatory to one such treaty.

In nearly identical language, these treaties – including the 1868 Crow Treaty – promised that "[i]f bad men among the whites or among other people, subject to the authority of the United States," committed a crime against the Indians, "upon proof made to the [Indian] agent and forwarded to the Commissioner of Indian Affairs at Washington City," the United States will arrest and punish the offender, and reimburse the injured Indian for the loss sustained. U.S.-Crow, art. 1, May 7, 1868, 15 Stat. 649. The text and negotiation history for these treaty clauses confirm that the United States acknowledged the tribe's authority to police its territory and investigate and identify crimes that had been committed. And once the tribe provided evidence of such crimes to the Indian agent, the treaty established that it was the United States' responsibility to prosecute the offender and provide monetary compensation to the injured parties.

This is precisely what happened here. A tribal police officer stopped to investigate when he saw the Respondent's car parked on the side of a rural highway

on the Crow Reservation. The police officer's investigation revealed that the Respondent, who had a small child in his vehicle, was likely under the influence of drugs and/or alcohol, and his car contained methamphetamine, drug paraphernalia, and several loaded firearms. The tribal police officer detained the Respondent and turned him over – with proof that a crime had been committed – to federal officials for prosecution. These actions were within the long-recognized inherent authority of the Crow Tribe, and are in accordance with the explicit guarantees of the 1868 Crow Treaty. The Ninth Circuit's decision suppressing the evidence obtained by the tribal police officer should therefore be reversed.



ARGUMENT

I. THE UNITED STATES HAS LONG RECOGNIZED THE POWER OF TRIBAL POLICE TO DETAIN PERSONS, INVESTIGATE CRIMES, AND EXTRADITE AND/OR BANISH NON-INDIANS FROM THEIR TERRITORY.

A. In the Eighteenth Century, Federal Officials Recognized Tribal Authority to Detain and Expel Non-Indian Criminals.

Federal officials in the Founding era recognized, and even relied on, the power of Indian tribes to police Indian country. For instance, in 1792, George Hammond, the British minister to the United States,

pressed Secretary of State Thomas Jefferson on federal Indian policy: "He said they apprehended our intention was to exterminate the Indians and take the lands," Jefferson recorded. Notes of a Conversation with George Hammond, June 4, 1792, *in* 24 PAPERS OF THOMAS JEFFERSON: MAIN SERIES 26-32 (John Capanzariti ed. 1990). Jefferson responded that, "on the contrary, our system was to protect them, even against our own citizens." *Id*. He continued: "We consider them as a Marechaussee, or police, for scouring the woods on our borders, and preventing their being a cover for rovers and robbers." *Id*. As Jefferson's allusion to the nascent French gendarmerie indicates, he relied on Native peoples to maintain and preserve order along the frontier, especially against the region's often-unruly white residents, whom other federal officials routinely described as "lawless banditti." *See*, *e.g.*, 1 ANNALS OF CONG. 623 (Joseph Gales, ed. 1790).

A similar view came from Arthur St. Clair, the federally appointed governor of the Northwest Territory and the region's superintendent of Indian affairs. *See Fin. Oversight and Mgmt. Bd. for Puerto Rico v. Aurelius Inv.*, 140 S. Ct. 1649, 1669 (2020) (Thomas, J., concurring). St. Clair approvingly referred to a provision in the 1795 Treaty of Greenville that stipulated that, if any U.S. citizen or "other white person" settled on Native lands, the signatory tribes "may drive off the settler, or punish him in such manner as they shall think fit." Letter from Arthur St. Clair to Sec'y of War James McHenry (July 15, 1799), Arthur St. Clair Papers, Roll 4, Ohio History Center (quoting Treaty of

Peace, U.S.-Wyandot Nation et al., art. 6, Aug. 3, 1795, 7 Stat. 49, 52). St. Clair urged that this provision be further extended to "expressly" encompass illegal hunters as well as settlers. "I know not how [such intrusion] is to be prevented, unless it be left to the Indians themselves," St. Clair observed. *Id*.

The Treaty of Greenville was not the only early treaty expressly acknowledging tribal power to police its borders. Many treaties in the eighteenth century recognized that Indian tribes routinely detained Indians and non-Indians alike, and obligated tribes to extradite both Indian and non-Indian criminals to the United States for prosecution. For example, in a 1786 treaty the Choctaw Tribe agreed to "restore all the prisoners, citizens of the United States, or subjects of their allies, to their entire liberty." U.S.-Choctaw Nation, art. 1, Jan. 3, 1786, 7 Stat. 21. The Treaty went on to note that if any "Indian or Indians, *or persons, residing among them, or who shall take refuge in* their nation," commits a capital crime against a U.S. citizen, the tribe "shall be bound to deliver him or them up to be punished according to the ordinances of the United States in Congress assembled." *Id.*, art. 5 (emphasis added). Similar language exists in many other treaties of this time period. U.S.-Cherokee Nation, arts. 1, 5, 6, Nov. 28, 1785, 7 Stat. 18; U.S.-Chickasaw Nation, arts. 1, 6, 7, Jan. 10, 1786, 7 Stat. 24; U.S.-Wyandot Nation et al., arts. 1, 5, Jan. 9, 1789, 7 Stat. 28; U.S.-Creek Nation, arts. 3, 8, 9, Aug. 7, 1790, 7 Stat. 35.

One especially clear example of federal recognition of Native power to police non-Indians within their

territory is the controversy surrounding Zachariah Cox. Cox was a Georgian land speculator who headed the Tennessee Company, one of four land companies that purchased Georgia's ownership of western territory in the state's controversial Yazoo sales of 1790 and 1795. Charles F. Hobson, THE GREAT YAZOO LANDS SALE: THE CASE OF FLETCHER V. PECK 27 (2016). Cox's purported title encompassed land guaranteed to the Creek, Cherokee, and Chickasaw Nations in treaties, and so federal officials, eager to preserve peace, sought to prevent his settlement. Gregory Ablavsky, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 55 (forthcoming 2021). In 1791, federal Governor William Blount of the Southwest Territory reportedly informed Cherokee leaders that, because Cox "was acting without any Permission or Authority of the Supreme Government," the Nation had "leave to intercept" his party; the Cherokees then expelled him from their territory. *Id.* at 56. Cox nonetheless persisted in his efforts, and, in 1798, he was arrested by federal officials. When Cox escaped and fled into Indian Country, federal officials, placing a reward on his head, encouraged Choctaw warriors to capture him and bring him to justice. Zachariah Cox, AN ESTIMATE OF COMMERCIAL ADVANTAGES BY WAY OF THE MISSISSIPPI AND MOBILE RIVERS, TO THE WESTERN COUNTRY 49 (1799).

B. In the Nineteenth Century, Many Southeastern Tribes Created Lighthorse Guards to Detain, Expel, and Extradite Non-Indian Criminals.

In the beginning of the nineteenth century, the federal government began to formalize these efforts to permit Indian tribes to police their borders. This was especially true among tribes in the Southeast, which began to create law enforcement units known as the "lighthorse regulars," or "lighthorse guards." Throughout the nineteenth century the lighthorse guards of the Cherokee, Choctaw and Seminole tribes exercised their authority to detain non-Indian citizens for the purpose of investigating crimes or removing them from Indian country. The activities of the lighthorse guards were known to federal officials, who often funded their efforts, and requested their assistance. *E.g.*, William Gerald McLoughlin, CHEROKEE RENASCENCE IN THE NEW REPUBLIC 45 (1986).

The Cherokee Nation created its lighthorse guard in the 1790s. Theda Perdue & Michael D. Green, THE CHEROKEE NATION AND THE TRAIL OF TEARS 43-45 (Kindle ed. 2007); Rennard Strickland, FIRE AND THE SPIRITS 56-58, 68, 96 (1975). The main impetus for the creation of this tribal police force was to reduce horse theft, which was one of the most common crimes in Indian country during the first quarter of the nineteenth century. Non-Indian criminal enterprises known as "pony clubs" were organized to steal horses within the Cherokee territory and sell them for profit. This was especially problematic because horses were necessary

for transportation, communication, and to access food sources. J. Matthew Martin, THE CHEROKEE SUPREME COURT: 1823-1835, 71-72 (forthcoming, Carolina Academic Press 2021) (citations to Red Shelf ed.).

For decades, the Cherokee lighthorse guard investigated crime and detained and expelled non-Indians who were determined to have engaged in horse theft, trespass, prostitution, and other crimes. Perdue & Green, *supra*, at 84-86; Martin, *supra*, at 74-75; Strickland, *supra*, at 148. This was well known to federal officials. For example, when the federal government admitted it was unable to fulfill treaty promises to expel "intruders" on Cherokee lands in the 1820s, Secretary of War John Calhoun advocated using the Cherokee lighthorsemen for this purpose, and President James Monroe specifically approved the practice. McLoughlin, *supra*, at 45, 309-12.

The Choctaw Nation established its lighthorsmen in 1824, prior to removal to the Indian Territory. Devon Abbott Mihesuah, CHOCTAW CRIME AND PUNISHMENT: 1884-1907, at 24-25 (2009).[2] While the Cherokee had

[2] The Choctaw lighthorsemen were the dominant tribal law enforcement agency for the Nation until the 1860s. But following the Civil War, a massive influx of non-Indian intruders resulted in a large number of crimes committed within Choctaw territory by non-Indians. Mihesuah, *supra*, at 7-8, 11, 20, 36. The lighthorsemen did not have sufficient manpower to stamp out this criminal activity, and thus, the Nation authorized the commission of elected sheriffs. While the lighthorsemen would continue to operate throughout the nineteenth century, the Choctaw sheriffs and deputy sheriffs came to wield more power. *Id.* at 24.

created their lighthorsemen initially to quash horse stealing, the Choctaw had different concerns. One concern was the continued illegal importation and sale of liquor into their territory. The Choctaw General Council authorized the lighthorsemen to confiscate and sell the property of any person who brought liquor into the Nation and did not pay the assessed fine, and to search the dwelling or bags of any suspicious person for liquor, which if found, could be destroyed. *Id*. at 98. The Choctaw lighthorsemen routinely searched non-Indians' houses for liquor. *Id.* at 27, 61.

The Choctaw were also concerned that non-Indians were squatting within their territory in increasing numbers. Federal officials recognized this problem, and in the 1820 Treaty of Doak's Stand, promised that the United States would provide funding for the lighthorsemen to "maintain[] good order and compel[] bad men to remove from the nation who are not authorized to live in it by a regular permit." U.S.-Choctaw, art. 13, Oct. 18, 1820, 7 Stat. 210. Tribal laws were adopted that prevented non-Indians from remaining within Choctaw territory without the permission of the federal Indian agent or tribal chief; all non-Indians who were not authorized to remain by the Nation were expelled by the lighthorsemen. Mihesuah, *supra*, at 36, 85. Other tribes used their own lighthorsemen to similarly exclude non-Indians from their territory. *See*, *e.g.*, Daniel F. Littlefield, Jr., Seminole Burning: A Story of Racial Vengeance 21, 24 (1996) (noting that "[t]he Seminole government had engaged in an aggressive policy of paying their lighthorse policemen to drive unwanted

whites out of the nation, which was small enough that they could patrol it with some ease"); Annual Report of the Commissioner of Indian Affairs, 1890, at 91 (stating that "[t]here is not a single intruder in the Seminole nation, the last one having been removed by the Indian police of this agency").

The historical evidence suggests that these early federal recognitions of Native power to search, detain and expel non-Indian intruders were based on the nations' status as sovereigns rather than landowners. To be sure, legal thought of the time did not carefully distinguish jurisdiction and property: "Unfortunately, in the discussion of our Indian relations, the claims to soil and to sovereignty, have been confounded as identical," future Justice Catron, then on the Tennessee Supreme Court, lamented in 1835. *State v. Foreman*, 16 Tenn. 256, 275 (1835). Yet, given the highly contested status of title to Indian lands under American law, *see*, *e.g.*, 5 ANNALS OF CONG. at 891-906, it was not clear that Native nations still held the property right to exclude over these disputed lands. Many purported intruders credibly asserted that, under state law, they legally owned the lands from which Native police forcibly evicted them. Zachariah Cox, for one, insisted that he held rightful title to the Tennessee Company's land stemming from Georgia's sale, Ablavsky, *supra*, at 208, and the U.S. Supreme Court belatedly vindicated Cox's claims in *Fletcher v. Peck*, where it held that Georgia had validly transferred fee simple title to the land notwithstanding the existence of "Indian title." 10 U.S. (6 Cranch) 87, 142-43 (1810). For his part, when arguing

that the Cherokee lighthorse should take primary responsibility for expelling intruders, Secretary of War Calhoun cited the Cherokee Nation's status not as landowner but as "an *independent* people." McLoughlin, *supra*, at 313. This was a standard phrase under law of nations to indicate sovereignty. *See*, *e.g.*, Emer de Vattel, THE LAW OF NATIONS 85 (Bela Kapossy and Richard Whatmore, eds. 2008) (1759) ("The law of nations is the law of sovereigns: free and independent states are moral persons, whose rights and obligations we are to establish in this treatise."); DECLARATION OF INDEPENDENCE (U.S. 1776) (pronouncing the colonies "Free and Independent States"). This evidence demonstrates that, despite the contested and uncertain status of underlying land title, Native nations enjoyed a distinct right to exclude as sovereigns under the law of nations. *Cf.* Vattel, *supra*, at 309 ("The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state.").

II. THE UNITED STATES NEGOTIATED TREATIES WITH THE CROW AND OTHER TRIBES THAT ACKNOWLEDGED TRIBAL AUTHORITY TO INVESTIGATE AND DETAIN "BAD MEN" WHO, UPON PROPER PROOF, WOULD BE PROSECUTED BY THE UNITED STATES.

A. In the Mid-Nineteenth Century, Congressional Investigations Established that Crimes Committed by Non-Indians Were the Cause of Many Indian Wars.

In 1866, the United States constructed Fort Phil Kearny in what is now north-central Wyoming, to protect settlers travelling west on the Bozeman Trail. Both the Trail and the Fort were located on hunting grounds guaranteed to the Crow, Sioux, Cheyenne, and Arapaho by earlier treaties, yet the military sought to exclude the Indians from this area and did nothing to prevent settlers from slaughtering the diminishing game. In December 1866, Red Cloud's band attacked and killed a group of more than eighty soldiers from Fort Phil Kearny led by Lieutenant William Fetterman. Congress, now alert to the seriousness of the Indian wars in the West, passed a resolution calling on the Secretary of the Interior to communicate any reports made to his department by Indian agents or military officials that would shed light on the cause of this conflict and suggest a means of terminating the ongoing hostilities. The resulting hastily compiled document, containing correspondence and testimony of military officials, Indian agents, and private citizens,

advocated for the creation of a commission to conduct an in-depth investigation and treat with the Indians. S. Exec. Doc. No. 13, 40th Cong., 1st Sess., serial 1308, at 6 (Letter from COIA Taylor advocating for a commission to treat with the Indians), 9, 39 (Letters from Commissioner Bogy advocating for a commission); 46-48 (letter from Ely Parker advocating for commission)

In 1867, Congress responded to this recommendation and authorized the creation of the Indian Peace Commission. An Act to establish Peace with certain Hostile Indian Tribes, § 1, 15 Stat. 17 (1867). The goal of the Commission was to end the wars with Indian tribes on the Plains and in the southwestern United States, which had been raging for several years. *Id.* To accomplish this goal, the Commission was to meet with the chiefs and headman of these tribes, and "ascertain the alleged reasons for their acts of hostility." *Id.* Then, the Commission was charged with negotiating treaties that would "remove all just causes of complaint on [the Indians] part," while establishing "peace and safety for the whites," including "security for person and property along the lines of railroad now being constructed to the Pacific and other thoroughfares of travel to the western Territories." *Id.*

The Indian Peace Commission was comprised of prominent civilian and military officials who were already familiar with federal Indian policy, including Commissioner of Indian Affairs Nathaniel Taylor, Chairman of the Senate Committee on Indian Affairs S.S. Tappan, and Lieutenant General William T. Sherman. *See* § 1, 15 Stat. 17 (naming certain officials and

directing the President to appoint three military officers); Report to the President by the Indian Peace Commission, Jan. 7, 1868 ("Peace Comm'n Rep't"), at 50, accompanying Annual Report of the Commissioner of Indian Affairs, 1868 ("1868 COIA Rep't"). During the fall of 1867, the Commission met with more than a dozen Indian tribes, including the Northern Cheyenne, Oglala and Brule Sioux, Crow, Arapaho, Kiowa, Comanche, and Apache, seeking to determine the reasons for current and past wars, as well as the path forward towards peaceful relations. 1868 COIA Rep't at 4.

The Commission uncovered several patterns that led to wars between the United States and Indian tribes on the Plains. First, the United States frequently violated Indian treaty rights. Peace Comm'n Rep't at 31; *see also* S. Exec. Doc. No. 13, *supra*, at 43. Violations often occurred because military officials were never given copies of the treaties, and therefore, unwittingly acted contrary to the promises contained in those documents. S. Exec. Doc. No. 13, *supra*, at 11, 17-18. For example, tribes were routinely ordered to leave hunting grounds that they had been guaranteed by treaty, and to which they needed access for sustenance. If they refused to leave these hunting grounds, the Indians risked being declared "hostile" and shot on sight by the U.S. military. Peace Comm'n Rep't at 39, 40. Military officials also refused to deliver guns and ammunition to tribes as part of their treaty annuity payments and prevented traders from doing the same – sometimes contrary to the explicit direction of the Commissioner of Indian Affairs and Indian agents –

when neighboring tribes were at war with the United States or when there was palpable tension between the tribe and non-Indian settlers. S. Exec. Doc. No. 13, *supra*, at 8-10, 19-22. The failure to provide the weapons and ammunition needed to hunt the already scarce game, however, only escalated tensions as it left the Indians in a condition of starvation.

Second, the Indian Peace Commission concluded that the U.S. military, often responding to false reports of Indian depredations on the property of non-Indian settlers, attacked and killed Indian men, women, and children without cause. Peace Comm'n Rep't at 34-35; S. Exec. Doc. No. 13, *supra*, at 59 ("We have found the whole population who live on the routes of travel and transportation to the gold-producing territories spreading false reports and calling on the government to make war on the Indians"). Additionally, non-Indian settlers trespassed on Indian lands, killed their game, and committed violent criminal acts against Indians, without being punished. This led to retaliation by the affected tribes, which ultimately escalated into war. The fact "[t]hat [the Indian] goes to war is not astonishing," wrote the Commission in its official report. "[H]e is often compelled to do so. Wrongs are borne by him in silence that never fail to drive civilized men to deeds of violence." Peace Comm'n Rep't at 36; *see also* S. Exec. Doc. No. 13, *supra*, at 57 (noting that on the Bozeman Trail, "[t]he first atrocity reported to us was the wanton shooting of a lone [Indian woman] by an emigrant or teamster, which was avenged by a large

party of Indians surrounding the train and demanding the murderer").

Of course, the Commission acknowledged that Indians did commit some depredations and violent acts on whites. But it noted that this was rare, and that it was improper for the military to engage in indiscriminate retaliatory attacks on Indian persons who bore no responsibility for the isolated crimes of individuals:

> To say that no outrages were committed by the Indians would be claiming for them more than can be justly claimed for the most moral and religious communities. Many bad men are found among the whites; they commit outrages despite all social restraints; they frequently, too, escape punishment. Is it to be wondered at that Indians are no better than we? Let us go to our best cities, where churches and schoolhouses adorn every square; yet unfortunately we must keep a policeman at every corner, and scarcely a night passes but, in spite of refinement, religion, and law, crime is committed. How often, too, it is found impossible to discover the criminal. If, in consequence of these things, war should be waged against these cities, they too would have to share the fate of Indian villages.

Peace Comm'n Rep't at 36; *see also* S. Exec. Doc. No. 13, *supra*, at 19 (Commissioner of Indian Affairs Lewis V. Bogy noting that "[t]hese chiefs control their different tribes, with the exception of a few bad men found among them, as among us"); S. Exec. Doc. No. 13, *supra*, at 94-95 (Indian Agent J. H. Leavenworth, noting that

he shall "protect the Indians of my agency, who, at the present time, were never more friendly. I speak of them as tribes. That there are some bad men it is true, but they can and will be controlled by the tribes"); S. Exec. Doc. No. 13, *supra*, at 112-13 (John Sanborn noting: "It is true that horses have been stolen, ranches burned, and men killed, in the region in which these Indians hunt, but in what part of our country have not such crimes been committed? . . . Holding states, nations, or tribes responsible for crimes committed, has been abandoned for many years, and there seems no reason for applying that rule in this case").

The conclusions arrived at by the Peace Commission were hardly new. In fact, they were supported by the recent findings of other Congressionally-led investigations. Just a few years earlier, Congress had created a joint special committee "to inquire into the present condition of the Indian tribes, and especially into the manner in which they are treated by the civil and military authorities of the United States." Joint Resolution, 13 Stat. 572 (1865). This special committee is commonly referred to as the Doolittle Committee, after its Chair, Senator James R. Doolittle. 1 Francis Paul Prucha, *The Great Father* 485 (1984). Like the Indian Peace Commission, the Doolittle Committee traveled throughout the west to interview tribal leaders and U.S. military officials; it also sent a detailed questionnaire to military commanders and Indian agents to gather information. *Id.* at 486; Donald Chaput, "Generals, Indian Agents, Politicians: The Doolittle

Survey of 1865," 3 *Western Hist.* Q. 269, 271-72 (July 1972).

The Doolittle Committee submitted its report to Congress in January 1867. Like the Indian Peace Commission's report, which was filed just one year later, the Committee determined "that in a large majority of cases Indian wars are to be traced to the aggressions of lawless white men, always to be found upon the frontier, or boundary lines between savage and civilized life." Conditions of the Indian Tribes: Report of the Joint Special Committee Appointed Under Joint Resolution of March 3, 1865, S. Rep. No. 39-156 (1867) ("Doolittle Rep't"), at 5; *see also id.*, Appendix, at 96 (attaching the statement of Colonel Kit Carson, who provided an example of how Indians often returned livestock that had strayed and expected to receive a reward for their efforts, but instead were frequently met with violence by non-Indians); *id.*, Appendix, at 93 (attaching statement of Colonel Bent recounting an incident where a non-Indian requested to exchange whisky for an Arapaho woman whom he could have sex with, and when a woman was not provided to him, he shot one of the Indians). The Committee noted that non-Indians were traveling west in large numbers into "those wild regions, where no civil law has ever been administered, and where our military forces have scarcely penetrated," leaving them "practically without any law" to constrain their conduct. The rights of Indians "are wholly disregarded; conflicts ensue; exterminating wars follow." Doolittle Rep't at 6.

The difference between the Indian Peace Commission and prior committees and investigations is that the Commission was tasked with negotiating treaties to end hostilities between the United States and Indian tribes in the west, while "remov[ing] all just causes of complaint on [the Indians'] part." § 1, 15 Stat. 17. The Commission acknowledged that this would "be no easy task," because it would be hard for the present generation of Indians to forget the wrongs that had already been committed. Still, the Commission believed the best possible way "to avoid war is to do no act of injustice," and to ensure that the frontier settler and railroad employees "treat [the Indian] with humanity," refrain from acts of violence, and "acquaint themselves with the treaty obligations of the government, and respect them as the highest law of the land." Peace Comm'n Rep't at 42, 47; *see also* 1868 COIA Rep't at 12 ("As a rule, with rare exceptions, if any, Indian tribes never break the peace without powerful provocation or actual wrong perpetrated against them first; if they are properly treated, their rights regarded, and our promises faithfully kept to them, our treaty engagements promptly fulfilled, and their wants of subsistence liberally supplied, there is seldom, if ever, the slightest danger of a breach of the peace on their part").

B. The 1868 Treaties Included "Bad Men" Clauses to Protect Indians Against the Criminal Acts of Non-Indians.

Nine new treaties with thirteen tribal signatories resulted from the Indian Peace Commission's activities and negotiations with tribes.[3] In each of these treaties, the tribes who were signatories thereto agreed to cease any and all wars against the United States. *E.g.*, U.S.-Kiowa and Comanche, art. 1, Oct. 21, 1867, 15 Stat. 581 ("From this day forward all war between the parties to this agreement shall forever cease"). To prevent future wars, each of these treaties also contained nearly identical provisions to punish "bad men" who committed "wrongs" against the other nation's citizens. If non-Indians committed crimes against Indians, they were to be arrested and prosecuted by the United States, and the United States would provide monetary compensation to the injured Indian(s). If Indians committed crimes against non-Indians, they were to be turned over to the United States for prosecution, and if the tribe refused to do so, money to compensate the injured party for the wrongs committed would be deducted from the tribes' annuities. In both instances, "proof" was to be provided to the Indian agent of the wrongs

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[3] U.S.-Kiowa and Comanche, Oct. 21, 1867, 15 Stat. 581; U.S.-Kiowa, Comanche and Apache, Oct. 21, 1867, 15 Stat. 589; U.S.-Cheyenne and Arapaho, Oct. 28, 1867, 15 Stat. 593; U.S.-Ute, Mar. 2, 1868, 15 Stat. 619; U.S.-Sioux Nation et al., April 29, 1868, 15 Stat. 635; U.S.-Crow, May 7, 1868, 15 Stat. 649; U.S.-Northern Cheyenne and Northern Arapaho, May 10, 1868, 15 Stat. 655; U.S.-Navajo Nation, June 1, 1868, 15 Stat. 667; U.S.-Eastern Band Shoshoni and Bannock, July 3, 1868, 15 Stat. 673.

alleged. In this way the treaties drafted by the Indian Peace Commission were supposed to address the concerns raised by tribal leaders that had led to prior wars. Crime would be reduced, false claims levelled against Indians and non-Indians would be discovered at the outset, and when crimes did occur, rather than retaliation through war, punishment would be meted out against the offender through the criminal and civil court systems.[4]

Federal courts have interpreted these "bad men" treaty clauses on a number of occasions. "[I]nterpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin v. Texas*, 552 U.S. 491, 506 (2008). But unlike statutory interpretation, courts must go beyond the "plain language" of the treaty and apply the special canons of Indian treaty construction. First, Indian treaties "must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians," at the time they were negotiated and signed. *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Choctaw Nation v. Oklahoma*, 397

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[4] S. Exec. Doc. No. 13, *supra*, at 48 (Ely Parker stated during the investigation following the attack on Fetterman's troops that "[i]n my opinion nothing could occur that would tend more strongly to advance the happiness of the Indians, and attach them firmly to the United States government, than the realization of the benefits of an impartial dispensation of justice among themselves and between them and the whites . . . I should deem very desirable, and I think would result in the greatest good in checking mischief, by summarily punishing lawlessness and crime, whether committed by whites or Indians").

U.S. 620, 631 (1970); *see also Washington State Dep't of Licensing v. Cougar Den*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring) (noting that the court is "charged with adopting the interpretation most consistent with the treaty's original meaning" and that it must "give effect to the terms as the Indians themselves would have understood them"). Thus, courts must look "beyond the written words to the larger context that frames the [t]reaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (internal citations omitted). Second, any ambiguities should be "resolved from the standpoint of the Indians." *Winters v. United States*, 207 U.S. 546, 577 (1908); *see also Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) ("Indian treaties must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians") (internal citations omitted). Third, treaties should be liberally construed in favor of preserving tribal rights. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). Fourth and finally, tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous. *E.g.*, *United States v. Dion*, 476 U.S. 734, 739-40 (1986) ("What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty"); *United States ex rel. Hualpi Indians v. Santa Fe Pac. R.R.*, 314 U.S. 339, 346, 353

(1941) (congressional intent to abrogate aboriginal property rights must be "plain and unambiguous" or "clear and plain").

After reviewing both the treaty text and the context and history of negotiations, federal courts have interpreted the 1868 treaties broadly to effectuate the Indians' understanding. For example, courts have concluded that the clause "bad men among the whites, or among other people subject to the authority of the United States," is not limited to employees or agents of the federal government, and likely includes all persons (regardless of race) who are not members of the signatory tribe. *Richard v. United States*, 677 F.3d 1141, 1152-53 (Fed. Cir. 2012) (concluding, after reviewing historical evidence, including the Doolittle Committee Report and Appendix, that the "bad men" clause permitted recovery against the federal government for the death of two Oglala Sioux tribal members who were killed by an intoxicated non-Indian driving on the Pine Ridge Reservation); *Tsosie v. United States*, 825 F.2d 393, 400 n.2 (Fed. Cir. 1987) (noting that the "bad men" clause in the 1868 treaty with the Navajo Nation likely covered the conduct of any non-Navajo, including persons of other Indian tribes or non-whites, after reviewing the treaty negotiations where General Sherman told the tribe: "[i]f you live in peace with your neighbors, we will see that your neighbors will be at peace with you – The government will stand between you and other Indians and Mexicans"). Additionally, damages that Indians may recover in civil suits against the United States are not limited to out-of-pocket costs,

but rather, include compensation for pain and suffering and other sums designed to make the victim whole. *Elk v. United States*, 87 Fed. Cl. 70, 79-80 (2009) (interpreting treaty language requiring that Indians be "reimburse[d]" to mean "indemnify or make whole," after reviewing the historical record).[5]

Still, federal courts have uniformly concluded that the "wrongs" referred to in these treaties are criminal acts – not mere acts of negligence. *Jones v. United States*, 846 F.3d 1343, 1355 (Fed. Cir. 2017) (noting that "only acts that could be prosecutable as criminal wrongdoing are cognizable under the bad men provision"). In doing so, they have been persuaded both by

[5] There are minor differences in language among the 1868 treaties that have resulted in differences in interpretation in the courts. For example, under the Navajo treaty, the "wrong" must occur within the boundaries of the Navajo reservation as created by that treaty. *See* U.S.-Navajo Nation, art. 13, June 1, 1868, 15 Stat. 667 (including unique language stating that "if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty"); *Herrera v. United States*, 39 Fed. Ct. 419, 420 (1997) (holding that crime committed against a Navajo boy at an off-reservation boarding school was not covered under the 1868 treaty), *aff'd*, 168 F.3d 1319 (Fed. Cir. 1998); *Pablo v. United States*, 98 Fed. Cl. 376 (Ct. Fed. Cl. 2011) (holding that crime committed against girl eligible for enrollment in the Navajo Nation was not cognizable under the "bad man" provision of the 1868 Treaty, because the crime occurred on the Rosebud Reservation). There is nothing in the other 1868 treaties, however, that limits the geographic scope of where cognizable wrongs may be committed. *See*, *e.g.*, *Jones v. United States*, 846 F.3d 1343, 1359-60 (Fed. Cir. 2017) (concluding that the bad men provision in the Ute treaty would include "off-reservation activities that are a clear continuation of activities that took place on-reservation").

the text of the treaty, which committed the United States to "arrest and punish" those who committed the wrong, as well as the history and broader context of treaty negotiations. In these cases, the United States has repeatedly "argue[d] that the bad men provision was intended to prevent crime or aggression by whites against the Native Americans," citing the report of the Indian Peace Commission, as well as the Doolittle Committee's Report. *Id.* at 1354-55; *see also Garreaux v. United States*, 77 Fed. Cl. 726, 735-37 (2007) (holding that the "bad men" provision of the Fort Laramie Treaty was limited to claims arising from criminal acts, and not mere negligence).

C. The 1868 Crow Treaty Requires Proof of Crimes Committed Against Indians, and Contemplates Tribal Authority to Detain and Investigate Wrongdoers.

One of the treaties negotiated by the Indian Peace Commission is the 1868 Treaty with the Crow. The Crow ceded more than 30 million acres of land in this treaty, and promised that they would remain at peace with the United States and permanently reside on an eight-million-acre reservation in what is now Montana. *Herrera*, 139 S. Ct. at 1692; U.S.-Crow, arts. 2 & 4, 15 Stat. 649. The United States did not provide monetary compensation to the Tribe for this significant land cession.[6] It did, however, promise to protect the

[6] The Treaty provided that "all sums of money or other annuities provided to be paid . . . under any and all treaties heretofore made with them" would be cancelled, and instead, tribal

Tribe from crimes committed by "bad men." Article 1 of that treaty states as follows:

> From this day forward peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.
>
> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, *upon proof made to the agent*, and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

U.S.-Crow, art. 1, 15 Stat. 649 (emphasis added).

During treaty negotiations, the Crow had identified the same concerns that leaders of other tribes mentioned to the Indian Peace Commission. While little was recorded of the November 12, 1867 treaty council with the Crow, the speeches that were recorded emphasized that non-Indians were flooding Crow territory, killing their game, and committing crimes

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members would receive articles of clothing and a per capita payment of between $10 and $20 each for 10 years. U.S.-Crow, art. 6, 15 Stat. 649.

against the Indians that went unpunished. Bear's Tooth told the Commissioners:

> All my people, for a long time, have been friendly to the whites. Some time ago, a white Chief struck one of my people on the head with a revolver. On the Yellow Stone there were four white people. Four Indians, two of them Chiefs, went over and asked for bread. One of the whites pulled out a revolver and shot two of the Indians. One died. The whites have killed a brother of one of my young men, Wolf Bow, who went and joined the Blackfeet.

The Institute for the Development of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868*, at 87 (1975) ("*Proceedings*"). Bear's Tooth juxtaposed the actions of these non-Indian settlers with the Crow's own actions. He noted that, when the Crow had mistakenly fired on a white camp believing them to be a Sioux war party, they had provided robes, mules and horses as compensation for this wrong. *Id.* The Crow were not made whole, however, for the criminal acts of the non-Indians.

Black Foot, another Crow leader, echoed Bear Tooth's statements, noting that they had so far refused to go to war against the United States, but their patience was waning:

> I am in earnest with you. All the Indians have been trying to make me fight you and join them. Your people going through the Country looking for gold are the ones who cause us much trouble. When I go to any travelling

> party of your people and ask for food, they strike me on the head with a club and run me off.

Proceedings, at 89. The "bad men" provision in the 1868 Treaty with the Crow, was thus meant to deter the commission of crimes by non-Indians, and to ensure that, unlike in the past, non-Indians who did commit crimes within the Crow Reservation would be punished.

D. Respondent is a "Bad Man" Under the 1868 Crow Treaty, and Regardless, the Tribe Possesses Inherent Sovereign Authority to Briefly Detain the Respondent While Investigating On-Reservation Crimes.

Respondent Cooley is a "bad man" under the 1868 Crow Treaty. He is not a member of the Crow Tribe, but he committed criminal acts within the boundaries of the Crow Reservation. The United States only has a duty to prosecute him for the crimes and compensate the tribe for any harm, however, "upon proof" submitted to federal officials that he did, indeed, commit such crimes.[7] Accordingly, the Treaty necessarily requires

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[7] The Crow Treaty only requires the Indian agent to collect evidence of crimes committed by Indians against non-Indians; it is the Tribe's responsibility to provide the initial proof of crimes committed by non-Indians against Indians. *See*, *e.g.*, U.S.-Crow, arts. 1 & 5, May 7, 1868, 15 Stat. 649 (referring, in Article 1, to the actions of Indians as "wrong[s] or depredation[s]," while limiting the actions of whites to only "wrong[s]," and noting in Article 5 that "[i]n all cases of *depredation* on person or property," the

that Crow law enforcement possess at least the authority to temporarily detain non-Indians and conduct a minimal investigation necessary to detect crime on the Crow Reservation. Only this will allow them to provide the "proof" required by the Treaty and ensure that "bad men" are "punished according to the laws of the United States."

Moreover, separate from the Treaty, the Crow Tribe retains its inherent sovereign power to investigate crimes committed by non-Indians within their territory, and to expel or extradite any wrongdoers. As described in Section I above, this power continued to be exercised by Indian tribes throughout the eighteenth and nineteenth centuries, and therefore, it was not implicitly divested by the arrival of Europeans in what is today the United States. Section I, *infra; see also* Mihesuah, *supra*, at 42, 61 (noting that it was contrary to Choctaw law in the nineteenth century for anyone other than Choctaw lighthorsemen or police officers to carry a weapon, and providing examples of this law being used to detain and search non-Indians in Indian country); *see also* Petitioner's Br. at 17-22 (noting that the continued exercise of tribal law enforcement power is consistent with Indian tribes'

Indian agent "shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty") (emphasis added); *Tsosie*, 825 F.2d at 401-02 (reading similar clauses in the 1868 Navajo treaty as requiring agency exhaustion only for crimes committed by Indians, because the "bad men" provision in Article 1 similarly indicated that "depredations" were only committed by Indians, not by non-Indians).

"dependent status," and in fact, has always been desired by federal officials to ensure that law and order is maintained). This Court clearly stated in *Duro v. Reina*:

> Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.

495 U.S. 676, 697 (1990); *see also Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975) (holding that tribes possess inherent authority to investigate crimes within their territory, to briefly detain and search non-Indians suspected of committing such crimes, and to exclude trespassers). Neither the language of the 1868 Treaty nor any other federal law has divested the Tribe of this inherent power. *See United States v. Winans*, 198 U.S. 371, 381 (1905) ("Treaties are "not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted."); *Tsosie*, 825 F.2d at 396 (noting that "[i]t is evident from the negotiations [of the 1868 treaty] that the Navajos were not to be permanently disarmed, and could defend their reservation"). Consequently, the power remains with the Crow Tribe.

Crime committed by non-Indian offenders within Indian country is unfortunately not only an historic

problem. Non-Indian offenders continue to impact the well-being and safety of Indians today, especially on large, rural reservations such as the Crow Reservation. *See*, *e.g.*, Open Letter from MMIP Families of Big Horn, Rosebud, & Yellowstone Counties, February 24, 2020, https://2a840442-f49a-45b0-b1a1-7531a7cd3d30.filesusr.com/ugd/6b33f7_6c826324172642179928 81a7a78b1f00.pdf (last accessed 1/5/2021); Olivia Reingold, Crow Tribe Declares State of Emergency Over Lack Of Law Enforcement (Nov. 25, 2019), https://www.mtpr.org/post/crow-tribe-declares-state-emergency-over-lack-law-enforcement (last accessed 1/5/2021); Jack Healy, Rural Montana Had Already Lost Too Many Native Women. Then Selena Disappeared (Jan. 20, 2020), https://www.nytimes.com/2020/01/20/us/selena-not-afraid-missing-montana.html (last accessed 1/5/2021).

The United States should keep its treaty promises, which were designed to ensure that the Crow and other tribes were protected from such acts.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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