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Greg S. Keogh

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## EXTENDING TRIBAL CRIMINAL JURISDICTION OUTSIDE OF INDIAN COUNTRY: *KELSEY V. POPE*

Greg S. Keogh\*

### *I. Introduction*

The inherent sovereignty of American Indian tribes, such as the Little River Band of Ottawa Indians, was recognized long before the founding of the United States. In fact, Indian tribal governments are some of the earliest governments in the world.<sup>1</sup> However, the powers and authorities intertwined with inherent sovereignty are neither established nor protected by the United States Constitution.<sup>2</sup> Although the structure and responsibilities of tribal governments varied from tribe to tribe, most tribes used some form of authoritative body to facilitate societal control.<sup>3</sup> These governing bodies held tribal members to a certain standard of individual behavior and self-control within the society. Members that did not live up to these standards and tribal norms were punished. Depending on the extent of the deviation, punishments included, but were not limited to, ordering the violator to make a payment to the injured member, banishing the violator, and, in extreme cases, sentencing the violator to death.<sup>4</sup> In short, Indian tribes have possessed and exercised the power to maintain social order over their members for well over two hundred years.<sup>5</sup>

This Note will explore the inherent sovereign powers retained by Indian tribes to exercise criminal jurisdiction over tribal members. In particular,

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\* Third-year student, University of Oklahoma College of Law.

1. *Tribal Sovereignty: History and the Law*, NATIVE AM. CAUCUS OF THE CAL. DEMOCRATIC PARTY, <http://www.nativeamericancaucus.org/resources/tribal-sovereignty-history-and-the-law> (last visited Oct. 19, 2018).

2. Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 544 (6th Cir. 2015) (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 168 (1982) (Stevens, J., dissenting)).

3. *See, e.g.*, RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* (1975).

4. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01(1)(a), at 206 (Nell Jessup Newton et al. eds., Supp. 2017) [hereinafter COHEN'S HANDBOOK] (citing RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE* (2009); SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* (1994); KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941); D'ARCY McNICKLE, *THEY CAME HERE FIRST* 52-65 (Harper & Row, rev. ed. 1975) (1949)).

5. *Tribal Sovereignty: History and the Law*, *supra* note 1.

this Note will analyze and compare the competing theories of membership-based jurisdiction and territory-based jurisdiction, as well as the extent to which Congress or treaties have limited jurisdictional powers. Furthermore, this Note will discuss the significance of the United States Court of Appeals for the Sixth Circuit's holding in *Kelsey v. Pope*.<sup>6</sup>

## II. *The Contours of Tribal Criminal Jurisdiction*

Although Indian tribes no longer possess the same freedom to prescribe laws for their members and punishments for violators, they do retain unique and limited powers of sovereignty. The United States has long recognized Indian tribes as “separate people[s], with the power of regulating their internal and social relations . . . .”<sup>7</sup> These powers are not granted from the United States to Indian tribes, but are inherent powers tribes have retained since long before the arrival of any European nation.<sup>8</sup> However, tribes’ “incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.”<sup>9</sup> This dependent relationship meant that tribal sovereignty, in a practical sense, hinged upon recognition by the United States government and could be limited by treaties and congressional enactments.

One such impediment on tribal sovereignty includes Congress’s ability to wield their “plenary and exclusive” power to limit tribal authority.<sup>10</sup> By creating laws and limiting tribal powers, the United States has exerted control over Indian Country<sup>11</sup> and all members within its boundaries. While a tribe’s presence within the territorial boundaries of the United States divests it of certain powers of sovereignty, including the power to enter into treaties with foreign nations, there are few limitations on internal tribal sovereignty.<sup>12</sup> Therefore, Indian tribes retain all sovereign powers to self-govern and facilitate social control, so long as those powers have not been

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6. 809 F.3d 849 (6th Cir. 2016), *cert. denied sub nom.* *Kelsey v. Bailey*, 137 S. Ct. 183 (2016).

7. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

8. *See United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

9. *Id.* at 323.

10. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (citing *United States v. Lara*, 541 U.S. 193, 200 (2004)).

11. 18 U.S.C. § 1151 (2012) (“[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government . . .”).

12. COHEN’S HANDBOOK, *supra* note 4, § 4.02(1), at 222.

expressly limited by statute, treaty, or implicit divestment by virtue of the tribe's domestic dependent status.<sup>13</sup>

An inherent sovereign power retained by tribes is the authority to exercise exclusive criminal jurisdiction over certain minor crimes committed by an Indian in Indian Country.<sup>14</sup> Over the years, Congress has enacted several provisions of the federal criminal code to limit tribes' inherent sovereign power to exercise tribal criminal jurisdiction in Indian Country. The General Crimes Act (GCA)<sup>15</sup> and the Major Crimes Act (MCA)<sup>16</sup> are two of the most significant additions to the federal criminal code.

The GCA provides that "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country," but not if the offense is "committed by one Indian against . . . another Indian, nor to any Indian committing any offense in the Indian country."<sup>17</sup> These "general laws" are "criminal statutes enacted by Congress to govern admiralty and maritime jurisdiction" and to protect important federal properties, including "post offices, national parks, and military installations."<sup>18</sup>

The MCA dictates that a tribal member who commits any felony listed in the statute against any person within Indian Country shall be subject to the exclusive criminal jurisdiction of the federal government.<sup>19</sup> Unlike the GCA, the MCA applies even if both the defendant and the victim are tribal members.<sup>20</sup> Therefore, minor offenses committed by one tribal member against another within Indian Country remain within a tribal government's exclusive criminal jurisdiction.

Until recently, it was widely assumed that any offense committed by one tribal member against another outside of Indian Country, regardless of severity, fell under the criminal jurisdiction of either the state or federal government. For example, in *Roe v. Doe*,<sup>21</sup> Jane Roe, a member of the

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13. *Id.* at 223.

14. *Id.* § 9.04, at 765-69.

15. 18 U.S.C. § 1152 (2012).

16. 18 U.S.C. § 1153 (2012).

17. 18 U.S.C. § 1152.

18. COHEN'S HANDBOOK, *supra* note 4, § 9.02(1)(c)(i), at 740 (citing 18 U.S.C. § 7 (2012)).

19. 18 U.S.C. § 1153.

20. *Id.*

21. 649 N.W.2d 566 (N.D. 2002).

Standing Rock Sioux Tribe, brought suit against John Doe, a member of the Three Affiliated Tribes of the Fort Berthold Reservation, in an attempt to establish that Doe was the father of Roe's child.<sup>22</sup> After the trial court ruled against Doe, he moved to vacate the judgment for lack of subject matter jurisdiction. Doe asserted that the trial court lacked subject matter jurisdiction because both Roe and Doe were tribal members, and both parties and the child were legal residents within Indian Country at the time of the suit.<sup>23</sup> After the trial court denied his motion, Doe appealed to the Supreme Court of North Dakota. Examining the circumstances in which the United States Supreme Court has upheld tribal courts' exclusive civil jurisdiction, the court found that pursuant to the Indian Child Welfare Act, tribal courts possess "exclusive jurisdiction 'over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law.'"<sup>24</sup> Thereafter, the court noted that although this case concerned tribal civil jurisdiction, "an Indian tribe has exclusive criminal jurisdiction over crimes committed by Indians against Indians in Indian country unless such crimes fall within the Major Crimes Act . . . . However, outside of Indian country, the state has general criminal jurisdiction over all persons, including Indians."<sup>25</sup> After finding "the record indicate[d] that all the events leading up to the action occurred off [the reservation]," the court reaffirmed the notion that, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."<sup>26</sup> Accordingly, the Supreme Court of North Dakota affirmed the trial court's denial of Doe's motion to vacate the trial court's judgment.<sup>27</sup>

In *Kelsey v. Pope*, however, the United States Court of Appeals for the Sixth Circuit took a different stance by endorsing the notion that Indian tribes have retained the inherent sovereign authority to exercise membership-based criminal jurisdiction independent of territorial

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22. *Id.* at 567-68.

23. *Id.* at 567-68.

24. *Id.* at 569 (quoting 25 U.S.C. § 1911(a)).

25. *Id.* (internal quotation marks omitted).

26. *Id.* at 579-80 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)) (internal quotation marks omitted).

27. *Id.* at 580.

jurisdiction, even when the parties are members of different tribes.<sup>28</sup> The Sixth Circuit's holding is an important stepping-stone towards greater freedom and lesser restraint on Indian tribes' ability to exercise their inherent sovereign powers, as it is the first federal judicial decision to recognize a tribe's power to extend criminal jurisdiction outside of Indian Country.

### *III. Background of Kelsey v. Pope*

The historical background of *Kelsey v. Pope* helps address why the Sixth Circuit held that Indian tribes may have retained the inherent sovereign power to exercise criminal jurisdiction over tribal members for conduct occurring outside of Indian Country under certain limited conditions. Located in northwest Michigan, the Little River Band of Ottawa Indians (the "Band") "is a federally recognized Indian tribe presently maintaining a government-to-government relationship with the United States."<sup>29</sup> Although this relationship and recognition has fluctuated over the years, the Band "became the first tribe 'acknowledged' by the Secretary of the Interior pursuant to the federal acknowledgment process . . . ."<sup>30</sup> Due to this recognition and incorporation within the territorial boundaries of the United States, the Band was divested of several aspects of the inherent sovereign powers it once possessed.<sup>31</sup>

Importantly, however, the Band retains "the inherent authority to establish [its] own form of government, including tribal justice systems."<sup>32</sup> Exerting these retained sovereign powers, the Band enacted a tribal constitution and established judicial independence.<sup>33</sup> Under this constitution and the powers vested within, the Band's tribal courts have the power "[t]o adjudicate all civil and criminal matters arising within the jurisdiction of the Tribe or to which the Tribe or an enrolled member of the Tribe is a party."<sup>34</sup> However, the issue of whether the Band retained the authority to extend criminal jurisdiction outside of Indian Country—under a membership-based

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28. *Kelsey v. Pope*, 809 F.3d 849, 860 (6th Cir. 2016) (citing *Duro v. Reina*, 495 U.S. 676, 686 (1990)).

29. *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney for W. Dist. of Mich.*, 369 F.3d 960, 961 (6th Cir. 2004).

30. *Id.* at 962; see 25 C.F.R. §§ 83.20-83.46.

31. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

32. 25 U.S.C. § 3601(4).

33. LITTLE RIVER BAND OF OTTAWA INDIANS CONST. art. VI, § 9.

34. *Id.* art. VI, § 8.

jurisdictional approach rather than a territory-based jurisdictional approach—remained unanswered until recently.

#### IV. *Kelsey v. Pope*

Norbert Kelsey, an elected member of the Little River Band of Ottawa Indians' nine-person tribal council, was charged with misdemeanor sexual assault and harassment in the Little River Tribal Court for inappropriate actions toward Heidi Foster.<sup>35</sup> "Foster [was] an employee of the Band's medical clinic and a member of a neighboring tribe."<sup>36</sup> The incident occurred on July 5, 2005, during a meeting of the tribal elders at the Band's Community Center, located outside of Indian Country.<sup>37</sup> Almost three years later, the tribal court held that "[s]ince Defendant [was] a tribal member, his victim [was] a Native American, and the site of his crime was a facility owned by the Tribe, [the] case was clearly within the territorial and subject matter jurisdiction of [the] court."<sup>38</sup> The Little River Tribal Court convicted Kelsey and sentenced him to six months in jail.<sup>39</sup>

Kelsey appealed the tribal court's judgment to the Little River Court of Appeals, arguing the Band lacked the authority to exercise criminal jurisdiction over his conduct because the incident occurred outside of the Band's territory.<sup>40</sup> Kelsey also asserted that section 4.03 of the Band's Criminal Offenses Ordinance precludes criminal jurisdiction over tribal members for conduct outside of Indian Country.<sup>41</sup> Under section 4.03(a), criminal jurisdiction extends to "[1] all land within the limits of the Tribe's reservation . . . [,] [2] [land] held in trust by the United States . . . [,] and [3] land considered 'Indian country.'"<sup>42</sup> Moreover, section 4.03(b) grants tribal courts the authority to extend criminal jurisdiction over members, no matter where the offense was committed, if the member committed any one of

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35. *Little River Band of Ottawa Indians v. Kelsey*, No. 07103TM, 2008 WL 6928233, at \*1 (Little River Band of Ottawa Indians Tribal Ct. Aug. 21, 2008). Kelsey was charged under LITTLE RIVER BAND OF OTTAWA INDIANS, ORDINANCE 03-400-03, § 4.03(b) (2010).

36. *Kelsey v. Pope*, 809 F.3d 849, 854 (6th Cir. 2016).

37. *Id.*

38. *Little River Band of Ottawa Indians*, No. 07103TM, at \*2.

39. *Kelsey*, 809 F.3d at 853.

40. *Id.* at 852.

41. *Id.* at 853.

42. *Id.* at 864 (quoting LITTLE RIVER BAND OF OTTAWA INDIANS, ORDINANCE 03-400-03, § 4.03(a) (2010)).

nine enumerated offenses.<sup>43</sup> Sexual assault is not among these offenses.<sup>44</sup> Although Kelsey's conduct did not fall within any of the provisions of section 4.03, the tribal court of appeals found this section inconsistent with the authority granted in the Band's constitution<sup>45</sup> and section 8.08 of the Criminal Procedure Ordinance.<sup>46</sup> Section 4.03 was deemed "unconstitutionally narrow in that it [did] not provide for the exercise of inherent criminal jurisdiction over all tribal lands."<sup>47</sup> Thus, the tribal court of appeals removed the incongruous territorial limitation and affirmed the jurisdictional reach of the Band.<sup>48</sup>

Kelsey filed a petition for a writ of habeas corpus in the Western District of Michigan, arguing that (1) the Band lacked inherent sovereign authority to extend criminal jurisdiction over his off-reservation conduct, and (2) the retroactive application of the criminal laws by the tribal court of appeals violated his due process protections under the Indian Civil Rights Act.<sup>49</sup> A magistrate judge examined Kelsey's appeal and found that "the Tribe lacked jurisdiction to prosecute Kelsey because the alleged crime occurred outside Indian country," as well as "that the Tribe's attempt to retroactively expand its jurisdiction to encompass crimes that occurred outside Indian country, if effective, would have violated Kelsey's due process rights."<sup>50</sup> The district court, while agreeing with the magistrate judge's conclusion that the Band lacked the authority to exercise criminal jurisdiction over Kelsey because the incident occurred outside of Indian Country, refused to

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43. *Id.* (citing LITTLE RIVER BAND OF OTTAWA INDIANS, Ordinance 03-400-03, § 4.03(b) (2010)).

44. *Id.*

45. "The Tribe's jurisdiction over its members and territory shall be exercised *to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law.*" LITTLE RIVER BAND OF OTTAWA INDIANS CONST. art. I, § 2 (emphasis added).

46. "The Tribal Court shall have jurisdiction over any action by any Indian as defined by this Ordinance, that is made a criminal offense under applicable Tribal Code and *that occurred within the territorial jurisdiction of the Tribe . . . .*" LITTLE RIVER BAND OF OTTAWA INDIANS, ORDINANCE 03-300-03, § 8.08 (2003), *quoted in Kelsey*, 809 F.3d at 865. This provision was reworded in 2011. *See* LITTLE RIVER BAND OF OTTAWA INDIANS, ORDINANCE 03-300-03, § 8.08 (2011), <http://lrboi-nsn.gov/images/docs/council/docs/ordinances/Title%20300-03.pdf>.

47. *Kelsey*, 809 F.3d at 865 (quoting Transcript of Record at 9, *Little River Band of Ottawa Indians v. Kelsey*, 8 Am. Tribal Law 283 (Little River Band of Ottawa Indians Tribal Ct. App. Feb. 3, 2009)).

48. *Id.*

49. *Id.* at 854; *see also* 25 U.S.C. § 1302(a)(8) (2012).

50. *Kelsey v. Pope*, No. 1:09-CV-1015, 2014 WL 1338170, at \*1 (W.D. Mich. 2014).

address the due process issue.<sup>51</sup> “Accordingly, the district court granted habeas relief for lack of tribal jurisdiction.”<sup>52</sup> The Band then appealed the district court’s judgment to the United States Court of Appeals for the Sixth Circuit.

The issues brought before the Sixth Circuit were: (1) whether the Band lacked criminal jurisdiction over Kelsey’s off-reservation conduct, and (2) whether the judgment by the tribal court of appeals violated Kelsey’s due process protections established under the Indian Civil Rights Act.<sup>53</sup> However, to answer these issues, the Sixth Circuit first had to address the broader issue of whether a tribal court’s criminal jurisdiction is territory-based or membership-based.

#### *V. Decision of the Case*

The United States Court of Appeals for the Sixth Circuit reversed the Western District Court of Michigan’s finding that tribal criminal jurisdiction was lacking and vacated the lower court’s grant of habeas corpus relief.<sup>54</sup> The Sixth Circuit held that the Little River Band of Ottawa Indians properly asserted criminal jurisdiction over Kelsey, even though his conduct occurred outside of Indian Country.<sup>55</sup> To reach this decision, the Court broke down the governing framework into three separate inquiries: “(1) [D]o Indian tribes have inherent sovereign authority to exercise extra-territorial criminal jurisdiction? (2) If so, has that authority been expressly limited by Congress or treaty? And (3) if not, have the tribes been implicitly divested of that authority by virtue of their domestic dependent status?”<sup>56</sup>

#### *A. “Do Indian Tribes Have Inherent Sovereign Authority to Exercise Extra-Territorial Criminal Jurisdiction?”*

The Sixth Circuit first addressed the Tribe’s inherent sovereign authority as it relates to extra-territorial criminal jurisdiction. As discussed above, the ability to prescribe laws for tribal members and to punish violators who break said laws is an inherent sovereign power retained by Indian tribes.<sup>57</sup>

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51. *Kelsey*, 809 F.3d at 854.

52. *Id.*

53. *Id.*; see also 25 U.S.C. § 1302(a)(8).

54. *Id.* at 852.

55. *Id.*

56. *Id.* at 855.

57. See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

However, the issue involved in *Kelsey* was not simply whether a tribe may exert criminal jurisdiction over a member, but whether this inherent authority extends outside of Indian Country.<sup>58</sup> *Kelsey* argued that the power to exercise criminal jurisdiction is governed by “the twin factors of tribal membership and territory . . . .”<sup>59</sup> When either factor is missing from the equation, the Tribe’s authority is nearly, if not completely, non-existent.<sup>60</sup> Arguing against this notion, the Band contended that tribes maintain the “inherent authority to prosecute tribal members for offenses substantially affecting tribal self-governance interests,’ even when such offenses take place outside of Indian country.”<sup>61</sup> In order to decide the more persuasive argument, the Sixth Circuit examined Supreme Court<sup>62</sup> and Ninth Circuit precedent.<sup>63</sup> Agreeing with the Band, the court found that “[t]he two most helpful cases in establishing membership as the driving force behind criminal jurisdiction are *Wheeler* . . . and *Duro* . . . .”<sup>64</sup>

In *United States v. Wheeler*, a Navajo tribal member convicted in tribal court for contributing to the delinquency of a minor was subsequently indicted in federal court for statutory rape.<sup>65</sup> In that case, the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution<sup>66</sup> does not bar federal prosecution of a criminal who has already been punished in a tribal court.<sup>67</sup> The Court reasoned that the grand jury’s indictment did not constitute double jeopardy because “the power to punish offenses against tribal law committed by [tribal] members, which was part of the Navajos’ primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority.”<sup>68</sup> Thus, when a tribe exercises

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58. *Kelsey*, 809 F.3d at 854-55.

59. *Id.* at 856.

60. *Id.*

61. *Id.* at 855-56.

62. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Duro v. Reina*, 495 U.S. 676 (1990); *United States v. Wheeler*, 435 U.S. 313 (1978).

63. See *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991); *Sidney v. Zah*, 718 F.2d 1453 (9th Cir. 1983); *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).

64. *Kelsey*, 809 F.3d at 856 (citing *Wheeler*, 435 U.S. 313, and *Duro*, 495 U.S. 676).

65. *Wheeler*, 435 U.S. at 313.

66. U.S. CONST. amend. V (“No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . .”).

67. *Wheeler*, 435 U.S. at 332.

68. *Id.* at 328.

criminal jurisdiction over a tribal member, “it does so as part of its retained sovereignty and not as an arm of the Federal Government.”<sup>69</sup> Although the conduct at issue occurred within Indian Country, *Wheeler* marked the first time the Supreme Court differentiated between member and nonmember Indians—stating that tribes retain “attributes of sovereignty over both their members and their territory . . . .”<sup>70</sup>

“While *Wheeler* provides a legal basis for the uncontroversial belief that tribes did not historically tip-toe around territorial borders in asserting their authority to enforce tribal laws,”<sup>71</sup> the court found that “*Duro* offers the most direct support for membership-based jurisdiction.”<sup>72</sup> The *Duro* case involved a member of the Torres-Martinez Band of Cahuilla Mission Indians who “allegedly shot and killed a 14-year-old boy within the Salt River [Pima-Maricopa Indian Community’s] Reservation boundaries.”<sup>73</sup> In this critical decision, the Supreme Court held that an Indian tribe lacked the authority to exercise criminal jurisdiction over members of other tribes regardless of whether the conduct occurred within its own territory.<sup>74</sup>

In response to this decision, Congress amended the Indian Civil Rights Act to indicate that the retained powers of Indian tribes include “the inherent power . . . to exercise criminal jurisdiction over all Indians.”<sup>75</sup> Although the Supreme Court reversed the Ninth Circuit’s finding that the Tribe possessed the power to exercise criminal jurisdiction over nonmembers, the Court affirmed the notion that tribes do possess the power to prosecute members.<sup>76</sup> The Court stated that “[r]etained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.”<sup>77</sup>

In *Kelsey*, Judge McKeague noted that it is “[t]his consensual agreement between a tribe and its members [that] provides the core principle underpinning and justifying a membership-based jurisdiction that is not

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69. *Id.*

70. *Id.* at 323 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

71. *Kelsey v. Pope*, 809 F.3d 849, 856 (6th Cir. 2016).

72. *Id.* (citation omitted).

73. *Duro v. Reina*, 495 U.S. 679, 679 (1990).

74. *Id.*

75. 25 U.S.C. § 1301(2).

76. *Duro*, 495 U.S. at 694.

77. *Id.*

rigidly tied to geographic qualifications.”<sup>78</sup> Although neither *Wheeler* nor *Duro* expressly declared that tribes retain the inherent sovereign authority to exercise extra-territorial jurisdiction over tribal members, the court found that “their core principles strongly support the Band’s theory of jurisdiction.”<sup>79</sup> Therefore, the Sixth Circuit answered the first of the three separate inquiries in the affirmative—Indian tribes have inherent sovereign authority to exercise extra-territorial criminal jurisdiction.<sup>80</sup>

*B. Since Tribes Have Inherent Sovereign Authority to Exercise Extra-Territorial Criminal Jurisdiction, Has That Authority Been “Expressly Limited by Congress or Treaty”?*

Addressing the second inquiry—whether Congress or treaties have expressly limited this inherent sovereign authority to exercise extra-territorial criminal jurisdiction—the court found that neither Kelsey nor the Western District of Michigan “identified any treaty or statute that explicitly divests the Band of extra-territorial criminal jurisdiction.”<sup>81</sup> Therefore, the second inquiry was answered in the negative; neither congressional action nor treaty has limited the Band’s inherent sovereign authority.<sup>82</sup>

*C. Have Tribes Been Implicitly Divested of the Power to Exercise Extraterritorial Jurisdiction by “Virtue of Their Domestic Dependent Status”?*

Turning to its third inquiry—whether Indian tribes’ status as domestic dependents implicitly divests them of the inherent sovereign authority to exercise extra-territorial jurisdiction—the court examined (1) “the history and breadth of implicit divestiture”<sup>83</sup> and (2) “whether statutes extending federal jurisdiction into Indian country serve as a basis for implicitly divesting tribes of their jurisdiction over off-reservation offenses.”<sup>84</sup>

Implicit divestiture is a judicially crafted theory that imposes additional limitations on tribal authority and “prohibits tribes from exercising various

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78. Kelsey v. Pope, 809 F.3d 849, 856 (6th Cir. 2016), *cert. denied sub nom.* Kelsey v. Bailey, 137 S. Ct. 183 (2016).

79. *Id.* at 859.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 860.

84. *Id.*

types of civil legislative and adjudicative jurisdiction.”<sup>85</sup> The Supreme Court created this theory in *Oliphant v. Suquamish Indian Tribe*,<sup>86</sup> a case involving two non-Indians arrested and charged in tribal court for separate incidents occurring within the territory of the Suquamish Indians. “*Oliphant* thoroughly canvassed the history of treaties, statutes, and judicial decisions regarding crimes in Indian country and found a ‘commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try *non*-Indians.’”<sup>87</sup>

Although Congress never explicitly divested Indian tribes of criminal jurisdiction over non-Indian individuals for conduct within Indian Country, the Supreme Court found “that Congress consistently believed this to be the necessary result of its repeated legislative actions.”<sup>88</sup> Weighing in on the subject, Judge McKeague stated that this belief was founded on Indian “tribes’ dependent status, identifying what [the Supreme Court] perceived to be an incongruous result should ‘Indian Tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to [tribal] customs and procedure.’”<sup>89</sup> The Supreme Court has consistently affirmed and extended this rationale in the years since *Oliphant*.<sup>90</sup> However, the Court has also expressly stated that Indian tribes have not been divested of the inherent sovereign power to exercise criminal jurisdiction over members for conduct that occurred within their territories.<sup>91</sup>

Despite the *Kelsey* court finding that tribes have not been implicitly divested of the inherent sovereign power to charge and prosecute their members for *on-reservation* conduct, it found tribes’ “unique dependent status requires a more nuanced analysis in determining whether they may extend tribal prosecutions to members’ *off-reservation* conduct.”<sup>92</sup> In undergoing this “nuanced analysis,” the court examined *Montana v. United*

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85. COHEN’S HANDBOOK, *supra* note 4, at § 4.02(3)(a), at 226 (citing Sarah Krakoff, *Tribal Civil Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 COLO. L. REV. 1187 (2010)).

86. 435 U.S. 191 (1978).

87. *Kelsey*, 809 F.3d at 860 (citing *Oliphant*, 435 U.S. at 206).

88. *Oliphant*, 435 U.S. at 204.

89. *Kelsey*, 809 F.3d at 860 (citing *Oliphant*, 435 U.S. at 208-11).

90. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Duro v. Reina*, 495 U.S. 676 (1990); *Montana v. United States*, 450 U.S. 544 (1981).

91. *See, e.g.*, *Duro*, 495 U.S. at 686; *see also* *United States v. Lara*, 541 U.S. 193, 197, 205 (2004).

92. *Kelsey*, 809 F.3d at 860 (emphasis added).

*States*,<sup>93</sup> which asked whether the Crow Tribe possessed the inherent power to exercise regulatory jurisdiction over hunting and fishing by non-Indian individuals on lands not owned by the Tribe but within its reservation boundaries.<sup>94</sup> In deciding this issue, the Supreme Court “clarified [that] the extent of sovereign authority [was] implicitly divested as a result of the tribes’ dependent status.”<sup>95</sup> The *Montana* Court declared that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”<sup>96</sup> Accordingly, when examining if the Band’s exercise of extra-territorial jurisdiction complied with *Montana*, the *Kelsey* court found it was “important to determine exactly what the Band [was] and [was] not arguing with respect to the scope of their jurisdictional power”<sup>97</sup> in order to determine whether their asserted extra-territorial authority dealt with internal relations and self-governance.

#### *VI. Application and Ruling*

The *Kelsey* court found that the Band was aware “that a free-floating, membership-based jurisdiction over *any criminal conduct*”<sup>98</sup> has the potential to conflict with *Montana*’s prescription that tribes’ limit criminal jurisdiction to “only that which is ‘necessary to protect tribal self-government or control internal relations.’”<sup>99</sup> Accordingly, the Band argued that Indian tribes possess a narrow, inherent extra-territorial power to exercise criminal jurisdiction for conduct occurring outside of Indian Country, “at least where the offenses *substantially affect [a tribe’s] self-governance interests*.”<sup>100</sup>

Agreeing with the Band, the court found that *Kelsey*’s conduct involved essential tribal government concerns and therefore substantially affected the Band’s “ability to control its self-governance.”<sup>101</sup> Examining the specific conduct at issue, the court found the following: *Kelsey* was a board member of the Band’s legislative Tribal Council; Foster, *Kelsey*’s victim and

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93. 450 U.S. 544 (1981).

94. *Id.* at 550-51.

95. *Kelsey*, 809 F.3d at 861 (citing *Montana*, 450 U.S. 544).

96. *Montana*, 450 U.S. at 564.

97. *Kelsey*, 809 F.3d at 861.

98. *Id.*

99. *Id.* (citing *Montana*, 450 U.S. at 564).

100. *Id.* (internal quotation marks omitted).

101. *Id.*

member of a neighboring tribe, was an employee of the Little River Band of Ottawa Indians and was acting within the scope of her employment at an official meeting of the Tribal Council; and the incident “took place at the [Band’s] Community Center, the center of Tribal community activities ever since it was purchased.”<sup>102</sup> The court held that “[t]his [was] no run-of-the-mill criminal conduct, but conduct visited on the Band’s employee by the Band’s *own elected official* during an official tribal function: in pure form, this was an offense against the peace and dignity of the Band itself.”<sup>103</sup> While a broad scope of membership-based jurisdiction over any criminal conduct is certainly unharmonious with tribes’ status as dependent sovereigns, the court held that “the instant exercise of criminal jurisdiction [did] not fall within that category.”<sup>104</sup>

Next, the court examined whether statutes extending federal jurisdiction into Indian Country should serve as a basis for implicitly divesting the Band of its jurisdiction over off-reservation offenses.<sup>105</sup> Kelsey argued that several federal statutes, including the Indian Trade and Intercourse Act (“Non-Intercourse Act”),<sup>106</sup> the Indian Country Crimes Act (“ICCA”),<sup>107</sup> and the Major Crimes Act (“MCA”),<sup>108</sup> suggest Congress believes “that tribes have been implicitly divested of criminal jurisdiction *outside* their territory.”<sup>109</sup>

The Non-Intercourse Act was “[t]he first act of Congress that specifically defined substantive rights and duties in the field of Indian affairs.”<sup>110</sup> The Act established, *inter alia*, federal regulation of trade with American Indians and “federal jurisdiction to enforce state criminal laws against non-Indians who committed offenses against Indians in Indian country.”<sup>111</sup> Additionally, the ICCA declared that federal criminal jurisdiction to punish individuals for offenses shall extend into Indian Country except where the offense is “committed by one Indian against the person or property of another Indian.”<sup>112</sup> The MCA further extended federal criminal jurisdiction over Indians by declaring that any Indian who commits any felony listed in

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102. *Id.* (internal quotation marks omitted).

103. *Id.* at 862.

104. *Id.*

105. *Id.*

106. Ch. 33, 1 Stat. 137 (1790).

107. 18 U.S.C. § 1152 (2012).

108. 18 U.S.C. § 1153 (2012).

109. *Id.*

110. COHEN’S HANDBOOK, *supra* note 4, § 1.03(2), at 35.

111. *Kelsey*, 809 F.3d at 862.

112. 18 U.S.C. § 1152.

the statute, such as murder or kidnapping, against any person within Indian Country, shall be under the federal government's exclusive criminal jurisdiction.<sup>113</sup> The court found, however, that these statutes failed to address "a tribe's authority over member conduct outside the reservation."<sup>114</sup>

While the district court declared that Congress believes tribes have been implicitly divested of their jurisdiction over off-reservation offenses due to lack of statutes discussing this type of concurrent criminal jurisdiction, the *Kelsey* court disagreed.<sup>115</sup> The Sixth Circuit found that this "legislative void" does not demonstrate "[c]ongressional intent to limit tribal criminal jurisdiction to Indian country" for three reasons.<sup>116</sup> First, the court began by considering the findings in *United States v. Wheeler*.<sup>117</sup> In this case, the Supreme Court examined the Non-Intercourse Act and the ICCA and found the two statutes "to be examples of general limitations on tribal criminal jurisdiction that do not limit tribal authority over members."<sup>118</sup> The *Kelsey* court upheld and followed this finding.<sup>119</sup> In fact, in discussing the two statutes, the Court in *Wheeler* expressly stated that "far from depriving Indian tribes of their sovereign power to punish offenses against tribal law by members of a tribe, Congress has repeatedly recognized that power and declined to disturb it."<sup>120</sup>

Second, the Sixth Circuit held that the district court incorrectly found that the lack of statutes addressing concurrent criminal jurisdiction for conduct occurring outside of Indian Country demonstrates congressional intent to limit tribal criminal jurisdiction to Indian Country. The Sixth Circuit found that this approach conflicts with the holdings of *Iowa Mutual Insurance Co. v. LaPlante*<sup>121</sup> and *Helvering v. Hallock*.<sup>122</sup> In *LaPlante*, an insurance company brought suit in federal court against members of the Blackfeet Indian Tribe seeking a declaration that it had no duty to defend or indemnify its insured after an employee of the insured sought compensation from involvement in a motor vehicle accident.<sup>123</sup> The Supreme Court held

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113. 18 U.S.C. § 1153.

114. *Kelsey*, 809 F.3d at 862.

115. *Id.*

116. *Id.*

117. 435 U.S. 313 (1978).

118. *Kelsey*, 809 F.3d at 862.

119. *Id.*

120. *Id.* (quoting *United States v. Wheeler*, 435 U.S. 313, 325 (1978)).

121. 480 U.S. 9, 14 (1987).

122. 309 U.S. 106, 132-33 (1940).

123. *LaPlante*, 480 U.S. at 11-12.

that because Indian tribes retain “all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.”<sup>124</sup> In *Helvering*, the Supreme Court examined “whether transfers of property inter vivos made in trust . . . [were] within the provisions of [section] 302(c) of the Revenue Act of 1926.”<sup>125</sup> Here, the Supreme Court reaffirmed the notion that congressional silence meant inherent sovereign authority remained.<sup>126</sup>

Third, the court held that congressional silence on whether tribal criminal jurisdiction could possibly extend outside of Indian Country must not be viewed as an implicit divestiture of tribes’ inherent sovereign powers.<sup>127</sup> Although the district court stated that “[i]t is inconceivable that Congress overlooked such an anomaly, regulating tribal jurisdiction [in] Indian country closely for these past two centuries, while leaving the tribes free to assert criminal jurisdiction outside Indian Country,”<sup>128</sup> the Sixth Circuit disagreed. Citing *Michigan v. Bay Mills Indian Community*, in which the Supreme Court examined “whether tribal sovereign immunity bars [the State of] Michigan’s suit against the Bay Mills Indian Community for opening a casino outside Indian lands,”<sup>129</sup> the court here found that it should not assume that Congress sought to undermine tribal self-governance.<sup>130</sup> Rather, Congress created criminal jurisdiction within Indian Country to bestow “criminal justice where tribal powers were presumed absent or inadequate.”<sup>131</sup> Accordingly, “[g]iven the baseline assumption that, ‘until Congress acts, the tribes retain their historic sovereign authority,’”<sup>132</sup> the court held that courts must respect Congress’s function of elucidating the retained sovereign powers of Indian tribes.<sup>133</sup> Additionally, in the absence

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124. *Id.* at 18 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982)).

125. *Helvering*, 309 U.S. at 109.

126. *Id.* at 121 (“[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.”).

127. *Kelsey v. Pope*, 809 F.3d 849, 863 (6th Cir. 2016), *cert. denied sub nom. Kelsey v. Bailey*, 137 S. Ct. 183 (2016).

128. *Kelsey v. Pope*, No. 1:09–CV–1015, 2014 WL 1338170, at \*20 (W.D. Mich. Mar. 31, 2014), *rev’d and vacated*, 809 F.3d 849 (6th Cir. 2016).

129. 134 S. Ct. 2024, 2028 (2014).

130. *Kelsey*, 809 F.3d at 863.

131. *Id.*

132. *Id.* (quoting *Bay Mills*, 134 S. Ct. at 2026).

133. *Id.*

of a legislative framework, tribes retain all inherent sovereign powers not divested.<sup>134</sup>

For the reasons explained above, the court held that since Kelsey's conduct involved essential tribal government concerns substantially affecting the Band's "ability to control its self-governance,"<sup>135</sup> the Band continues to possess the inherent sovereign power to exercise criminal jurisdiction over Kelsey's conduct, despite it occurring outside of Indian Country. Therefore, the court "reverse[d] the district court's grant of habeas relief for lack of tribal jurisdiction."<sup>136</sup>

Lastly, the Sixth Circuit examined whether the tribal court of appeals judgment violated Kelsey's due process rights under the Indian Civil Rights Act (ICRA).<sup>137</sup> Because "[t]he Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes,"<sup>138</sup> the court found that ICRA was the only source of due process relief for Kelsey.<sup>139</sup> ICRA provides that no Indian tribe may "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."<sup>140</sup> Kelsey's conduct involved essential tribal government concerns that substantially affected the Band's self-governance. Conclusively, it was within tribal jurisdiction, and thus the court found that Kelsey was protected.<sup>141</sup>

Kelsey argued that his due process protections were violated when the tribal court of appeals "[struck] down a territorial limitation on the Band's jurisdiction in one of the Tribal criminal ordinances and 'retroactively expand[ed] the geographic reach' of criminal jurisdiction over his off-reservation conduct."<sup>142</sup> At the time of the incident, section 4.03(a) of the Little River Band of Ottawa Indians' Criminal Offenses Ordinance provided that criminal jurisdiction shall extend to "[1] all land within the limits of the Tribe's reservation . . . [,] [2] [land] held in trust by the United States . . . [,] and [3] land considered 'Indian country.'"<sup>143</sup> Section 4.03(b) provided that criminal jurisdiction could be exercised over a tribal member

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134. *Id.*

135. *Id.* at 861.

136. *Id.* at 863.

137. *See* 25 U.S.C. § 1302(a)(8) (2012).

138. *Kelsey*, 809 F.3d at 863.

139. *Id.*; *see* 25 U.S.C. § 1302(a)(8).

140. 25 U.S.C. § 1302(a)(8).

141. *Kelsey*, 809 F.3d at 864.

142. *Id.* (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

143. *Id.* (quoting LITTLE RIVER BAND OF OTTAWA INDIANS, ORDINANCE 03-400-03, § 4.03(a) (2010)).

if he or she committed any one of nine enumerated offenses, no matter where the conduct occurred.<sup>144</sup> “Sexual assault was not one of the enumerated offenses.”<sup>145</sup> Consequently, Kelsey claimed that the tribal courts lacked criminal jurisdiction to charge and convict him.<sup>146</sup> However, the tribal court of appeals found—and the Sixth Circuit agreed—that the Offenses Ordinance conflicted with both the Band’s constitution and section 8.08 of the Band’s Criminal Procedure Ordinance.<sup>147</sup>

The tribal court of appeals held that the Offenses Ordinance, which Kelsey relied upon, was unconstitutional.<sup>148</sup> Article I of the Band’s constitution provides that “[t]he territory of the Little River Band of Ottawa Indians shall encompass all lands which are now or hereinafter owned by or reserved for the Tribe”<sup>149</sup> and that “[t]he Tribe’s jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law.”<sup>150</sup> Thus, Article I of the Band’s constitution “required extending jurisdiction over tribal members and also to tribally-owned land (like the Community Center) ‘to the fullest extent’ permissible under tribal and federal law.”<sup>151</sup> Further, section 8.08 of the Band’s Criminal Procedure Ordinance declares that “[t]he Tribal Court shall have jurisdiction over any action by any Indian as defined by this ordinance, that is made a criminal offense under [the] applicable Tribal Code and that occurred within the territorial jurisdiction of the Tribe as defined in the Constitution.”<sup>152</sup> The Sixth Circuit held that, rather than retroactively expanding the geographic reach of criminal jurisdiction as Kelsey alleged, the tribal court of appeals removed the “dissonant territorial limitation” in order “[t]o harmonize the Offenses Ordinance with the Tribal Constitution.”<sup>153</sup> Therefore, since both the Band’s constitution and section 8.08 of the Band’s Criminal Procedure Ordinance “provided warning that criminal jurisdiction would extend to Kelsey’s conduct by virtue of either Tribal ownership of the Community

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144. *Id.* (quoting LITTLE RIVER BAND OF OTTAWA INDIANS, ORDINANCE 03-400-03, § 4.03(b) (2010)).

145. *Id.*

146. *Id.*

147. *Id.* at 864-65.

148. *Id.* at 865.

149. LITTLE RIVER BAND OF INDIANS OF OTTAWA CONST. art. I, § 1.

150. *Id.* art. I, § 2.

151. *Kelsey*, 809 F.3d at 865.

152. LITTLE RIVER BAND OF OTTAWA INDIANS, ORDINANCE 03-300-03, § 8.08 (2003), *quoted in Kelsey*, 809 F.3d at 865.

153. *Kelsey*, 809 F.3d at 865.

Center or Kelsey's tribal membership," the Sixth Circuit held that Kelsey was not denied fair notice.<sup>154</sup>

### *VII. The Significance of the Court's Holding*

The Sixth Circuit's holding is an emphatic victory for Indian tribes because it is the first federal judicial decision to recognize a tribe's power to extend criminal jurisdiction outside of Indian Country. The District Court for the Western District of Michigan inferred that the lack of federal statutes addressing concurrent criminal jurisdiction for conduct occurring outside of Indian Country demonstrated congressional intent to implicitly divest tribes of their power to exercise criminal jurisdiction over off-reservation offenses. In stark contrast, the Sixth Circuit found that unless Congress has expressly divested tribes of such powers, they are maintained.

Not only did the Sixth Circuit endorse the inherent sovereign authority of tribes, but the court's holding affirmed that Indian tribes have the power to enforce membership-based criminal jurisdiction, independent of the already established territorial-based jurisdiction. However, it is important to note that the Sixth Circuit's holding does not grant tribes the power to exercise criminal jurisdiction over tribal members for any conduct occurring outside of Indian Country. Rather, the court recognized that a "free-floating, membership-based jurisdiction" over any criminal conduct has the potential to create significant problems with *Montana's* holding. Using the *Montana* rule to determine whether a tribe has overstepped their jurisdictional authority, the court correctly established a narrow precedent that must be read in light of the unique facts. Under this rule from the Sixth Circuit, in order for a tribe to enforce its criminal jurisdictional authority over conduct occurring off-reservation, the exercise of such power must be necessary to protect tribal self-government or to control internal relations.

Here, the interests of the Band to protect the tribe's self-governance and to control internal relations were overwhelmingly obvious. This case involved one of nine elected officials of the Band's Tribal Council, Kelsey, who was acting as an agent of the Tribe when the incident occurred. Foster, the other actor, was a tribal employee. Although the incident occurred outside of Indian Country, both Kelsey and Foster were attending a tribal activity at a tribally-owned community center. Further, the Sixth Circuit noted that "[i]t also involve[d] a Tribal Court finding that [Kelsey] exercised political influence affecting the victim and the Tribe's welfare."<sup>155</sup>

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154. *Id.* at 868.

155. *Id.* at 853 n.1.

The United States Supreme Court's denial of Kelsey's petition for writ of certiorari on October 3, 2016,<sup>156</sup> solidifies the Sixth Circuit's rule that Indian tribes retain inherent sovereign powers not expressly divested by Congress. Accordingly, tribes may exercise criminal jurisdiction over members for conduct occurring outside of Indian Country if it is necessary to protect tribal self-government or to control internal relations. However, many questions regarding the breadth of such powers remain unanswered. One such example focuses on whether a tribe can exercise criminal jurisdiction over a tribal member for illegal conduct occurring outside of Indian Country and on property not owned by the tribe. Regardless of the answers to these lingering questions, the Sixth Circuit's holding remains a momentous triumph for Indian tribes.

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156. *See* Kelsey v. Bailey, 137 S. Ct. 183 (2016).