No. 14-1537

United States Court of Appeals for the Sixth Circuit

NORBERT J. KELSEY

Petitioner – Appellee

v.

MELISSA LOPEZ POPE, Chief Justice of the Little River Band of Ottawa Indians Tribal Court of Appeals; MARTHA KASE, Justice of the Little River Band of Ottawa Indians Tribal Court of Appeals; RONALD DOUGLAS, Special Visiting Justice of the Little River Band of Ottawa Indians Tribal Court of Appeals

Respondents,

and DANIEL T. BAILEY, Chief Judge of the Little River Band of Ottawa Indians Tribal Court

Respondent – Appellant.

On Appeal from the United States District Court for the Western District of Michigan
The Honorable Gordon J. Quist

BRIEF OF RESPONDENT-APPELLANT CHIEF JUDGE DANIEL T. BAILEY

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1537 Case Name: Kelsey v. Pope, et al.

Name of counsel: Riyaz A. Kanji

Pursuant to 6th Cir. R. 26.1, Daniel T. Bailey, Chief Judge, Little River Band of Ottawa Indians
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 30, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Riyaz A. Kanji
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The question of tribal criminal authority over tribal members raised in this appeal goes to the very heart of tribal self-government. Respondent-Appellant therefore respectfully requests oral argument.

INTRODUCTION

Indian tribes, like other sovereigns, have long enjoyed criminal jurisdiction over their territory and, independently, their members. The court below, however, decreed that the latter jurisdiction no longer exists. This radical conclusion directly contradicts Supreme Court precedent and threatens grave harm to law and order within tribal communities and to tribal self-government more generally.

The Little River Band of Ottawa Indians ("LRB" or "Band") prosecuted Appellee Norbert Kelsey for the sexual assault of one of its governmental employees. Mr. Kelsey was a member at the time not only of the Band but of its legislative Council. After his conviction, Mr. Kelsey challenged the Band's jurisdiction, claiming that the Band's Community Center, where he committed his crime, lies just outside the Band's historic reservation boundaries. The Band's courts rejected this argument, holding that Mr. Kelsey's membership in the Band, and the Band's strong interests in prosecuting his crime, provided ample basis for jurisdiction under tribal and federal law. Mr. Kelsey then filed this habeas action.

This should have been a straightforward matter below. In *United States v. Wheeler*, 435 U.S. 313, 322 (1978), the Supreme Court deemed it "undisputed that Indian tribes have power to enforce their criminal laws against tribe members." The Court reiterated this holding in *Duro v. Reina*, 495 U.S. 676, 694 (1990), *superseded by statute*, 25 U.S.C. § 1301 (1990), explaining that "[r]etained

criminal jurisdiction over members is . . . 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."

The district court disregarded these decisions, finding that tribes have been implicitly divested of membership-based criminal jurisdiction outside of their territories, even though the Supreme Court has plainly held that the doctrine of implicit divestiture applies only to tribal relations with nonmembers. *Duro*, 495 U.S. at 686; *Wheeler*, 435 U.S. at 326. The court also posited that statutes providing for federal criminal jurisdiction concurrent with tribal jurisdiction within Indian country suggest an intention to curtail tribal jurisdiction over members outside of it, a claim without support in the text or history of the statutes.

Nor does the decision below find support in policy considerations. Membership-based jurisdiction beyond a tribe's territorial boundaries exists concurrent with, and thus does not impair, that of state and federal governments. And this is not a case – to use the magistrate judge's offensive formulation – of a tribe engaged in "wanderlust." Report, RE35, PageID#528. Many tribes like the Band have highly fragmented land bases as a result of failed federal policies and the plundering of their reservations in the nineteenth and early twentieth centuries. As those tribes seek, in fulfillment of the modern-day policy of self-determination, to restore at least some small portion of those land bases, they rely on criminal

jurisdiction over their members to maintain the safety and cohesion of communities that extend beyond the scattered remnants of their former territories. The federal and state governments enjoy the same extraterritorial criminal jurisdiction over their citizens the Band seeks to vindicate here, and the Band respectfully urges this Court to reverse the district court's unprecedented infringement on its sovereign authority.

JURISDICTION

The district court's jurisdiction arose under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303, and 28 U.S.C. § 1331. The court entered final judgment on March 31, 2014. Order, RE42. A notice of appeal was timely filed on April 29, 2014. Notice, RE43. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the Band has been divested of its inherent authority to prosecute tribal members for offenses substantially affecting its self-governance interests but taking place outside of its Indian country.

2. Whether the Tribal Court of Appeals' decision that tribal law allowed for the exercise of jurisdiction over Mr. Kelsey violated principles of fair notice where the Band's substantive laws clearly proscribed the conduct at issue and

multiple provisions of the Band's Constitution and laws provided for the exercise of such jurisdiction.

STATEMENT OF THE CASE

I. BACKGROUND

A. The Little River Band

The Band is a federally recognized tribe located in western Michigan. *See* 25 U.S.C. § 1300k-2. The United States established a government-to-government relationship with the Band through the Treaty of Greenville in 1795, and that relationship endured (including through treaties creating reservations in 1836 and 1855) until 1872. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Att'y for the W. Dist. of Mich.*, 369 F.3d 960, 961-62, 967 (6th Cir. 2004) (discussing the political history of the Grand Traverse Band and noting it to be "essentially parallel" with that of LRB); *see also* 25 U.S.C. § 1300k.

That year, the Secretary of the Interior unlawfully terminated federal recognition of the Band and other signatories to the 1855 Treaty of Detroit. *Grand Traverse Band*, 369 F.3d at 961 & n.2. The Band then endured over a century of federal neglect, until Congress reaffirmed its federal recognition in 1994. 25 U.S.C. § 1300k-2. Congress found that despite the United States' actions, the Band had "continued [its] political and social existence with viable tribal governments," *id.* § 1300k(6), and that its "members . . . continue to reside close to

their ancestral homeland[.]" *Id.* § 1300k(4). Congress expressly provided that "[a]ll rights and privileges of the Band[], and their members thereof, which may have been abrogated or diminished before September 21, 1994, are hereby reaffirmed." *Id.* § 1300k-3(a).

Pursuant to the reaffirmation legislation, the Band adopted a strict separation-of-powers Constitution establishing an independent judicial branch. *See* Constitution of the Little River Band of Ottawa ("Tribal Constitution") art. VI, § 9 Appendix A at 3. The Constitution mandates that "[t]he judicial powers of the Little River Band shall extend to . . . 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," and authorizes the courts to "rule void those ordinances and resolutions" inconsistent with its foundational terms. *Id.* § 8(a), Appendix A at 3.

Since reaffirmation, the Band has endeavored to restore a small portion of its fractured land base. The 1855 Treaty of Detroit had "created what were intended to be permanent reservations for the [signatory] tribes with[in] their traditional homelands." S. Rep. No. 103-260, 1994 WL 194298, at *2 (1994). However, the "mismanagement," "criminal wrongdoing," and "fraudulent activities" of the very federal officials assigned to protect the reservations meant that "by the end of the nineteenth century, all that remained of the reservations within the exterior boundaries . . . were scattered parcels," *id.*, a process compounded by the

Secretary's unlawful termination of the Band's federal recognition. *Grand Traverse Band*, 369 F.3d at 961-62.

The rebuilding of the Band's land base has necessarily proceeded on an incremental basis given the lack of resources and available property. It has also been hampered by the delays and other obstacles the Band has faced in having the federal government take its land acquisitions into trust, *see infra* at 47, even though the trust process is mandated by the reaffirmation act. 25 U.S.C. § 1300k-4.

Trust acquisitions become a part of the Band's "Indian country," a term that refers to lands expressly set aside for tribes by the federal government. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). The term is codified at 18 U.S.C. Section 1151 to include reservation lands, dependent Indian communities, and lands allotted to individual Indians, and has been judicially construed also to include trust lands and various other landholdings. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991). As developed at length below, tribes have territorial jurisdiction within their Indian country, and also enjoy membership-based jurisdiction (*i.e.*, jurisdiction over members by virtue of that relationship) extending beyond it. Because of the Band's land history, many of its members reside on property outside of its formal Indian country, and various of its governmental and

communal properties, including the Community Center at the heart of this dispute, do not enjoy trust status.

B. Appellee Norbert Kelsey

As a Band member, Petition, RE01, PageID#6, Norbert Kelsey enjoys various privileges, including eligibility for the Band's assistance programs, ranging from "community well-being" and elder payments to per capita payments from the Tribe's gaming operations. *See* Membership Assistance Program Ordinance, Appendix A at 7-8; Revenue Allocation Ordinance § 8.03, Appendix A at 8. Band members also enjoy significant opportunities to participate in tribal government. Members convene in bi-annual General Membership meetings, in which resolutions binding the government may be adopted, Tribal Constitution art. VII, Appendix A at 4, and may also vote in the Band's elections and hold elected office, Tribal Constitution art. IV, § 3, art. V, § 2, art. IX, § 3, Appendix A at 2-4. When he committed his crime, Mr. Kelsey was an elected and salaried member of the Tribal Council, Order of Judgment, RE09, PageID#1558, which exercises the Band's legislative power, Tribal Constitution art. IV, § 7, Appendix A at 3.

II. TRIBAL COURT PROCEEDINGS

A. The Conviction

On January 21, 2008, after a bench trial, the Tribal Court convicted Mr. Kelsey of sexual assault against a tribal employee named Heidi Foster. Order of

Judgment, RE09, PageID#1556-1559. Ms. Foster, who worked for the Band as a Community Health Representative, Trial Transcript, RE11-1, PageID#1517, is also a Native American (but a member of a different tribe). Findings of Fact, RE09, PageID#1566.

Tribal law defines sexual assault as occurring when a person "subjects another person to any sexual contact; and . . . he knows or reasonably should know that the sexual contact is offensive to the victim; or . . . he is in a position of authority over the victim and used this authority to coerce the victim to submit." Law and Order Ordinance § 19.01(c)(1), Appendix A at 5-6. Sexual contact includes "any intentional touching of . . . the breasts of a female person . . . whether the touching is on the bare skin or on intervening clothing." *Id.* § 3.17.

The Tribal Court found "beyond a reasonable doubt that the sexual assault did occur . . . as the victim described." Order of Judgment, RE09, PageID#1558. Ms. Foster testified, and witnesses corroborated, that on July 2, 2005, she had conducted a meeting of tribal elders at the Band's Community Center to assist them in applying for Medicare benefits. Trial Transcript, RE11-1, PageID#1517-1519; Order of Judgment, RE09, PageID#1557. At the meeting, Mr. Kelsey approached her, asked who she was and grabbed the name tag she wore on her blouse, touching her breasts through her clothing in the process. He then pulled on her blouse to expose her breasts to his view. "Then he turned around and did it

again. The same thing." Trial Transcript, RE11-1, PageID#1519. The Tribal Court found without question that Mr. Kelsey "had to touch Ms. Foster's breasts through her clothing when he pulled the badge away from her person. He did this twice." Order of Judgment, RE09, PageID#1557.[1]

The Tribal Court sentenced Mr. Kelsey to one year of probation with six months in jail held in abeyance pending his compliance with the conditions of probation – payment of a fine, performance of community service, and a ban on speaking to the Band's female employees. Order of Sentencing, RE09, PageID#1561-1562. The Tribal Court later stayed the sentence pending appeal, except for the speech restriction, which expired on February 4, 2009. Order Granting Stay, RE09, PageID#1563; Order of Affirmance, RE09, PageID#1549.

B. The Jurisdictional Analysis

At the time of the assault, the Community Center was, as the Tribal Court of Appeals found, "a community gathering point to host varied and numerous tribal meetings, to serve community meals and to provide tribal office space for the conduct of the business of a tribal sovereign." Jurisdiction Order, RE09, PageID#1539. Two weeks after his conviction, Mr. Kelsey filed a motion to

[1] While Ms. Foster further testified that this assault initiated a pattern of harassing actions, Trial Transcript, RE11-1, PageID#1520-1524, the trial court acquitted Mr. Kelsey of sexual harassment, Order of Judgment, RE9, PageID#1558-1559. The court credited Ms. Foster's testimony, but found Mr. Kelsey's actions not to satisfy the standard for harassment established by the Band's laws. *Id*.

vacate his conviction for lack of jurisdiction. Motion to Vacate, RE11, PageID#1279. He claimed that the Center lies just beyond the Tribe's historic reservation boundaries and that those boundaries have been disestablished in any event. *Id.* PageID#1286-1287. Accordingly, he contended that the Center falls outside of the Band's Indian country, and that the Band thus lacked jurisdiction over his crime.

The Tribal Court rejected the argument because "Defendant is a tribal member, his victim is a Native American, and the site of his crime was a facility owned by the Tribe[.]" Findings of Fact, RE09, PageID#1565. The Tribal Court of Appeals affirmed. Like the trial court, it assumed without deciding that the Community Center falls outside of the Band's Indian country, but held that nothing in federal law barred the Band's courts from exercising jurisdiction based on Mr. Kelsey's membership status and the Band's significant interests in the matter:

> The interests of the Tribe are very strong here. This case involves a tribal member in an elected position acting as an agent of the Tribe at a Tribal activity who committed a crime against a Tribal employee in a public setting openly visible to other employees and Tribal members who were present. It also involves a Tribal Court finding that Defendant exercised political influence affecting the victim and the Tribe's welfare.

Jurisdiction Order, RE09, PageID#1540. The Court then examined the Band's Constitution and laws to determine whether they authorized the prosecution and determined that they did. *Id.* PageID#1541-1542.

C. Ongoing Proceedings

After the Tribal Court of Appeals upheld the Band's jurisdiction, Mr. Kelsey filed a series of appellate briefs raising evidentiary issues, seeking reconsideration of the jurisdictional issue, and arguing that the Court of Appeals' construction of the Band's jurisdictional provisions violated his due process right of fair notice. Motion for Clarification, RE10, PageID#1018, 1022. But before the Court could issue any further rulings, Mr. Kelsey filed this federal habeas action. *See* Order for Stay, RE09, PageID#1554-1555. The Court then stayed the proceedings before it. *Id*.

III. PROCEEDINGS BELOW

Mr. Kelsey filed his habeas petition on November 5, 2009. Petition, RE01. He named various tribal judges as respondents, but by order of the district court, Tribal Court Chief Judge Daniel Bailey was deemed to be the only proper Respondent in the matter, and the remaining judges were dismissed without prejudice. Dismissal, RE03, PageID#199-200; Reconsideration, RE17, PageID#351-353.

Pursuant to 28 U.S.C. Section 636(c), the matter was referred to a magistrate judge, before whom Respondent waived the comity-based requirement that Mr. Kelsey first exhaust his tribal court remedies. Answer, RE13, PageID#264-266. To avoid time-consuming litigation over the Band's reservation boundaries,

Respondent also assumed – *solely* for the purposes of this litigation, and as had the Tribal Court of Appeals – that the Community Center falls outside of the Tribe's Indian country. *See id.* PageID#255, 259 n.4.

On November 7, 2013, the magistrate judge issued a Report and Recommendation ("Report") finding the Band to have been implicitly divested of its membership-based jurisdiction. Report, RE35, PageID#528-530. He further suggested that various statutes conferring *federal* criminal jurisdiction within Indian country dictate an absence of *tribal* jurisdiction outside of it. *Id.* PageID#513-516. Respondent objected to the Report, Objections, RE36, but on March 31, 2014, the district court adopted it in a brief opinion and entered an order granting the writ. Opinion, RE41; Order, RE42. This appeal followed.

SUMMARY OF ARGUMENT

1. In *Michigan v. Bay Mills Indian Community*, the Supreme Court reaffirmed that Indian tribes "remain separate sovereigns pre-existing the Constitution," and as such continue to "exercise inherent sovereign authority." 134 S. Ct. 2024, 2030 (2014) (internal quotation marks omitted). While Congress may diminish that authority, "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* at 2032.

The district court's decision, which predated *Bay Mills*, cannot be squared with these principles. Tribes have retained the sovereign authority "to prescribe

laws applicable to tribe members and to enforce those laws by criminal sanctions." *Wheeler*, 435 U.S. at 322. They exercised this authority long "[b]efore the coming of the Europeans," *id.* at 322-23, and accordingly did so independently of the tribal-specific boundaries now associated with Indian country.

The district court deemed the tribes to have been implicitly divested of their membership-based criminal jurisdiction outside of Indian country. But in *Wheeler*, the Supreme Court plainly held that the doctrine of implicit divestiture does not apply to a tribe's criminal jurisdiction over its own members, but only to certain powers "involving the relations between an Indian tribe and nonmembers of the tribe," *id.* at 326, a holding it reiterated in *Duro*, 495 U.S. at 686. The district court lacked the authority to disregard these decisions and to arrogate to itself the power to create a new category of tribal powers subject to judicial diminishment. Its approach contrasts starkly with that of the *Bay Mills* Court, which refused to ascribe the magic to Indian country boundaries that the district court posited here. The Supreme Court instead rejected arguments (as had this Court) that it should restrict another core tribal power – sovereign immunity from suit – to Indian country, holding that it is for Congress to curtail tribal authority should it so choose rather than for the courts to "suddenly . . . start carving out exceptions." 134 S. Ct. at 2031.

The court below also suggested that various enactments providing for the expansion of federal criminal jurisdiction into Indian country connote a congressional intent to deprive tribes of their membership-based jurisdiction outside of it. This suggestion runs directly counter to the admonition in *Bay Mills* that courts should "not lightly assume" a congressional derogation of tribal powers, as the statutes say not a word about restricting tribal authority, but have instead been construed by the Supreme Court as recognizing tribal membership-based jurisdiction and "declin[ing] to disturb it." *Wheeler*, 435 U.S. at 325. Indeed, statutes and treaties dating back to the earliest days of the Republic, and running through today, evidence Congress's understanding that tribes have retained criminal authority over their members irrespective of territorial boundaries.

Tribal membership-based jurisdiction obtains with particular force in a case such as this where the criminal conduct threatened core governmental interests. Other sovereigns – federal, state, and international – enjoy extraterritorial criminal jurisdiction over their citizens under such circumstances, and the district court lacked any appropriate justification for the drastic impairment of tribal sovereignty it sought to effect here.

2. The Tribal Court of Appeals' conclusion that tribal law provided for the assertion of jurisdiction over Mr. Kelsey did not violate the fair notice requirement set forth in *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

Jurisdictional determinations do not implicate that requirement, *see, e.g.*, *United States v. al Kassar*, 660 F.3d 108, 119 (2d Cir. 2011), and in any event, the Band's Constitution and laws provided ample notice of its membership-based authority.

STANDARD OF REVIEW

On appeal of a district court's decision granting a writ of habeas corpus in the state context, this Court reviews "de novo the court's legal conclusions and its factual findings for clear error," *Hawkins v. Coyle*, 547 F.3d 540, 545 (6th Cir. 2008), and Respondent is unaware of any cases suggesting a different standard of review in the tribal context. In general, when reviewing a tribal court's orders, federal courts review questions of federal law de novo, and "review findings of fact by the tribal courts for clear error and defer to their interpretation of tribal law." *Att'y's Process and Investigation Servs. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 934 (8th Cir 2010).

ARGUMENT

I. THE BAND ENJOYED MEMBERSHIP-BASED JURISDICTION TO PROSECUTE MR. KELSEY.

A. Indian Tribes Possess Inherent Sovereign Authority over both Their Members and Their Territory.

1. Indian tribes enjoy sovereign status.

Since the Founding, the United States has treated Indian tribes as sovereign entities. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (Marshall, C.J.)

("The Indian nations ha[ve] always been considered as distinct, independent political communities[.]"). The Constitution expressly recognizes tribes, along with the states and foreign governments, as sovereigns with which Congress may regulate commerce. U.S. Const. art. I, § 8. And "[f]rom the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate." *Worcester*, 540 U.S. at 556-57.

Tribes retain their sovereign status today. As the Supreme Court reaffirmed last term, tribes "remain separate sovereigns pre-existing the Constitution," and continue to "exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty*, 134 S. Ct. 2024, 2030 (2014) (internal quotation marks omitted).

2. Tribal sovereignty includes both a membership-based and a territorial component.

Tribes "possess[] attributes of sovereignty over both their members and their territory[.]" *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (internal quotation marks omitted); *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1256 (10th Cir. 2001) ("As the Supreme Court has repeatedly explained, the powers of tribes extend over not only their territory but also their members[.]"); *Sidney v. Zah*, 718 F.2d 1453, 1456 (9th Cir. 1983) ("Membership is . . . another

aspect of tribal sovereignty which exists separate and apart from the territorial jurisdiction of the tribe.").

The tribes' retention of membership-based and territorial jurisdiction parallels the separate citizenship-based and territorial jurisdiction enjoyed by the United States, the states, and foreign nations. *See*, *e.g.*, Restatement (Third) of Foreign Relations Law § 402 comment b (1987) ("Territoriality and nationality are discrete and independent bases of jurisdiction."). Indeed, while the court below would not accept that jurisdiction might exist apart from territory, membership-based jurisdiction is both ancient and ubiquitous. *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) ("Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar.").

While tribes exercise territorial jurisdiction within their Indian country, *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) ("[P]rimary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it[.]"), membership-based jurisdiction is "justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government," *Duro v. Reina*, 495 U.S. 676, 694 (1990), *superseded by statute*, 25 U.S.C. § 1301 (1990), and hence is not limited to particular territory. *See*, *e.g.*, *John v. Baker*, 982 P.2d 738, 757 (Alaska 1999) ("[*Venetie*] makes clear that any allocative significance that exists in the concept of

Indian country pertains to a tribe's territorial power over its land, not its members.").

3. Tribal sovereign powers are inherent but subject to divestiture.

As the Supreme Court reaffirmed in *Bay Mills*, tribal sovereignty is "inherent." 134 S. Ct. at 2030. It is "[p]erhaps the most basic principle of all Indian law" that tribal sovereign powers are not "granted" by the United States, Cohen's Handbook of Federal Indian Law 207 (LexisNexis 2012), but instead inhere in the tribes' status as self-governing polities "pre-existing the Constitution," *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks omitted). *See also United States v. Doherty*, 126 F.3d 769, 777 (6th Cir. 1997) ("[T]ribes exercise powers of self-government not pursuant to a Constitutional grant of authority, but pursuant to their status as sovereigns[.]"), *overruled on other grounds*, *Texas v. Cobb*, 532 U.S. 162 (2001); *White v. Univ. of Cal.*, 765 F.3d 1010, 1024 (9th Cir. 2014) (same).

However, tribes are "no longer possessed of the full attributes of sovereignty." *Wheeler*, 435 U.S. at 323 (internal quotation marks omitted). Congress wields "plenary and exclusive [power] to legislate in respect to Indian tribes," *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks omitted), and hence may curtail tribal powers. But "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine

Indian self-government." *Id*. at 2032. Accordingly, "unless and '[u]ntil Congress acts, the tribes retain' their historic sovereign authority." *Id.* at 2027 (quoting *Wheeler*, 435 U.S. at 323). *See also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (because the tribes "retain[] all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from [congressional] silence . . . is that the sovereign power . . . remains intact") (internal quotation marks omitted) (ellipses in original); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1195 (10th Cir. 2002) (same). These principles reflect "judicial respect for Congress's primary role in defining the contours of tribal sovereignty," *Bay Mills*, 134 S. Ct. at 2039, and honor "the unique trust relationship between the United States and the Indians," *Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985).

The rule that tribal powers may be diminished only by express congressional action is subject to one exception: the limited class of powers that tribes have "implicitly lost by virtue of their dependent status." *Wheeler*, 435 U.S. at 326. This limited class includes the power to form political relations with foreign governments and to freely alienate tribal land. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978). And in *Oliphant*, the Court held that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes . . .

necessarily g[a]ve up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210.

However, as will be developed further below, the tribes' "powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Wheeler*, 435 U.S. at 326.

In sum, then, tribes possess inherent sovereign powers that, *apart from a limited class involving external relations with nonmembers*, are subject to defeasance only by express congressional action. When Congress has not so acted, those powers remain in full force and effect.

B. No Divestiture Has Occurred of Tribal Membership-Based Jurisdiction.

1. Tribal membership-based criminal jurisdiction is inherent and independent of territory.

There is no dispute that tribes historically exercised, and retain today, inherent criminal authority over their members. In *Wheeler*, the Court considered whether the Navajo Nation, in prosecuting a member, had exercised inherent authority or powers delegated by the United States (in which case prosecution by the latter of the same individual would have raised double jeopardy concerns). The

Court undertook a searching examination of tribal criminal jurisdiction and concluded that:

> Indian tribes have power to enforce their criminal laws against tribe members. . . . [Tribes] remain a separate people, with the power of regulating their internal and social relations. Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions.

435 U.S. at 322 (internal quotation marks, citations, and footnote omitted).

There likewise is no dispute that tribes enjoyed this power long "[b]efore the coming of the Europeans[.]" *Id.* at 322-23. Tribes thus possessed criminal authority over their members independent of the boundaries now associated with Indian country. An Opinion of the Solicitor of the Interior Department authored in 1939 – when the proper scope of the tribes' sovereign authority was a foremost concern of federal policy as the government re-committed itself to tribal self-determination – underscores this point: "That the original sovereignty of an Indian tribe extended to the punishment of a member . . . for depredations or other forms of misconduct *committed outside the territory of the tribe* cannot be challenged." Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs ("Solicitor Opinion"), April 27, 1939, Appendix B at 9 (emphasis added).[2]

[2] The Opinion addressed tribal jurisdiction over unrestricted fee lands within allotted reservations, and reserved the question of tribal jurisdiction outside reservation boundaries, Appendix B at 16, but extensive portions of it, including those quoted here, addressed tribal jurisdiction more broadly, and without regard to that limitation.

The Opinion further underscores that the advent of Indian country boundaries did not operate to alter this authority: "That Indian tribes . . . acted to punish their members for depredations committed against whites *outside of the Indian country* is a matter of historical record." *Id.* (emphasis added). The sole remaining question, then, is whether tribes have been divested, implicitly or by statute, of their authority to punish their members irrespective of territory.

2. Tribes have not lost their membership-based criminal jurisdiction by implication.

a. *The doctrine of implicit divestiture does not limit tribal authority over members.*

The court below held that "the Tribe's exercise of jurisdiction outside of Indian country would be inconsistent with the status of tribes as dependent entities[.]" Opinion, RE41, PageID#584; *see also* Report, RE35, PageID#530 (same). In so holding, the court ran headlong into *Wheeler*, which rejects the notion that tribes have been implicitly divested of powers over members:

> [T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. *The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe*.
>
> *. . . But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they*

> *are not such powers as would necessarily be lost by virtue of a tribe's dependent status*.

Wheeler, 435 U.S. at 326 (emphases added). *See also id.* at 328.[3]

Twelve years later, *Duro* found that tribes had been implicitly divested of authority to prosecute all nonmembers, and not just non-Indians, but reaffirmed *Wheeler*'s core teaching that a tribe's power "to prescribe and enforce rules of conduct for its own members does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status." *Duro*, 495 U.S. at 686 (quoting *Wheeler*, 435 U.S. at 326) (internal quotation marks omitted). *See also United States v. Lara*, 541 U.S. 193, 197, 205 (2004) (characterizing tribal criminal jurisdiction over members as among those "'inherent powers of a limited sovereignty which has never been extinguished'" and noting that by contrast the Court had treated "the power to prosecute nonmembers [as] an aspect of the tribes' external relations and hence part of the tribal sovereignty that was divested" (quoting *Wheeler*, 435 U.S. at 322)).[4]

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[3] The *Wheeler* Court used the term "internal criminal laws," 435 U.S. at 326, to refer to those laws applicable to tribal member defendants, *see id.* at 322 ("Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions."), and juxtaposed them with the tribes' more limited authority to "determine their external relations" with nonmembers, *id.* at 326.

[4] Within a year of the *Duro* decision, Congress enacted the "*Duro* fix," restoring to tribes the inherent power to prosecute nonmember Indians. *See* 25 U.S.C. § 1301(2). *Lara* confirmed Congress's power to so act.

b. *The district court was not free to disregard* Wheeler *and* Duro.

The district court disregarded *Wheeler* and *Duro* on the ground that they "only address tribes' authority to prosecute crimes within their territory." Opinion, RE41, PageID#581. *See also id*. at 582 (same). But though both cases involved Indian country crimes, they cannot be so easily dismissed. The district court characterized the decisions only as "describ[ing] the limits of a tribe's authority within its territory," *id.*, but the Court's opinions are devoid of language so confining their reach. Rather, the Court repeatedly discussed tribal criminal authority over members without reference to territory – *see*, *e.g.*, *Duro*, 495 U.S. at 693 ("in the criminal sphere membership marks the bounds of tribal authority") – and its reasoning directly supports its unqualified approach. For the Court clearly distinguished between the implicit divestiture of tribal criminal authority over nonmembers on the one hand, *see Duro,* and the lack of such divestiture with respect to members on the other, *see Wheeler*. The district court ignored that distinction, even though nothing in the Court's opinions suggests that territory has any bearing on it.

Indeed, *Duro* explains the principle underpinning membership-based jurisdiction in terms that admit of no geographic qualification. Such jurisdiction "is . . . 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." 495 U.S. at 694.

The district court accordingly lacked the authority to cast *Wheeler* and *Duro* aside and to create an additional category of implicit divestiture directly contradicting their teachings. "When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which [courts] are bound." *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 67 (1996); *see also id*. (noting that courts must "adhere not only to the holdings of . . . prior cases, but also to their explications of the governing rules of law") (internal quotation marks omitted).[5]

c. *The district court erred in viewing tribal sovereignty as inseparable from territory.*

By insisting that a territorial gloss be placed on the decisions in *Wheeler* and *Duro*, the district court committed the very error warned against by the Solicitor in his 1939 opinion. Because tribal sovereignty "is not a strictly territorial sovereignty . . . [w]e may therefore approach the problem of defining the scope of this sovereignty *without begging the question by assuming in advance that the*

[5] Even if dicta, *Wheeler* and *Duro* still merited the district court's respect. *See, e.g., ACLU of Ky. v. McCreary County, Ky.*, 607 F.3d 439, 447 (6th Cir. 2010) ("Lower courts are [presumptively] obligated to follow Supreme Court dicta[.]" (internal quotation marks omitted)); *Wright v. Morris*, 111 F.3d 414, 419 (6th Cir. 1997) ("Where there is no clear precedent to the contrary, we will not simply ignore the Court's dicta.").

sovereignty is limited to any particular kind of land." Solicitor Opinion, Appendix B at 8 (emphasis added). *See also Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 558 n.12 (9th Cir. 1991) ("[T]ribal sovereignty is not coterminous with Indian country."); *Sidney*, 718 F.2d at 1456 ("[R]eservation boundaries are not considered absolute limitations on tribal power . . . [because m]embership is . . . another aspect of tribal sovereignty which exists separate and apart from the territorial jurisdiction of the tribe.").

For well over a century, the Supreme Court has emphasized the significance of membership as a jurisdictional fact in construing tribal powers. Hence, the Court long ago held that states, not tribes, possess criminal jurisdiction over non-Indians who commit crimes against other non-Indians in Indian country. *United States v. McBratney*, 104 U.S. 621, 624 (1881). And in *Oliphant*, the Court further derogated from the tribes' territorial sovereignty by deeming them to have been divested of jurisdiction over all crimes committed by non-Indians. 435 U.S. at 212.

Accordingly, it cannot be gainsaid that membership considerations have overridden a robust vision of territorial authority in the Court's jurisprudence. *See Duro*, 495 U.S. at 685 ("*Oliphant* recognized that the tribes can no longer be described as [full territorial] sovereigns."); *Nevada v. Hicks*, 533 U.S. 353, 382 (2001) (Souter, J., concurring) ("It is the membership status of the unconsenting

party, not the status of real property, that counts as the primary jurisdictional fact."). And yet, as the district court would have it, territorial considerations should now operate to further diminish tribal powers.

But the law is not so one-sided. Just as "[s]tate sovereignty does not end at [] reservation[] border[s]," *Hicks*, 533 U.S. at 361, tribal powers can extend beyond them, as the *Bay Mills* decision emphatically reaffirmed. There, the Court held, as had this Court, that another of the tribes' inherent powers – "the common-law immunity from suit traditionally enjoyed by sovereign powers," 134 S. Ct. at 2030 (internal quotation marks omitted) – protects them from suit for conduct within or outside of Indian country. The Court "opted to 'defer' to Congress about whether to abrogate tribal immunity for off-reservation commercial conduct" rather than to "suddenly . . . start carving out exceptions." *Id*. at 2031 (internal quotation marks omitted).

The district court should have followed the same path. Indian country boundaries chart territorial jurisdiction. Neither the Supreme Court nor this Court has understood them to circumscribe membership-based jurisdiction, and the district court lacked any warrant for doing so.

d. *The case law statements cited below provide no basis for a finding of divestiture.*

The district court and magistrate judge relied on isolated statements from various decisions to support their unwarranted assumptions about tribal

sovereignty. But these statements do not support the propositions for which they are cited, and the reliance on them below to cabin the Band's membership-based jurisdiction contravened "Congress's primary role in defining the contours of tribal sovereignty." *Bay Mills*, 134 S. Ct. at 2039.

For example, the district court referenced an isolated statement from *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008), that tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation," Opinion, RE41, PageID#582. But that case has nothing to do with membership-based jurisdiction. Rather, it concerned the scope of tribal territorial authority over non-Indians, and the quoted statement merely recognized the uncontroversial point that tribal authority is at its zenith for on-reservation member activities. Nothing indicates that the Supreme Court intended to upend decades of settled law by rejecting membership as a separate basis for tribal jurisdiction. *See, e.g.*, *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

The Report relied heavily on what it identified as a "particularly instructive" unpublished district court order. Report, RE35, PageID#525-526 (*citing Fife v. Moore* (E.D. Okla. Sept. 8, 2011), RE32-2, PageID#491). The *Fife* court had, in a prior ruling, preliminarily enjoined tribal court criminal proceedings for an alleged

lack of tribal jurisdiction outside Indian country. *Fife v. Moore*, 808 F. Supp. 2d 1310 (E.D. Okla. 2011). After additional briefing, the court adhered to its position, but did so using language that entirely undercuts the opinion's persuasive value:

> [The tribal] respondents . . . make a *clear and forceful presentation that this court was incorrect in its ruling.*
> . . . .
> *Respondents may well be correct in their position. Nevertheless, this court has found a few scattered references (quite few and quite scattered) indicating that the present state of the law has been interpreted in the same manner as by this court*. Under those circumstances, the court is persuaded it should stand on its previous ruling.

RE32-2, PageID# 492-493 (emphasis added). Thus, if anything from *Fife* is "particularly instructive," it is the court's admission (nowhere acknowledged by the magistrate judge) that the law favors membership-based tribal criminal jurisdiction, not its stubborn refusal to follow that law based on "quite few and quite scattered" references (which merely reflect that states enjoy territorial jurisdiction over crimes outside Indian country).

The Report's reliance on *United States v. Doherty*, 902 F. Supp. 773 (W.D. Mich. 1995) (*Doherty I*), was also misplaced. *See* Report, RE35, PageID#518. In stating that "Indian tribal courts have jurisdiction over crimes committed in Indian country by tribe members and other Indians," 902 F. Supp. at 775, the *Doherty I* court did not purport to define the outer boundaries of tribal jurisdiction. The case addressed the overlap between tribal and federal enforcement authority in Indian

country. *Id*. Because *federal* prosecutorial authority over Indian status crimes is limited (by statute) to Indian country, it was natural for the court to speak in those terms. *Id*.

Further, *Doherty I* is not precedent. On appeal, this Court cited *Wheeler* for the proposition that "the power to enforce their criminal laws is one of the sovereign powers that the tribes have not relinquished." *United States v. Doherty*, 126 F.3d at 778 (*Doherty II*). The Report, then, relied on a district court statement taken out of context to reach a conclusion inconsistent not only with controlling Supreme Court precedent but also with this Court's decision in the same case.

The Report likewise erred in relying on two Ninth Circuit cases decided several years before *Wheeler*. Report, RE35, PageID#513 (citing *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975)); *id*. PageID#517 (citing *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974)). *Wheeler* came to the Supreme Court from the Ninth Circuit, and the Circuit was reversed because it had fundamentally misconstrued tribal criminal authority as a delegated federal power. 435 U.S. at 316, 319. Thus, *Settler*'s unsupported assertion that tribes may exercise criminal jurisdiction outside of Indian country only where treaty rights are implicated, 507 F.2d at 238, 240, is unpersuasive and cannot survive *Wheeler*'s subsequent recognition of tribal membership-based authority.

Ortiz-Barraza's pre-*Wheeler* dicta that tribal criminal jurisdiction applies only "within the limits of the reservation," 512 F.2d at 1179, likewise lacks any force. *Ortiz-Barraza* relied exclusively on the 1942 Edition of Cohen's Handbook, which in turn relied on a terse statement in a 1934 Opinion of the Solicitor of Interior that "[t]he jurisdiction of the Indian tribe ceases at the border of the reservation[.]" Cohen's Handbook of Federal Indian law at 148 n.236 (1942 ed.) (quoting Powers of Indian Tribes, 55 I.D. 14 at 806 n.2[6]). But that Opinion patently misinterpreted the historical sources on which it relied.

One of the two authorities cited by Cohen and the Solicitor's Opinion was an 1886 Opinion of the Acting Attorney General. That Opinion did not address the scope of tribal criminal jurisdiction, but instead concluded that certain federal law enforcement officers whose jurisdiction was limited by their authorizing statute to "Indian reservations" had no enforcement authority beyond them. *See* 18 Op. Att'y Gen. 440 (1886). This was purely a matter of statutory interpretation. Indeed, the Opinion explicitly recognized that the statute did not foreclose the exercise by on-reservation tribunals of jurisdiction over off-reservation crimes. *Id.*

The other cited authority was an 1883 district court opinion holding that Arkansas lacked the power to extradite a Cherokee citizen to the Cherokee Nation

[6] Available at: http://digital.library.okstate.edu/kappler/vol5/html_files/v5p0778.html.

for trial, because Congress had not authorized extradition between tribes and states. *Ex parte Morgan*, 20 F. 298 (W.D. Ark. 1883). But a lack of formal extradition procedures does not deprive a court of jurisdiction. *See United States v. Blevins*, 29 F. App'x 195, 197-98 (6th Cir. 2001). Moreover, states can and do permit extradition of Indian defendants to tribes. *See, e.g.*, Ariz. Rev. Stat. § 13-3869. Thus, as the more recent editions of Cohen recognize, *Morgan* "seems wrong and has never been followed by any subsequent court," Cohen's Handbook at 777 (LexisNexis 2012). And indeed, as discussed above, by 1939 the Solicitor had abandoned the unfounded assumption that tribal jurisdiction is limited to Indian country. *See, e.g.*, 1939 Solicitor Opinion, Appendix B at 8, 16 (recognizing that inherent tribal sovereignty is "not [] strictly territorial" but instead "primarily [] personal" and not "limited to any particular kind of land").

3. Congress has not diminished Tribal membership-based criminal jurisdiction.

Just as there has been no implicit diminishment of the Band's membership-based criminal jurisdiction, there has been no statutory divestiture either.

a. *No positive law specific to the Band strips it of authority over its members outside its territory.*

The court below did not identify any Band-specific treaty or statute purporting to diminish its membership-based criminal jurisdiction, and none exists. The Band's political forebears were signatories to two principal treaties – the 1836

Treaty of Washington, 7 Stat. 491, and the 1855 Treaty of Detroit, 11 Stat. 621. *See* 25 U.S.C. § 1300k(1). Neither treaty, nor any other, restricts the Band's membership-based jurisdiction.

Moreover, when Congress reaffirmed the Band's sovereign status in 1994, it made no effort to cabin the tribe's inherent criminal jurisdiction over its members. To the contrary, Congress expressly stated that "[a]ll rights and privileges of [the Band and the] members thereof, which may have been abrogated or diminished before September 21, 1994, are hereby reaffirmed." 25 U.S.C. § 1300k-3(a).

b. *Congress has not divested Tribes generally of membership-based criminal jurisdiction outside Indian country.*

In addition to their holding of implicit divestiture, the district court and magistrate judge erroneously concluded that certain federal statutes – the Indian Trade and Intercourse Act ("Non-Intercourse Act"), 1 Stat. 137 (1790), the Indian Country Crimes Act ("ICCA"), 18 U.S.C. § 1152, and the Major Crimes Act ("MCA"), 18 U.S.C. § 1153 – extending federal criminal jurisdiction *into* Indian country demonstrate that "Congress believes" that tribal membership-based criminal jurisdiction does not exist *outside* of it. *See* Opinion, RE41, PageID#583-584; Report, RE35, PageID#514-519.[7] But these statutes evidence no intent to

[7] The Non-Intercourse Act extended federal criminal jurisdiction over crimes by non-Indians against Indians committed within Indian country. 1 Stat. 137 § 5. The ICCA made the general laws of the United States applicable to Indian country

impair inherent tribal criminal jurisdiction over members. *See Wheeler*, 435 U.S. at 324-25 (citing Non-Intercourse Act and ICCA as examples of statutes that "have recognized an Indian tribe's jurisdiction over its members," and as demonstrating 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*") (emphasis added).

In concluding otherwise, the district court relied on the fact that the legislative focus of these statutes (in extending federal jurisdiction) is on Indian country to support its view that tribes have no criminal jurisdiction elsewhere:

> *While the statutes do not directly address the issue of a tribe's jurisdiction outside Indian country*, they are instructive in determining how Congress views the issue of tribal jurisdiction. The statutes establish a comprehensive legislative framework for concurrent criminal jurisdiction in Indian country. However, the Court is not aware of a single statute discussing concurrent jurisdiction outside Indian country. That legislative void lends to the conclusion that Congress believes that tribes do not have jurisdiction outside their territory.

Opinion, RE41, PageID#583-584 (emphasis added).

This reasoning misses the mark entirely. First, as discussed above, "courts will not lightly assume that Congress in fact intends to undermine Indian self-government," *Bay Mills*, 134 S. Ct. at 2032, and "the proper inference from

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when either the victim or the defendant – but not both – is an Indian. 18 U.S.C. § 1152. The MCA extended federal criminal jurisdiction over Indians for specific serious offenses committed in Indian country. 18 U.S.C. § 1153.

[congressional] silence . . . is that the sovereign power . . . remains intact," *LaPlante*, 480 U.S. at 18 (internal quotation marks omitted) (ellipses in original). Thus, the district court's conclusion that the statutes in question "do not directly address the issue of a tribe's jurisdiction outside Indian country," Opinion, RE41, PageID#583, should have been the end of the matter, rather than a starting point for reasoning that statutes that do not speak to tribal criminal jurisdiction nevertheless operate to undermine it.

Second, Congress limited its focus in these statutes for reasons unrelated to its views of tribal membership-based jurisdiction outside Indian country. Historically, tribes had exclusive criminal jurisdiction over crimes involving Indians in Indian country. *See Keeble v. United States*, 412 U.S. 205, 209-10 (1973). Congress extended federal criminal jurisdiction into Indian country based on the perception prevalent in the early days of the Republic that some tribal justice systems were inadequate to ensure peace and justice there. *See id*. at 210. As the Court explained in *Oliphant*:

> Congress' concern was with providing effective protection for the Indians from the violences of the lawless part of our frontier inhabitants. . . . Beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137, therefore, Congress assumed federal jurisdiction over offenses by non-Indians against Indians . . . . In 1817, Congress went one step further and extended [through the ICCA] federal enclave law to the Indian country[.]

435 U.S. at 201 (internal quotation marks omitted).

Outside Indian country, Congress's concern in enacting these statutes did not obtain because state and federal criminal jurisdiction was in place. And Congress's choice to address the "special problems of [on-reservation] law enforcement," *id.*, by establishing a system of concurrent jurisdiction within Indian country says nothing about its views of the nature and extent of tribal criminal jurisdiction for crimes committed beyond.

The district court's contrary reasoning echoes an argument soundly rejected in *Bay Mills*. There, it was claimed that the Indian Gaming Regulatory Act's abrogation of tribal sovereign immunity with respect to certain gaming activities taking place "on Indian lands" should apply equally to gaming activities outside Indian country. But the Supreme Court explained:

> This Court has no roving license . . . to disregard clear language simply on the view that . . . Congress "must have intended" something broader. . . .
>
> *[T]he problem Congress set out to address in IGRA . . . arose in Indian lands alone. And the solution Congress devised, naturally enough, reflected that fact.*

Bay Mills, 134 S. Ct. at 2034 (emphasis added).

In sum, in inferring from federal statutes addressing a problem specific to Indian country a broad congressional policy applicable elsewhere, the district court departed from long-held understandings regarding the genesis of those statutes, as

well as from settled principles of statutory interpretation so recently reaffirmed by the Supreme Court.[8]

c. *Congress has instead evinced its understanding that Tribes possess criminal authority over their members beyond their Indian country borders.*

Far from diminishing tribal membership-based jurisdiction, federal criminal statutes evidence Congress's understanding that tribes in fact possess that authority outside Indian country. Legislation from the earliest days of the Republic recognized such authority by holding tribes directly accountable for extraterritorial crimes. For example, the 1796 Indian Trade and Intercourse Act provided that if any Indian crossed over Indian country boundaries and committed an act of theft or violence, the victim was entitled to look first to "the nation or tribe, to which such Indian or Indians shall belong, for satisfaction[.]" Act of May 19, 1796, 1 Stat. 469 § 14. If a tribe failed to take action, the United States would compensate the victim from the tribe's annuity monies. *Id*.; 2 Stat. 139 § 14 (1802) (reauthorizing Trade and Intercourse Act).

[8] The magistrate judge's assertion that the Courts of Indian Offenses "limit[ed] tribes' criminal jurisdiction over Indians," Report, RE35, PageID#516 n.3, was similarly misplaced. Those courts, which dispense justice on reservations lacking a functioning tribal court system (and hence now service few tribal communities, 25 C.F.R. § 11.100), were established by the Interior Department for the same reasons that Congress enacted 18 U.S.C. Sections 1152 and 1153 – to address a perceived law enforcement gap within Indian country. *See* 25 C.F.R. § 11.102.

While these laws do not expressly authorize tribal criminal jurisdiction over members outside Indian country (and, it bears underscoring, had no need to do so because of the inherent nature of tribal sovereign authority, *see*, *e.g.*, *Wheeler*, 435 U.S. at 326-27), they plainly sought to encourage its exercise. Off-reservation depredations committed by tribal members were of significant concern to early congresses. They desired tribes to take the measures necessary to discourage such depredations, and to that end held the tribes financially liable for them. The punishment of tribal members for engaging in off-reservation depredations was perhaps the most natural mechanism available to tribal governments for deterring such acts, and the laws incentivized that deterrence.

The 1939 Solicitor Opinion understood the laws in precisely this fashion. "[The provisions] placing responsibility upon the tribal authorities for the wrongs of individual Indians committed outside of the reservation clearly contemplate[d] that the tribal authorities w[ould] deal in proper fashion with such individual Indians," and such provisions thus "positively recognized" tribal jurisdiction "to punish errant members of the tribe for offenses, no matter where committed[.]" Appendix B at 10-11. *See also*, *e.g.*, Cohen's Handbook at 37 (LexisNexis 2012) (for crimes committed by Indians outside Indian country, "[t]he tribe to which the Indian offender belonged had the first opportunity to punish the offender").

Treaties from this era similarly encouraged tribes to punish their members' extraterritorial crimes. *See, e.g.*, Treaty with the Delawares, etc., art. 7, 7 Stat. 113 (1809); Solicitor Opinion, Appendix B at 11 (citing additional treaties). "The fact is that the United States, over a long period, encouraged the Indian tribes to help in controlling the conduct of their members outside of the Indian country, and in order to encourage such control made the tribe responsible for such individual offenses." *Id*.

Recent legislation likewise evidences Congress's understanding that tribes possess membership-based criminal jurisdiction beyond Indian country. In its 2013 reauthorization of the Violence Against Women Act ("VAWA"), Congress included landmark provisions restoring tribes' inherent authority to criminally prosecute non-Indian perpetrators of domestic violence. 25 U.S.C. § 1304. Congress placed several substantial limitations on this authority, including the requirement that the crime "occur in the Indian country of the participating tribe." *Id*. § 1304(c)(1)-(2).

If tribal criminal authority were already confined to Indian country, this explicit territorial limitation would have been superfluous. But Congress is presumed not to enact statutory provisions that are devoid of effect. *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014). Indeed, just three years earlier, Congress had passed the Tribal Law and Order Act ("TLOA"), which expands the

sentencing authority for tribes providing additional procedural rights for Indian criminal defendants, and does not limit the exercise of that jurisdiction to Indian country. 25 U.S.C. § 1302(b)-(d). "[W]here words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion. A contrary interpretation would parody the presumption against redundancy." *Sexton v. Panel Processing, Inc.*, 754 F.3d 332, 335 (6th Cir. 2014) (brackets in original) (internal quotation marks and citation omitted); *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) (presumption against redundancy "applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times").

* * *

In sum, the district court's conclusion that tribal membership-based criminal jurisdiction contradicts "two centuries of Congress's purpose," Opinion, RE41, PageID#584, cannot be squared with history or with the text of the federal statutes pertaining to tribal criminal authority. No basis exists for concluding that tribes have been divested – either expressly or implicitly – of their inherent jurisdiction over their members for crimes committed within or beyond their territory.

C. The Band's Assertion of Extraterritorial Jurisdiction Comports with the Bounds of its Sovereign Authority and Accepted Norms Applicable to Other Sovereigns.

1. The Band's exercise of membership-based jurisdiction served legitimate governmental interests.

In the main, *Wheeler* and *Duro* speak of tribes' retained criminal jurisdiction over their members in the broadest of terms. *Duro*, 495 U.S. at 693 ("[I]n the criminal sphere membership marks the bounds of tribal authority."); *Wheeler*, 435 U.S. at 326 (discussing "the sovereign power of a tribe to prosecute its members for tribal offenses"). At other junctures, they anchor the jurisdiction in the tribes' "'powers of self-government,'" and "the retained sovereignty . . . needed to control their own internal relations, and to preserve their own unique customs and social order." *Duro*, 495 U.S. at 685-86 (quoting *Wheeler*, 435 U.S. at 326).

Whether the Band's criminal jurisdiction is viewed as extending to its members under all circumstances, or to just those circumstances implicating the Band's ability to govern itself and safeguard its interests, such jurisdiction unquestionably obtains here. Mr. Kelsey has not disputed his membership in the Band or the considerable benefits he has reaped from his voluntary maintenance of that status. *See* LRB Enrollment Ordinance art. IX, Appendix A at 6-7 (setting forth rights of voluntary relinquishment of tribal membership).

Nor has Mr. Kelsey disputed that his crime bore directly on the Band's right of self-government. At the time, he was a member not only of the Band but of its

nine-person legislative Council. His victim was a tribal employee discharging her official duties. Mr. Kelsey committed his crime, moreover, at the Band's Community Center, which had been "the center of Tribal community activities ever since it was purchased[.]" Jurisdiction Order, RE09, PageID#1539. And his conduct violated core Band norms against sexual assault and abuse of one's position.

As the Tribal Court of Appeals put it, "[t]he interests of the Tribe are very strong here. This case involves a tribal member in an elected position acting as an agent of the Tribe at a Tribal activity who committed a crime against a Tribal employee in a public setting openly visible to other employees and Tribal members who were present." *Id*. PageID#1540. The Band's interests in self-government and the ability "to control [its] own internal relations, and to preserve [its] . . . social order," *Duro*, 495 U.S. at 685-86, surely include being able to take action with respect to predatory sexual behavior and other criminal offenses committed against tribal members and employees, particularly when committed by *its own government officials*. But the district court's holding threatens to render the Band powerless to do so unless the crimes are perpetrated on the few scattered trust parcels that – through no fault of the Band's – are the only undisputed Indian country that remain in the Band's possession. *See supra* at 45-47.

2. The federal and state governments would enjoy extraterritorial jurisdiction under these circumstances.

The magistrate judge posited that state and federal criminal jurisdiction "normally comes with recognized territorial restrictions," suggesting that to recognize any measure of extraterritorial criminal jurisdiction for tribes would amount to special treatment relative to other sovereigns. Report, RE35, PageID#530 n.13. This is not the case.

In the federal context, "[i]t is well-established that Congress may criminalize extraterritorial conduct," *United States v. Shibin*, 722 F.3d 233, 245 (4th Cir. 2013), and its power to do so "based solely on the defendant's status as a U.S. citizen is firmly established," *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006) (citing cases). *See also, e.g.*, *United States v. Reeh*, 780 F.2d 1541, 1543 n. 2 (11th Cir. 1986) ("The defendants are all U.S. citizens . . . and a state may punish the wrongful conduct of its citizens no matter where it takes place.").

As the Supreme Court explained in *Blackmer v. United States*, 284 U.S. 421, 436-37 (1932), this power is "inherent in sovereignty" and based on "the duties of the citizen in relation to his own government" and his "continued . . . allegiance" to it while beyond its borders. And jurisdiction on this basis comfortably meets the requirements of due process. *See id*; *see also Clark*, 435 F.3d at 1108 (applying the "longstanding principle that citizenship alone [as a basis for extraterritorial criminal jurisdiction] is sufficient to satisfy Due Process"). Indeed, the United

States may exercise extraterritorial jurisdiction even without regard to citizenship wherever legitimate governmental interests are implicated. *See, e.g.*, *United States v. Yousef*, 327 F.3d 56, 91 n.24, 110-11 (2d Cir. 2003); *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990).

For their part, it is unclear whether states may exercise extraterritorial jurisdiction based solely on citizenship, but they plainly may do so "with respect to matters in which the State has a legitimate interest[.]" *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941). *See also, e.g.*, *Pac. Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1170-73 (9th Cir. 2011) (canvassing cases upholding extraterritorial criminal jurisdiction where legitimate governmental interests involved); *People v. Weeren*, 607 P.2d 1279, 1281 (Cal. 1980) ("California, in the protection of its legitimate interests may exercise penal control over its citizens extraterritorially."); *State v. Jack*, 125 P.3d 311, 318, 322 (Alaska 2005); Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. Pa. L. Rev. 855, 871 (2002).

Far from constituting a radical exercise of governmental power, then, the Band's assertion of jurisdiction over Mr. Kelsey fell well within accepted norms applicable to the criminal jurisdiction of both the federal and state governments.

D. Judicial Divestiture of Tribal Membership-Based Jurisdiction Would Cause Significant Hardship and Compound the Sins of History.

What has been discussed above should mark the end of this matter. Congress has not divested tribes of concurrent criminal jurisdiction over their own members for crimes committed outside their territory, and the Supreme Court has plainly held that the doctrine of implicit divestiture pertains only to tribal relations with nonmembers. If change is to come, it must come from Congress, not from the courts according to their own policy views. *Bay Mills*, 134 S. Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal [powers]"). But because the Report in particular ventures deeply into the policy arena, the subject must be addressed here.

Affirmance of the decision below would cause significant hardship without any corresponding benefit to tribes seeking to maintain law-abiding communities and to fulfill the congressional goal of self-determination. The Band's history is like that of many others in Michigan and throughout the country. As the result of broken treaty promises and the worst forms of human avarice, tribes such as the Band find themselves with only remnants of the land base they were meant to retain even after non-Indian settlement. In the Band's case, treaties signed in 1836 and 1855 established reservations totaling approximately 185,000 acres in exchange for the cession by the Band and its sister tribes of nearly one-third of the

land mass in Michigan. *See* 1836 Treaty of Washington, 7 Stat. 491, and 1855 Treaty of Detroit, 11 Stat. 621. And as the Senate Report accompanying the reaffirmation of the Band's federal recognition in 1994 confirms, "[t]he historical record is clear . . . that the 1855 treaty . . . created what were intended to be permanent reservations for the tribes[.]" S. Rep. No. 103-260, 1994 WL 194298, at *2.

No sooner had the ink dried on that treaty, however, than were forces unleashed resulting in the near-total dispossession of the Band's lands. Much of that dispossession took place at the hands of the very federal officials assigned to protect it. *Id*. An honest federal agent at the time described the plundering of the Michigan reservations as "robbery and cruelty in the extreme,"[9] and so swiftly did the dispossession take place that "[b]y the end of the 1800's, all that remained of the reservations were the treaty boundaries and isolated Ottawa/Odawa homesteads," H. Rep. No. 103-621, 1994 WL 388905. In 1872, the Secretary of the Interior compounded matters through the unlawful termination of the Band's recognition described above, *supra* at 4-5, delivering it into a century of extreme poverty and political and social upheaval.

[9] Matthew Fletcher, *The Eagle Returns: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians* 71 (Mich. St. Univ. 2012).

With the Restoration Act of 1994, Congress sought to right at least some of these wrongs and to return the Band to the sovereign status it would have enjoyed had the treaties been honored. 25 U.S.C. § 1300k-3(a). Since then, the Band has endeavored to rebuild a small fraction of its stolen land base, parcel by parcel, through purchases on the open market. This has not been an exercise in "wanderlust," Report, RE35, PageID#528, but rather an effort to provide housing for the Band's members and land for its governmental operations and community and economic initiatives.

Obtaining Indian country status for these lands through the land-into-trust process, 25 U.S.C. § 465, and hence establishing the Band's territorial jurisdiction over them, entails very significant practical difficulties. For example, when the events giving rise to this dispute occurred, delays at the Interior Department of a decade or more were not uncommon in the processing of trust applications. *See, e.g.*, Testimony of NCAI on the Supreme Court Decision in *Carcieri v. Salazar*, U.S. Senate Committee on Indian Affairs, May 21, 2009 ("[T]he chief problem with the land to trust process is the interminable delays . . . . Too often have tribes spent scarce resources to purchase land and prepare a trust application only to have it sit for years or even decades without a response.").[10]

[10] Available at http://www.indian.senate.gov/sites/default/files/upload/files/Allentestimony.pdf.

To hold, then, that tribes like the Band have no jurisdiction over their own members beyond their Indian country boundaries, even on lands purchased in an effort to reassemble their unlawfully shattered land bases, would only perpetuate the ill effects of more than a century of federal malfeasance and incompetence, and undermine the ability of many tribes to maintain law and order in their communities. Numerous tribes have asserted their sovereign right to exercise extraterritorial jurisdiction over their members to preserve law and order. *See*, *e.g.*, Appendix C (collecting a sampling of tribal constitutional and statutory provisions asserting criminal jurisdiction outside of Indian country). The divestiture of tribal power effectuated by the district court's decision would render these tribes powerless to deal with many offenses committed by their own citizens, all in the face of Congress's policy of support for tribal courts as the preferred means of administering justice in tribal communities. *See*, *e.g.*, *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985) (noting that "Congress is committed to a policy of supporting tribal self-government and self-determination," including the development of tribal court systems); *Wheeler*, 435 U.S. at 332 ("Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government[.]").

This congressional policy is particularly important with regard to crimes of sexual violence. "[D]omestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions[.]" TLOA § 202(a)(5)(A), 124 Stat. 2258, 2262 (2010). "Thirty-four percent of American Indian women will be raped during their lifetime, compared to less than one in five women nationwide." *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1029 (9th Cir. 2013). And Michigan tribes are not exempt from this scourge. *See, e.g., United States v. Waylon Pego*, 2012 WL 5292922 (E.D. Mich. Oct. 25, 2012), *aff'd*, 563 Fed. App'x 395 (6th Cir. 2014) (documenting crimes of a serial abuser against female members of the Saginaw Chippewa Tribe).

Moreover, many tribes, like the Band, engage in substantial governmental activities outside of their Indian country, including the provision of services and benefits to members residing there. *See, e.g.*, Tribal Constitution arts. IV, §§ 2-3 and IX, § 3, Appendix A at 2-4 (Band members residing outside of Indian country may vote and hold office); LRB Education Department (scholarships and education assistance);[11] Membership Assistance Program Ordinance, Appendix A at 7-8 (financial assistance).[12] *See also* White Earth Nation Human Services

[11] Available at http://www.lrboi-nsn.gov/index.php/membership-services/education-department2.

[12] *See also* http://www.lrboi-nsn.gov/index.php/membership-services/members-assistance.

Transfer Project (program providing medical care, food, housing, child care and vocational assistance "to tribal members and their families who reside on or off the reservation");[13] Cheyenne River Sioux Tribe Education Services Department (financial assistance for "students attending college off-reservation");[14] *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 26, 32 (1st Cir. 2000) (describing project involving "the construction of a low-income housing development" on "land purchased by the Tribe but situated outside the reservation"). Tribes must protect themselves against the abuse of such programs, and many choose to do so through criminal sanctions. *See*, *e.g*, Sault Ste. Marie Tribe of Chippewa Indians, Tribal Code § 71.303, Appendix C at 7 (extending criminal jurisdiction over "the following offenses wherever committed: Embezzlement and theft from a tribal organization, Abuse of office, . . . Election fraud, . . . [and] Public bribery"); Absentee Shawnee Tribe of Indians of Oklahoma, Courts Code § 5 and Criminal Offenses Code § 2(a), Appendix C at 1 (tribal jurisdiction extends to "Crimes Against Public Justice," including "Bribery," "Misusing Public Money," "Obstructing Governmental Function" and "Tampering with Public Property," "where ever such violation may occur").

[13] Available at http://www.whiteearth.com/programs/?program_id=7.

[14] Available at http://www.sioux.org/index.php/main/inner/sioux/education_services_department.

Affirmance of the lower court's holding would significantly undermine their ability to do so.

These significant hardships would come without any corresponding justification. The Band's exercise of jurisdiction did not impinge on the authority of Michigan or its courts, which enjoy concurrent (territorial-based) criminal jurisdiction over the Band's fee land. *See, e.g.*, Criminal Jurisdiction on the Seminole Reservations in Florida, M. Op. 36907, 85 I.D. 433, 435 (Nov. 14, 1978).[15] The Band fully recognizes this concurrent jurisdiction, *see* Law and Order Ordinance § 4.01, Appendix A at 5, and the double jeopardy clause does not operate to bar subsequent prosecutions by state or tribal governments as they are separate sovereigns. *See Wheeler*, 435 U.S. at 317; *People v. Davis*, 695 N.W.2d 45, 51 (Mich. 2005). As the Michigan Supreme Court has recently reaffirmed, "Michigan has . . . enjoyed a long history of collaboration between state and tribal courts," Order Creating the Michigan Tribal State Federal Judicial Forum, Michigan Supreme Court Administrative Order No. 2014-12 (June 25, 2014),[16] and the exercise of jurisdiction by the Band's courts here poses no threat to that collaboration.

[15] Available at http://www.doi.gov/solicitor/decisions/doi_decisions_085.pdf.

[16] Available at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2014-33_2014-06-25_formatted%20AO%202014-12_with%20link%20to%20charter.pdf.

At the same time, affirmation of tribal membership-based jurisdiction would serve the goal of judicial efficiency. While membership status is readily determined, the Indian country status of a tribe's land is frequently in dispute and can involve a highly fact-intensive inquiry costly for both litigants and the courts. In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), for example, the courts had to look to a broad range of factors to determine the jurisdictional status of reservation land opened for non-Indian settlement by statute, including: "the historical context" of the statute, the "subsequent treatment" and "pattern of settlement" of the land, "subsequent congressional and administrative references to the reservation," "demographic trends," the "manner in which the transaction was negotiated . . . and the tenor of legislative Reports presented to Congress," and manifestations of state and tribal authority over the lands. *Id*. at 344, 351-55 (internal quotation marks and citations omitted). Following a remand by the Supreme Court, more than a decade of additional fact-intensive litigation ensued. *See Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). It was precisely this sort of quagmire that the Band sought to avoid by relying on its membership-based jurisdiction rather than litigating the Community Center's Indian country status.

Nor is the lower court's holding justified by any concern that tribal court defendants might receive inadequate procedural protections. Pursuant to ICRA,

tribal courts afford significant rights to all persons subject to tribal jurisdiction, including the rights to equal protection and due process, to a speedy and public trial, and to present and confront witnesses, as well as protections against self-incrimination and double jeopardy. 25 U.S.C. § 1302(a). Tribes that seek to impose sentences greater than one year's imprisonment or a $5,000 fine must afford still more rigorous procedural protections. *See id*. § 1302(b) and (c). And tribal court defendants may vindicate these rights through habeas corpus relief in federal court. *Id*. § 1303.

The Band has embraced these fundamental rights, enshrining them in its own Constitution. Tribal Constitution art. III, Appendix A at 1-2. That Constitution further establishes a "Tribal Judiciary [that is] independent from the legislative and executive functions of the tribal government[.]" *Id*. art. VI, § 9, Appendix A at 3. And the Tribal Court has adopted comprehensive rules governing civil and criminal procedure, rules of evidence, and rules of judicial conduct. Court Rules, RE12, PageID#821-835.

This case amply demonstrates the Tribal Court's commitment to the rights of criminal defendants. Mr. Kelsey was tried for two crimes: sexual assault and harassment. Order of Judgment, RE09, PageID#1556. He was found guilty of sexual assault but not harassment, *id*. PageID#1556-1559, and given a suspended sentence pursuant to which he has had to spend not a single day in jail, Order of

Sentencing, RE09, PageID#1561-1562. The tribal courts have afforded him numerous opportunities to challenge his conviction, entertaining well over a dozen post-trial motions, including the untimely challenge to the Band's jurisdiction that led to these proceedings. Remand Order, RE09, PageID#1533-1535.

* * *

In sum, while policy considerations should play no role in the decision here, they fully support the conclusion that no divestiture of the Band's membership-based criminal jurisdiction is warranted.

II. THE TRIBAL COURT OF APPEALS DID NOT VIOLATE THE DUE PROCESS REQUIREMENT OF FAIR NOTICE.

Mr. Kelsey claims that the Tribal Court of Appeals violated his due process rights by interpreting the Band's laws as providing jurisdiction over his conduct. However, Mr. Kelsey was on full notice that his conduct was a crime, which is all that due process requires. And even if fair notice requirements apply to jurisdictional provisions, the Court of Appeals nowhere ran afoul of them in construing the Band's provisions here.

A. The Fair Notice Requirement Applies to the Elements of a Crime and Not to Jurisdictional Determinations.

"Due process protects against judicial infringement of the 'right to fair warning' that *certain conduct* will give rise to criminal penalties[.]" *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (quoting *Marks v. United States*, 430 U.S.

188, 191-92 (1977)) (emphasis added). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal quotation marks omitted). As this Court has observed, this fair notice analysis has been applied only to "judicial decisions that . . . retroactively convert[] an innocent act into a crime." *Webb v. Mitchell*, 586 F.3d 383, 393 (6th Cir. 2009); *see also United States v. Blaszak*, 349 F.3d 881, 886 (6th Cir. 2003) ("The touchstone behind [fair notice] concerns is [whether] . . . the provision in question made it reasonably clear at the relevant time that the defendant's conduct was criminal." (internal quotation marks omitted)). Such concerns are not implicated here, as the Band's sexual assault provisions were firmly in place at the time of Mr. Kelsey's conduct. *See* Law and Order Ordinance art. XIX, § 19.01(c), Appendix A at 6.

The Second Circuit has recently affirmed that fair notice requirements pertain only to judicial decisions that retroactively alter the elements of a crime, and not to decisions regarding a court's jurisdiction. *See United States v. al Kassar*, 660 F.3d 108, 119 (2d Cir. 2011) ("Fair warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere." (emphasis in

original)). Because the Tribal Court of Appeals' jurisdictional decision did not "attach[] criminal penalties to what previously had been innocent conduct," *Rogers*, 532 U.S. at 459, it did not implicate fair notice concerns.

B. The Tribal Court of Appeals' Decision Did Not Violate Fair Notice Principles.

Even if the fair notice requirement applies to jurisdictional determinations, there was no violation here. That requirement was first articulated in *Bouie*. There, two civil rights protesters were convicted of trespass. 378 U.S. at 348-49. At the time of their protest, the South Carolina trespass statute, by its plain language and as construed by the State Supreme Court for more than a century, did not encompass the defendants' conduct. *Id*. at 349-50, 356-57. Nevertheless, that court upheld their convictions based on a novel reinterpretation of the statute. *Id*. at 350.

The United States Supreme Court reversed, explaining that "[i]f a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." *Id*. at 354 (internal quotation marks omitted). Accordingly, because the South Carolina decision was "clearly at variance with the statutory language, [and had] not the slightest support in prior South Carolina decisions," it could not stand. *Id*. at 356.

As the Supreme Court has emphasized, *Bouie*'s fair notice principle is narrow and applies to only the most unforeseeable reinterpretations of settled law. In *Rogers*, the Tennessee Supreme Court had abolished an outdated common law rule that would have precluded the defendant's conviction and then applied that decision retroactively to the defendant. *Rogers*, 532 U.S. at 453. The Court upheld the conviction because, in contrast to *Bouie*, the state court's decision was not "a marked and unpredictable departure from prior precedent," but merely "a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense." *Id*. at 467.

Thus, while due process restricts courts from upending settled constructions, it does not strip courts of the flexibility to clarify and resolve uncertainties in the law. Indeed, such tasks are hallmarks of the judicial function, and thus foreseeable. *See O'Neal v. Bagley*, 743 F.3d 1010, 1017 (6th Cir. 2013) (under AEDPA review, where state court "resolved the uncertainty evident in" overlapping statutory provisions, "its new construction was not 'unexpected and indefensible by reference to [existing] law,' *Bouie*, 378 U.S. at 354, 84 S. Ct. 1697, even if the [new] rule was not inevitable" (brackets in original)). *See also Blaszak*, 349 F.3d at 887; *Blacksom v. Klee*, 2013 WL 5913687, at *2 (E.D. Mich. Nov. 1, 2013) (denying reconsideration of denial of habeas corpus because state court decision reconciling two conflicting statutory provisions was "not unforeseeable").

Here, there was nothing "unexpected" or "indefensible" about the Tribal Court of Appeals' decision. Two separate provisions of the Band's Constitution in effect at the time of Mr. Kelsey's crime, along with its Tribal Court Ordinance, required the Band to assert criminal jurisdiction over its members and its territory, including its fee land. Article I of the Constitution provided:

> Section 1 --- *Territory*. The 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[.]
>
> Section 2 --- *Jurisdiction Distinguished From Territory*. 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.

Tribal Constitution art. I, Appendix A at 1 (final emphasis added).[17] Section 2 spoke of the Tribe's jurisdiction over both its members and its territory, which Section 1 defined to include all land "owned by" the tribe, and mandated that such jurisdiction be exercised to the fullest extent permissible under federal and tribal law. Thus, as the Tribal Court of Appeals held, Jurisdiction Order, RE09, PageID#1539-1541, these constitutional provisions supplied unambiguous notice of the Band's jurisdiction over Mr. Kelsey's crime based on two independent jurisdictional facts: (1) his status as a member and (2) the Community Center's location within the Band's constitutionally defined "Territory."

[17] Given the nature of his fair notice challenge, all references to the Band's Constitution and laws in this section are to provisions in effect at the time of Mr. Kelsey's crime and prosecution.

Similarly, Article VI, Section 8 of the Tribal Constitution provided that "[t]he judicial powers of the Little River Band shall [include the power to] 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.*" Appendix A at 3 (emphasis added). Like its counterpart in Article I, this provision required the tribal courts to exercise both membership-based and territorial jurisdiction, and provided clear notice of these independent bases of authority.

And there is more. The Tribal Court Ordinance, also in effect when Mr. Kelsey committed his crime, defined the tribal courts' civil and criminal jurisdiction over tribal members and the Band's constitutionally defined territory in terms identical to those in the Constitution. *See* Tribal Court Ordinance §§ 4.01, 5.01, Appendix A at 4. *See also* Law and Order Ordinance § 4.02, Appendix A at 5 ("The criminal jurisdiction of the Tribe shall extend to all Indians[.]").

Accordingly, the Band's constitutional and statutory scheme provided ample notice that the Tribe's criminal jurisdiction extended to Mr. Kelsey's crime. Against this consistent body of tribal law, the Court of Appeals identified a lone statutory provision to be in tension with it. That provision stated:

> 4.03. *Territorial Jurisdiction*
>
> > a. Except as provided in sub. (b), the criminal jurisdiction of the Tribe shall extend to [the Tribe's Indian country].

Law and Order Ordinance § 4.03, Appendix A at 5.

The Court of Appeals deemed this definition of the Band's territorial jurisdiction to be "unconstitutionally narrow" because it did not encompass all of the Tribe's "territory" as that term is used in the Constitution. Jurisdiction Order, RE09, PageID#1542. Mr. Kelsey rests his due process claim on that statement alone. But his claim fails for three independent reasons.

First, Mr. Kelsey had no reason to believe that, setting aside the proper scope of the Band's territorial jurisdiction, the Court would not rely on the Tribe's inherent membership-based jurisdiction, which was specifically acknowledged by the Law and Order Ordinance itself, as well as by the Constitution and the Tribal Court Ordinance, as being separate and apart from the Tribe's territorial jurisdiction. *See* Law and Order Ordinance § 4.02, Appendix A at 5; Jurisdiction Order, RE09, PageID#1541 ("[T]ribal jurisdiction is **larger** than territory because some tribal authority extends beyond its land, e.g. tribal membership[.]" (emphasis in original)).

Second, Mr. Kelsey has admitted that he was unaware that the Community Center might not fall within the Band's Indian country until *after he was convicted*. *See* Remand Order, RE09, PageID#1535. Thus, he could not have relied on his asserted territorial-jurisdiction expectations when he committed his crime. *Cf. Blaszak*, 349 F.3d at 887 (noting that a defendant's efforts to conceal his actions "belie[d] his contentions" of lack of fair notice); *al Kassar*, 660 F.3d at 119

(defendants' "deliberate attempts to avoid detection" inconsistent with lack of fair notice).

Finally, and perhaps most fundamentally, it was not unexpected that the Court would harmonize the definition of territorial jurisdiction in the Law and Order Ordinance with the broader definition found in the Constitution and the Tribal Court Ordinance by according primacy to the Constitution. The Tribal Court's power "[t]o review ordinances and resolutions of the Tribal Council . . . to ensure they are consistent with th[e] Constitution and rule void those ordinances and resolutions deemed inconsistent" is enshrined in Article VI, Section 8(a)(2) of the Band's Constitution, Appendix A at 3, and this power goes to the core of the judicial function. State courts may reconcile conflicting laws without running afoul of the fair notice principle, *see O'Neal*, 743 F.3d at 1017, and *Blacksom*, 2013 WL 5913687, and this is no less true for tribal courts.

This case, in sum, is a far cry from *Bouie*. Mr. Kelsey does not dispute that he was on notice that sexual assault of a tribal employee was a crime. Due process requires no more. Even if it does, the Tribal Court of Appeals did not construe the Band's jurisdictional provisions in a manner clearly contravening their plain text or well-settled judicial construction, but to the contrary engaged in the classic judicial function of harmonization. Mr. Kelsey's contrary argument "'would place an unworkable and unacceptable restraint on normal judicial processes [that would

be] incompatible with the resolution of uncertainty that marks any evolving legal system.'" *Metrish v. Lancaster*, 133 S. Ct. 1781, 1788 (2013) (quoting *Rogers*, 532 U.S. at 461).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted this 30th day of October, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 13,997 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: October 30, 2014

By: /s/Riyaz A. Kanji
Riyaz A. Kanji

CERTIFICATE OF SERVICE

I certify that on October 30, 2014 this document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Riyaz A. Kanji
Riyaz A. Kanji

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Respondent-Appellant, per Sixth Circuit Rule 30(g), hereby designates the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No.
Petitioner Kelsey's Verified Petition for Writ of Habeas Corpus in Federal District Court (Petition)	11/05/2009	RE01	1-27
Memorandum of Law in Support of Verified Petition for Writ of Habeas Corpus	11/05/2009	RE02	156-198
Federal District Court Order Dismissing Without Prejudice Certain Tribal Judicial Respondents (Dismissal)	12/03/2009	RE03	199-200
Tribal Court of Appeals Order Denying Preemptory Reversal and Remanding to Consider Jurisdiction (Remand Order)	04/02/2010	RE09	1533-1535
Tribal Court of Appeals Opinion and Order Regarding Jurisdiction (Jurisdiction Order)	04/02/2010	RE09	1537-1543
Tribal Court of Appeals Opinion and Order Affirming Conviction and Sentence (Order of Affirmance)	04/02/2010	RE09	1547-1551
Tribal Court of Appeals Order to Stay Tribal Court Proceedings During Pendency of Petitioner Kelsey's Federal Habeas Corpus Action (Order for Stay)	04/02/2010	RE09	1554-1555
Tribal District Court Order of Judgment Finding Petitioner Kelsey Guilty of Sexual Assault (Order of Judgment)	04/02/2010	RE09	1556-1559
Tribal District Court Order Sentencing Petitioner Kelsey (Order of Sentencing)	04/02/2010	RE09	1561-1562
Tribal Court of Appeals Order Granting in Part Petitioner Kelsey's Motion to Stay Pending Appeal (Order Granting Stay)	04/02/2010	RE09	1563-1564
Tribal District Court Findings on Jurisdiction (Findings of Fact)	04/02/2010	RE09	1565-1566

Petitioner Kelsey's Motion to Tribal Court of Appeals for Clarification or for Rehearing Regarding Jurisdiction (Motion for Clarification)	04/02/2010	RE10	1017-1027
Petitioner Kelsey's Motion to Vacate in Tribal District Court (Motion to Vacate)	04/02/2010	RE11	1279-1293
Excerpts from Tribal Court Trial Transcript (Trial Transcript)	04/02/2010	RE11-1	1517-1524
Little River Band Tribal Court Rules (Court Rules)	04/02/2010	RE12	821-835
Respondent Bailey's Federal District Court Answer (Answer)	04/02/2010	RE13	246-294
Federal District Court Order Denying Reconsideration of Order of Dismissal (Reconsideration)	08/17/2010	RE17	351-353
Fife v. Moore (unpublished order of the United States District Court for the Eastern District of Oklahoma, Sept. 8, 2011)	12/12/2011	RE32-2	490-495
United States Magistrate Judge's Report and Recommendation (Report)	11/07/2013	RE35	502-533
Respondent Bailey's Objections to Report and Recommendations (Objections)	11/21/2013	RE36	534-560
Petitioner Kelsey's Reply to Respondent Bailey's Objections (Reply)	12/19/2013	RE39	565-576
United States District Judge's Opinion Adopting Report and Recommendation (Opinion)	03/31/2014	RE41	580-585
United States District Judge's Order Adopting Report and Recommendation (Order)	03/31/2014	RE42	586
Respondent Bailey's Notice of Appeal to the Sixth Circuit (Notice)	04/29/2014	RE43	587

Appendix A

Relevant Provisions of the Constitution and Laws of the Little River Band of Ottawa Indians[1]

Little River Band of Ottawa Indians Tribal Constitution:

- Art. I. Territory

  Section 1. *Territory*. The 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 . . . .

  Section 2. *Jurisdiction Distinguished From Territory*. 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.

- Art. III. Constitutional Rights

  Section 1. *Civil Rights*. The Little River Band in exercising the powers of self-government shall not:

  > (a) Make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and to petition for a redress of grievances;
  >
  > (b) Violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
  >
  > (c) Subject any person for the same offense to be twice put in jeopardy;

[1] Unless otherwise indicated, the full text of the provisions cited in this Appendix is contained in the Tribal Law Appendix filed in the district court at Docket Entry 12. Relevant excerpts of the provisions are appended here pursuant to Federal Rule of Appellate Procedure 28(f).

(d) Compel any person in any criminal case to be a witness against himself;

(e) Take any private property for a public use without just compensation;

(f) Deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(g) Require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of five thousand dollars ($5000.00), or both, or the maximum penalty allowed under Federal law;

(h) 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;

(i) Pass any legislation, directed against a designated person, pronouncing him/her guilty of an alleged crime, without trial or conviction or ex post facto law, which retroactively changes the legality or consequences of a fact or action after the occurrence of that fact or commission of the act;

(j) Deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six (6) persons;

(k) Make or enforce any law unreasonably infringing the right of tribal members to keep and bear arms; or

(l) The enumeration of rights in this Constitution shall not be construed to deny or disparage other rights retained by tribal members.

- Art. IV. Tribal Council

Section 2. *Composition of the Tribal Council.* . . . (b) Tribal Council positions shall be elected by the membership . . . .

Section 3. *Qualifications.* Any member of the Tribe who is twenty-one (21) years of age or older who has resided within the State of Michigan for at least six (6) months prior to the date of the next scheduled election may serve on the Tribal Council. . . .

Section 7. *Powers of the Tribal Council.* The legislative powers of the Little River Band of Ottawa Indians shall be vested in the Tribal Council, subject to any express limitations contained in this Constitution. . . .

- Art. V. Tribal Ogema

Section 1. The Executive powers of the Little River Band of Ottawa Indians shall be invested in the Tribal Ogema.

Section 2. *Qualifications.* Any member of the Tribe who is twenty-five (25) years of age or older, who has resided within the nine (9) county district defined in subsection 2(b)(1) of Article IV, for at least six (6) months prior to the date of the next scheduled election may serve as Tribal Ogema.

- Art VI. Tribal Court

Section 8. *Powers of the Tribal Court.*

(a) The judicial powers of the Little River Band shall extend to all cases and matters in law and equity arising under this Constitution, the laws and ordinances of or applicable to the Little River Band including but not limited to:

1. To 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.

2. To review ordinances and resolutions of the Tribal Council or General Membership to ensure they are consistent with this Constitution and rule void those ordinances and resolutions deemed inconsistent with this Constitution. . . .

Section 9. *Judicial Independence.* The Tribal Judiciary shall be independent from the legislative and executive functions of the tribal government and no person exercising powers of the legislative or executive functions of government shall exercise powers properly belonging to the judicial branch of government . . . .

- Art. VII. General Membership Powers

  Section 1. *General Membership Meetings.*

  (a) Meetings of the General Membership of the Little River Band shall be held twice a year; once in the spring, once in the fall, at a site suitable for such a meeting. . . .

  3. Subject to the express limitations contained in this Constitution, motions and ordinances adopted by the General Membership shall have the status of law and be binding on the Tribal Council, Tribal Ogema and Judiciary; provided at least thirty (30%) percent of the registered voters of the Tribe are present at such Membership Meeting, as verified by the Election Board. . . .

- Art. IX. Election

  Section 3. *Voting.*

  (a) Any duly enrolled member of the Little River Band of Ottawa, who is at least eighteen (18) years old, and is registered to vote on the date of any given tribal election shall be eligible to vote in that tribal election. . . .

Tribal Court Ordinance (#97-300-01)

- Section 4. 4.01. *Original Jurisdiction*. The Tribal Court shall have original jurisdiction to hear and determine all civil and criminal claims and remedies arising within the jurisdiction of the Tribe or which the Tribe or an enrolled member of the tribe is a party . . . .

- Section 5. 5.01. The judicial powers of the Little River Band of Ottawa Indians shall extend to all cases and matters in law and equity arising under the Tribal Constitution, the laws and ordinances of or applicable to the Little River Band of Ottawa Indians including but not limited to:

  1. To adjudicate all civil and criminal matters arising within the jurisdiction of the Tribe or which the Tribe or an enrolled member of the Tribe is a party . . . .

Law and Order Ordinance (#03-400-03)

- Art. III. Definitions

  Section 3.17. *Sexual Contact* means any intentional touching of the genital organs of a male or female person, or the breasts of a female person, or any portion of the body of a female person between the knees and a line around the circumference of the abdomen at the point of the navel, whether the touching is on the bare skin or on intervening clothing.

- Art. IV. Jurisdiction

  Section 4.01. *Generally*. The offenses specified in this Ordinance, or those provided for in other Ordinances of the Tribal Code, constitute forbidden criminal conduct against the Tribe. Persons committing such offenses may be tried and punished by the Tribal Court as provided for by this Ordinance; provided, however, that such jurisdiction, whether or not exercised, shall not affect the power or authority of any other courts, including those of the United States, or the State of Michigan, which may have jurisdiction.

  Section 4.02. *Persons Under the Tribe's Criminal Jurisdiction.*

  a. The criminal jurisdiction of the Tribe shall extend to all Indians, and all other persons other than where prohibited by Federal law. . . .

  Section 4.03. *Territorial Jurisdiction.*

  a. Except as provided in sub. (b), the criminal jurisdiction of the Tribe shall extend to:

     1. all land within the limits of the Tribe's reservation, including trust land, fee patented land and rights of way running through the reservation; and

     2. all land outside the boundaries of the Tribe's reservation held in trust by the United States for individual members of the Tribe or for the Tribe; and

     3. all other land considered "Indian count[r]y" as defined by 18 U.S.C. section 1151 that is associated with the Tribe. . . .

- Art. XIX. Sex Crimes

  Section 19.01. *Unlawful Sexual Conduct*. . . .

  c. *Sexual Assault.*

  1. *Offense*. A person commits the offense of sexual assault, if he subjects another person to any sexual contact; and

  A. he knows or reasonably should know that the sexual contact is offensive to the victim; or

  B. he has substantially impaired the victim's power to appraise or control either person's conduct by administering or employing without consent or knowledge of the victim any drug, intoxicant, or other means for the purpose of preventing awareness or resistance; or

  C. he knows or reasonably should know that the victim is of such a state of consciousness or mind, or that the victim suffers from such mental disease or defect, which renders the victim incapable of recognizing the nature of either person's conduct; or

  D. he is in a position of authority over the victim and used this authority to coerce the victim to submit; or

  E. the victim is less than sixteen years of age.

  2. *Sentence*. A person convicted of sexual assault may be sentenced to imprisonment for a period not to exceed one year, or a fine not to exceed five thousand dollars ($5,000.00), or both.

Enrollment Ordinance (#04-200-01).[2]

- Art. IX. Relinquishment of Membership

  Section 9.01. *Relinquishment Procedure*. An individual may relinquish membership by:

[2] The Enrollment Ordinance is available on the Band's government website at: http://www.lrboi-nsn.gov/images/docs/council/docs/ordinances/Title%20200-01.pdf.

a. Submitting a written and signed statement to the Enrollment Officer requesting that his/her name be removed from the membership roll. . . .

e. The Tribal Enrollment Officer may not refuse a competent member's request to relinquish his/her membership, if such person's request is supported by a written, signed and notarized letter making that request.

Membership Assistance Program Ordinance (#06-700-04)

- Art. I. Purpose; Findings

  Section 1.01. *Purpose*. This ordinance is intended to outline the programs providing assistance to tribal members.

  Section 1.02. *Findings*. The Tribal Council, in adopting this ordinance, makes the following findings:

  a. The Constitution of the Little River Band of Ottawa Indians delegates to the Tribal Council the responsibility and authority, "to exercise the inherent powers of the Little River Band by establishing laws . . . to promote, protect and provide for the public health . . . and general welfare of . . . its members." *Constitution, Article IV, Section 7(a)(2)*. [Ellipses in original.]

  b. That provision of adequate housing, welfare and health services to members is an important aspect of governmental activities. . . .

  c. That the development of services that can be accessed by all members in a coordinated program is an essential governmental function. . . .

- Art. VI. Home Repair Program[3]
- Art. VII. Low Income Energy Assistance Program
- Art. VIII. Rental and Mortgage Assistance Program

[3] The regulations pertaining to these individual program components are available on the Band's government website at: http://www.lrboi-nsn.gov/index.php/membership-services/members-assistance.

- Art. IX. Food Assistance Program
- Art. X. Elder Chore Service Assistance Program
- Art. XI. Emergency Transportation Assistance

Revenue Allocation Ordinance (#08-0123-20)

- Section 8.01. Allocation. The Tribal Council hereby allocate[s] 40% of net gaming revenues to individual per capita distributions. . . .

- Section 8.03. Per Capita Distribution Eligibility.

  (a). Eligibility Criteria. In order to be eligible to receive a per capita distribution an individual must: (i). be a "qualified tribal member" . . . .

Appendix B

60616

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington

April 27, 1939

MEMORANDUM for the

Commissioner of Indian Affairs:

The following questions have been put to me in connection with the law enforcement activities of Indian courts, including both the Courts of Indian Offenses under the Departmental regulations and the tribal courts under tribal codes, and of Indian police officers:

(1) May an Indian court exercise jurisdiction over acts committed by Indians on unrestricted lands within an Indian reservation, where the Indians concerned are properly before the court?

(2) May an Indian court exercise jurisdiction over acts committed by Indians on lands outside of an Indian reservation, where the Indians concerned are properly before the court?

(3) May an Indian police officer make arrests on unrestricted lands within an Indian reservation?

(4) May an Indian police officer make arrests outside of an Indian reservation?

I.

Jurisdiction over Acts Committed on Unrestricted Lands

Questions of court "jurisdiction" frequently turn out upon analysis to be a confused mixture of questions dealing with international law, constitutional law, statutory construction and common law principles. It is important, therefore, that we define the question that concerns us as clearly and realistically as possible. In asking whether an Indian court has "jurisdiction" over acts committed in certain areas we are concerned to ascertain whether such a court commits a wrongful act, that is to say, an act which is punishable, actionable, or enjoinable in a State or Federal court, if it orders the trial and punishment of an Indian who is before the court, on the basis of an act which that Indian has performed in the area designated.

A question of jurisdiction arises when an Indian who is before an Indian court claims that the judges of such court are acting

without proper authority and that such action, therefore, constitutes assault, false imprisonment, trespass, or some similar offense under State or Federal law. It is, therefore, necessary in passing upon such a jurisdictional question to inquire into the basis of authority upon which an Indian court acts. This is a subject which has been dealt with elsewhere at some length. The viewpoint of this Department, as expressed in an opinion on "Powers of Indian Tribes" approved October 25, 1934 (55 I. D. 14), is to the following effect:

> "The attempts of the Interior Department to administer a rough-and-ready sort of justice through Courts of Indian Offenses, or directly through superintendents, cannot be held to have impaired tribal authority in the field of law and order. These agencies have been characterized, in the only reported case squarely upholding their legality, as 'mere educational and disciplinary instrumentalities by which the Government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian.' (United States v. Clapox, 35 Fed. 575; and cf. Ex parte Bi-a-lil-le, 12 Ariz. 150, 100 Pac. 450; United States v. Van Wert, 195 Fed. 974.) Perhaps a more satisfactory defense of their legality is the doctrine put forward by a recent writer that the Courts of Indian Offenses 'derive their authority from the tribe, rather than from Washington.' (W.G. Rice, Jr., "The Position of the American Indian in the Law of the United States", 16 Jour. Comp. Leg. (3d Ser.), Part 1, pp. 78, 93 (1934).
>
> "Whichever of these explanations be offered for the existence of the Courts of Indian Offenses, their establishment cannot be held to have destroyed or limited the powers vested by existing law in the Indian tribes over the province of law and order and the administration of civil and criminal justice." (at page 64)

Recognition by the Supreme Court of the dual role of the tribe and of the Interior Department in providing disciplinary action over Indians not provided for by Federal criminal statutes is contained in the holding in United States v. Quiver, 241 U. S. 602, and the following quotation therefrom (page 605):

> "We have now referred to all the statutes. There is none dealing with bigamy, polygamy, incest, adultery or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws and to such preventive and corrective measures as reasonably could be taken by the administrative officers."

The authority of the Interior Department to establish Courts of Indian Offenses as an administrative means of educating and civilizing the Indians was analyzed with some thoroughness and upheld in the Solicitor's memorandum of February 28, 1935. This memorandum pointed out the number of cases in which the authority for promulgating law and order regulations by the Department is taken for granted by the courts. Bad Elk v. United States, 177 U. S. 529; United States v. Mullen, 71 Fed. 682 (D. C. Neb. 1895). See also United States v. Taylor, 33 F. (2d) 608, 612. The authority of the Department was found by the Solicitor to rest principally on the statutes placing supervision of the Indians in the Secretary of the Interior coupled with the long line of appropriation acts, through sixty years, appropriating funds for the pay of Indian judges and Indian police to maintain order on Indian reservations.

The authority of the Indian tribes to control the conduct of members of the tribe through tribal courts and other disciplinary agencies has likewise been demonstrated, particularly in the Solicitor's opinion of October 25, 1934, above referred to (55 I. D. at 56-64), and has been unmistakably upheld in Ex parte Crow Dog, 109 U. S. 556, and United States v. Quiver, supra.

Whether the Indian Court is an administrative Court of Indian Offenses or a tribal court, it appears that each has sufficient authority to include in its jurisdiction the trial and punishment of offenses by Indians which were committed on unrestricted land.

If, on the one hand, Courts of Indian Offenses be considered, as suggested in the Clapox case, to be not regular judicial bodies but "mere educational and disciplinary instrumentalities," the propriety of educational and disciplinary action which such "courts" undertake will depend upon the relationship between the court and the person disciplined. On this view the location of the offense to which the discipline is directed becomes unimportant. An Indian Service hospital treats a diseased Indian regardless of where the disease was acquired. An Indian Service teacher may control the conduct of his pupils and administer discipline on a railroad car traveling through Texas, as well as on restricted Indian land. (See Peck v. A. T. & S. F. Ry. Co., 91 S. W. 323) An Indian will be regarded as married or divorced, a member of a given tribe, an eligible candidate for a certain position or office, regardless of where the acts leading to such a personal status may have taken place. So, if action of a Court of Indian Offenses is regarded as "educational and disciplinary" rather than strictly judicial, such action is not restricted in its horizon to a given territory. The Indian who assaults his fellow-tribesman on fee patented land within the reservation is

subject to disciplinary action by the Court of Indian Offenses in the same measure as if the offense had been committed on restricted Indian land. Perhaps the closest analogy for this "educational and disciplinary" theory of the functions of a Court of Indian Offenses is to be found in the common law of domestic relations. The common law still confers a disciplinary power upon parents with respect to their children. To a certain extent guardians generally may exercise such power over their wards. In none of these cases is the exercise of such authority limited by any consideration of the locality of the misconduct. (See Townsend v. Kendall, 4 Minn. 412, 77 Amer. Dec. 534.)

In United States v. Earl, 17 Fed. 75, it was held that an Indian ward off the reservation nevertheless was in the charge of an Indian agent within the meaning of a statute forbidding the sale of liquor to such Indians. In Peters v. Malin, 111 Fed. 244, the court stated that wherever Indians are maintaining their tribal relations, the control and management of their affairs is in the Federal Government irrespective of the title to the land upon which they might, for the time being, be located. In that case the State law of guardianship was held not to apply to tribal Indians either at an industrial school off the reservation or on a reservation the title to which was in the Governor of Iowa. Moreover, the State criminal law was held not to apply to the removal of a child from a reservation and his detention from a Government school, indicating that these acts outside the reservation were of concern only to the Federal Government because of the personal relationship between the Government and its wards. "The relation of dependency existing between tribal Indians and the national government does not grow out of the ownership of the land either by the Indians or the government." (page 250.)

This principle has been followed in administrative practice since the beginning. The Superintendents and the Courts of Indian Offenses have not in the past refrained from using corrective measures for violations of the regulations because the violations occurred on nontrust land. It may be doubted whether the Indian courts have ever made a practice of inquiring into the title of the land where the violation occurred. Nor have the departmental regulations required such inquiry and restraint. The 1904 law and order regulations of the Indian Office (sections 584-591, Regulations of the Indian Office, 1904) gave the Courts of Indian Offenses original jurisdiction over Indian offenses, including participating in the Sun Dance, contracting a plural marriage, preventing the attendance of children at school, and other misdemeanors committed by Indians "belonging to the reservation", without any limitation as to where the offense might be committed. It was not intended that Indians could dance the Sun Dance and practice polygamy with impunity simply because they did so on nontrust land. Such a distinction

would have defeated the educational purpose of the regulations. On the contrary, the 1904 regulations went so far as to authorize police surveillance of the Indians leaving the reservation and to contemplate their arrest and punishment for infraction of the rules outside the reservation (sections 585-589).

However, whatever may be the disciplinary authority of the Secretary of the Interior over the conduct of Indian wards outside an Indian reservation, the Indian reservation itself has been considered an area peculiarly set apart as a domain within which the Federal Government exercises guardianship over the Indians. This guardianship is extended to all the Indians within the reservation, regardless of their residence or temporary location on unrestricted land. In the early days after the allotment act there was a tendency to withdraw protection from citizen and fee-patented Indians. This tendency was later reversed and Federal guardianship over tribal members has been recognized in spite of citizenship, possession of fee patents or residence on unrestricted land. A recent and far-reaching recognition of administrative supervision over all Indians within the boundaries of the reservation is found in the case of United States v. Dewey County, 14 F. (2d) 784 (D.C., S.D., 1926); Aff'd Dewey County v. United States, 26 F. (2d) 435 (C.C.A. 8th, 1928). The following quotations which uphold the authority of the Department to make rules and regulations governing all the Indians on the reservation, particularly fee patent Indians residing on fee patented lands, are set forth because of their peculiar applicability to the questions involved:

> "In the light of the plain determination of the question of the right, the power, and the duty of Congress to terminate this relation of guardian and ward, the /fee patent/ Indians named in the complaint must be held to be wards of the government, unless there is legislation of Congress plainly indicating the intent and purpose to terminate the relation. Defendant urges consideration of the Act of June 25, 1910 (36 Stat. 855) * * *.
>
> "This, in my judgment, is far short of a congressional declaration that the relationship of guardian and ward shall, by the issuance of the /fee/ patent, cease. It is simply a step recognizing some progress by the Indian as being competent to handle the particular piece of land, and the act grants to him only the power to manage and dispose of the particular land. There is neither language plainly expressing, nor from which it may be reasonably inferred, that there is any intent or purpose that they should be taken out of the tribe of Indians, that their tribal relations should cease, and they

should have no further interest in the tribal lands or in the moneys to be paid for such lands; that they should, from that time forward, not be subject to the agent provided for the band of Indians to which they belong, nor to the rules and regulations promulgated by the Indian Department as to the government of the reservation and all of the Indians thereon, the education of their children, and the policy that the agent is required to work out with and for the members of the tribes. * * *

"In the absence of further delcaration on the part of Congress that the guardianship of the government shall terminate as to these Indians, it seems clear that it must be so held as to those Indians to whom /fee/ patents have been issued, who are found by this record to be members of the Cheyenne band of Sioux Indians; that they all had their allotments; that they all resided on their /fee patent/ allotments or near them within the original limits of the Cheyenne River reservation, and some of them within the diminished portions thereof; that all of said Indians, at all times mentioned in the complaint, appeared on the rolls at the Cheyenne River agency; that they are entitled to participate and partake of tribal funds and of the rents and profits of all tribal lands, together with the fact that the government maintains an agency and agent in charge of said tribe of Indians, including these particular Indians named in the complaint, are still wards of the government; that the government is still the guardian of all of these Indians, with control of their property, except in so far as that control of their property is released by the legislation above referred to, and the Indians are thereby granted the power to manage and control the particular piece of land involved in the fee-simple patent." (Underlining supplied.)

The foregoing authorities make it clear that if Indian courts are viewed as administrative agencies of the Interior Department, their authority is not limited to offenses committed on restricted land.

If, on the other hand, the Indian courts are viewed as tribal courts, deriving their power from the unextinguished fragments of tribal sovereignty, it must be recognized that this sovereignty is primarily a personal rather than a territorial sovereignty. The tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely a jurisdiction over persons. We must therefore beware of reading into the measure of this jurisdiction the common law principle of the territoriality of criminal law. As was said in the case of Ex parte Tiger, 47 S. W. 304, 2 Ind. T. 41,

> "If the Creek Nation derived its system of jurisprudence through the common law, there would be much plausibility in this reasoning. But they are strangers to the common law. They derive their jurisprudence from an entirely different source, and they are as unfamiliar with common-law terms and definitions as they are with Sanskrit or Hebrew."

We must recognize that the general common law doctrine of the territoriality of criminal law has validity in practice only in so far as it is embodied in our criminal statutes. It is not a principle of logic or eternal reason. There are numerous well-recognized exceptions to this doctrine.

There are, in the first place, certain offenses for which citizens of the United States are punishable in United States courts, no matter where the offenses are committed (e.g., 18 U.S.C., Secs. 1, 5). The power of the Federal Government to govern the conduct of our citizens abroad by subjecting them, when they return to this jurisdiction, to trail and punishment for offenses committed abroad, has never been successfully challenged. (See The Appollon, 9 Wheat. 362, at 370.) If this power has been exercised, in fact, only in exceptional cases, that is because as a matter of policy it is generally believed that the power to punish for extra-territorial offenses should be invoked only under special circumstances.

A second departure from the general rule of territoriality is presented by the jurisdiction vested in Congress over Indian affairs. It is well settled that this Congressional jurisdiction does not apply simply to the "Indian country" but applies to offenses no matter where committed:

> "The question is not one of power in the national government, for, as has been shown, congress may provide for the punishment of this crime wherever committed in the United States. Its jurisdiction is co-extensive with the subject-matter, -- the intercourse between the white man and the tribal Indian, -- and is not limited to place or other circumstances." (United States v. Barnhart, 22 Fed. 288.)

Again, it is a matter of policy, and not of law, to say how far Congress should extend its laws over Indians "off the reservation." The Indian liquor laws are the outstanding instance of a jurisdiction not limited to offenses committed within the reservation. (25 U. S. C. Sec. 241.)

A third recognized departure from the territorial principle is found in the application of Federal laws to our citizens in certain

Eastern countries. Americans committing offenses in uncivilized countries, for instance, are triable before United States consuls (22 U. S. Code, Sec. 180), and Americans committing offenses in China are triable in the United States Court for China (Biddle v. United States, 156 Fed. 759) over which the Circuit Court of Appeals for the Ninth Circuit exercises appellate jurisdiction (22 U. S. Code, Secs. 191-202).

A fourth important limitation upon the doctrine of territoriality is the rule that in civil cases a court which has jurisdiction over the parties may consider all the elements of the case regardless of geographical considerations.

If, then, an Indian court is to be considered a judicial organ of Indian tribal sovereignty, we must recognize that this sovereignty is not a strictly territorial sovereignty, but primarily a personal sovereignty. We may therefore approach the problem of defining the scope of this sovereignty without begging the question by assuming in advance that the sovereignty is limited to any particular kind of land. The recognized exceptions to the usual rule of territoriality are closer to the situation here presented than the rule itself.

In defining the powers of an Indian tribe we look to Federal laws and treaties not for the basis of sovereignty but for the limitations on tribal powers. United States v. Quiver, 241 U. S. 602; Talton v. Mayes, 163 U. S. 376; Ex parte Crow Dog, 109 U. S. 556; Patterson v. Council of Seneca Nation, 245 N. Y. 433, 157 N. E. 734.

As was said in the opinion of this Department on Powers of Indian Tribes, 55 I. D. 14, at page 19:

> "Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the statutory category, 'powers vested in any Indian tribe or tribal council by existing law.'"

In the absence of Federal law to the contrary, it is for the tribe to decide as a matter of its own public policy whether members of the tribe who may properly appear before the judicial agency of the tribe, shall be triable and punishable for acts committed on unrestricted land. The answer given to this question in the Law and Order Regulations approved by the Secretary of the Interior November 27, 1935, and approved by numerous tribal councils before and after that date, is unmistakable. Section 1 of Chapter 1 reads:

> "A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in Chapter 5, when committed by an Indian, within the reservation or reservations for which the Court is established.
>
> "With respect to any of the offenses enumerated in Chapter 5 over which Federal or State courts may have lawful jurisdiction, the jurisdiction of the Court of Indian Offenses shall be concurrent and not exclusive. It shall be the duty of the said Court of Indian Offenses to order delivery to the proper authorities of the State or Federal Government or of any other tribe or reservation, for prosecution, any offender, there to be dealt with according to law or regulations authorized by law, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender.
>
> "For the purpose of the enforcement of these regulations, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction, and a 'reservation' shall be taken to include all territory within reservation boundaries, including fee patented lands, roads, waters, bridges, and lands used for agency purposes."

The question remains, then, whether this statement of authority is in conflict with any Federal law.

That the original sovereignty of an Indian tribe extended to the punishment of a member by the proper tribal officers for depredations or other forms of misconduct committed outside the territory of the tribe cannot be challenged. Certainly we cannot read into the laws and customs of the Indian tribes a principle of territori-

ality of jurisdiction with which they were totally unfamiliar, and which no country has adopted as an absolute rule. That Indian tribes friendly to the United States acted to punish their members for depredations committed against whites outside of the Indian country is a matter of historical record. Will any one claim that such punishment was unconstitutional? The fact is that the United States, over a long period, encouraged the Indian tribes to help in controlling the conduct of their members outside of the Indian country, and in order to encourage such control made the tribe responsible for such individual offenses.

The analysis of Federal laws applicable to the situation under consideration indicates that the right of Indian tribal authorities to punish errant members of the tribe for offenses, no matter where committed, has not only never been denied but has been positively recognized. The act of June 30, 1834 (4 Stat. 731), which is still in many respects the basis of Indian administration, placed upon the Indian "nation or tribe" the responsibility of securing redress for depredations committed by individual members of the nation or tribe outside of, as well as within, the Indian country. The section in question, as amended by the act of February 28, 1859 (11 Stat. 401), appears today as section 229 of title 25 of the United States Code, reading as follows:

> "Sec. 229. Injuries to property by Indians. If any Indian, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which such Indian shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time not exceeding twelve months, such superintendent, agent, or subagent shall make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury. (R. S. Sec. 2156)."

This provision placing responsibility upon the tribal authorities for the wrongs of individual Indians committed outside of the reservation clearly contemplates that the tribal authorities will deal in proper fashion with such individual Indians. While the occasion that gave rise to this legislation may have disappeared, the judicial basis of tribal action which the legislation assumed has never been challenged.

Provisions similar to that above quoted are found in many treaties with Indian tribes. (See for instance Treaty with the Kiowas, etc., May 26, 1837 (7 Stat. 533), Secs. 3, 5; Treaty with the Comanches, etc., July 27, 1853 (10 Stat. 1013), Art. 5; Treaty with the Rogue River Indians, September 10, 1853 (10 Stat. 1018), Art. 6; Treaty with the Blackfeet, October 17, 1855 (11 Stat. 657), Art. 11.)

Federal laws affecting the personal status of Indians have no direct bearing upon our present problem. The General Allotment Law of February 8, 1887 (24 Stat. 390), as amended by the act of May 8, 1906 (34 Stat. 182), provides:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside * * *" (25 U. S. C. Sec. 349)

Because of this provision fee patent allottees have been held to be subject to the laws of the State wherever they may be within the reservation. Eugene Sol Louie v. United States, 274 Fed. 47 (C.C.A. 9th, 1921); State v. Monroe, 83 Mont. 556, 274 Pac. 840 (1929). However, this fact does not mean that so long as the fee patent Indians live within the outer boundaries of the reservation and maintain tribal relations they are not also subject to the rules and regulations of the Department and to the tribal ordinances governing tribal members. That they are so subject is stated in the recent case of United States v. Dewey County, from which extensive quotation to this effect is given above.

Moreover, the allotment act certainly did not make a fee patented allotment a place of sanctuary on which even an unallotted member of the tribe may commit offenses without the risk of future punishment by his tribe. Fee patented lands are undoubtedly subject to State

jurisdiction, but in the words of the Supreme Court, there is "no denial of the personal jurisdiction of the United States" (United States v. Celestine, 215 U. S. 278, 291), and neither is there any denial of the personal jurisdiction of the tribe. It is for the Federal Government itself to decide whether it shall retain jurisdiction over certain offenses by Indians, e.g., liquor offenses on fee patented land, and relinquish to the State jurisdiction over certain other offenses. Likewise, it is for the Indian tribe itself, subject only to limitation by Congress, to decide whether it shall retain jurisdiction over certain offenses committed by members of the tribe on such land.

The fact that Federal courts have refrained from taking jurisdiction of Indian offenses on fee patented lands does not negative the jurisdiction of the Indian courts. Since the fallacy of identifying the jurisdiction of the one with the other is a ready one, an analysis of the fundamental distinctions between them is desirable.

The Federal District Courts have been authorized by Congress to exercise jurisdiction over specific crimes committed by Indians or white people against Indians in the "Indian country" and in "Indian reservations." The Federal courts have no jurisdiction other than that granted by Federal statute. On the other hand, the Indian tribes retain all their original jurisdiction over their members except as may be limited by Federal statutes. Likewise, the authority of the Department to exercise administrative supervision over Indians is not based upon a statutory specification of crimes and criminal jurisdiction but, as previously indicated, upon a statutory duty of guardianship and Congressional authorization to maintain order on Indian reservations. See United States v. Quiver, 241 U. S. 602, at 605.

The Federal court exercises an absolute and exclusive jurisdiction over Indians when their crimes fall within the circumstances covered by the statutes. There is no statutory authority for concurrent jurisdiction of State and Federal courts when an Indian or Indian land becomes subject to State jurisdiction. If the Federal courts have jurisdiction, the State courts do not, and vice versa. However, there is no prohibition on a determination by the Interior Department to exercise corrective measures over Indians within the reservation when the State has jurisdiction but refuses to handle the case or upon a similar determination by the tribe that members uncorrected by State action shall be subject to correction by the tribal court.

Furthermore, the Federal courts are exercising judicial power as courts established by Congress pursuant to the United States Constitution, whereas the Department through the Court of Indian Offenses is not exercising judicial power but administrative guardianship powers and the tribe is exercising tribal powers over the persons of its members. The establishment of an Indian court and the extent of its jurisdiction is, therefore, in both cases an administrative policy question. No court is established where there is little restricted land. Courts are established, however, where there is much restricted land within a reservation. The Federal courts are obligated to take jurisdiction of crimes coming within the Federal statutes upon restricted lands regardless of administrative need. It would not be argued that there is any obligation on the part of the Department to provide corrective measures on such restricted lands if it is not advisable or necessary. In other words, it has often been recognized that the jurisdiction of the Federal courts and of the Indian courts does not coincide, since they derive their authority from different powers and function for different purposes.

I have reviewed the Federal laws which might be viewed as restricting or limiting the power of an Indian court to try and to punish an Indian for an offense committed on unrestricted land within a reservation. I find no Federal law imposing any such limitation.

Is there any provision of the Federal Constitution that precludes such exercise of jurisdiction? Would such an exercise of authority, in an area where the State may exercise a concurrent jurisdiction, constitute "double jeopardy" and violate the Fifth Amendment to the Federal Constitution?

Even if it could be maintained, in the face of the decision in Talton v. Mayes, 163 U. S. 376, that constitutional limitations under the "due process" clause are applicable to an Indian court, there is no force in the argument that the exercise of jurisdiction by such a court in these cases would subject the offender to "double jeopardy." The fact that an offense committed outside of restricted Indian lands may be subject to punishment in State courts does not

make it unconstitutional for the court of another sovereignty to punish the same person for the same act. The decided cases clearly establish the principle that an individual who in a single act offends against the laws of several jurisdictions may be constitutionally punished by the agencies of each jurisdiction.

In the cases of Moore v. Illinois, 14 How. 13, the Supreme Court, per Justice Grier, declared:

> " * * * Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of Fox v. The State of Ohio, (5 How. 432) that a State may punish the offense of uttering or passing false coin, as a cheat or fraud practised on its citizens; and, in the case of the United States v. Marigold, (9 How. 560) that Congress, in the proper exercise of its authority, may punish the same act as an offense against the United States." (at page 20)

Again in the case of United States v. Lanza, 260 U. S. 377, the Supreme Court, per Taft, C. J., declared:

> "The defendants insist that two punishments for the same act, one under the National Prohibition Act and the other under a state law, constitute double jeopardy under

the Fifth Amendment; and in support of this position it is argued that both laws derive their force from the same authority, -- the second section of the Amendment, -- and therefore that in principle it is as if both punishments were in prosecutions by the United States in its courts." (at pages 379 to 380)

"We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." (at page 382)

In view of these decisions of the United States Supreme Court it is clear that the fact that an act is punishable in State courts is no bar to punishment in an Indian court. There remains, of course, a question of public policy to be considered in asserting jurisdiction over acts which are subject to another jurisdiction. This question is met by a specific provision in the Law and Order Regulations above set forth, under which cases in which Indian tribal jurisdiction is concurrent with State jurisdiction are to be turned over to State authorities, if such authorities are willing to exercise jurisdiction. This is undoubtedly a reasonable provision in view of the fact that the State may be, in many cases, unwilling to exercise even an admitted jurisdiction over Indians with respect to acts committed on unrestricted Indian lands within a reservation.

It should further be noted that the Law and Order Regulations do not purport to cover offenses committed outside of Indian reservations. There is therefore no immediate occasion to consider the legal and administrative problems that would be raised by any such exercise of jurisdiction. It is enough for our present purposes to note that the exercise of jurisdiction by an Indian court, under the departmental law and order or tribal codes, does not diminish the jurisdiction of State courts, does not subject the offender to "double jeopardy", and is not prohibited by any known Federal statute.

There remains the final question whether the action of an Indian court in trying and punishing an Indian for an offense committed within the jurisdiction of the State courts may violate

any State law. While it is impossible to decide an issue of this sort in the abstract with entire certainty, it is enough to say that I know of no State legislation which would interfere with such exercise of jurisdiction by an Indian court, and since the matter is one that concerns the relations between an Indian and his tribe it would appear to be a matter on which State legislation would be ineffective. Worcester v. State of Georgia, 6 Pet. 514; United States v. Quiver, 241 U. S. 602; United States v. Hamilton, 233 Fed. 685; In re Blackbird, 109 Fed. 139; In re Lincoln, 129 Fed. 247; and see Opinion M. 28568, approved December 11, 1936, on the right of State game wardens to make searches on an Indian reservation.

In view of the foregoing authorities, I am of the opinion that an Indian court which orders the trial and punishment of an Indian before the court, on the basis of acts committed on unrestricted lands within an Indian reservation, does not offend against any State or Federal law. The first question proposed is therefore to be answered in the affirmative.

II.

Jurisdiction over Acts Committed Outside of Indian Reservation

In view of the fact that the existing Law and Order Regulations and tribal codes restrict the jurisdiction of Indian courts to acts committed within an Indian reservation, and in view of the fact that no amendments to extend such jurisdiction over lands outside of Indian reservations are before the Department, the question of the legality of such jurisdiction need not be answered at this time.

III.

Arrests on Unrestricted Lands

The legality of an arrest made by an Indian police officer on unrestricted lands within an Indian reservation will ordinarily be tested by an action for false imprisonment brought in the courts of the State. It will help us to avoid some of the confusions that have grown up around the term "jurisdiction" if we fix our attention upon the concrete question of the liability of an Indian police officer for an arrest of an Indian who is subject to the jurisdiction of an Indian court, where such an arrest takes place on unrestricted land within the boundaries of the reservation.

The question may then first be considered as one of State law.

There is no dispute as to the general rule that when the peace officer of one sovereignty is outside the territory of that sovereignty, he is only a private citizen and can make arrests only as a private citizen and only for violation of the laws obtaining in that territory. Any other arrest or detention by such an officer will amount to false imprisonment. To this general principle, however, there are many exceptions established by statute or by common law.

There are, in the first place, certain personal relationships which justify arrest or detention without regard to locality. The most notable example of such a relationship is that under which military and naval authorities are empowered to arrest, detain or discipline soldiers and sailors wherever they may be. Likewise, the commander of a ship may exercise similar powers over the crew, and in case of extreme necessity, over passengers as well. A similar rule has been applied to railroad conductors in relation to passengers. (See Peck v. A. T. & S. F. Railway Company, 91 S. W. 323.) Similarly, a parent may exercise custody over a child, school authorities may detain pupils, custodians of institutions may impose confinement upon those committed to their care, and generally speaking, a guardian may assert custody over his ward, without thereby becoming liable in damages or punishable in the criminal courts. In all these cases the custody is justified by the relationship between the parties, which is not limited to a particular locality. Thus, in the case of Townsend v. Kendall, 4 Minn. 412, 77 Am. Dec. 534, it was held that a guardian appointed in Ohio who followed his ward into Minnesota and there took custody of the ward was not liable in an action for false imprisonment. The court declared:

> "The power once conferred follows the person of the ward. It would lead to great inconvenience if it should be held that a guardian could not exercise his authority or be recognized outside of the State or locality of his appointment. Such a ruling would embarrass the guardian in investing the funds of his ward in securities of other States, and render it necessary that he should be reappointed in every State or country through which he should pass with his ward in traveling, if an emergency should arise in which it became necessary to assert his authority. * * * we think the better rule is, upon principle and authority, to recognize the foreign appointment of a guardian as creating that relation between the parties in this State, subject, of course, to the laws of this State, as to any exercise of power by virtue of such relation either as to the person or property of the ward."

A second exception to the general rule that arrest or detention must be justified by the law of the locality has been established by statute in borderline cases where a strict application of the rule of territoriality would interfere with practical law enforcement. Thus, in the case of Helm v. Commonwealth, 81 S. W. 270, 271 (Ky.), the court declared:

> "The rule is admitted that ordinarily an officer's authority is limited to the district which elected him, but this is a matter within the legislative control, and his authority may by the Legislature be made coextensive with his county, although he is elected by one of its subdivisions."

See to the same effect State v. Seery, 95 Iowa 652, 64 N. W. 631.

These examples are cited simply to show that the question of whether agents of another jurisdiction may make arrests within the jurisdiction of a given State is something which that State can decide for itself. There is no constitutional obstacle to prevent a State from allowing the agents of another sovereignty to detain or arrest persons who have a peculiar relationship to that sovereignty.

If the question is thus considered one of local law within the State in which the reservation is situated, no categoric answer to the question that is put to me can be made for all States. It may be helpful, however, to suggest certain general considerations upon the basis of which the detention or arrest of an Indian by an Indian police officer on land which is not restricted may be justified where the laws of the State are silent or ambiguous on the point.

In the first place, it should be recognized that the general rule that a police officer has authority only within the territory of the sovereignty that he serves is not completely applicable to a police officer of an Indian reservation, for the reason that his authority is primarily a personal rather than a territorial authority. This personal relationship does not depend for its existence upon the tenure of the land upon which the arrest is made. Peters v. Malin, supra.

In the second place, it should be pointed out that in an action for false imprisonment the existence of a personal relationship justifying custody is a defense. The authorities which set forth the bases of such a relationship cover, in principle, the "ward Indian" in his relationship to his tribe and to the United States. On this point, the decision in Townsend v. Kendall cited above, is extremely persuasive.

In the third place, we recognize that the inconveniences which

have led courts and legislatures to recognize exceptions to the rule of territoriality exist in a significant degree on a checkerboarded Indian reservation. If the power to make an arrest were controlled by questions of land tenure, we should have what has been called "government in spots." In the case of State v. Lott, 21 Idaho 646, the court declared:

> "If, on the other hand, the State has jurisdiction everywhere except on an Indian allotment, it would be 'government in spots' only, and the civil and police officers of the State would have to go armed with the latest revised maps and plats from the General Land Office in order to know where and when they could exercise the authority of the State in bringing offenders against its laws to justice."

In view of the serious inconvenience that would be created by any such limitation upon the power to make arrests on a checkerboarded reservation, it should require an unmistakable statute or a clear judicial decision to justify the position that an Indian police officer has no authority over a "ward Indian" on unrestricted land within the reservation.

Aside from the fact that under State law an Indian policeman may be privileged to arrest a tribal member on unrestricted land within the reservation for violation of departmental regulations and tribal ordinances, such an arrest may be said to be positively sanctioned by Federal law.

Since the Indian Department Appropriation Act of May 27, 1878 (20 Stat. 63, 86), Congress has annually appropriated funds for the pay of Indian police to be employed in "maintaining order." For more than twenty years, in the period approximately from 1890 to 1910, the purpose of the employment of the police was described as follows: "to be employed in maintaining order and prohibiting illegal traffic in liquor on the several Indian reservations and within the Territory of Alaska, in the discretion of the Secretary of the Interior." For approximately the next twenty years their function was described simply as "maintaining order" with no specification of locality. The appropriation act of May 9, 1938 (Public No. 497, 75th Congress, 3d session) appropriates a fund for "maintaining law and order on Indian reservations" including the pay of judges of Indian courts and Indian police.

These acts place an obligation upon the Interior Department to provide for the maintenance of order among the Indians, at least within the reservations, if not without, and leave to administrative discretion

the direction of the Indian police and the determination of the means necessary to accomplish the end. If it is necessary to the maintenance of order within an Indian reservation for the Indian police to arrest an Indian anywhere within the reservation for violation of the departmental regulations or tribal laws, authority for the action of the Indian police is found in these acts. In this connection it must be remembered that these acts have been passed annually for sixty years in the light of continued administrative practice and must be said to recognize and accept that practice. The past administrative practice has been to enforce the departmental regulations against the Indians everywhere within the reservations, whether by arrest or by the reduction of rations, as in the early days, or by other appropriate means. This practice was implicit in the 1904 Law and Order Regulations and was made more explicit in section 1 of chapter 1 of the 1935 Law and Order Regulations which provided that "For the purpose of the enforcement of these regulations, * * * a 'reservation' shall be taken to include all territory within reservation boundaries * * *."

It has already been noted in considering question 1 above that the entire Indian reservation has been viewed as an administrative unit, for purposes of enforcing the Law and Order Regulations of the Department or the ordinances of the Indian tribe. This principle, we have noted, was recently expressed in the case of United States v. Dewey County, which described fee patent Indians on fee patent lands as subject to the rules and regulations of the Department for "the government of the reservation". The same considerations which lead to the view that such Indians are subject to regulations for the "government of the reservation" lead to the parallel conclusion that such Indians are subject to arrest where arrest is authorized under statutes providing for "maintaining law and order on Indian reservations". If Indians generally are subject to administrative control anywhere within the reservation, regardless of the status of the land on which they are found, it is reasonable to conclude that they are also subject to arrest anywhere within the reservation, as a necessary means to the exercise of that control.

In view of the foregoing analysis, I am of the opinion that there is no legal reason to repeal or modify the existing Law and Order Regulations so far as they deal with the matter of arrests by Indian police officers. Specific questions that may arise in various jurisdictions on the basis of the statutes or common law of the various States will be dealt with as they arise, in the light of the foregoing general considerations and such special circumstances as may be involved in the particular case.

IV.

Arrests Outside of a Reservation

The Interior Department Appropriation Act of May 9, 1938, is similar to a large number of previous appropriation acts, as indicated in connection with the third question, in providing for Indian police to maintain order "on Indian reservations." Such acts restrict the operations of the Indian police to the boundaries of the reservations. One such appropriation act was so construed by the Attorney General in his opinion of August 28, 1886 (18 Ops. Atty. Gen. 440), in which he informed the Interior Department that the Indian police had no ex officio jurisdiction beyond the reservation boundaries in view of the provisions of the appropriation act. Under existing laws and regulations, therefore, the fourth question proposed must be answered in the negative.

(Sgd) Frederic L. Kirgis,

Acting Solicitor.

Approved: May 2, 1939.

(Sgd) Oscar L. Chapman,

Assistant Secretary.

LAW AND ORDER--DUAL SOVEREIGNTY--POWERS OF INDIAN TRIBES AND U.S.

April 27, 1939.

Memorandum for the Commissioner of Indian Affairs:

The following questions have been put to me in connection with the law enforcement activities of Indian courts, including both the Courts of Indian Offenses under the Departmental regulations and the tribal courts under tribal codes, and of Indian police officers:

(1) May an Indian Court exercise jurisdiction over acts committed by Indians on unrestricted lands within an Indian reservation, where the Indians concerned are properly before the court?

(2) May an Indian court exercise jurisdiction over acts committed by Indians on lands outside of an Indian reservation, where the Indians concerned are properly before the court?

(3) May an Indian police officer make arrests on unrestricted lands within an Indian reservation?

(4) May an Indian police officer make arrests outside of an Indian reservation?

I.

Jurisdiction over Acts Committed on Unrestricted Lands

Questions of court "jurisdiction" frequently turn out upon analysis to be a confused mixture of questions dealing with international law, constitutional law, statutory construction and common law principles. It is important, therefore, that we define the question that concerns us as clearly and realistically as possible. In asking whether an Indian court has "jurisdiction" over acts committed in certain areas we are concerned to ascertain whether such a court commits a wrongful act, that is to say, an act which is punishable, actionable, or enjoinable in a State or Federal court, if it orders the trial and punishment of an Indian who is before the court, on the basis of an act which that Indian has performed in the area designated.

A question of jurisdiction arises when an Indian who is before an Indian court claims that the judges of such court are acting without proper authority and that such action, therefore, constitutes assault, false imprisonment, trespass, or some similar offense under State or Federal law. It is, therefore, necessary in passing upon such a jurisdictional question to inquire into the basis of authority upon which an Indian court acts. This is a subject which has been dealt with elsewhere at some length. The view point of this Department, as expressed in an opinion on "Powers of Indian

Tribes", approved October 25, 1934 (55 I.D. 14), is to the following effect:

> "The attempts of the Interior Department to administer a rough-and-ready sort of justice through Courts of Indian Offenses, or directly through superintendents, cannot be held to have impaired tribal authority in the field of law and order. These agencies have been characterized, in the only reported case squarely upholding their legality, as 'mere educational and disciplinary instrumentalities by which the Government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian.' (*United States* v. *Clapox*, 35 Fed. 575; and *cf. Ex parte Bi-a-lil-le*, 12 Ariz. 150, 100 Pac. 450; *United States* v. *Van Wert*, 195 Fed. 974.) Perhaps a more satisfactory defense of their legality is the doctrine put forward by a recent writer that the Courts of Indian Offenses 'derive their authority from the tribe, rather than from Washington.' (W. G. Rice, Jr., "The Position of the American Indian in the Law of the United States," 16 Jour. Comp. Leg. (3d Ser.), Part 1, pp. 78, 93 (1934).
>
> "Whichever of these explanations be offered for the existence of the Courts of Indian Offenses, their establishment cannot be held to have destroyed or limited the powers vested by existing law in the Indian tribes over the province of law and order and the administration of civil and criminal justice." (at page 64)

Recognition by the Supreme Court of the dual role of the tribe and of the Interior Department in providing disciplinary action over Indians not provided for by Federal criminal statutes is contained in the holding in *United Stales* v. *Quiver*, 241 U.S. 602, and the following quotation therefrom (page 605):

> "We have now referred to all the statutes. There is none dealing with bigamy, polygamy, incest, adultery or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws and to such preventive and corrective measures as reasonably could be taken by the administrative officers."

The authority of the Interior Department to establish Courts of Indians Offenses as an administrative means of educating and civilizing the Indians was analyzed with some thoroughness and upheld in the Solicitor's memorandum of February 28, 1935. This memorandum pointed out the number of cases in which the authority for promulgating law and order regulations by the Department is taken for granted by the courts. *Bad Elk* v. *United States*, 177 U.S. 529; *United States v. Mullen*, 71 Fed. 682 (D.C. Neb. 1895). See also *United States* v. *Taylor*, 33 F. (2d) 608, 612. The authority of the Department was found by the Solicitor to rest principally on the statutes placing supervision of the Indians in the Secretary of the Interior coupled with the long line of appropriation acts, through sixty years, appropriating funds for the pay of Indian judges and Indian police to maintain order on Indian reservations.

The authority of the Indian tribes to control the conduct of members of the tribe through tribal courts and other disciplinary agencies has likewise been demonstrated, particularly in the Solicitor's opinion of October 25, 1934, above referred to (55 I.D. at 56-64). and has been unmistakably upheld in *Ex parte Crow Dog*, 109 U.S. 556, and *United States* v. *Quiver*, *supra*.

Whether the Indian Court is an administrative Court of Indian Offenses or a tribal court, it appears that each has sufficient authority to include in its jurisdiction the trial and punishment of offenses by Indians which were committed on unrestricted land.

If, on the one hand, Courts of Indian Offenses be considered, as suggested in the *Clapox* case, to be not regular judicial bodies but "mere educational and disciplinary instrumentalities," the propriety of educational and disciplinary action which such "courts" undertake will depend upon the relationship between the court and the person disciplined. On this view the location of the offense to which the discipline is directed becomes unimportant. An Indian Service hospital treats a diseased Indian regardless of where the disease was acquired. An Indian Service teacher may control the conduct of his pupils and administer discipline on a railroad car traveling through Texas, as well as on restricted Indian land. (See *Peck v. A. T. & S. F. Ry. Co.*, 91 S.W. 323.) An Indian will be regarded as married or divorced, a member of a given tribe, an eligible candidate for a certain position or office, regardless of where the acts leading to such a personal status may have taken place. So, if action of a Court of Indian Offenses is regarded as "educational and disciplinary" rather than strictly judicial, such action is not restricted in its horizon to a given territory. The Indian who assaults his fellow tribesman on fee patented land within the reservation is subject to disciplinary action by the Court of Indian Offenses in the same measure as if the offense had been committed on restricted Indian land. Perhaps the closest analogy for this "educational and disciplinary" theory of the functions of a Court of Indian Offenses is to be found in the common law of domestic relations. The common law still confers a disciplinary power upon parents with respect to their children. To a certain extent guardians generally may exercise such power over their wards. In none of these cases is the exercise of such authority limited by any consideration of the locality of the misconduct. (See *Townsend* v. *Kendall*, 4 Minn. 412, 77 Amer. Dec. 534.)

In *United States* v. *Earl*, 17 Fed. 75, it was held that an Indian ward off the reservation nevertheless was in the charge of an Indian agent within the meaning of a statute forbidding the sale of liquor to such Indians. In *Peters* v. *Malin*, 111 Fed. 244, the court stated that wherever Indians are maintaining their tribal relations, the control and management of their affairs is in the Federal Government irrespective of the title to the land upon which they might, for the time being, be located. In that case the State law of guardianship was held not to apply to tribal Indians either at an industrial school off the reservation or on a reservation the title to which was in the Governor of Iowa. Moreover, the State criminal law was held not to apply to the removal of a child from a reservation and his detention from a Government school, indicating that these acts outside the reservation were of concern only to the Federal Government because of the personal relationship between the Government and its wards. "The relation of dependency existing between tribal Indians and the national government does not grow out of the ownership of the land either by the Indians or the government." (page 250.)

This principle has been followed in administrative practice since the beginning. The Superintendents and the Courts of Indian Offenses have not in the past refrained from using corrective measures for violations of the regulations because the violations occurred on nontrust

land. It may be doubted whether the Indian courts have ever made a practice of inquiries into the title of the land where the violation occurred. Nor have the departmental regulations required such inquiry and restraint. The 1904 law and order regulations of the Indian Office (sections 584-591, Regulations of the Indian Office, 1904) gave the Courts of Indian Offenses original jurisdiction over Indian offenses, including participating in the Sun Dance, contracting a plural marriage, preventing the attendance of children at school, and other misdemeanors committed by Indians "belonging to the reservation", without any limitation as to where the offense might be committed. It was not intended that Indians could dance the Sun Dance and practice polygamy with impunity simply because they did so on nontrust land. Such a distinction would have defeated the educational purpose of the regulations. On the contrary, the 1904 regulations went so far as to authorize police surveillance of the Indians leaving the reservation and to contemplate their arrest and punishment for infraction of the rules outside the reservation (sections 585-589).

However, whatever may be the disciplinary authority of the Secretary of the Interior over the conduct of Indian wards outside an Indian reservation, the Indian reservation itself has been considered an area peculiarly set apart as a domain within which the Federal Government exercises guardianship over the Indians. This guardianship is extended to ail the Indians within the reservation, regardless of their residence or temporary location on unrestricted land. In the early days after the allotment act there was a tendency to withdraw protection from citizen and fee-patented Indians. This tendency was later reversed and Federal guardianship over tribal members has been recognized in spite of citizenship, possession of fee patents or residence on unrestricted land. A recent and far-reaching recognition of administrative supervision over ail Indians within the boundaries of the reservation is found in the case of *United*

States v. *Dewey County*, 14 F. (2d) 784 (D.C., S.D. 1926); Aff'd *Dewey County* v. *United States*, 26 F. (2d) 435 (C.C.A. 8th, 1928). The following quotations which uphold the authority of the Department to make rules and regulations governing all the Indians on the reservation, particularly fee patent Indians residing on fee patented lands, are set forth because of their peculiar applicability to the question involved:

> "In the light of the plain determination of the question of the right, the power, and the duty of Congress to terminate this relation of guardian and ward, the [fee patent] Indians named in the complaint must be held to be wards of the government, unless there is legislation of Congress plainly indicating the intent and purpose to terminate the relation. Defendant urges consideration of the Act of June 25, 1910 (36 Stat. 855) * * *.
>
> "This, in my judgment, is far short of a congressional declaration that the relationship of guardian and ward shall, by the issuance of the [fee] patent, cease. It is simply a step recognizing some progress by the Indian as being competent to handle the particular piece of land, and the act grants to him only the power to manage and dispose of the particular land. There is neither language plainly expressing, nor from which it may be reasonably inferred, that there is any intent or purpose that they should be taken out of the tribe of

> Indians, that their tribal relations should cease, and they should have no further interest in the tribal lands or in the moneys to be paid for such lands; *that they should, from that time forward, not be subject to the agent provided for the band of Indians to which they belong, nor to the rules and regulations promulgated by the Indian Department as to the government of the reservation and all of the Indians thereon,* the education of their children, and the policy that the agent is required to work out with and for the members of the tribes. * * *
>
> "In the absence of further declaration on the part of Congress that the guardianship of the government shall terminate as to these Indians, it seems clear that it must be so held as to those Indians to whom [fee] patents have been issued, who are found by this record to be members of the Cheyenne band of Sioux Indians; that they all had their allotments; that they all resided on their [fee patent] allotments or near them *within the original limits of the Cheyenne River reservation, and some of them within the diminished portions thereof;* that all of said Indians, at all times mentioned in the complaint, appeared on the rolls at the Cheyenne River agency; that they are entitled to participate and partake of tribal funds and of the rents and profits of all tribal lands, together with the fact that the government maintains an agency and *agent in charge of said tribe of Indians, including these particular Indians named in the complaint,* are still wards of the government; that the government is still the guardian of all of these Indians, with control of their property, except in so far as that control of their property is released by the legislation above referred to, and the Indians are thereby granted the power to manage and control the particular piece of land involved in the fee-simple patent." (Italics supplied.)

The foregoing authorities make it clear that if Indian courts are viewed as administrative agencies of the Interior Department, their authority is not limited to offenses committed on restricted land.

If, on the other hand, the Indian courts are viewed as tribal courts, deriving their power from the unextinguished fragments of tribal sovereignty, it must be recognized that this sovereignty is primarily a personal rather than a territorial sovereignty. The tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely a jurisdiction over persons. We must therefore be aware of reading into the measure of this jurisdiction the common law principle of the territoriality of criminal law. As was said in the case of *Ex parte Tiger*, 47 S.W. 304, 2 Ind. 41,

> "If the Creek Nation derived its system of jurisprudence through the common law, there would be much plausibility in this reasoning. But they are strangers to the common law. They derive their jurisprudence from an entirely different source, and they are as unfamiliar with common-law terms and definitions as they are with Sanskrit or Hebrew."

We must recognize that the general common law doctrine of the territoriality of criminal law has validity in practice only in so far as it is embodied in our criminal statutes. It is not a principle of logic or eternal reason. There are numerous well recognized exceptions to this doctrine.

There are, in the first place, certain offenses for which citizens of the United States are punishable in United States courts, no matter where the offenses are committed (e.g., 18 U.S.C., Secs. 1, 5).

The power of the Federal Government to govern the conduct of our citizens abroad by subjecting them, when they return to this jurisdiction, to trial and punishment for offenses committed abroad, has never been successfully challenged. (See *The Appollon*, 9 Wheat, 362, at 370.) If this power has been exercised, in fact, only in exceptional cases, that is because *as a matter of policy* it is generally believed that the power to punish for extra-territorial offenses should be invoked only under special circumstances.

A second departure from the general rule of territoriality is presented by the jurisdiction vested in Congress over Indian affairs. It is well settled that this Congressional jurisdiction does not apply simply to the "Indian country" but applies to offenses no matter where committed:

> "The question is not one of power in the national government, for, as has been shown, Congress may provide for the punishment of this crime wherever committed in the United States. Its jurisdiction is co-extensive with the subject-matter,-the intercourse between the white man and the tribal Indian,-and is not limited to place or other circumstances." (*United States* v. *Barnhart*, 22 Fed. 288.)

Again, it is a matter of policy, and not of law, to say how far Congress should extend its laws over Indians "off the reservation." The Indian liquor laws are the outstanding instance of a jurisdiction not limited to offenses committed within the reservation. (25 U.S.C. Sec. 241.)

A third recognized departure from the territorial principle is found in the application of Federal laws to our citizens in certain Eastern countries. Americans committing offenses in uncivilized countries, for instance, are triable before United States consuls (22 U.S. Code, Sec. 180), and Americans committing offenses in China are triable in the United States Court for China (*Biddle* v. *United States*, 156 Fed. 759) over which the Circuit Court of Appeals for the Ninth Circuit exercises appellate jurisdiction (22 U.S. Code, Secs. 191-202).

A fourth important limitation upon the doctrine of territoriality is the rule that in civil cases a court which has jurisdiction over the parties may consider all the elements of the case regardless of geographical considerations.

If, then, an Indian court is to be considered a judicial organ of Indian tribal sovereignty, we must recognize that this sovereignty is not a strictly territorial sovereignty, but primarily a personal sovereignty. We may therefore approach the problem of defining the scope of this sovereignty without begging the question by assuming in advance that the sovereignty is limited to any particular kind of land. The recognized exceptions to the usual rule of territoriality are closer to the situation here presented than the rule itself.

In defining the powers of an Indian tribe we look to Federal laws and treaties not for the basis of sovereignty but for the limitations on tribal powers. *United States* v. *Quiver*, 241 U.S. 602; *Talton* v. *Mayes*, 163 U.S. 376; *Ex parte Crow Dog*, 109 U.S. 556; *Patterson* v. *Council of Seneca Nation*, 245 N.Y. 433, 157 N.E. 734.

As was said in the opinion of this Department on Powers of Indian Tribes, 55 I.D. 14, at page 19:

> "Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the statutory category, 'powers vested in any Indian tribe or tribal council by existing law.' "

In the absence of Federal law to the contrary, it is for the tribe to decide as a matter of its own public policy whether members of the tribe who may properly appear before the judicial agency of the tribe, shall be triable and punishable for acts committed on unrestricted land. The answer given to this question in the Law and Order Regulations approved by the Secretary of the Interior November 27, 1935, and approved by numerous tribal councils before and after that date, is unmistakable. Section 1 of Chapter 1 reads:

> "A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in Chap-

> ter 5, when committed by an Indian, within the reservation or reservations for which the Court is established.
>
> "With respect to any of the offenses enumerated in Chapter 5 over which Federal or State courts may have lawful jurisdiction, the jurisdiction of the Court of Indian Offenses shall be concurrent and not exclusive. It shall be the duty of the said Court of Indian Offenses to order delivery to the proper authorities of the State or Federal Government or of any other tribe or reservation, for prosecution, any offender, there to be dealt with according to law or regulations authorized by law, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender.
>
> "For the purpose of the enforcement of these regulations, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction, and a 'reservation' shall be taken to include all territory within

> reservation boundaries, including fee patented lands, roads, waters, bridges, and lands used for agency purposes."

The question remains, then, whether this statement of authority is in conflict with any Federal law.

That the original sovereignty of an Indian tribe extended to the punishment of a member by the proper tribal officers for depredations or other forms of misconduct committed outside the territory of the tribe cannot be challenged. Certainly we can not read into the laws and customs of the Indian tribes a principle of territoriality of jurisdiction with which they were totally unfamiliar, and which no country has adopted as an absolute rule. That Indian tribes friendly to the United States acted to punish their members for depredations committed against whites outside of the Indian country is a matter of historical record. Will anyone claim that such punishment was unconstitutional? The fact is that the United States, over a long period, encouraged the Indian tribes to help in controlling the conduct of their members outside of the Indian country, and in order to encourage such control made the tribe responsible for such individual offenses.

The analysis of Federal laws applicable to the situation under consideration indicates that the right of Indian tribal authorities to punish errant members of the tribe for offenses, no matter where committed, has not only never been denied but has been positively recognized. The act of June 30, 1834 (4 Stat. 731), which is still in many respects the basis of Indian administration, placed upon the Indian "nation or tribe" the responsibility of securing redress for depredations committed by individual members of the nation or tribe outside of, as well as within, the Indian country. The section in question, as amended by the act of February 28, 1859 (11 Stat. 401), appears today as section 229 of title 25 of the United States Code, reading as follows:

> "Sec. 229. *Injuries to property by Indians*. If any Indian, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, or other property belonging to any citizen or inhabitant of the United States, such citizen *or* inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall under the direction of the President, make application to the nation or tribe to which such Indian shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time not exceeding twelve months, such superintendent, agent, or sub-agent shall make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury. (R.S. Sec. 2156)."

This provision placing responsibility upon the tribal authorities for the wrongs of individual Indians committed outside of the reservation clearly contemplates that the tribal authorities will deal in proper fashion with such individual Indians. While the occasion that gave rise to this legislation may have disappeared, the judicial basis of tribal action which the legislation assumed has never been challenged.

Provisions similar to that above quoted are found in many treaties with Indian tribes. (See, for instance, Treaty with the Kiowas, etc., May 26, 1837 (7 Stat. 533), Secs. 3, 5; Treaty with the Comanches, etc., July 27, 1853 (10 Stat. 1013, Art. 5; Treaty with the Rogue River Indians, September 10, 1853 (10 Stat. 1018), Art. 6; Treaty with the Blackfeet, October 17, 1855 (11 Stat. 657) , Art. 11.)

Federal laws affecting the personal status of Indians have no direct bearing upon our present problem. The General Allotment Law of Febru-

ary 8, 1887 (24 Stat. 390), as amended by the act of May 8, 1906 (34 Stat. 182), provides:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside * * *" (25 U.S.C. sec. 349).

Because of this provision fee patent allottees have been held to be subject to the laws of the State wherever they may be within the reservation. *Eugene Sol Louie* v. *United States*, 274 Fed. 47 (C.C.A. 9th, 1921); *State* v. *Monroe*, 83 Mont. 556, 274 Pac. 840 (1929). However, this fact does not mean that so long as the fee patent Indians live within the outer boundaries of the reservation and maintain tribal relations they are not also subject to the rules and regulations of the Department and to the tribal ordinances governing tribal members. That they are so subject is stated in the recent case of *United States* v. *Dewey County*, from which extensive quotations to this effect are given above.

Moreover, the allotment act certainly did not make a fee patented allotment a place of sanctuary on which even an unallotted member of the tribe may commit offenses without the risk of future punishment by his tribe. Fee patented lands are undoubtedly subject to State jurisdiction, but in the words of the Supreme Court, there is "no denial of the personal jurisdiction of the United States" (*United States* v. *Celestine*, 215 U.S. 278, 291), and neither is there any denial of the personal jurisdiction of the tribe. It is for the Federal Government itself to decide whether it shall retain jurisdiction over certain offenses by Indians, e.g., liquor offenses on fee patented land, and relinquish to the State jurisdiction over certain other offenses. Likewise, it is for the Indian tribe itself, subject only to limitation by Congress, to decide whether it shall retain jurisdiction over certain offenses committed by members of the tribe on such land.

The fact that Federal courts have refrained from taking jurisdiction of Indian offenses on fee patented lands does not negative the jurisdiction of the Indian courts. Since the fallacy of identifying the jurisdiction of the one with the other is a ready one, an analysis of the fundamental distinctions between them is desirable.

The Federal District Courts have been authorized by Congress to exercise jurisdiction over specific crimes committed by Indians or white people against Indians in the "Indian country" and in "Indian

reservations." The Federal courts have no jurisdiction other than that granted by Federal statute. On the other hand, the Indian tribes retain all their original jurisdiction over their members except as may be limited by Federal statutes. Likewise, the authority of the Department to exercise administrative supervision over Indians is not based upon a statutory specification of crimes and criminal jurisdiction but, as previously indicated, upon a statutory duty of guardianship and Congressional authorization to maintain order on Indian reservations. *See United States* v. *Quiver*, 241 U.S. 602, at 605.

The Federal court exercises an absolute and exclusive jurisdiction over Indians when their crimes fall within the circumstances covered by the statutes. There is no statutory authority for concurrent jurisdiction of State and Federal courts when an Indian or Indian land becomes subject to State jurisdiction. If the Federal courts have jurisdiction, the State courts do not, and vice versa. However, there is no prohibition on a determination by the Interior Department to exercise corrective measures over Indians within the reservation when the State has jurisdiction but refuses to handle the case or upon a similar determination by the tribe that members uncorrected by State action shall be subject to correction by the tribal court.

Furthermore, the Federal courts are exercising judicial power as courts established by Congress pursuant to the United States Constitution, whereas the Department through the Court of Indian Offenses is not exercising judicial power but administrative guardianship powers and the tribe is exercising tribal powers over the persons of its members. The establishment of an Indian court and the extent of its jurisdiction is, therefore, in both cases an administrative policy question. No court is established where there is little restricted land. Courts are established, however, where there is much restricted land within a reservation. The Federal courts are obligated to take jurisdiction of crimes coming within the Federal statutes upon restricted lands regardless of administrative need. It would not be argued that there is any obligation on the part of the Department to provide corrective measures on such restricted lands if it is not advisable or necessary. In other words, it has often been recognized that the jurisdiction of the Federal courts and of the Indian courts does not coincide, since they derive their authority from different powers and function for different purposes.

I have reviewed the Federal laws which might be viewed as restricting or limiting the power of an Indian court to try and to punish an Indian for an offense committed on unrestricted land

within a reservation. I find no Federal law imposing any such limitation.

Is there any provision of the Federal Constitution that precludes such exercise of jurisdiction? Would such an exercise of authority, in an area where the State may exercise a concurrent jurisdiction, constitute "double jeopardy" and violate the Fifth Amendment to the Federal Constitution?

Even if it could be maintained, in the face of the decision in *Talton* v. *Mayes*, 163 U.S. 376, that constitutional limitations under the "due process" clause are applicable to an Indian court, there is no

force in the argument that the exercise of jurisdiction by such a court in these cases would subject the offender to "double jeopardy." The fact that an offense committed outside of restricted Indian lands may be subject to punishment in State courts does not make it unconstitutional for the court of another sovereignty to punish the same person for the same act. The decided cases clearly establish the principle that an individual who in a single act offends against the laws of several jurisdictions may be constitutionally punished by the agencies of each jurisdiction.

In the cases of *Moore* v. *Illinois*, 14 How. 13, the Supreme Court, *per* Justice Grier, declared:

> "* * * Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may {if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of *Fox* v. *The State of Ohio*, (5 How. 432) that a State may punish the offense of uttering or passing false coin, as a cheat or fraud practiced on its citizens; and, in the case of the *United States* v. *Marigold*, (9 How. 560) that Congress, in the proper exercise of its authority, may punish the same act as an offense against the United States." (at page 20)

Again in the case *ot United States* v. *Lanza*, 260 U.S. 377, the Supreme Court, per Taft, C. J., declared:

> "The defendants insist that two punishments for the same act, one under the National Prohibition Act and the other under a state law, constitute double jeopardy under the Fifth Amendment; and in support of this position it is argued that both laws derive their force from the same authority,-the second section of the Amendment, -and therefore that in principle it is as if both punishments were in prosecutions by the United States in its courts." (at pages 379 and 380)

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to act prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." (at page 382)

In view of these decisions of the United States Supreme Court it is clear that the fact an act is punishable in State courts is no bar to punishment in an Indian court. There remains, of course, a

question of public policy to be considered in asserting jurisdiction over acts which are subject to another jurisdiction. This question is met by a specific provision in the Law and Order Regulations above set forth, under which cases in which Indian tribal jurisdiction is concurrent with State jurisdiction are to be turned over to State authorities, *if such authorities are willing to exercise jurisdiction.* This is undoubtedly a reasonable provision in view of the fact that the State may be in many cases, unwilling to exercise even an admitted jurisdiction over Indians with respect to acts committed on unrestricted Indian lands within a reservation.

It should further be noted that the Law and Order Regulations do not purport to cover offenses committed outside of Indian reservations. There is therefore no immediate occasion to consider the legal and administrative problems that would be raised by any such exercise of jurisdiction. It is enough for our present purposes to note that the exercise of jurisdiction by an Indian court, under

the departmental law and order or tribal codes, does not diminish the jurisdiction of State courts, does not subject the offender to "double jeopardy," and is not prohibited by any known Federal statute.

There remains the final question whether the action of an Indian court in trying and punishing an Indian for an offense committed within the jurisdiction of the State courts may violate any State law. While it is impossible to decide an issue of this sort in the abstract with entire certainty, it is enough to say that I know of no State legislation which would interfere with such exercise of jurisdiction by an Indian court, and since the matter is one that concerns the relations between an Indian and his tribe it would appear to be a matter on which State legislation would be ineffective. *Worcester* v. *State of Georgia*, 6 Pet. 514; *United States* v. *Quiver*, 241 U.S. 602; *United States* v. *Hamilton*, 233 Fed. 685; *In Re Blackbird*, 109 Fed. 139; *In re Lincoln*, 129 Fed. 247; and see Opinion M. 28568, approved December 11, 1936, on the right of State game wardens to make searches on an Indian reservation.

In view of the foregoing authorities, I am of the opinion that an Indian court which orders the trial and punishment of an Indian before the court, on the basis of acts committed on unrestricted lands within an Indian reservation, does not offend
against any State or Federal law. The first question proposed is therefore to be answered in the affirmative.

II.

Jurisdiction over Acts Committed Outside of Indian Reservation

In view of the fact that the existing Law and Order Regulations and tribal codes restrict the jurisdiction of Indian courts to acts committed *within an Indian reservation,* and in view of the fact

that no amendments to extend such jurisdiction over lands outside of Indian reservations are before the Department, the question of the legality of such jurisdiction need not be answered at this time.

III.

Arrests on Unrestricted Lands

The legality of an arrest made by an Indian police officer on unrestricted lands within an Indian reservation will ordinarily be tested by an action for false imprisonment brought in the courts of the State. It will help us to avoid some of the confusions that have grown up around the term "jurisdiction" if we fix our attention upon the concrete question of the liability of an Indian Police officer for an arrest of an Indian who is subject to the jurisdiction of an Indian court, where such an arrest takes place on unrestricted land within the boundaries of the reservation.

The question may then first be considered as one of State law.

There is no dispute as to the general rule that when the peace officer of one sovereignty is outside the territory of that sovereignty, he is only a private citizen and can make arrests only as a private citizen and only for violation of the laws obtaining in that territory. Any other arrest or detention by such an officer will amount to false imprisonment. To this general principle, however, there are many exceptions established by statute or by common law.

There are, in the first place, certain personal relationships which justify arrest or detention without regard to locality. The most notable example of such a relationship is that under which military and naval authorities are empowered to arrest, detain or discipline soldiers and sailors wherever they may be. Likewise, the commander of a ship may exercise similar powers over the crew, and in case of extreme necessity, over passengers as well. A similar rule has been applied to railroad conductors in relation to passengers. (See *Peck* v. *A. T. & S. F. Railway Company*, 91 S.W. 323.) Similarly, a patent may exercise custody over a child, school authorities may detain pupils, custodians of institutions may impose confinement upon those committed to their care, and generally speaking, a guardian may assert custody over his ward, without thereby becoming liable in damages or punishable in the criminal courts. In all these cases the custody is justified by the relationship between the parties, which is not limited to a particular locality. Thus, in the case of *Townsend* v. *Kendall*, 4 Minn. 412, 77 Am. Dec. 534, it was held that a guardian appointed in Ohio who followed his ward into Minnesota and there took custody of the ward was not liable in an action for false imprisonment. The court declared:

> "The power once conferred follows the person of the ward. It would lead to great inconvenience if it should be held that a guardian could not exercise his authority or be recognized outside of the State or locality of his appointment. Such a ruling would embarrass the guardian in investing the funds of his ward in securities of other States, and render it necessary that he should be reappointed in every State or country through which he should pass with his ward in traveling, if an emergency should arise in which it became necessary to assert his authority. * * * we think the better rule is, upon principle and authority, to recognize the foreign appointment of a guardian as creating that relation between the parties in

> this State, subject, of course, to the laws of this State, as to any exercise of power by virtue of such relation either as to the person or property of the ward."

A second exception to the general rule that arrest or detention must be justified by the law of the locality has been established by statute in borderline cases where a strict application of the rule of territoriality would interfere with practical law enforcement. Thus, in the case of *Helm* v. *Commonwealth*, 81 S. W. 270, 271 (Ky.), the court declared:

> "The rule is admitted that ordinarily an officer's authority is limited to the district which elected him, but this is a matter within the legislative control, and his authority may by the Legislature be made coextensive with his county, although he is elected by one of its subdivisions."

See to the same effect *State* v. *Seery*, 95 Iowa 652, 64 N. W. 631.

These examples are cited simply to show that the question of whether agents of another jurisdiction may make arrests within the jurisdiction of a given State is something which that State can decide for itself. There is no constitutional obstacle to prevent a State from allowing agents of another sovereignty to detain or arrest persons who have a peculiar relationship to that sovereignty.

If the question is thus considered one of local law within the State in which the reservation is situated, no categoric answer to the question that is put to me can be made for all States. It may be helpful, however, to suggest certain general considerations upon the basis of which the detention or arrest of an Indian by an Indian police officer on land which is not restricted may be justified where the laws of the State are silent or ambiguous on the point.

In the first place, it should be recognized that the general rule that a police officer has authority only within the territory of the sovereignty that he serves is not completely applicable to a police officer of an Indian reservation, for the reason that his authority is primarily a personal rather than a territorial authority. This personal relationship does not depend for its existence upon the tenure of the land upon which the arrest is made. *Peters* v. *Malin*, *supra*.

In the second place, it should be pointed out that in an action for false imprisonment the existence of a personal relationship justifying custody is a defense. The authorities which set forth the bases of such a relationship cover, in principle, the "ward Indian" in his relationship to his tribe and to the United States. On this point, the decision in *Townsend* v. *Kendall* cited above, is extremely persuasive.

In the third place, we recognize that the inconveniences which have led courts and legislatures to recognize exceptions to the rule of territoriality exist in a significant degree on a checkerboarded Indian reservation. If the power to make an arrest were controlled by questions of land tenure, we

should have what has been called "government in spots." In the case of *State* v. *Lott*, 21 Idaho 646, the court declared:

> "If, on the other hand, the State has jurisdiction everywhere except on an Indian allotment, it would be 'government in spots' only, and the civil and police officers of the State would have to go armed with the latest revised maps and plats from the General Land Office in order to know where and when they could exercise the authority of the State in bringing offenders against its laws to justice."

In view of the serious inconvenience that would be created by any such limitation upon the power to make arrests on a checkerboarded reservation, it should require an unmistakable statute or a clear judicial decision to justify the position that an Indian police officer has no authority over a "ward Indian" on unrestricted land within the reservation.

Aside from the fact that under State law an Indian policeman may be privileged to arrest a tribal member on unrestricted land within the reservation for violation of departmental regulations and tribal ordinances, such an arrest may be said to be positively sanctioned by Federal law.

Since the Indian Department Appropriation Act of May 27, 1878 (20 Stat. 63, 86), Congress has annually appropriated funds for the pay of Indian police to be employed in "maintaining order." For more than twenty years, in the period approximately from 1890 to 1910, the purpose of the employment of the police was described as follows: "to be employed in maintaining order and prohibiting illegal traffic in liquor on the several Indian reservations and within the Territory of Alaska, in the discretion of the Secretary of the Interior." For approximately the next twenty years their function was described simply as "maintaining order" with no specification of locality. The appropriation act of May 9, 1938 (Public No. 497, 75th Congress, 3d session) appropriates a fund for "maintaining law and order on Indian reservations" including the pay of judges of Indian courts and Indian police.

These acts place an obligation upon the Interior Department to provide for the maintenance of order among the Indians, at least within the reservations, if not without, and leave to administrative discretion the direction of the Indian police and the determination of the means necessary to accomplish the end. If it is necessary to the maintenance of order within an Indian reservation for the Indian police to arrest an Indian anywhere within the reservation for violation of the departmental regulations or tribal laws, authority for the action of the Indian police is found in these acts. In this connection it must be remembered that these acts have been passed annually for sixty years in the light of continued administrative practice and must be said to recognize and accept that practice. The past administrative practice has been to enforce the departmental regulations against the Indians everywhere within the reservations, whether by arrest or by the reduction of rations, as in the early days, or by other appropriate means. This practice was implicit in the 1904 Law and Order Regulations and was made more explicit in section 1 of chapter 1 of the 1965 Law and Order Regulations which provided that "For the purpose of the enforcement of

these regulations, * * * a 'reservation' shall be taken to include all territory within reservation boundaries * * *."

It has already been noted in considering question 1 above that the entire Indian reservation has been viewed as an administrative unit, for purposes of enforcing the Law and Order Regulations of the Department or the ordinances of the Indian tribe. This principle, we have noted, was recently expressed in the *case* of *United States* v. *Dewey County,* which described fee patent Indians on fee patent lands as subject to the rules and regulations of the Department for "the government of the reservation." The same considerations which lead to the view that such Indians are subject to regulations for the "government of the reservation" lead to the parallel conclusion that such Indians are subject to arrest where arrest is authorized under statutes providing for "maintaining law and order on Indian reservations." If Indians generally are subject to administrative control anywhere within the reservation, regardless of the status of the land on which they are found, it is reasonable to conclude that they are also subject to arrest anywhere within the reservation, as a necessary means to the exercise of that control.

In view of the foregoing analysis, I am of the opinion that there is no legal reason to repeal or modify the existing Law and Order Regulations so far as they deal with the matter of arrests by Indian police officers. Specific questions that may arise in various jurisdictions on the basis of the statutes or common law of the various States will be dealt with as they arise, in the light of the foregoing general considerations and such special circumstances as may be involved in the particular case.

IV.

Arrests Outside of a Reservation

The Interior Department Appropriation Act of May 9, 1938, is similar to a large number of previous appropriation acts, as indicated in connection with the third question, in providing for Indian police to maintain order "on Indian reservations." Such acts restrict the operations of the Indian police to the boundaries of the reservations. One such appropriation act was so construed by the Attorney General in his opinion of August 28, 1886 (18 Ops. Atty. Gen. 440), in which he informed the Interior Department that the Indian police had no *ex officio* jurisdiction *beyond* the reservation boundaries in view of the provisions of the appropriation act. Under existing laws and regulations, therefore, the fourth question proposed must be answered in the negative.

FREDERIC L. KIRGIS,

Acting Solicitor.

Approved: May 2, 1939.

OSCAR L. CHAPMAN, *Assistant Secretary.*

Appendix C

Examples of Tribal Constitutional and Statutory Provisions Asserting Jurisdiction Outside of Indian Country

1. Absentee Shawnee Tribe:

   - Criminal Code – Criminal Offenses:

     Sec. 2 – Application: "(a) This Title shall apply to all Indian persons violating its provisions within the territorial jurisdiction of the Tribe, provided, that the provisions of Chapter Four of this Title shall apply to all members of the Tribe and all Indian residents of the jurisdiction of the Tribe where ever such violation may occur, if such violation has any actual or intended effect upon the political integrity or political or economic security of the Tribe."

     Chapter Four – "Crimes Against Public Justice," including:

     401 Bribery . . .
     406 Oppression In Office
     407 Misusing Public Money . . .
     412 Tampering With Public Records . . .
     414 Obstructing Governmental Function . . .
     428 Obstructing Justice . . .
     433 Failure To Obey A Lawful Order Of The Court . . .
     442 Tampering with Public Property

2. Big Lagoon Rancheria:

   - Constitution, Art. II – Territory and Jurisdiction: "The jurisdiction of the tribe . . . shall extend to the fullest extent permitted by applicable law to . . . (d) All tribal members, wherever located."

3. Citizen Potawatomi Nation:

- Constitution, Art. 4 – Tribal Jurisdiction, Sec. 2: "The jurisdiction and governmental powers of the Citizen Potawatomi Nation shall also, consistent with applicable Federal law, extend outside the exterior boundaries of the Citizen Potawatomi Nation to all tribal members[.]

4. Curyung Tribal Council:

- Tribal Code, Title I – Tribal Court Operations: Ch. 1 – General Provisions, Sec. 3 – Jurisdiction of the Tribe: "The jurisdiction of the Curyung Tribe shall extend over matters arising: 1. In the Curyung Tribe's Indian Country; and/or 2. Over all Tribal members within or outside Indian Country; and/or 3. Over all persons and entities who entered into consensual relations with the Tribe or Tribal members or whose activities affect the political integrity or economic security of the Tribe or health or welfare of the Tribe or Tribal members; and/or 4. Over any matters so delegated by Congress."

5. Dry Creek Rancheria Band of Pomo Indians:

- Tribal Judicial Code, Title I – Judicial Code, Ch. 1 – Title and Purpose, Sec. 6 – Jurisdiction: "(A) Territory. The Tribal Court may exercise territorial jurisdiction over disputes arising within or concerning all territory within the Dry Creek Rancheria, and within or concerning other lands outside the boundaries of the Dry Creek Rancheria in which the Tribe has a significant governmental interest, including without limitation fee patent lands, allotments, assignments, roads, waters, bridges and lands used or maintained for Tribal governmental purposes, and existing and future lands outside the boundaries of the Rancheria owned or controlled by the Dry Creek Rancheria for the benefit of its members or in which the Tribe has a significant governmental interest as set forth in the Tribe's laws."

6. Ione Band of Miwok Indians:

- Constitution, Art. II – Territory and Jurisdiction, Sec. 2 – Jurisdiction: "The jurisdiction of the Tribe extends to all of its members wherever located, to all persons throughout its territory, and within its territory over all lands, waters, river beds, submerged lands, properties, air space, minerals, fish, forests, wildlife, and other resources, and any interest therein now held or acquired in the future."

7. Kalispel Tribe:

- Law and Order Code, Ch. 1 – Kalispel Tribal Court, Sec. 1-2 – Jurisdiction, 1-2.03 – Reservation: "For the purpose of the enforcement of the Regulations of this Code, the term 'Reservation' shall mean the Kalispel Indian Reservation . . . and all other lands, wherever located, owned by the Kalispel Tribe of Indians, including lands held in fee, or any interest in lands held by the Tribe, whether or not such lands or interests are held in trust for the Tribe by the United States [.]"

8. Kashia Band of Pomo Indians:

- Constitution, Art. I – Territory and Jurisdiction:

  Sec. 1 – Territory: "The Territory of the Tribe includes all lands within the exterior boundaries of the Stewarts Point Rancheria; any and all other lands held by the Tribe; and any additional lands acquired by the Tribe or by the United States for the benefit of the Tribe."

  Sec. 2 – Jurisdiction: "The Tribe has and may exercise jurisdiction over all its members, wherever located; and all persons, property, lands, resources and activities occurring within the Tribe's Territory, to the fullest extent permitted by law."

9. Kaw Nation:

- Constitution, Art. I – Jurisdiction:
  Sec. 1: "[T]he authority and jurisdiction of the Kaw Nation shall extend to all territory within the boundaries now known as Kaw Land and to all lands that may be acquired for the Kaw Nation by the United States or which the Kaw Nation may acquire for itself, and to all Indian country of the Kaw Nation and its citizens now or hereinafter defined by Federal law[.]"

  Sec. 2: "The Kaw Nation may exercise its authority and jurisdiction outside the territory described above to the fullest extent not prohibited by Federal law."

10. Keweenaw Bay Indian Community:

- Tribal Code, Title One – General Provisions, Ch. 1.1 – Tribal Court, Sec. 1.103 – Tribal Court Jurisdiction; Persons and Entities: "D. The Tribal Court shall have jurisdiction to the maximum extent permitted by applicable law, over any person or entity who has a consensual relationship with the Keweenaw Bay Indian Community, or whose activity or conduct threatens the Keweenaw Bay Indian Community or members thereof."

11. Klamath Tribe:

- Constitution, Art. IV - Jurisdiction: Sec. III: "The sovereign powers, authority and jurisdiction of the Klamath Tribes and its government may extend beyond the geographical boundaries of the Klamath Tribes territorial jurisdiction."

- Tribal Court Ordinance, Title 2, Ch. 11: Sec. 11.02 – Definitions:
  "(l) 'Klamath Territory' means: (1) All lands within the exterior boundaries of the Former Reservation; and (2) All Klamath Tribal Lands."

"(o) 'Klamath Tribal Lands' means all Klamath Reservation lands and all other lands that may hereafter be acquired or conveyed in fee to the Klamath Tribes, whether by purchase, gift, act of Congress, or otherwise[.]"

12. Lac Vieux Desert Band of Lake Superior Chippewa Indians:

- Constitution, Art. I – Territory:
  Sec. 1 – Territory: "The territory of the Band shall encompass all lands which are now or hereafter owned by the Band or held in trust for the Band by the United States."

  Sec. 2 – Jurisdiction Not Restricted: "The jurisdiction of the Band shall not be restricted to the territory described in Section 1 of the Article, but shall be exercised to the full extent of the Band's sovereign power."

13. Little Traverse Bay Bands of Odawa Indians:

- Constitution, (Tribal Code of Law Title I), Art. IV – Territory, Jurisdiction, Language & Service Area: . . .

  B. Jurisdiction: "The jurisdiction of the Little Traverse Bay Bands of Odawa Indians shall extend to all territory set forth in Section (A) of this Article and to any and all persons or activities therein based upon the inherent sovereign authority of the Little Traverse Bay Bands of Odawa Indians and Federal law. . . . Jurisdiction over members of the Little Traverse Bay Bands of Odawa Indians shall extend beyond the territory set out in Section (A) whenever they are acting pursuant to, or jurisdiction is created or affirmed by, either: . . . 2. Little Traverse Bay Bands of Odawa Indians statute, ordinance, resolution, or other authorization[.]"

14. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians:

- Judicial Ordinance, Ch. II – Jurisdiction, Sec. 1 – Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians Tribal Court Jurisdiction: "The civil and criminal jurisdiction of the Tribal Court shall extend to: . . .

  (f) All persons and property outside the exterior boundaries of the Reservation or MBPI tribal trust land that may be subject to the jurisdiction of the Tribe to the maximum extent authorized by federal or tribal law, including but not limited to any person who personally or through an agent does any of the following insofar as a cause(s) of action arises from the doing of such act: . . .

  (5) Conduct that threatens or has some direct effect on the political integrity, economic security or the health and welfare of the Tribe."

15. Navajo Nation:

- Tribal Code: Title 17 – Law and Order, Ch. 2 – General Provisions, Subch. 1 – General, Sec. 203 – Territorial applicability: "The Navajo Nation Courts shall have jurisdiction over . . . any member of the Navajo Nation who commits an offense against any other member of the Navajo Nation wherever the conduct which constitutes the offense occurs."

16. Pawnee Tribe of Oklahoma:

- Law and Order Code: Title VI – Criminal Offenses, Sec. 2 – Application: "a) This ordinance shall apply to all Indian persons violating its provisions within the territorial jurisdiction of the Tribe, provided, that the provisions of Chapter Four of this ordinance shall apply to all members of the Tribe and all Indian residents of the jurisdiction of the Tribe where ever such violation may occur, if such violation has any actual or intended effect upon the political integrity or political or economic security of the Tribe."

17. Sac and Fox Nation:

- Code of Laws: Title 10 – Tribal Criminal Code, Sec. 2 – Application: "(a) This Title shall apply to all Indian persons violating its provisions within the territorial jurisdiction of the Tribe, provided, that the provisions of Chapter Four of this Title shall apply to all members of the Tribe and all Indian residents of the jurisdiction of the Tribe where ever such violation may occur, if such violation has any actual or intended effect upon the political integrity or political or economic security of the Tribe."

18. San Carlos Apache Tribe of Arizona:

- Constitution, Art. II – Territory: "The authority of the San Carlos Apache Tribe shall extend to all of the territory within the boundaries of the San Carlos Reservation and to all lands which may be acquired for the Tribe or which the Tribe may acquire for itself."

19. Sault Ste. Marie Tribe of Chippewa Indians:

- Tribal Code, Criminal Offenses § 71.303: Territorial Extend: . . . (2) The criminal jurisdiction of the Tribe shall extend to the following offenses wherever committed:

  (a) Embezzlement and theft from a tribal organization, '71.808;
  (b) Abuse of office, '71.1101, if the office involved is a tribal office;
  (c) Improper influence of a tribal official, '71.1102;
  (d) Election fraud, '71.1103, if the election involved is a tribal election;
  (e) Malicious criminal prosecution, '71.1104, if the prosecution involves the Tribal Court;
  (f) Obstruction of justice, '71.1105, if the investigation involves a violation of tribal law or the case involved is in Tribal Court;

(g) Public bribery, '71.1006, if the public servant involved is an official, appointee, judge or employee of the Tribe; [*see Settler v. Lameer*]
(h) Refusing, omitting and delaying to arrest, '71.1107; and
(i) Filing fictitious report, '71.1109.

20. Smith River Rancheria:

- Tribal Court Ordinance: Sec. I – Establishment of the Smith River Tribal Court: "(c) The establishment of a Tribal Court that can exercise jurisdiction over civil disputes and criminal acts occurring on Tribal lands and over members wherever situated, particularly those disputes and acts over which the Courts of the State of California and Oregon lack jurisdiction, is necessary to maintain peace and order on Tribal lands."

21. Tule River Indian Tribe:

- Constitution: Art. I – Territory: "The jurisdiction of the Tule River Indian Tribe shall extend to the territory within the confines of the Tule River Indian Reservation, . . . to all lands claimed by the tribe and to which title in the tribe may hereafter be established; and to such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law."

22. Tunica-Biloxie Indians of Louisiana:

- Constitution, Art. VII – Jurisdiction: "The jurisdiction of the Tunica - Biloxie shall extend to any parish where any Tunica - Biloxie tribal member may reside and particularly to any lands held or hereafter acquired by or for the Tunica - Biloxie Indians of Louisiana, Inc."

23. White Mountain Apache Tribe:

- Constitution, Art. I – Territory & Jurisdiction:
  Sec. 1 – Territory: "The authority of the [W]hite Mountain Apache Tribe, of Arizona, shall extend to all of the territory within the exterior boundaries of the Fort Apache Indian Reservation as established by the Act of Congress, June 7, 1897, and to such other lands as the United States may acquire for the benefit of the Tribe, or which the Tribe may acquire for itself."

  Sec. 2 – Jurisdiction: "The White Mountain Apache Tribe shall have jurisdiction over all persons, subjects, property and all activities occurring within the boundaries of the reservation or on other lands within its territory as defined by this Article. Nothing in this Article shall be construed to limit the ability of the Tribe to exercise its jurisdiction within or without its territory based upon Federal law or upon its inherent sovereignty as an Indian Tribe."

24. Yavapai-Apache Nation:

- Constitution: Art. I – Jurisdiction: "The jurisdiction of the Yavapai-Apache Tribe shall extend to all lands within the boundaries of the Camp Verde Indian Reservation and to any and all lands held by the Tribe, trust allotments located outside the reservation boundaries to the extent permitted by federal law, and to any additional lands acquired by the Tribe or by the United States for the benefit of the Tribe; except where expressly prohibited by federal law. . . . Nothing in this Article shall be construed to limit the ability of the Tribe to exercise its jurisdiction based upon its inherent sovereignty as an Indian Tribe."

25. Yurok Tribe:

- Constitution, Art. I – Territory, Jurisdiction and Authority, Sec. 3 – Jurisdiction: "The jurisdiction of the Yurok Tribe extends to all of its member wherever located[.]"

- Judicial Branch Ordinance, Sec. 1 – Jurisdiction: 1.1 – Territory: "The jurisdiction of the Yurok Tribal Court and the effective area of this Ordinance shall minimally include, but not necessarily be limited to, all territory within the Yurok Indian Reservation . . . and existing and future lands outside the boundaries of the currently federally recognized Reservation owned or controlled by the Yurok Tribe for the benefit of its members."