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Federal Recent Developments

FEDERAL RECENT DEVELOPMENTS

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTION: Lesser Included Offenses of Enumerated Crimes Under the Major Crimes Act.

United States v. Walkingeagle, 974 F.2d 551 (4th Cir. 1992).

During an altercation on Indian land, an Indian, Walkingeagle, pushed his girlfriend, pulled her hair, poured beer on her, and kicked and hit her in the face, lacerating her lip. The Cherokee tribal court charged him with assault and battery. For the same offense, federal prosecutors indicted Walkingeagle for two felonies, assault with a dangerous weapon with intent to do bodily harm, and assault resulting in serious bodily injury. The Cherokee tribal court dismissed its charges against Walkingeagle without prejudice, pending the outcome of the federal proceedings.

At the conclusion of the government's case, Walkingeagle moved for a judgment of acquittal. The trial court found that a single blow of the defendant's hand did not make the hand a "dangerous weapon" or an object used in a manner likely to endanger life or cause serious bodily harm.[1] The trial court further found that the victim's lacerated lip did not rise to the level of "serious bodily injury."[2] In so finding, the trial court granted Walkingeagle's motion for acquittal on the felonies but then instructed the jury on the lesser included offense of assault by striking, beating, or wounding.[3]

The issue before the Fourth Circuit was whether the trial court retained jurisdiction over the lesser included offense after it granted a judgment of acquittal on the felonies. The Major Crimes Act[4] confers jurisdiction to the federal courts over enumerated felonies committed by Indians on Indian lands.[5] Jurisdiction over non-enumerated crimes is not specifically conferred and ordinarily remains with the tribal courts.[6] The felonies with which Walkingeagle was charged and acquitted are enumerated in the Major Crimes Act, but the lesser included offense is not.[7]

1. United States v. Walkingeagle, 974 F.2d 551, 553 (4th Cir. 1992).
2. *Id.*
3. Assault by striking, beating, or wounding is a violation of 18 U.S.C. § 113(d) (1988).
4. 18 U.S.C. § 1153 (1988).
5. *Walkingeagle*, 974 F.2d at 553.
6. *Id.*
7. 18 U.S.C. §§ 1153, 3242 (1988).

The Fourth Circuit relied on the Supreme Court's holding in *Keeble v. United States*[8] and language in the Major Crimes Act,[9] which states that Indians charged with enumerated crimes shall be tried in the same manner as non-Indians committing offenses within the exclusive jurisdiction of the United States.[10] Accordingly, the Fourth Circuit ruled that Indians should benefit from and be subject to lesser included offense instructions in the same way that non-Indians are in federal criminal trials.[11]

Walkingeagle distinguished *Keeble* by noting that the defendant in that case requested a lesser included offense instruction to be submitted along with instructions on the felony.[12] The Fourth Circuit reasoned that the decision in *Keeble* established a procedural requirement that Major Crimes Act trials be conducted in the same manner as non-Major Crimes Act trials in federal court and rejected Walkingeagle's argument.[13] The Fourth Circuit ultimately held that the trial court retains jurisdiction over non-enumerated lesser included offenses even though the trier of fact determines that there is insufficient evidence of the "major crime."[14]

In his dissenting opinion, Judge Hamilton noted that the Cherokee tribal court dismissed the assault charges pending the outcome of the federal case and would have retained jurisdiction over the lesser included offense.[15] Judge Hamilton felt that the trial court should have deferred to the Cherokee tribal court after its finding that there was insufficient evidence of the "major crimes."[16]

8. 412 U.S. 205 (1973).
9. 18 U.S.C. § 3242 (1988).
10. *Walkingeagle*, 974 F.2d at 553.
11. *Id.*
12. *Id.*
13. *Id.* at 553-54.
14. *Id.* at 554.
15. *Id.* at 555 (Hamilton, J., dissenting).
16. Judge Hamilton stated:

> What the United States may not do directly, it may now accomplish by indirection under the majority's holding. District courts are now empowered to try a host of crimes previously reserved to the tribal courts by the express direction of Congress by the simple expedient of those crimes being classified as lesser included offenses of the specifically enumerated crimes in § 1153. The majority's decision invites creative charging by federal prosecutors under the [Major Crimes] Act for the purpose of obtaining jurisdiction over offenses that would not otherwise be triable in federal court . . . .

Id. at 555-56.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTION: Tribal Sovereign Immunity Where the Tribe is an Indispensable Party.

Pembina Treaty Committee v. Lujan, 980 F.2d 543 (8th Cir. 1992).

The U.S. Treasury Department and Congress set aside $52 million to be distributed to five groups of Pembina Chippewa Indians. These funds were set aside as a result of a lawsuit several years ago. Congress established a mechanism for distributing the funds.[1] Eighty percent was to be distributed to individual tribal members. The remaining twenty percent was to be placed in trust and invested by the Secretary of the Interior for the tribe's benefit.[2] Interest from the trust was to be distributed to the governing body of the tribe on an "annual budgetary basis" subject to the approval of the Secretary. The money was to be used for tribal administration or social and economic programs.[3]

A group of individual tribal members known as the Pembina Treaty Committee (the Committee) sued, among others, the Secretary of the Interior, Manual Lujan, and the Turtle Mountain Band of Chippewa Indians (the Tribe). The Committee sought a declaratory judgment that the federal trustees had breached their fiduciary duty by failing to require an annual budget from the Tribe before releasing the money. The Committee also asked the trial court to declare the Tribe's spending plan for 1991 invalid. The Committee further requested an order compelling the Tribe to place any unspent 1991 funds into escrow pending the adoption of a valid spending plan and compelling an accounting from the trustees. Finally, the Committee requested a preliminary injunction against the Bureau of Indian Affairs and the Tribe prohibiting distribution of unspent funds.

The Tribe moved for its dismissal from the suit, claiming sovereign immunity. The federal defendants moved for dismissal of the complaint altogether, claiming that the Tribe was an indispensable party. The trial court granted both motions. The Committee appealed, claiming that the trial court abused its discretion in dismissing the complaint and in not affording the Committee a hearing on the motions.

The Tribe was indisputably immune from suit; therefore, the only issue before the Eighth Circuit was whether the Tribe was an indispensable party. If the Tribe was not an indispensable party, the suit

1. *See* Act of Dec. 31, 1982, Pub. L. No. 97-403, 96 Stat. 2022, 2022-23.
2. *Id.*
3. *Id.*

could proceed; otherwise, the complaint must be dismissed for want of an indispensable party.[4]

The Eighth Circuit noted that rule 19(b) of the Federal Rules of Civil Procedure requires that the trial court "determine whether in equity and good conscience" the suit should proceed without the absent party, and in so determining should consider the adequacy of and prejudice resulting from a remedy granted in the party's absence.[5] The trial court is also to consider whether the plaintiff will have an adequate remedy if the complaint is dismissed altogether.[6] The court then found that any judgment against the federal defendants would jeopardize the Tribe's ability to use money it had already received.[7] The court determined that any declaration affecting the disbursement of future funds, without the Tribe's participation in the proceedings, would be an encroachment on the Tribe's right of self-governance.[8]

Even though the Committee admittedly had no other legal recourse, the Eighth Circuit affirmed the trial court's dismissal of the suit for want of an indispensable party.[9] The dismissal upheld the Tribe's interest in self-governance, and left the plaintiffs to seek a remedy within tribal political processes.[10]

RELIGIOUS FREEDOM: Defining "Indian" for Purposes of Eligibility to Participate in Native American Religion Activities in Prison.

Bear v. Nix, 977 F.2d 1291 (8th Cir. 1992).

Gary Bear, a prisoner in the Iowa State Penitentiary (the prison), sued prison warden, Crispus Nix, and the prison's Native American Religion (NAR) consultant, Ken Bordeaux, for violating Bear's civil rights.[1] To avoid the constitutionally sensitive task of determining who would be eligible to participate in NAR activities, the prison hired Bordeaux as a consultant. Bordeaux is an enrolled tribal member and spiritual leader in NAR who began working with the prison in 1985. In 1988, he was given the exclusive authority to determine who may participate in NAR activities.

Bordeaux determined that only enrolled tribal members would be eligible to participate in NAR activities. This excluded Bear, who is

4. *See* FED. R. CIV. P. 19(a).
5. Pembina Treaty Comm. v. Lujan, 980 F.2d 543, 545 (8th Cir. 1992).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 546.
10. *Id.*

1. Suit was filed pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (1988), which allows civil actions to remedy rights violations committed by persons acting under color of state law.

part Kiowa but does not have enough blood quantum to be an enrolled member. Bear participated in NAR sporadically as a youth and more frequently when he went to prison in 1981. He quit in September 1981, then in 1986 again became very active. Until February 1988, when Bordeaux was given the authority to determine NAR eligibility, Bear had occasionally acted as firekeeper and door watcher for the sweat lodge.

Bear claimed that the prison acquiesced to Bordeaux's eligibility decision, thus depriving him of his First Amendment right to free exercise of religion. The district court looked to a settlement agreement entered into in 1990[2] between the prison and two Native American inmates.[3] The district court interpreted the settlement agreement to allow an inmate to "genuinely self-identify" himself as a Native American and accordingly ruled in favor of Bear, ordering defendants to allow Bear to participate in NAR activities. Nix and Bordeaux appealed. During the pendency of this appeal, Bordeaux was replaced by a new consultant who continued to deny Bear the right to participate in NAR practices.

The Eighth Circuit found no language in the settlement agreement consistent with an inmate's right to "genuinely self-identify" himself as a Native American, though it did acknowledge a provision allowing an inmate to present "other evidence" to prove his Native American status.[4] The Eighth Circuit rejected Bear's argument that he has a right to practice NAR notwithstanding the existence of or language in the settlement agreement.[5] Bear relied on *Turner v. Safley*,[6] which held that a prison regulation impinging on an inmate's constitutional rights is only valid if it meets some legitimate penological interests.[7] Bear did not argue that Bordeaux's decision was the product of malice, bad

2. Walker v. Scurr, Civ. Nos. 83-313-D, 84-26-B (S.D. Iowa Feb. 27, 1990).

3. The agreement's terms relevant to membership and an understanding needed in the case at bar are as follows:

> A. Inmates who are Native Americans are entitled to participate in Native American religious activities unless their participation would violate the tenets of the Native American religion. An inmate claiming to be Native American may do so by proof of an enrollment number in a Native American tribe or by proof of eligibility to be an enrolled member of a Native American tribe. In lieu of an enrollment number or proof of eligibility to be an enrolled member of a Native American tribe, an inmate claiming to be Native American may offer other evidence, such as corroboration of tribal or family members, official records, physical appearance, prior participation in Native American activities, etc. . . .

Id., slip op. at 3-5, *quoted in* Bear v. Nix, 977 F.2d 1292, 1294 (8th Cir. 1992).

4. *Bear*, 977 F.2d at 1295.

5. *Id.* at 1293.

6. 482 U.S. 78 (1987).

7. *Id.* at 89.

faith, or unconstitutional motive, but he argued that his status as a Native American is patently obvious. The Court refused to order the consultant to allow Bear to participate in NAR activities.[8] The Eighth Circuit held, "To review such decisions would require courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made."[9]

The Eighth Circuit reversed the district court's ruling and remanded the case, ordering the consultant to determine whether Bear is a Native American for purposes of NAR participation. The Eighth Circuit also ordered the consultant to give Bear the opportunity to produce "other evidence" of his Native American status.[10]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SOVEREIGN IMMUNITY: Adversary Complaints Against a Tribe-owned Business in Bankruptcy Proceedings.

Greene v. Mt. Adams Furniture, 980 F.2d 590 (9th Cir. 1992).

Mr. and Mrs. Greene purchased furniture from Mt. Adams Furniture (Mt. Adams), a wholly-owned and operated business of the Yakima Indian Nation (the Tribe). Though Mt. Adams had no security interest in the furniture, they peaceably repossessed the furniture when the Greenes failed to pay for it as agreed. Mt. Adams then took the furniture back to its place of business in Wapato, Washington, on the Yakima Indian reservation. Within ninety days of the repossession, the Greenes filed for relief under chapter 7 of the Bankruptcy Code, thus rendering Mt. Adams' repossession a preferential transfer. The trustee filed an adversary complaint to set aside the preferential transfer. The Tribe appeared and claimed immunity from the adversary proceeding. The Bankruptcy Court rejected the Tribe's claim and entered a judgment against the Tribe in the amount of $8,779. The district court affirmed the judgment.

The issue before the Ninth Circuit was whether the Tribe, as a market or business participant, is immune from adversary proceedings when the transaction in question, the repossession, took place off-reservation. First, the court acknowledged the Tribe's common-law

8. *Bear*, 977 F.2d at 1294.
9. *Id.*
10. *Id.* at 1295.

immunity based on its original status as a sovereign.[1] The court then looked at *Puyallup Tribe, Inc. v. Washington Game Department*,[2] which held that immunity traditionally enjoyed by a tribe does not extend to individual tribal members and businesses.[3] The Ninth Circuit noted that the *Puyallup* decision did not address sovereign immunity for off-reservation activities, nor did it address sovereign immunity for businesses owned and managed directly by the tribe itself.[4]

After an analysis of various state approaches to recognizing and limiting tribal sovereign immunity, the Ninth Circuit ultimately held that the key to determining the validity of a sovereign immunity claim is to look at the nature of the relationship involved.[5] The court, citing *Oklahoma Tax Commission v. Potawatomi Tribe*,[6] noted that Congress' support of the sovereign immunity doctrine is in the interest of promoting Indian self-governance, self-sufficiency and economic development.[7] The court further noted that sovereign immunity, at common law, has an extraterritorial component.[8]

The court held that the Tribe was exercising its power as a sovereign in the interest of enhancing the economic development of the Tribe when it operated and managed Mt. Adams Furniture.[9] The court further held that the trustee in the bankruptcy proceeding cannot pierce the Tribe's extraterritorial immunity.[10] The Ninth Circuit ordered the dismissal of the adversary proceeding.[11]

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EQUAL PROTECTION: State Funding Reductions for Contracted Social Programs for Indian Tribes.

Navajo Nation v. New Mexico, 975 F.2d 741 (10th Cir. 1992).

The federal government provides money to states under title XX of the Social Security Act[1] to be used for human services.[2] In 1982, 1983,

1. Greene v. Mt. Adams Furniture, 980 F.2d 590, 592 (9th Cir. 1992).
2. 433 U.S. 165 (1977).
3. *Id.* at 171-73.
4. *Greene*, 980 F.2d at 592. In fact, the *Puyallup* decision was limited to the issue of state regulation of fishing rights on and off reservation. *Puyallup*, 433 U.S. at 167.
5. *Greene*, 980 F.2d at 593.
6. 498 U.S. 505 (1991).
7. *Greene*, 980 F.2d at 596.
8. *Id.* at 596-97.
9. *Id.* at 598.
10. *Id.*
11. *Greene*, 980 F.2d at 598.

1. 42 U.S.C. § 1397 (1981).
2. *Id.*

and 1984 the state of New Mexico allocated $466,277 per year to the Navajo Nation for its home care program. In 1985, the state of New Mexico allocated the same amount;[3] however, prior to the disbursement, the state settled a claim in an unrelated law suit and entered into a consent decree. The consent decree required the state Human Services Department (the Department) to spend an estimated $315,000 to form citizen review boards to oversee foster child placement. The Department was only able to obtain $127,000 in additional funding from the state legislature, leaving a shortfall of $188,000. The Department then decided to cut 1985 allocations to the Navajo Nation home care program by $188,000, from $466,277 to $278,000. The Navajo Nation sued, claiming that the funding cut was discriminatory.

The district court found that the 1985 funding cut was facially discriminatory, because it singled out Navajos, and alternatively found that the cut was implemented with discriminatory intent.[4] In so finding, the district court noted that the funding decision was not narrowly tailored to serve a compelling state interest and that less burdensome alternatives were available. Also, the district court found that the spending cut had an immediate and direct effect only on Navajos.[5]

The state based its argument on *Personnel Administrator v. Feeney*,[6] which, according to the state, requires that discriminatory intent be the primary motivation of the defendant in order for a state action to be unconstitutional.[7] The Tenth Circuit noted that their argument "relies on the state's omission of several key words whenever it quotes *Feeney*, and is so trivial that we would not address it separately did it not form the backbone of the state's appeal."[8] The court then noted that the correct standard is that "discriminatory motive exists when action is taken at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[9]

The court found that the funding was initially approved, but then, "outside the normal procedural process and without considering the normal substantive criteria," the Department decided to cut the Nav-

3. Because of the Navajo Nation's linguistic, cultural, and economic needs, the state has chosen not to provide home care directly but rather to contract these services to the Navajo Nation. The Navajo Nation followed standard procedures for submitting its request for a contract to the state for funding its home care program. After following its standard procedure for soliciting and reviewing proposed contracts, the Department initially recommended a proposed contract for $446,277 with the Navajo Nation for 1985, which is $20,000 less than the previous three years. Navajo Nation v. New Mexico, 975 F.2d 741, 742 (10th Cir. 1992).

4. *Id.* at 743.

5. *Id.*

6. 442 U.S. 256 (1979).

7. *Id.* at 272.

8. *Navajo Nation*, 975 F.2d at 744.

9. *Id.* at 743-44 (citing *Feeney*, 442 U.S. at 279).

ajos' funding in favor of another program.[10] The court also found that the Department and its secretary, Juan Vigil, knew that the cuts would only affect Navajos.[11] Finally, the court found that Navajos are disadvantaged in the political process in New Mexico and that the funding decision was based primarily on the fear of political retaliation that would have occurred had the Department opted to cut other social programs instead.[12]

The state claimed that home care is a low priority program and that the contract with the Navajos is the only one sizeable enough to remain viable after such a substantial cut. The state offered no explanation as to why the noncontract (direct) home care program, with a budget in excess of $800,000, received no cuts. The Tenth Circuit found that "other contracts could have been reduced along with reductions to the Navajo contract without destroying the viability of their programs."[13] The Tenth Circuit further noted that the state's argument was not enhanced by its claim that budget cuts in noncontract programs would result in massive layoffs in the state sector.[14] The court held that there is no legitimate reason to favor a forty percent reduction in Navajo jobs over an equal number of job reductions in the state sector.[15] In fact, the court felt that this argument supported the Navajo's claim that the state unduly and exclusively burdened the Navajo Nation with the state's budget shortfall.[16]

The court held that the state is immune from a claim or award of compensation for past wrongs but held also that the district court's injunction proscribing future wrongs was appropriate.[17] The court reaffirmed the reasoning and holding in *Papasan v. Allain*[18] that the Eleventh Amendment to the Constitution of the United States prevents a court from granting an award compensating a plaintiff for a state's past illegal acts but allows a court to remedy a present and ongoing violation.[19] The Tenth Circuit held that the district court's order meets

10. *Id.* at 744.
11. *Id.*
12. *Id.* at 744.
13. *Id.*
14. *Id.* at 744-45.
15. *Id.*
16. *Id.* at 745.
17. *Id.* at 745-46. The district court's order enjoined the state from funding the Navajo Nation's title XX contract services for the present and subsequent years for less than $446,277, unless a lower level of funding can be justified by the need for those services on the Navajo Nation or in Navajo Indian Country and from administering and allocating title XX funds in any manner that fails to ensure the availability of title XX services to Navajo Indians at the same level, relative to their need, as those services are available to all New Mexicans. *Id.*
18. 478 U.S. 265 (1986).
19. *Navajo Nation*, 975 F.2d at 745 (citing *Papasan*, 478 U.S. at 278-82).

the requirements of *Papasan* and affirmed the order and the district court's decision.[20]

SUPREME COURT OF KANSAS

INDIAN GAMING: Sufficiency of Governor's Signature on Class III Gaming Compact to Render Compact Binding on the State.

State ex rel. *Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992).

This original action in mandamus and quo warranto was brought by the state of Kansas, ex rel., Robert T. Stephan, Attorney General, against the Governor of Kansas, Joan Finney. The case included the following chronology of the events which led to the present action:

> August 28, 1991 — Kickapoo Nation in Kansas served a request on Governor Finney to negotiate a tribal-state compact relative to Class III gaming activities on its reservation.
>
> January 16, 1992 — Kickapoo Nation and Governor Finney execute a tribal-state compact.
>
> January 22, 1992 — Original tribal-state compact is received by the Department of the Interior for approval.
>
> January 24, 1992 — Kansas House Concurrent Resolution introduced which urges the Secretary of the Interior to withhold approval of the compact because the Kansas Legislature's approval thereof is required . . . . (Bill died January 27, 1992.)
>
> February 5, 1992 — Action herein filed . . . .
>
> . . . .
>
> February 11, 1992 — House Bill No. 2928 introduced . . . which would authorize Governor or her designated representative to negotiate tribal-state compacts . . . on behalf of the State . . . . (Bill died in committee May 26, 1992).
>
> February 25, 1992 — Senate Bill No. 739 introduced which would create the Kansas Legislative Commission on State-Indian Affairs which would be charged with negotiation of tribal-state compacts. (Bill died in committee, May 26, 1992.)
>
> February 28, 1992 — Department of Interior notifies the Kickapoo Nation that [the department's assessment] . . . will be deferred pending resolution of the court proceeding.
>
> . . . .

20. *Id.* at 745.

> March 13, 1992 — Letter from Department of the Interior to the Kickapoo Nation advising [that the] Department will approve compact if the Kansas Supreme Court determines that "the Governor is authorized to bind the state to the compact" . . . .
>
> . . . .
>
> May 19, 1992 — Declaratory judgment/mandamus action filed in United States District Court for the District of Columbia by the Kickapoo Nation and Governor of Kansas . . . to compel approval of compact by the Secretary [of the Interior] based upon the running of the statutory 45-day period for approval.[1]

The narrow issue before the Kansas Supreme Court was whether the Governor has the authority to bind the state to a tribal-state compact with the Kickapoo Nation (the Tribe). The attorney general argued that the power to bind is a legislative rather than executive function. The governor argued that the Kansas Constitution,[2] Kansas Statutes,[3] and the language of the Indian Gaming Regulatory Act (IGRA)[4] give her the authority to negotiate for and enter into tribal-state compacts.

The Kansas Supreme Court held that section 75-107 of the Kansas Statutes Annotated does not apply because the compact is between the governor and the Tribe, not between the governor and the federal government.[5] Also, the statute did not apply because "the transaction of business connotes the day-to-day operation of government under previously established law or public policy."[6] The governor's act, according to the court, was not pursuant to any existing law but was an "enactment of law and determination of public policy."[7]

The court noted provisions in state law[8] which give the governor limited powers to make law and determinations of public policy.[9] In

1. State *ex rel.* Stephan v. Finney, 836 P.2d 1169, 1173-74 (Kan. 1992). The 45-day period for approval is specified in 25 U.S.C. § 2710(d)(8) (1988).

2. KAN. CONST. art. 1, § 3. The Governor is the supreme executive power of Kansas. *Id.*

3. KAN. STAT. ANN. § 75-107 (1989) provides that "The Governor shall transact all business of the state, civil and military, with the [federal] government, except in cases otherwise specifically provided by law."

4. 25 U.S.C. §§ 2701-2721 (1988).

5. State *ex rel.* Stephan v. Finney, 836 P.2d 1169, 1178 (Kan. 1992).

6. *Id.*

7. *Id.*

8. KAN. STAT. ANN. § 48-925 (1989) provides that the governor, during a state of disaster or emergency, may issue orders and proclamations which shall have the force and effect of law.

9. *Finney*, 836 P.2d at 1179.

the absence of any statutory authority, the governor, according to the court, is without the authority to negotiate for and enter into tribal-state compacts.[10] The court noted that language in the compact purports to create or authorizes the creation of agencies or commissions and/or the expansion of existing agencies or commissions.[11] To bind the state to this agreement, according to the court, is beyond the statutory or constitutional authority of the governor and falls within a power reserved for the legislature.[12] The court found no constitutional impediment to the governor's authority to enter into negotiations but found the power to bind the state to the compact a different matter.[13]

10. *Id.* at 1185.
11. *Id.* at 1182-83.
12. *Id.* at 1184.
13. *Id.* at 1185.