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The Legal Bases for Religious Peyote Use

By Kevin Feeney, J.D.

While religious peyote use dates back several millennia (Schultes & Hofmann, 1992), the practice of peyotism in the United States is a relatively recent phenomenon. The rise of peyotism, which was traditionally limited to Mexico, Texas, and the Southwest, was intrinsically tied to the rapid and widespread destruction of Native American cultures across the continent in the 19th century (Long, 2000). During this period, tribes from across the country were forced off their lands onto small reservations, which they often shared with tribes who spoke different languages, had different cultures, and came from very different parts of the United States. While peyotism was unknown to most tribal groups in the early part of the 19th century, the removal of so many disparate tribes to isolated reservations produced circumstances where once remote practices and traditions could be shared and rapidly dispersed among numerous tribal groups. At this critical juncture, when many tribes were facing the loss of land, traditions, and way of life, peyotism surfaced as a way to create social and tribal solidarity among the diverse tribes that had been forced together, and at the same time preserve aspects of Indian culture (Long, 2000). The peyote ritual, just as the Ghost Dance, became a symbol of resistance and helped form the foundation of a pan-Indian movement, a movement that would help create unity among American tribes against the cultural devastation wrought by European settlers.

The objective of this chapter is to explore and explain the legal bases that currently support the limited religious use of peyote. This chapter consists of four parts. The first part

considers the history of peyote prohibition, religious exemptions, and the failed constitutional challenge that led to the current federal exemption; the second focuses on the parameters of the current federal exemption, as laid out in the American Indian Religious Freedom Act Amendments of 1994 (AIRFA), including who is protected, and whether non-recognized Indians may have an Equal Protection claim protecting their religious practices; the third concerns the Religious Freedom Restoration Act of 1993 (RFRA), and examines what the 2006 Supreme Court decision in *Gonzalez v. O Centro Espirita Beneficiente Uniao Do Vegetal* (*Gonzalez v. UDV*) means for non-Indian members of the Native American Church and other peyotist traditions; and finally, the fourth part explores whether the protections offered by AIRFA and RFRA extend to the state level, and if so, to what degree. While the current federal exemption is limited to Indian practitioners of traditional Indian religions, it is my aim to demonstrate that non-recognized Indians[1] might successfully seek protection under the statute by bringing an Equal Protection claim, and that all sincere practitioners, Indian and non-Indian alike, should find federal protection to practice traditional Indian religions under RFRA.

A Brief Legal History

The controversy surrounding ceremonial peyote use dates back several centuries, and stems from the belief of colonialists and missionaries that its use was an affront to God. In 1620 the Roman Catholic Church outlawed the use of peyote by indigenous peoples in Mexico (Beltran, 1952). When peyotism later spread to the United States in the 19th century, Christian missionaries worked with the Bureau of Indian Affairs (BIA) to eradicate its use (Long, 2000). Apart from the belief that peyote use was sinful, the use of peyote by Indians was hindering attempts to convert them to Christianity and assimilate them into American society.

As attempts to eradicate peyote use failed, those opposing its use looked to Congress. In 1918, the same year the Native American Church (NAC) was incorporated, the U.S. House of Representatives passed a bill prohibiting peyote use (Long, 2000). The bill did not advance further, and attempts to prohibit peyote at the federal level did not resume until the mid-1960s.

While peyote was rarely used recreationally, it was peyote's association with LSD and the 1960s counter-culture that finally prompted Congress to outlaw peyote in 1965. This first piece of legislation, known as the Drug Abuse Control Amendments of 1965, was passed with the understanding that religious peyote use would be protected (Olson, 1981). Shortly thereafter, a regulatory exemption was passed by the Department of Health, Education and Welfare (HEW) to allow the religious use of peyote by the NAC. The Act was soon replaced by the Controlled Substances Act (CSA) in 1970, which also lacked a statutory exemption for religious peyote use. The CSA, however, was passed with assurances by the newly formed Bureau of Narcotics & Dangerous Drugs (BNDD) that it would adopt a regulatory exemption similar to the previous exemption approved by HEW (Olson, 1981). This exemption would allow "the nondrug use of peyote in bona fide religious ceremonies of the Native American Church" (Drug Enforcement Administration, 1971).

Employment Division v. Smith: The Free Exercise Challenge

Despite the regulatory exemption promulgated by the BNDD, individual state governments were not bound to honor the exemption and many states prohibited all uses of peyote, including use in traditional Indian religions. As a result, the limited federal exemption proved useless to many Indian peyotists who then faced state level prohibitions to their religious practices. One of these individuals was a Klamath Indian by the name of Al Smith, a recovering alcoholic who worked as a substance abuse counselor in Roseburg, Oregon. After a dispute with

his employer over his religious peyote use, Smith was fired for allegedly abusing an illegal substance. Smith applied for unemployment with the state of Oregon, and was denied on the basis that he had been fired for "misconduct" (Epps, 2001).

Smith brought a suit challenging the decision of the Employment Division to deny him unemployment benefits as a violation of his right to free exercise of religion under the First Amendment. The result was a landmark decision by the Supreme Court that reduced the once deferential Free Exercise Clause to a mere constitutional footnote, concerned only with the most blatant forms of religious discrimination (*Employment Division v. Smith*, 1990).

Prior to the Supreme Court's decision in *Employment Division v. Smith* (1990), a three-part balancing test known as the *Sherbert* test was used to determine whether a law unconstitutionally burdened an individual's free exercise rights. Under the *Sherbert* test, the individual must first show that the law in question substantially burdens his free exercise of religion. In response, the government must show that the law serves a compelling government interest, and that the government interest cannot be advanced by any less intrusive means (*Sherbert v. Verner*, 1963). The Supreme Court in *Smith* overturned this test in favor of a neutrality test. Under the court created neutrality test the government would no longer need a compelling interest to burden religion, but could burden religious practices so long as the law in question treated all people similarly. For Al Smith, this meant that Oregon's law prohibiting peyote use was valid because it prohibited peyote use by all people and was not specifically targeting the religious use of peyote by the NAC. The foreseeable impact of the law on the practices of the NAC was deemed unimportant.

The Aftermath of *Smith*

The fallout from *Employment Division v. Smith* (1990) was considerable, causing a universal outcry among religious groups across the country. These groups formed an unlikely political coalition, including groups as diametrically opposed as Pat Robertson's American Center for Law & Justice and the American Civil Liberties Union (Epps, 2001). These groups converged for the purpose of pushing Congress to overturn the *Smith* decision by legislatively reinstating the *Sherbert* balancing test. Congress responded, and passed the Religious Freedom Restoration Act (RFRA) in 1993, which restored the *Sherbert* test used prior to *Smith*.[2]

While the movement to restore the *Sherbert* test was widely supported, American Indians were apprehensive about the proposed legislation's ability to effectively protect their rights to practice their religion. After all, Justice Sandra Day O'Connor, who did not support overturning *Sherbert*, joined the majority based on her view that religious peyote use would not have been protected by the Free Exercise Clause had the *Sherbert* balancing test been applied (*Employment Division v. Smith*, 1990). In light of O'Connor's opinion, a request was made by a prominent Road man,[3] Reuben Snake, that the coalition adopt (as one of its objectives) protections for religious peyote use. This request was rejected by the coalition, which worried that such an objective was too controversial and would fragment their fragile coalition (Epps, 2001).

Having recently suffered a tremendous loss at the Supreme Court, American Indian peyotists were hesitant to settle for a simple reinstatement of the *Sherbert* test, a test which in no way guaranteed protection for religious peyote use. The peyotists continued to lobby Congress. Finally, in 1994, Congress passed an amendment to the American Indian Religious Freedom Act (AIRFA) recognizing that "the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian

tribes and cultures" and exempting Indian practitioners from the criminal prohibitions on peyote (AIRFA, 1994).

A New Exemption

AIRFA exempts the use of peyote by Indians, identified as members of federally recognized tribes, for "bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion" (AIRFA, 1994). Under this new exemption, mere NAC membership is insufficient; one must also be part of a federally recognized tribe. The removal of any reference to the NAC in the exemption acts to make the law more constitutionally palatable[4] and may also have been meant to narrow the exemption by excluding non-Indian peyotists.[5] This wording allows peyote use by practitioners of other Indian peyote religions, separate from the NAC, and recognizes the diversity of religious traditions that have developed around ceremonial peyote use.

To understand the scope of this new exemption, several issues need to be explored. First, who is an "Indian" for purposes of this Act, and what does it mean to be part of a federally recognized tribe? Second, what is the basis for allowing this select group of "Indians" to practice their traditional beliefs and for excluding "non-recognized Indians," as well as non-Indians who may also subscribe to these beliefs and practices? These questions are the subjects of the sections that follow.

Who is an "Indian?"

Under the exemption, an Indian is defined as a member of a tribe "which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" (AIRFA, 1994). This definition has two parts: (1) to qualify as an Indian

under the exemption, one must be an enrolled member of a tribe, and, (2) the tribe to which the individual belongs must be one that is recognized by the federal government (AIRFA, 1994).

The fact that the statute exempts members of federally recognized tribes is important. As will be explored later, the federal government has a lot of flexibility in how it chooses to define the term "Indian" when passing legislation that provides services to or directly affects "Indians." Other than federal tribal recognition, elements used to define who is an Indian include: treaty rights, whether an individual lives on or off a reservation, and the percentage of Indian blood an individual can claim through ancestry. Limitations on blood quantum (ancestry) can be particularly limiting and may serve to exclude non-Indian spouses or mixed race children from protections or benefits otherwise offered by the law. By choosing not to define the term "Indian" by blood quantum, the government has left the extent of the protections offered by the peyote exemption to be determined by individual tribes through tribal enrollment practices.

A tribe's right to define its own membership and enrollment criteria has been recognized by the Supreme Court as central to the tribe's "existence as an independent political community," and to the preservation of its traditions and culture (*Santa Clara Pueblo v. Martinez*, 1978, p. 72 n. 32). Some tribes choose to require a minimum blood quantum,[6] while others will recognize mixed race children of any blood quantum so long as they are a child of a tribal member.[7] Thus the criterion for tribal enrollment often fluctuates from tribe to tribe.

Being enrolled in a tribe is not sufficient, however, to qualify for the peyote exemption. The tribe to which one is enrolled must be federally recognized, a limitation that ultimately excludes many ancestral Indians from legal protection, even when peyotism is a traditional religious practice. There are many tribes that never developed a government-to-government relationship with the United States and so have never been recognized; others have had the

misfortune to lose their federally recognized status due to the Allotment Act, passed in 1887, or to unilateral termination of federally recognized status by the federal government. In the wake of the Allotment Act, many tribes were coerced into trading their sovereign rights, and thus federal recognition, for small parcels of land. Later, in the 1950s, over one hundred tribes had their federally recognized status revoked in accordance with the termination policy of that era.[8] These policies left many tribes without a land base, without a recognized governing body, and generally ineligible for federal benefits and protections, which include the current peyote exemption.

This narrow definition of the term "Indian" excludes many who are Indians by race and heritage from claiming the peyote exemption and thus prohibits them from legally practicing their religious traditions. By limiting the exemption to members of federally recognized tribes the exemption fails to recognize the pan-Indian nature of many peyote religions such as the NAC, which are not tribally based or tribe specific religions. Whenever the federal government creates a classification of people for different treatment under the law, as it has done with the peyote exemption, it subjects itself to scrutiny under the equal protection guarantees of the Due Process Clause of the Fifth Amendment to the Constitution.

Equal Protection of Indians from non-Recognized Tribes

The level of scrutiny applied under the Due Process Clause depends on the nature of the classification assigned. The law requires application of the highest level of scrutiny (strict scrutiny) when classifications are based on race.[9] Intermediate levels of scrutiny are applied to classifications based on sex, child illegitimacy, or alienage.[10] All other classifications are generally subject to the lowest level of scrutiny, usually referred to as rational basis review, which requires that the law in question be rationally related to a legitimate government interest. Although the protections offered by the peyote exemption appear to be based on a racial

classification, thus requiring application of strict scrutiny, the Supreme Court has determined that, because the federal government has a special trust responsibility to protect and preserve Indian tribes and cultures, the laws singling out Indians for special protection fall within this responsibility and do not constitute racial classifications (*Morton v. Mancari*, 1974).

The following section will explore what the trust responsibility means in terms of equal protection claims, and whether the exemption may be extended to non-recognized Indians. This section will also consider several alternative interests that may exclude non-recognized Indians from the exemption, as well as any risks an expansion of the exemption may pose.

The Trust Responsibility. In 1974, the Supreme Court addressed the problems raised by the convergence of the government's trust responsibility with its duties under the Due Process Clause in a case called *Morton v. Mancari*. At issue in *Morton* was a federal law mandating employment preferences for Indians within the Bureau of Indian Affairs (BIA). Non-Indian employees of the BIA alleged that the employment preference constituted racial discrimination in violation of due process.

Instead of simply finding that the law was based on a racial classification, the court set forth a test based on the trust responsibility for determining whether statutory preferences for Indians are Constitutional. The test can be stated as follows: where special treatment for Indians can be rationally tied to the fulfillment of Congress' unique trust obligation, which establishes a governmental duty to protect and preserve Indian tribes and cultures,[11] such preferences will be upheld as constitutional (*Morton v. Mancari*, 1974, p. 555). This test can be broken down into two parts: first, the goal behind the classification must be within the purview of Congress' trust responsibility; second, the classification must be reasonable and rationally designed to further that goal. The court explained that classifications that pass this test would be considered political

rather than racial classifications and would be subject only to rational basis review, the lowest level of scrutiny (*Morton v. Mancari,* 1974).

In *Morton* (1974), the Court found that the purpose of the employment preference was to "further Indian self-government" (p. 555), a goal that falls within the purview of the government's trust obligation. The court also found that the preference was reasonable and rationally designed to further that goal. The court based these findings on the fact that the BIA only serves federally recognized tribes and only members of federally recognized tribes are eligible for the employment preference. This classification is reasonable because the BIA does not offer services to non-recognized tribes and is rationally tied to the goal of furthering Indian self-government because it allows members of federally recognized tribes to have more say in the agency that governs their activities. Had the classification been extended to Indians from non-recognized tribes, the preference becomes overly broad and is no longer clearly related to the goal of advancing Indian self-government. Under the latter circumstances the law would have been more likely to fail as a racially based classification because extending the preference to Indians from non-recognized tribes does not further the government's purposes of advancing Indian self-government and appears to be a simple racial classification.

After *Morton* (1974), it became clear that legislative preferences for Indians would not be subject to the strict scrutiny standards usually applied to racial classifications under the Fifth and Fourteenth Amendments, and that such preferences would be upheld so long as they were rationally related to the trust obligation. While the trust responsibility has generally been limited to issues regarding property or fiduciary rights held by recognized tribes or by treaty right, several court decisions have interpreted the trust responsibility as including a duty to preserve Indian culture and religion.

The Fifth Circuit, in the case of *Peyote Way Church of God v. Thornburgh* (1991), was one of the first courts to recognize preservation of Indian cultures and religions as "fundamental to the federal government's trust relationship with Tribal Native Americans" (p. 1216). The First Circuit, relying partially on the decision in *Peyote Way*, also found that the government's trust responsibility extended to the preservation of Indian culture and therefore justified exemptions for the religious use of eagle feathers by Indians while denying the same rights to non-Indians (*Rupert v. Director, U.S. Fish & Wildlife Serv*., 1992). Some may argue that these courts are breaking new ground, but the inclusion of cultural and religious preservation as part of the government's trust responsibility is in keeping with the historical foundation of this unique relationship with American Indians.

The foundations of this relationship are based on the historical subjugation of Indian peoples by the United States Government. As the Supreme Court has explained, this relationship arose because:

> …the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection. . . (*Board of County Comm'rs* v. *Seber*, 1943, p. 715).

As the Supreme Court suggests, the foundations for the trust responsibility do not arise because certain tribes are federally recognized, or because they entered treaties with the United States, but because of actions by the United States government resulting in the decline of all American Indian cultures and societies.

While the government may be able to provide a rational basis for limiting some rights and protections to federally recognized tribes, such as employment preferences with the BIA that advance the goals of Indian self-government, protections for the preservation of Indian culture

and religion cannot rationally exclude Indians who share in the same cultural and religious traditions.

The Trust Responsibility as a Means to Preserve Indian Religions. In *Peyote Way* (1991), the Peyote Way Church of God, a non-Indian peyotist church, challenged the original peyote exemption alleging that the exemption was based on a racial classification in violation of equal protection. The Fifth Circuit, following the Supreme Court's lead in *Morton* (1974), sought to establish whether the classification was racial or political in nature. The Fifth Circuit, however, seems to have misunderstood the ruling in *Morton*, believing the Supreme Court had "characterized the BIA employment preference as a political rather than racial classification because the BIA regulations implementing the preference limit eligibility to members of federally recognized tribes who have at least 25% Native American blood" (*Peyote Way v. Thornburgh*, 1991, p. 1215). Assuming that the exemption would only be acceptable as a political classification under *Morton* if it were limited to members of federally recognized tribes with at least 25% Indian heritage, the Fifth Circuit set out to "determine whether NAC membership presupposes tribal affiliation and Native American ancestry, and thus effects a political classification under *Morton*" (p. 1215).

The Fifth Circuit, following this logic, determined that the peyote exemption was a political classification limited to members of federally recognized tribes with 25% Indian heritage (*Peyote Way v. Thornburgh*, 1991). The court's finding was based on the testimony of Emerson Jackson, president of the Native American Church of North America (NACNA), one of over a hundred denominations of the NAC (Fikes, 2002), who testified that these were the membership requirements of the NAC. The NACNA, unlike other congregations of the NAC, restricts membership to members of federally recognized tribes with 25% Indian heritage, a

requirement that was adopted in 1982 (Stewart, 1987). While each congregation of the NAC makes its own rules, and most accept non-Indians so long as they are seriously interested (Stewart, 1987), the court did not hear this testimony and established the membership protocol for the NACNA as the standard for all congregations of the Church.[12] As a result, the Fifth Circuit's ruling in *Peyote Way* is premised not only on a misunderstanding of the holding in *Morton* (1974), but on a misunderstanding of the NAC as well.

While Indian self-government was at issue in *Morton* (1974), the government interest behind the peyote exemption is not self-government but the preservation of traditional Indian religions. While self-government is unique to federally recognized tribes, and, employment preferences for members of these tribes is rationally related to promoting self-government, Indian religion and culture are not unique to federally recognized tribes.

The Native American Church, first established in 1918, is not the product of one Indian Nation, and has never been tribe specific (Bannon, 1998). In fact, "in 1918, when tribal leaders decided to incorporate and to choose a name, they chose the name "Native American Church" to emphasize…intertribal solidarity" (p. 478). By limiting the peyote exemption to federally recognized tribes, the Fifth Circuit failed to recognize the nature and history of the church and instead perpetuated the assimilationist measures used against Indian peoples that ultimately brought the Native American Church into existence. Indian religions, particularly peyotism, cross tribal lines and thus restricting the exemption to members of federally recognized tribes – as done by the Fifth Circuit and later by AIRFA – does not appear to have a rational basis. There may be, of course, other unarticulated reasons for restricting the classification under AIRFA.

Other Government Interests. Although rational basis review is not a difficult standard to satisfy, it is not a green light for the government to do whatever it wants (*Romer v. Evans,* 1996).

While it is reasonable for the government to seek to preserve the religious practices of Indians, there appears to be little rationale in excluding Indians who are not federally recognized when they share a common religious tradition. Nevertheless the government may have other interests in allowing only a narrow exemption to criminal drug laws.

One interest often advanced in cases of religious drug use is an interest in protecting the health of the religious practitioner.[13] This interest is unlikely to succeed, however, particularly in light of the existing exemption. In the case of *Kennedy v. Bureau of Narcotics & Dangerous Drugs* (1972), a non-Indian religious group calling itself the "Church of the Awakening" sought an exemption for the religious use of peyote. The sole interest asserted by the government in denying the Church's petition was in protecting the health of the Church members. It was not surprising that the *Kennedy* court dismissed this interest. Citing the peyote exemption, the court found that the government had no "lesser or different interest in protecting the health of the Indians than it has in protecting the health of non-Indians" (p. 417).

Another interest cited in cases of religious drug use is an interest in preventing the diversion of drugs used for religious purposes to the black market. To legitimately exclude non-recognized Indians from the peyote exemption the government would have to show that the exclusion is rationally related to the goal of preventing diversion of peyote. The problem with this argument is that peyote is a relatively obscure drug which has rarely appeared on the black market. The Drug Enforcement Administration (DEA) argued, in a case called *Olsen v. DEA* (1989), that the differences between illicit use and availability of peyote justified allowing an exemption for religious peyote use while simultaneously denying an exemption for religious marijuana use. The DEA explained:

> [T]he actual abuse and availability of marijuana in the United States is many times more pervasive . . .than that of peyote. . . . The amount of

> peyote seized and analyzed by the DEA between 1980 and 1987 was 19.4 pounds. The amount of marijuana seized and analyzed by the DEA between 1980 and 1987 was 15,302,468.7 pounds. This overwhelming difference explains why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies, and not for a religion which espouses continual use of marijuana (p. 1463).

Because of the extremely limited availability of peyote, it is unlikely that expanding the exemption to include all Indian peyotists would increase the risk of diversion to the black market. This is a reality that is compounded by the severely depleted populations of peyote in its natural habitat, a depletion that is marked by the decreasing size of available peyote buttons[14] and the increasing difficulty in obtaining peyote among peyotists for religious purposes (Anderson, 1995). While the annual peyote harvest brings in nearly 2 million peyote buttons, this is far short of the annual demand by the NAC, which approaches 5 to 10 million buttons a year (Anderson, 1995). While peyote has yet to be listed as an endangered species, the increasing scarcity of the sacred cactus mitigates the argument that expanding the exemption would increase diversion to the black market.

Risks of an Expanding Exemption. Given an expanded understanding of the trust obligation, the peyote exemption would not likely survive an equal protection challenge by an NAC adherent from a non-recognized tribe. There are those who worry, however, that such a challenge would put the survival of the peyote exemption in danger. John Thomas Bannon, Jr., senior counsel for the Department of Justice in the *Peyote Way* case, warns that:

> …a decision holding the federal exemption unconstitutional would have been yet another blow to Native American culture and religion…Because it is unlikely that Congress would expand the exemption to include non-Indians…given the considerable potential for abuse such an expansion would provide… (Bannon, 1998, p. 476).

Bannon's perception of the exemption is misguided. The case in *Peyote Way* was brought by a non-Indian church, and Bannon feared that ruling the exemption unconstitutional would require

Congress to either exempt everyone who claims to use peyote religiously or eliminate the exemption. However, by invoking the trust obligation the government may restrict the exemption to Indian religious practitioners. Such a limitation would be rationally related to the government's interest in preserving Indian culture and traditions. The government, however, does not have a trust obligation to the Peyote Way Church of God nor to the Church of the Awakening for that matter, and, equal protection does not compel an extension of the exemption to them.

While Bannon (1998) argues that the exemption must be limited to members of federally recognized tribes, this position is irreconcilable with his exceptional historical account of the Native American Church. Bannon acknowledges that peyote "was instrumental in bringing stability to life on the reservations" when so many "different Indian peoples, different Indian cultures, and different Indian religions were thrown together" (p. 477). He calls the Native American Church "the most important pan-Indian institution in America" (p. 477), and yet calls for the preservation of an exemption that divides the church along tribal lines and strikes at the pan-Indian foundation of the NAC.

Limiting the exemption to recognized tribes arbitrarily excludes thousands of NAC members and peyotists, and cannot be said to be rationally related to preserving this pan-Indian religion. Without sheltering all purported "religious claimants" the 1994 peyote exemption can be expanded to protect all Indian people, regardless of tribal affiliation, and avoid equal protection violations by properly fulfilling the government's goal of preserving Indian religion pursuant to the trust obligation.

This interpretation of the trust obligation as applied to traditional religious use of peyote, however, may be a non-issue in light of the passage of the Religious Freedom Restoration Act

(RFRA) in 1993 and the 2006 ruling of the Supreme Court in *Gonzalez v. UDV*. Under the ruling in *Gonzalez*, non-recognized Indians as well as non-Indians will likely be protected from the criminal peyote laws if they are practicing traditional Indian peyote religions.

The Religious Freedom Restoration Act

While the 1993 Religious Freedom Restoration Act (RFRA) was originally regarded by Indian peyotists with skepticism, it may ultimately prove to be more effective than the 1994 AIRFA exemption. The original cynicism towards RFRA was based on Justice O'Connor's concurrence in *Employment Division v. Smith* (1990). O'Connor argued that under the *Sherbert* test the government's interest in prohibiting a controlled substance would always exceed the interests of religious groups who used the substance as a sacrament. However, the recent Supreme Court decision in *Gonzalez v. UDV* (2006) rejected this view.

The case of *Gonzalez v. UDV* (2006) concerned a small religious sect, with origins in the Amazon Rainforest, who consume a sacramental tea brewed from plants indigenous to the Amazon. The tea, called 'hoasca,' contains DMT, a federally controlled substance. In 1999, three drums of hoasca headed from the Amazon to the American branch of the UDV Church were intercepted and confiscated by United States Customs inspectors. The UDV was subsequently threatened with prosecution.

In response, the UDV filed suit in Federal District Court seeking an injunction against application of the Controlled Substances Act (CSA) to their religious use of hoasca. In their suit, the UDV argued that application of the CSA to their religious use of hoasca was a violation of their religious practices, as protected by RFRA. The Supreme Court agreed (*Gonzalez v. UDV*, 2006).

Under RFRA, the *Sherbert* test is applied to determine whether a law violates an individual's religious freedom (*Callahan v. Woods*, 1984). Under the *Sherbert* test the individual must first show that the law in question substantially burdens his free exercise of religion. In response, the government must show that the law serves a compelling government interest, and must show that the stated interest cannot be advanced by any less intrusive means (*Callahan v. Woods*, 1984).

In *Gonzalez* (2006), the government conceded the first element of the analysis, that use of hoasca by the UDV was an important component of their religious practices, and, that application of the CSA would substantially interfere with this practice. On appeal to the Supreme Court the government argued that uniform application of the CSA itself constituted a compelling interest and that any exceptions to the Act would undermine this interest. The court found that the mere placement of DMT into Schedule I[15] of the CSA by Congress could not relieve the government of its duty to meet its burden under RFRA. In support of its position, the court cited both the statutory and regulatory exemptions that have permitted limited religious use of peyote, a Schedule I controlled substance, for the last thirty-five years. The court reasoned that if the government could make an exemption for peyote use in native religious traditions without undermining the goals of the CSA, then the government could certainly make an exemption for the religious use of hoasca by the UDV (*Gonzalez v. UDV*, 2006).

The Supreme Court's ruling means that the mere placement of a substance in Schedule I of the CSA is not a sufficiently compelling reason to permit the government to substantially burden a sincere religious practice without accommodation. As a result, the government must put forth a specific interest when burdening religious practices. The government must

demonstrate the compelling nature of the asserted interest and must prove that the law cannot be tailored to accommodate the religious practice without undermining the stated interest.

Before reaching the Supreme Court, the government had argued that uniform enforcement of the CSA was the least restrictive means of advancing three such governmental interests. These articulated interests included "protecting the health and safety of UDV members, preventing the diversion of hoasca from the church to recreational users, and, complying with the 1971 United Nations Convention on Psychotropic Substances" (*Gonzalez v. UDV*, 2006, p. 4). Because the Supreme Court decision in *Gonzalez* requires the government to articulate a compelling interest and to demonstrate that the interest cannot be affected by any less restrictive means, it is necessary to understand the likely interests the government will advance against the religious use of Schedule I substances.

In support of its first interest, the government offered evidence that DMT, the controlled substance in hoasca, "can cause psychotic reactions, cardiac irregularities, and adverse drug interactions" (*Gonzalez v. UDV*, 2006, p. 5). The district court found this evidence evenly weighted with evidence put forth by the UDV, which cited "studies documenting the safety of its sacramental use of hoasca" and presented "evidence that minimized the likelihood of the health risks raised by the government" (p. 5). The court found the evidence to be in equipoise and determined that the government failed to demonstrate that the health risks associated with the sacramental use of hoasca were sufficiently compelling to justify the substantial burden on the UDV's religious practices (*Gonzalez v. UDV*, 2006).

In support of its second interest the government "cited interest in the illegal use of DMT and hoasca in particular" and pointed to evidence of "a general rise in the illicit use of hallucinogens" (*Gonzalez v. UDV*, 2006, p. 5) to support its contention that hoasca would be

diverted to the black market. The UDV countered that given the small amounts of hoasca used by the church, the absence of any previous diversion problems, and the lack of any substantial illicit market for hoasca, that the risk of diversion of hoasca to recreational users was too minimal to justify a substantial burden on their religious practices. The district court, finding the evidence on diversion to be "virtually balanced" (p. 5) determined that the government had again failed to carry its burden of demonstrating a compelling interest justifying a substantial burden on the religious practices of the church.

The district court also rejected the government's asserted interest in complying with the 1971 Convention on Psychotropic Substances outright, finding that the Convention did not apply to hoasca.[16] While the government may argue that it has other compelling interests in future RFRA cases, the arguments for protecting the health of religious practitioners and preventing diversion of controlled substances to the black market are likely to be recurring governmental interests in strict application of the CSA.

Should a non-Indian member of the NAC, or some other peyotist tradition, be arrested for peyote possession he will likely have a viable defense in RFRA (1993). To claim RFRA, the defendant must usually demonstrate that the law in question substantially interferes with his free exercise of religion. This usually means that the defendant must show that the activities burdened by the law constitute religious practices based on a sincere religious belief. Congress, through passage of the AIRFA Amendments of 1994, has already recognized that use of peyote plays a significant role in some traditional Indian practices, and that enforcement of the CSA in these circumstances would substantially burden these religious practices. This congressional recognition should be sufficient to establish substantial interference with the religious practices of peyotists.

In response, the government will be required to put forth a compelling reason for excluding the individual from the peyote exemption. As described above, two interests that the government is likely to advance include: (1) protecting the health and safety of the individual; and, (2) preventing diversion of peyote to the black market. In addition, the government will have to show that these goals cannot be accomplished by less restrictive means that would still allow an exemption for peyote use by the religious claimant. This is a showing that will likely prove difficult in light of the current peyote exemption for "Indians."

The interests in protecting the health of the religious claimant and preventing diversion of peyote suffer from the same weaknesses discussed under the equal protection analysis discussed previously. As explained by the Ninth Circuit in *Kennedy*, the government has no "lesser or different interest in protecting the health of the Indians than it has in protecting the health of non-Indians" (*Kennedy v. BNDD*, 1972, p. 417). Nor is the likelihood of diversion of this scarce cactus likely to increase should non-Indians be allowed to practice peyotism within the folds of the Native American Church, or any other Indian peyote religions. While other Indian peyote traditions may be different, the NAC is not a racially or tribally based religion, and, it has frequently embraced non-Indian members (Stewart, 1987). Unless the government can articulate some other compelling reason for restricting the peyote exemption to Indians, RFRA will very likely serve to protect all adherents of peyotism in accordance with the open and inclusive nature of those traditions.

State Level Protections

The AIRFA peyote exemption and RFRA are both federal laws. While both are written to provide protections at the federal and state level, the Supreme Court, in *City of Boerne v. Flores* (1997), struck down RFRA as applied to the states for unconstitutionally violating the

principles of federalism and separation of powers. This means that RFRA is only a defense to federal prosecution, unless legislatively adopted by the state in question. Since 1993, only eleven states have adopted state equivalents of RFRA.[17] The AIRFA Amendments of 1994 appear to suffer from the same unconstitutional quality. Although AIRFA has yet to be overturned as applied to the states, it is possible that a court will rule that the peyote exemption only applies to federal prosecutions. As a result, peyotists need to be aware of their state laws should they practice their religion away from federal reservation lands. Currently twenty-eight states recognize the use and possession of peyote for religious purposes,[18] of which fifteen have explicit legislative exemptions,[19] and two of which allow religious use of peyote as a legal defense.[20]

Conclusion

Since *Employment Division v. Smith* (1990), the legal foundations for the religious use of peyote have regained solid footing with the passage of both the AIRFA Amendments of 1994 and the Religious Freedom Restoration Act in 1993. While AIRFA explicitly exempts the use of peyote in traditional Indian religions by members of federally recognized tribes, the Religious Freedom Restoration Act, as interpreted by the Supreme Court in *Gonzalez v. UDV* (2006), appears to protect the religious use of peyote by all individuals who sincerely practice traditional Indian peyote religions. There is also a strong argument that the federal trust obligation requires the peyote exemption under AIRFA to be expanded to encompass all Indian peoples whether federally recognized or not. While the trust obligation is based on a government-to-government relationship between tribes and the federal government, it has been interpreted as encompassing a duty to protect and preserve traditional Indian culture (*Peyote Way v. Thornburgh*, 1991; *Rupert v. Director, U.S. Fish & Wildlife Serv*., 1992). Indian culture and religion, such as the

pan-Indian Native American Church, cross tribal boundaries and it is unlikely that any rational basis exists for restricting the federal government's duty of preservation of culture and religion to federally recognized tribes to the exclusion of all other Indian peoples.

While the protections for religious peyote use currently stand on the strongest legal foundation they ever have, the peyote religions currently face a much greater threat than criminal prohibition. Due to land and economic developments in southern Texas where peyote is harvested commercially, and due to the harmful harvesting practices of some Indians and licensed peyote distributors, concern is mounting that peyote may soon become endangered (Anderson, 1996; Sahagun, 1994; Terry, 2003; Trout, 2002). While appropriate legal protections are finally in place for religious use of peyote, practitioners of traditional peyote religions now face a graver concern – preservation of their sacrament.

ENDNOTES

[1] "Non-recognized Indian" is a term I will use throughout this chapter to refer to individuals who are Indian by heritage, but who are excluded from the legal definition of "Indian" for purposes of the peyote exemption under AIRFA (1994).

[2] It should be noted that RFRA reinstates the *Sherbert* test as a statutory protection only. It does not expand the constitutional protections for free exercise of religion, which were diminished by *Employment Division v. Smith*.

[3] The term "Road Man" generally refers to an individual who leads peyote ceremonies.

[4] The Ninth Circuit, in *Kennedy v. Board of Narcotics & Dangerous Drugs* (1972), accepted the argument that limiting the peyote exemption to the NAC was unconstitutional, but declined to expand the exemption to the Church of the Awakening, which sought to be included in the exemption, because expanding "the regulation to include the Church of the Awakening…suffers the same constitutional infirmity as the present regulation" (p. 417).

[5] For most of the history of the NAC non-Indians have been allowed to participate in NAC ceremonies and also to become NAC members (Stewart, 1987).

[6] For example, the Ute require a 5/8 blood quantum for tribal membership, the Mississippi Choctaw require 1/2, and the Mashantucket Pequot of Connecticut require 1/16 tribal blood quantum. Of tribes that retain blood quantum eligibility rules, 1/4 blood is the most commonly required quantum.

[7] Tribes in the East and Mid-west generally use the criteria of descent rather than blood quantum to determine enrollment. Conceivably this means a child could be enrolled with a blood quantum as low as 1/100, so long as he is a descendant of a tribal member.
[8] Termination was implemented as a policy in the 1950s with the goal of eliminating tribal self-government and of integrating Indians into the general population. During this period a series of Acts were passed by Congress eliminating the governmental status and federal recognition of approximately 109 different tribes.
[9] To pass muster under strict scrutiny the law must be based on a compelling government interest, and there must be no less restrictive means of achieving that interest. The *Sherbert* test, discussed earlier, requires application of strict scrutiny to laws which substantially burden religious practices.
[10] Intermediate scrutiny requires that the law in question bear a substantial relationship to an important government interest which that law seeks to advance.
[11] The trust responsibility is generally traced back to two early Supreme Court cases: *Cherokee Nation v. Georgia* (1831); and, *Worcester v. Georgia* (1832).
[12] The *Peyote Way* case is not the first time Emerson Jackson had asserted that the NACNA's strict membership requirements extended to all congregations of the NAC. In 1984, Jackson informed the FBI that a Mr. and Mrs. John D. Warner, peyote custodians for the NAC of Tokio, North Dakota, were not members of the NAC. Jackson testified that "they were not bona fide members of the NAC because they were not Indians," and were therefore in illegal possession of peyote (Stewart, 1987, p. 333). The jury found the couple innocent after they were able to prove that the Tokio congregation considered them bona fide members of the NAC (Stewart, 1987).
[13] See *Employment Division v. Smith* (1990). See also, *United States v. Kuch* (1968), *Kennedy v. Bureau of Narcotics & Dangerous Drugs* (1972), and *State v. Whittingham* (1973).
[14] The term 'peyote button' refers to the harvested top of the peyote cactus which is consumed either fresh or dried in religious peyote ceremonies.
[15] A Schedule I drug is one that has been determined to have no medical value and a high potential for abuse.
[16] The Supreme Court rejected the district court's contention that hoasca was not covered by the Convention, but found that this fact was not an automatic demonstration of a compelling government interest in applying the CSA (*Gonzalez v. UDV*, 2006).
[17] Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Rhode Island, South Carolina and Texas.
[18] Alaska, Arizona, California, Colorado, Idaho (reservation use only), Iowa, Kansas, Maryland, Minnesota, Mississippi, Montana, New Jersey, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas (limited to 25% Indian blood quantum), Utah (reservation use only), Virginia, Washington, West Virginia, Wisconsin, and Wyoming.
[19] Alaska, Arizona, Colorado, Idaho, Iowa, Kansas, Minnesota, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Wisconsin and Wyoming.
[20] Arizona and Oregon.

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