

UNITED STATES GOVERNMENT

Memorandum

*DEF
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OLC
COMMENTS ON
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DATE: February 28, 1979

TO : Robert T. Richardson
Acting Deputy Chief Counsel

FROM : Harry L. Myers
Attorney

SUBJECT: OLC's Comment on the Peyote Exemption

Attached for your review is a memorandum I received from Larry Sims of the Office of Legal Counsel. Mr. Sims is concerned about the constitutionality of the Peyote Exemption in 21 CFR 1307.31, and about our failure to amend the Exemption to correct the defects cited by Kennedy v. BNDD, 459 F.2d 415 (1972).

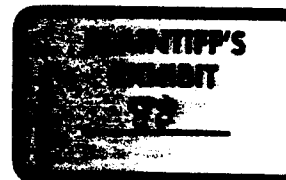
The Existing Exemption

First, there is nothing in the Controlled Substances Act that expressly grants any exemption for the religious use of drugs. Second, there is nothing in the Act that permits the Attorney General to allow the use of drugs by anyone outside of research. Mr. Sims recognizes this. In a footnote on page 3 of his memorandum to the Honorable Robert L. Lipshutz, Counsel to the President, Mr. Sims notes: ". . . that there would appear to be no statutory basis for the exemption granted to the American Native Church by 21 C.F.R. § 320.3 (c)(3), which was first adopted by the FDA in 1968."

Despite the lack of express statutory authority, we have ~~consistently maintained, as did the FDA before us,~~ that Congress did not intend to prohibit the non-drug use of peyote in bona fide ceremonies of the Native American Church. ~~There is abundant support for this position contained in the legislative histories of the Drug Abuse Control Amendments of 1965 and the CSA of 1970. Our litigation report in NACNY v. US outlines these histories and is attached.~~



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Thus, the Peyote Exemption is simply our view of ~~Congress' intent. The Exemption is not a regulation in the strict sense. We have no independent power to promulgate such a regulation.~~ *

As for the scope of the Exemption, we have taken the position that it applies to:

1. ✓ the use of peyote
2. ✓ by Native American (Indian) Peyotists
3. ✓ in traditional peyote rituals, such as those practiced by the various Native American Churches

As you know, there are many Native American Churches, just as there are many "Baptist" Churches. Our ~~interpretation of the scope of the Exemption is, again, based upon Congress' intent. Our analysis of that intent is contained in a supplemental litigation report, which is also attached.~~

The Kennedy Decision

* In May, 1969, a non-Indian Church, called the Church of the Awakening, petitioned the Director of BNDD for an exemption to use peyote for religious purposes. The Bureau granted the Church a hearing but, ultimately, ~~denied the Church's request (35 FR 14789 - Sept. 23, 1969).~~ ~~Why the Bureau conducted a hearing is not clear. But the grounds for the denial were well outlined in the Director's Decision, and in Deputy Chief Counsel Michael Sonnenreich's comment on the case before a Congressional Hearing:~~

"We presently are involved in another hearing regarding another church that is a non-Indian Church that is seeking the exemption and the order is going to be published, I believe, either today or tomorrow denying them the same exemption as the Native American Church."

"We consider the Native American Church to be sui generis."

* * * *

The Church of the Awakening appealed this decision to the Ninth Circuit. The Church's argument was simple:

1. The Federal Government must have a constitutionally acceptable basis for distinguishing between groups or classes when drafting or implementing legislation.
2. No acceptable distinction can be made between the religious use of peyote by the Native American Church and the Church of the Awakening.
3. Therefore, to grant the Exemption to one, but not to the other, is a violation of the Due Process Clause of the Fifth Amendment.

The Ninth Circuit ~~accepted this analysis.~~ Unfortunately for the plaintiff, the Court carried the argument one step further. The Court reasoned that if the Exemption ~~were extended~~ to include both churches, it would still be unconstitutional, because there is no acceptable basis for distinguishing between the Native American Church and the Church of the Awakening on the one hand, and all other Churches claiming a religious use of peyote. Therefore, the Court refused to extend the Exemption.

The gist of the decision is the Court's determination that no acceptable distinction can be made between Churches claiming a religious use of peyote.

After Kennedy, DEA had only three basic options:
~~(1) revoke the Exemption; (2) extend the Exemption;~~
~~(3) "stand pat".~~

Revoking the Exemption

Revoking the Exemption is an unacceptable option. First, it is clear that Congress intended Native American Peyotists to be exempt. To revoke the Exemption would flout Congress' intention in passing the CSA.

Second, I am convinced that the religious use of peyote by Native Americans is a protected activity, particularly after the Supreme Courts' decision in Wisconsin v. Yoder, 406 U.S. 205 (1972) (unique historical nature of Amish Church justifies the Church's religious practice of removing Amish children from public schools after the eighth grade; therefore, compulsory education to age 16 is unconstitutional as applied to the Amish). Revoking the Exemption would force an unnecessary Court challenge, which the Native American Church is likely to win.

Third, the country is now sympathetic to the cultural needs of Indians. The American Indian Religious Freedom Act of 1978 (PL95-341), a copy of which is attached, is evidence of this concern. If we took steps to revoke the Exemption, Congress, the Indians and the public would be "on our backs."

Expand the Exemption

Expanding the Exemption is also unacceptable. First, we have no statutory authority to expand or create new "Exemptions". If new exemptions are to be created, it must be by Congress or by the Courts. The fact that the existing Exemption might be constitutionally defective, and that changes might be required, does not mean that we have the authority to make the changes. Can an agency in the Executive Branch "rewrite" legislation which a Court has declared unconstitutional, or must the rewriting be done by Congress or by the Court?

Second, assuming we have the authority to expand the exemption, what would we expand it to? All bona fide religious uses of peyote? All bona fide religious uses of marihuana? (The Rastafarian cult worships the spirit of Haile Selassie, the late Ethiopian Emperor. Its members use marihuana as a part of their religious services). The religious use of all psychedellics (as the NACNY has asked)? Where would we draw the line?

The reasoning of the Kennedy decision indicates to me that no line can be drawn between religions claiming a bona fide use of drugs. Anything short of creating a general religious exemption is likely to come under constitutional attack.

Third, even if we have the authority to amend the Exemptions, and assuming our amendment would withstand constitutional attack, should the decision on which religions to exempt from the drug laws be made by an Agency, or by Congress? In my view, Congress is the proper body to make such political decisions and to split such fine societal "hairs." This Agency is not equipped to undertake such a challenge.

Mr. Sims apparently understands the problem, even though he does not articulate it. He states on page 2 of his memorandum: "I believe that DEA continues to be in what is at best an uncomfortable position with regard to § 1307.31." He's correct, of course; but, there seems to be nothing that DEA can do to correct the problem.

I should note at this point that the Narcotic and Dangerous Drug Section of the Criminal Division represented DEA in the Kennedy case. After the decision was issued, William Ryan, then Chief of NDDS, advised us by memorandum dated April 21, 1972, that "While the opinion indicates that the regulation . . . is itself constitutionally invalid, it is our (NDDS's) view that this is dicta. Since the Native American Church was not a party . . . that part of the decision dealing with the regulation as it applies to the Native American Church is not a part of the holding and is accordingly not a binding declaration that the regulation as now written is null and void."

If there is a legally sound way out of this dilemma. I would welcome having someone outline it for us. I do not see a way out short of legislation, followed by more litigation.

Attachments