

Native American issues play key role in free exercise law

Contributed by James Gibson, BJC Staff Counsel
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Recently, the 9th U.S. Circuit Court of Appeals announced its decision in *Navajo Nation v. U.S. Forest Service*. The court ruled that the Religious Freedom Restoration Act of 1993 does not prohibit the U.S. Forest Service from expanding a commercial ski area and using artificial snow manufactured from sewage water on the San Francisco Peaks, lands sacred to a number of Native American tribes.

This is far from the first case implicating pivotal Native American religious liberty issues. In fact, Native American religious freedom issues have played a key role in modern free exercise jurisprudence. It was a dispute over Native American free exercise rights that led to the U.S. Supreme Court's 1990 decision in *Employment Division v. Smith*, which scaled back the reach of the Free Exercise Clause.

Congress, at the urging of the Baptist Joint Committee and others, enacted the Religious Freedom Restoration Act in 1993 - the very legislation at issue in the *Navajo Nation* case - to restore free exercise jurisprudence to pre-Smith status. *Bowen v. Roy*, a 1986 Supreme Court decision, is another notable Native American free exercise case dealing with qualifications for welfare benefits. A plurality in *Bowen* foreshadowed the Court's decision in *Smith*.

As the U.S. Supreme Court considers several tribes' request to review the 9th Circuit's decision in the *Navajo Nation* case, it is appropriate to reflect on the myriad religious liberty challenges faced by Native Americans, the longest-tenured of our fellow citizens.

These issues were the impetus for a Freedom Forum conference on Native American Religious Freedom that I attended last year at the University of South Dakota in Vermillion, S.D. The three-day event was attended by academics, attorneys and several Native American leaders who have committed their adult lives to securing for their people the religious liberty that is the birthright of every American. The conference delved into some of the key issues in Native American religious freedom with which those of us who support religious freedom for all should be familiar: protection of, and respect for, Native American sacred places; repatriation of Native American human remains removed from burial grounds for study and display; and free exercise rights for Native American inmates of the federal prison system, allowing them the right - subject, of course, to the realities of incarceration - to practice their faith while imprisoned.

Sacred Places

Native

American sacred places are areas where Native Americans go to practice their religion. These places are considered sacred because they are burial grounds, areas conducive to communicating with spiritual beings, the site of notable past events, or contain certain natural resources.

Native

American religions were outlawed under the "Civilization Regulations" of the late nineteenth and early twentieth centuries. One consequence of these laws was the destruction or desecration of many sacred places. The American Indian Religious Freedom Act of 1978, as well as other legislation and Carter Administration executive orders, was enacted in part to protect sacred places but many Native Americans argue that enforcement has been inconsistent and is complicated by the fact that none of these laws contain a discrete legal cause of action that would allow Native Americans to go to court to protect their sacred places.

The

sacred places issue has been heavily litigated. In addition to the Navajo Nation case, a dispute over sacred places reached the U.S. Supreme Court in 1988 with *Lyng v. Northwest Indian Cemetery Prot. Ass'n*. In *Lyng*, the Court held that the U.S. Forest Service did not violate the Free Exercise Clause by constructing a paved road through lands considered to be sacred places by certain Native Americans.

Repatriation

Like

many cultures in America and elsewhere, Native American religious and cultural traditions include specific beliefs regarding burial of the deceased. Yet throughout the centuries numerous of Native American graves have been exhumed, with the remains in the possession of scientists for study or to museums for public display. This violates the religious beliefs of many Native Americans tribes, a number of whom advocate for repatriation, the return of exhumed remains to the deceased's tribal descendants.

Native Americans' struggle for

repatriation often pits them against the scientific community, which maintains that the burial remains and funerary objects are of intrinsic scientific value. As such, scientists argue, they should be studied and displayed in museums, and not returned to tribal descendants.

How

did this mass exhumation of Native American gravesites happen in the first place? Although historically non-Native American gravesites were protected by law, this was not the case with Native American burials and bodies, which resulted in a large number of remains and funerary objects being exhumed. The situation worsened in 1906, when Congress passed the American Antiquities Act of 1906, which classified Native American burials on federal and reservation lands as "cultural resources" and federal government property.

In 1989-90, Congress

passed several laws, including the Native American Graves Protection and Repatriation Act (NAGPRA), that criminalized trafficking in Native American remains and allowed repatriation of remains and funerary

objects upon application of descendants who could demonstrate a tribal affiliation to the requested remains. Although it is a step in the right direction, many Native Americans maintain that NAGPRA has not fully alleviated the problem, because it does not apply to Native American tribes not recognized by the federal government, and because it allows the institution in possession of the remains to determine whether cultural affiliation exists - a regulation that some Native Americans contend invites abuse.

Inmates in the Federal Prison System

Religious

minorities often struggle for the right to religious accommodation in both state and federal prisons, and Native American inmates - a distinct minority within the federal prison system - are no exception. From grooming policies that proscribe growth of the long hair required by their religious beliefs and access to Native American religious leaders, to observance of holy days and access to sacred objects (such as medicine bags) and ceremonies (such as sweat lodges), Federal Bureau of Prison policies sharply curtail Native American inmates' free exercise of religion. Although notable progress was made in these areas with regulatory changes in the late 1990s and the Baptist Joint Committee-supported Religious Land Use and Institutionalized Purposes Act of 2000, the situation has regressed due to post-9/11 security regulations. While there are - and should be - instances when an inmate's free exercise rights must bow to the realities of prison security and administration, the successes of the 1990s-era regulations demonstrates that these two competing concerns can be balanced to allow Native Americans the free exercise of their religion without impeding the government's legitimate correctional concerns.

Americans

have just experienced a harried and historic election season, a time during which we heard a lot about religion, most often in the context of America's Christian religious majority. But our commitment to religious freedom is best served when we contemplate and respect the religious traditions of all faiths, including those of Native Americans - our country's original occupants.

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