

TOPIC

Free Exercise of Religion – Peyote Use

Text of the decision

We were asked whom the approval authority is for religious accommodations for sacramental peyote use, and what limitations may be placed on its use.

We conclude if the Airman meets the requirements of Title 42, United States Code, Section 1996a, they are permitted to use peyote. There are, however, certain rules the commander may impose to promote military readiness, safety, or to comply with international law or laws of other countries.

Peyote

Peyote is a small, spineless cactus which contains the hallucinogenic mescaline.¹ It is a Schedule I controlled substance, meaning it has a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision.² The top of the peyote cactus is referred to as the “crown” and consists of disc-shaped buttons that are removed.³ The fresh or dried buttons are chewed or soaked in water to produce an intoxicating liquid.⁴ Peyote buttons may also be ground into a powder that can be placed inside gelatin capsules to be swallowed, or smoked with a leaf material such as cannabis or tobacco.⁵

Use of peyote and mescaline will cause varying degrees of illusions, hallucinations, altered perception of space and time, and altered body image.⁶ Additionally, users may experience euphoria, which is sometimes followed by feelings of anxiety.⁷ Following the consumption of peyote and mescaline, users may experience intense nausea, vomiting, dilation of the pupils, increased heart rate, increased blood pressure, a rise in body temperature that causes heavy perspiration, headaches, muscle weakness, and impaired motor coordination.⁸

For many Native Americans, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been an integral way of life, and has been significant in perpetuating Indian tribes and cultures.

¹ U.S. Department of Justice Drug Enforcement Administration, “Drugs of Abuse – A DEA Resource Guide”, 2017 Edition, page 71.

² Title 21, United States Code (U.S.C.), Section (§) 812.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

Law

Since 1965, the ceremonial use of peyote has been protected by Federal regulation. At least 28 states have enacted laws, which are similar to, or in conformance with, the Federal regulation which protects the ceremonial use of peyote by Native American practitioners. However, in 1990, the Supreme Court, in the case of *Employment Division v. Smith*, 494 U.S. 872 (1990), held that the First Amendment does not protect Native American practitioners who use peyote in Indian religious ceremonies, and also raised uncertainty whether this religious practice would be protected under the compelling governmental interest standard.

Congress responded to the *Smith* decision by passing a variety of laws,⁹ specifically citing *Smith* and mandating strict scrutiny when government action interferes with religious exercise. Under Title 42, United States Code, Section 1996a, *Traditional Indian religious use of peyote*, Congress stated:

Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation....¹⁰

The statute further provides:

Subject to the provisions of the Religious Freedom Restoration Act, this section does not prohibit the Secretary of Defense from promulgating regulations establishing reasonable limitations on the use, possession, transportation, or distribution of peyote to promote military readiness, safety, or compliance with international law or laws of other countries.

In 1997, the Assistant Secretary of Defense published a memorandum entitled, “Sacramental Use of Peyote by Native American Service Members.” The memorandum was designed to provide interim guidance concerning the sacramental use of peyote by Native American Service members for bona fide traditional ceremonial purposes until Department of Defense Instruction 1300.17, *Accommodation of Religious Practices Within the Military Services*, February 3, 1988, was updated to incorporate this guidance.¹¹ The policy echoes the language from the statute, stating: “Armed Forces personnel who are members of Indian tribes as defined in [42 U.S.C. § 1996a] may use, possess, or transport the peyote cactus as a religious sacrament in connection with the bona fide practice of a traditional Indian religion, and shall not be penalized or discriminated against on the basis of such use, possession, or transportation.”

⁹See *Traditional Indian Religious Use of Peyote*, 42 U.S.C. § 1996b; *Religious Freedom Restoration Act of 1993*, 42 U.S.C. § 2000bb; *Religious Land Use and Institutionalized Persons Act of 2000*, 42 U.S.C. § 2000cc.

¹⁰ 42 U.S.C. § 1996b(b)(1).

¹¹ Although the 1988 version of the Department of Defense Instruction was cancelled and republished in 2009, and updated in 2014, the current version still does not address peyote use. Accordingly, the 1997 memorandum still stands as the official Department implementing policy for peyote use.

The policy proceeds, in accordance with 42 U.S.C. § 1996a(b)(7), to establish reasonable limitations on the use, possession, transportation, or distribution of peyote to promote military readiness, safety, or to comply with international law or laws of other countries. The policy states the Military Departments shall impose the following limitations:

1. Peyote shall not be used on duty or within 24 hours before scheduled military duty.
2. Peyote may be possessed in amulet form, not for ingestion, and such an amulet may be worn as an item of religious apparel subject to Service uniform regulations. Otherwise, peyote shall not be used, possessed, distributed, or introduced aboard military vehicles, vessels, or aircraft or, except when permitted by the installation commander, on military installations.
3. A Service member who has used peyote shall promptly notify his or her commander upon return to duty after such use. The Military Department may require pre-use notification for Service members performing designated duties when it is in the interest of military readiness or safety to notify commanders of a member's intent to use peyote. Upon notification of use or intended use of peyote, the member's commander shall verify the member is an enrolled member of an Indian tribe, as identified by 42 U.S.C. § 1996a(c)(2).¹²
4. Peyote shall not be used, possessed, transported, or distributed when such would violate International law or the laws of other countries.

The policy memo further states the Secretaries of the Military Departments may impose additional limitations, subject to approval by the Assistant Secretary of Defense for Force Management Policy,¹³ and subject to compliance with the Religious Freedom Restoration Act. To date, the Air Force has not implemented any such regulations imposing additional limitations. It is important to note, however, Department of Defense Manual 5210.42 states an individual found to have ever used a drug that could cause flashbacks will be decertified or disqualified for a personnel reliability program position.¹⁴ However, although mescaline resembles other hallucinogens in certain respects, some studies have shown peyote does not appear to produce flashbacks in the manner of LSD.¹⁵

¹² The term "Indian tribe" means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. § 1601 et seq.)), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

¹³ Now the Under Secretary of Defense for Personnel and Readiness.

¹⁴ Department of Defense Manual 5210.42, *Nuclear Weapons Personnel Reliability Program*, January 13, 2015 (Incorporating Change 2, March 23, 2017), Appendix 4 to Enclosure 3, paragraph 2.c.

¹⁵ John H. Halpern, Andrea R. Sherwood, James I. Hudson, Deborah Yurgelun-Todd, and Harrison G. Pope Jr, "Psychological and Cognitive Effects of Long-Term Peyote Use Among Native Americans," *Biological Psychiatry*, 2005; 58: 624-231, 630.

Discussion

Airmen who are members of Indian tribes as deemed by 42 U.S.C. § 1996a may use, possess, or transport the peyote cactus as a religious sacrament in connection with the bona fide practice of a traditional Indian religion, and shall not be penalized or discriminated against on the basis of such use, possession, or transportation. Commanders cannot outright deny a request pursuant to the statute. However, in accordance with the statute, the commander must verify the Airman is a member of an Indian tribe and ensure the Airman's Air Force Specialty Code requirements do not restrict them from using peyote.

After confirming the requestor is a member of an Indian tribe, the commander should provide the requesting member with a memorandum stating the following:

In accordance with 42 U.S.C. § 1996a, *Traditional Indian Religious Use of Peyote*, you may use, possess, or transport the peyote cactus as a religious sacrament in connection with the bona fide practice of a traditional Indian religion. You will not use peyote while in a duty status, or within 24 hours before scheduled duty. If the time requested for your religious worship falls within normal duty hours or rosters, you may request exception from those hours or rosters. Similarly, you may use peyote while in a pass status or request ordinary leave to observe lengthy holy days or periods. In the interest of military readiness and safety, you will notify me and your supervisor in writing 48 hours in advance of your intended use each time prior to using peyote. Additionally, you will promptly notify me upon return to duty after such use. Peyote shall not be used, possessed, distributed, or introduced aboard military vehicles, vessels, or aircraft, except when permitted by the installation commander, on military installations. You will not distribute or share peyote with anyone who does not also qualify for the sacramental use of peyote in accordance with 42 U.S.C. § 1996a.

If the Airman would like to wear an amulet as an item of religious apparel while in uniform, he or she must submit an exception to policy request through his or her chain of command to USAF/A1 for approval in accordance with Air Force Instruction 36-2903, *Dress and Appearance of Air Force Personnel*.

Conclusion

The sacramental use of peyote is a form of Free Exercise of Religion protected by the First Amendment of the Constitution. Members of Native American tribes may engage in the sacramental use of peyote, subject to the restrictions outlined by the Department of Defense's 1997 policy memorandum.

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