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# Indian Religious Freedom: Recognized/Denied

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## ABSTRACT

[Clinton]'s sacred site executive order applies to all "federal lands" and to all "recognized" Indian tribes. A "sacred site" is defined as "any specific, discrete, narrowly delineated location of Federal land that is identified by an Indian tribe, or Indian individual... as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site."

The issue that seemed most troublesome from [William Downes]' legal perspective, besides the alleged Establishment clause violation, was that the Park Service had also announced that if the "voluntary closure" was unsuccessful, they would look at additional actions, one of which included converting the "voluntary" June closure of the site to climbers to a "mandatory" shut down. Downes claimed that this threat " `coerces' the support of some American Indians' religious practices."

In closing, Downes did declare, however, that the National Park Service's "voluntary program," where climbers were encouraged to show respect for Indian religious traditions, was both "laudable and constitutionally permissible." The unforced closure plan was deemed a "permissible accommodation of American Indian religious practices in light of the government's legitimate interest in protecting the preserving for American Indians their inherent right to exercise the traditional religions, including their access and use of sacred sites."

## FULL TEXT

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The United States' ambivalent relationship toward the religious rights of indigenous peoples was again exemplified by two recent events. First, President Clinton rightly recognized the religious rights of Indians when, on May 24, 1996, he issued an executive order to promote accommodation of access to sites considered holy by Indian religious practitioners, and which provides additional security for the physical integrity of these sacred sites.

Unfortunately, just two and a half weeks later, a federal district court decision undermined these same religious rights when it ruled, on June 8, 1996, that the National Park Service could not "voluntarily" ban rock climbers during the month of June to accommodate the religious rights of several tribes who hold ceremonies at Devils Tower, Wyoming, a sacred site to the Indians, and a national monument.

A quick review of these two events and their historical context will reveal the inappropriateness of the federal court's ruling in the larger religious/cultural context of federal Indian policy. Clinton was not acting hastily in the issuance of this order. In fact, he was exercising authority derived from several constitutional provisions, including that which requires the president to "take care that the laws be faithfully executed," the commander-in-chief clause, the express powers vested in him by congressional statutes and, in his own words, "in furtherance of Federal

treaties."

This executive order is a companion measure to an earlier Clinton executive order issued April 29, 1994, which required federal agencies and departments to accommodate American Indians in their need for eagle fathers and body parts.

Clinton's sacred site executive order applies to all "federal lands" and to all "recognized" Indian tribes. A "sacred site" is defined as "any specific, discrete, narrowly delineated location of Federal land that is identified by an Indian tribe, or Indian individual... as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site."

Although not designed to handicap the enforceable rights of third parties who have been previously granted access by federal administrative action, nor intended to "create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any part against the United States, its agencies, officers, or any person," the executive order nevertheless mandates that all federal agencies with any responsibility for the management of federal lands "promptly implement practices" which would oblige and aid tribal citizens with access to and ceremonial use of sacred sites, and requires those agencies to avoid activities the might negatively affect the "physical integrity of such sacred sites." The agencies were given a year in which to prepare a report for the president on how they were going to implement his order.

Indigenous peoples, who throughout history have viewed the president as both the symbolic and substantive embodiment of the federal government's treaty and trust obligations towards their nations, were doubtless pleased and relieved to receive news of this executive order, especially in light of the massive sacred site losses, desecrations, and interference Indians have experienced as a result of direct federal action or complicity (e.g., Rainbow Bridge of the Navajos; San Francisco Peaks of the Navajo and Hopis, Mount Graham of the Apaches). Moreover, there are dozens, if not hundreds, of spiritual sites located within land claimed by the federal government that are now threatened or imperiled by either federal, corporate, or private action.

The tribal sense of spiritual euphoria after Clinton's order, however, was rocked hard fifteen days later, on June 8, 1996, when William Downes, a federal district judge in Casper, Wyoming, ruled in Bear Lodge Multiple Use Association v. Babbitt, that the National Park Service had violated the First Amendment Rights of a no-profit corporation, some of whose members also had a commercial rock-climbing guide service, when it developed a comprehensive management plan sensitive to the spiritual needs of local Indians who consider it a holy site, but that still allowed non-Indian related activities. "In respect for the reverence many American Indians hold for Devils Tower as a sacred site," said the Park Service, "rock climbers will be asked to voluntarily refrain from climbing on Devil's Tower during the culturally significant month of June."

However, according to Judge Downes, this "voluntary closure" of Devil's Tower to commercial and recreational climbing "for the sole purpose of aiding or advocating some American Indians' religious practices violates the First Amendment's Establishment Clause."

The issue that seemed most troublesome from Downes' legal perspective, besides the alleged Establishment clause violation, was that the Park Service had also announced that if the "voluntary closure" was unsuccessful, they would look at additional actions, one of which included converting the "voluntary" June closure of the site to climbers to a "mandatory" shut down. Downes claimed that this threat " `coerces' the support of some American Indians' religious practices."

In closing, downes did declare, however, that the National Park Service's "voluntary program," where climbers were encouraged to show respect for Indian religious traditions, was both "laudable and constitutionally permissible." The unforced closure plan was deemed a "permissible accommodation of American Indian religious practices in light of the government's legitimate interest in protecting the preserving for American Indians their inherent right to exercise the traditional religions, including their access and use of sacred sites."

Presumably, Downes was aware of President Clinton's two-week old executive order, though he makes no reference to it in his decision. If he was aware of the order, we must ask why this federal judge decided to flout the President's mandate. If he was not aware of the order, we must ask why not, given the important correlation between the presidential directive and the thrust of the decision.

In other words, since Congress has the sole constitutional authority to set the government's Indian policy, and since the President, in developing the executive order, was adminis-tratively fulfilling statutory law and treaty law, then clearly the courts should defer to what the political branches have decreed: support the unique spiritual rights of American Indians.

Several other issues and questions also beg for clarification. First, why is commercial and recreational rock climbing deemed a constitutionally protected First Amendment right, but having access to and the peace and quiet required to practice living spiritual traditions like vision quests, sweat lodges, and individual meditation, is not a constitutionally protected First Amendment right? Since when, in other words, did rock climbing become a religious tradition?

Second, why does the court insist on relying on the establishment clause as a primary rationale to defeat efforts by other branches of the government to provide some real protection and recognition to tribal-based religious expressions, when all these fairly recent and long overdue federal actions are doing is merely providing some measure of accommodation - not establishment - of access to and protection of sacred sites Laws which exempt churches and church-related schools from the payment of certain taxes are not struck down as having established Christianity.

No Americans, in other words, are being coerced into practicing or believing in Indian religions and, to my knowledge, Congress has never passed a law mandating an Indian religion as the national religion of the U.S.

History, of course, is replete with examples where federal officials, in cahoots with Christian missionaries, sought to coercively "establish" Christianity as the only religion for indigenous peoples.

Finally, since tribal nations are just that-separate nations - there is the reality, as other federal court's have noted, that the U.S. Constitution's First Amendment does not apply to indigenous peoples exercising religious traditions that predate the federal Constitution. The First Amendment limits the rights of the federal government and the states, not the tribes.

Indian religious traditions are, or ought to be, protected under existing treaty arrangements and the trust doctrine. Hence, Congress' passage of the American Indian Religious Freedom Act in 1978, and the subsequent laws and executive orders recognizing the distinctive religious traditions of Indians, are a recognition of their separate political status and a needed exercise of the trust doctrine, since the Constitution has not effectively protected indigenous religious traditions.

These laws and the actions of federal agencies, like the National Park Service, carrying out the wishes of Congress and the President, therefore, do not run contrary to the Establishment Clause and are not coercing non-Indians into practicing Indian religions since tribes have a different, non-constitutional status, unlike any other peoples in the U.S.

President Clinton and the Congress should notify their sister branch, the Supreme Court and the lower federal courts, that this nation has finally decided to respect the religious traditions of America's indigenous peoples. The Courts need to be reminded that in disputes centering around Indian religious practice the unique political/cultural status of tribes as separate sovereigns necessitates their using the treaty/trust standard to make sure the federal and state governments and other entities as well recognize the rights of tribes to practice their religions.

Such recognition is neither "establishing" a religion nor "coercing" non-practitioners to join in a tribal or individual Indian religious expression. It is merely the act of one sovereign (the U.S.) supporting the citizens of another sovereign (tribal nations-remembering, of course, that American Indian have concurrent citizenship in their tribes, states, and the United States) in their quest for long denied religious freedom.