

Politics and Religious Freedom Restoration Act Make Strange Bedfellows: The Sessions Memo¹

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The Legal Frontier

The legal frontier in American law is always expanding, breaking new ground, at times spasmodically, opening new areas for legal decision, giving judges and lawyers more work. Most of the big moving and shaking in the legal arena is done by corporations and government. Corporate desires drive Congressional priorities. Corporate litigation drives Supreme Court decisions. In this environment, First Amendment protections for Freedom of Religion provide fertile ground for the expansion of corporate privilege.

With this as backdrop, we will examine the significance of [Executive Order # 13798](#) signed May 4, 2017, entitled “Promoting Free Speech and Religious Liberty,” and the Attorney General’s Memorandum on “[Federal Law Protections for Religious Liberty](#)” (the “Memo”), issued October 6, 2017. The Memo gives the DOJ the job of enforcing the Religious Freedom Restoration Act (RFRA), and tasks the nation’s federal prosecutors with making the world more legally secure for churches, religiously-tinged corporations, and believing citizens who come armed with sincere religious persuasions and capable counsel. After discussing where we are and how we got here, we’ll look at what the Memo means for the ceremonial use of Ayahuasca and other visionary substances in the USA.

The Bill of Rights for Corporations

Lawyers in multinational corporate firms look at the Bill of Rights and see something like a butcher examining a side of beef, and everywhere they look, there are good cuts. They see every legal right made available to “persons,” and seek to apply it to corporations, regardless of how tortured the fit. Because when the Constitution is on your side, other laws and policies have to bend to your will. A Constitutional argument, when correct, is essentially unbeatable, except by an argument based on an international treaty. The First Amendment, for example, provided all the muscle behind the *Citizens United* case, that effected the total destruction of existing campaign finance law by granting First Amendment rights of free speech to corporations, and equating corporate speech with money. Thus, to limit a corporation’s spending on speech was to silence it. Constitutional earthquakes often cause spasmodic shifts in the legal landscape.

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RFRA – Corporate Religion on Steroids

The next corporate First Amendment earthquake happened in the *Hobby Lobby* case. The *Hobby Lobby* plaintiff was a company that told the Court that, because it had religious scruples, it should be exempt from the general law that requires bosses to buy insurance that covers birth control. Hobby Lobby won by strapping on RFRA like a jetpack, and soaring above the earth and the constraints of general law. The RFRA jetpack proved to be amazingly effective, defying even the gravitational pull of scientific facts, because the Court decided that only the *sincerity* of company's belief, and *not its accuracy*, was subject to judicial examination.

A Strange Law that Trump and the Religious Right Love Anyway

RFRA is an unusual statute, because it basically says that anyone who sincerely, religiously, believes that a law is wrong, has a defense to the violation of that law, and can sue to protect the right to break the law. If you think about it, there's something very strange about the President telling the prosecutor to get right to work protecting the rights of the religious to violate general laws without consequence. If it weren't the religious benefiting, it would seem unfair and counterproductive to pass laws and then encourage people to ignore them if they can come up with a religious reason why they should be able to do that.

Although many would say that the President's zeal for RFRA arises from questionable motives, RFRA is a good law that exists for two reasons: (1) because religion can give something back to society so valuable that the law must bend to allow that bestowal of benefit, and (2) because there once was a cruel old Supreme Court Justice who loved to commit mischief and get the last, nasty word, and he twisted First Amendment law so badly that Congress had to fix it.

RFRA was enacted to Congressionally overrule *Oregon Employment Division v. Smith*, a scurrilous opinion authored by "Exterminating Angel" Antonin Scalia that trampled Supreme Court jurisprudence, abrogating decades of precedent establishing when the judiciary should allow the restrictions of general law to give way to religious beliefs. Scalia's blithe and inconsiderate opinion jeopardized the long-recognized right of the Native American Church to eat peyote ceremonially, and Congress was moved to alleviate that hardship.

It's unlikely that Congress would be capable of finding its arse with both hands these days, much less pull together the political will to poke Scalia in the eye and enact a statute like RFRA. And in these innovative days of federal governance, when anything and everything goes, the Trump Administration has decided to expand the rights of religious entities to practice free of the constraints of general law.

Why is the government taking this direction? It would appear to be a simple exercise in feeding the President's political base the red meat they crave – an Executive Order to

make the religious more free than ever! Rumor has it the President was resting his thumbs after a heavy tweet session when he noticed Sessions sitting there. Sessions had not pissed him off at all that day, so the President said to him in a brotherly way, “You are a good Christian, and you know a lot of Christian people. I want Christians to be my people forever. What gift should I give them that will keep them loyal always?”

Quick as the Devil, Sessions answered, “You know, Mr. President religious freedom does *not actually cost any money, but it is prized above all other things*. Our nation was founded on religious liberty. If you would issue an Executive Order directing me to expand upon this theme and make it government policy, I would be happy to comply. When the President heard that Christians could be made happy with nothing more than an Executive Order, he was delighted, said it was a no-brainer, and that Sessions really was good people. He signed Executive Order # 13798 immediately and took the rest of the day off.

Some persons, doubtful about the President’s agenda, might say Sessions prepared the Executive Order for Trump’s signature precisely to give him license to redirect the Department of Justice away from enforcing laws against race and sex discrimination, investigating police departments that kill people they are paid to protect, and locking up “legal” opiate distributors who are killing off the last of the working class. Skeptics might say that the primary beneficiaries of the Memorandum are (1) Christian dressmakers and cake-makers presently in fear of being compelled to sew lesbian bridal dresses and bake gay wedding cakes, (2) the nation’s elementary schools, uncertain about whether to accommodate the bathroom needs of students who have gender issues; and of course, (3) corporations like Hobby Lobby crying to be free of the obnoxious duty to pay for their employees to engage in sex without consequence, and other irreligious practices yet to be named.

Descent Into Nonsense at the Supreme Court

Skeptics might further say that RFRA has elevated the act of shunning a gay couple by refusing to bake their wedding cake into a debate over religious freedom, and the purpose of the Memo is to encourage the filing of more such cases. It would be hard to rebut their contention, because these kooky cases are picking up a hell of a head of steam. The Supreme Court argument in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* thus hosted an absurd debate with giddy solemnity, focusing on a soundbite so clever it could make the Cooking Channel: ***Is food speech? Does requiring a baker to bake a cake for a gay wedding force the baker to speak in favor of gay marriage?***

These arcane issues are exactly the type of weird legal debates that RFRA is going to spark more of, because religious corporations and individuals are going to raise objections to all kinds of laws. Further, under the RFRA analysis, the Court has no business asking whether those beliefs *make sense*, but only whether they are *sincere*. In the *Hobby Lobby* case, this meant that the Court *didn’t even consider* whether Hobby Lobby was relying on bad science when it claimed that certain birth control procedures violated its religious scruples. It didn’t matter, said the Court, because the belief didn’t need to be accurate, just sincere.

Just the Facts, Ma'am, Just the Facts

After enjoying the loopy scenery visible from the heights to which RFRA allows the religious to soar, let's come back to earth and take a close look at the document to see what it offers the adherents of psychedelic religion. The Memo sets forth 20 principles of religious liberty, beginning with the statement that religious liberty is a fundamental right that extends to all people and organizations, including religious denominations, organizations, schools, private associations, and businesses. The negative "right to abstain from action," *i.e.*, to refuse to bake gay wedding cakes, is given plenty of attention. The Memo makes the point that even though religious organizations may take government money in the form of grants, that doesn't allow the government to demand that an organization relinquish its religious freedom in order to receive the funds.

Notwithstanding the *intentions* of the Memo, that I'm afraid don't go far beyond the vindication of the biases of the many, it contains plenty of good news for entheogenic churches, shamanic practitioners who use visionary herbs, and solitary followers of psychedelic wisdom. Let's try and identify some of those.

A Tutorial For Prosecutors on When Not to Enforce a General Law Against Sincere Religious Believers Who Object to Its Provisions

First, the Memo explains for the DOJ prosecutors (most of whom have never given a thought to RFRA) how RFRA works. Sessions tells his lawyers that RFRA prohibits the federal government from "substantially burdening religious observance or practice" by (1) banning a religious observance or practice; (2) compelling an act inconsistent with religious observance or practice; or (3) pressuring a church, person or business to modify its religious observance or practice. The government can only be allowed to "substantially burden religious observance or practice" to satisfy a "compelling government interest" by using the "least restrictive means."

The Memo tells prosecutors that in order to satisfy RFRA's limitations on burdening religion, the government may have to spend more money, modify existing federal exemptions, or create new programs. RFRA applies to "all actions" by federal agencies, including rulemaking, enforcement, grantmaking, and contracting.

The Memo tells government agencies that when a general law fails to pass RFRA's "strict scrutiny" test, a test that Sessions calls "exceptionally demanding," a religious exemption must be granted, even when it requires reduction of the rights of third persons. So Hobby Lobby's employees lost their legally-protected right to get insurance coverage for birth control because their boss objected to the provision *in religious language*.

This principle could be helpful for psychedelic churches if they faced zoning objections or burdensome restrictions to conducting ceremonies in particular locations. The rather surprising lesson of the Memo on this point is that religious expression increases the allocation of rights that citizens hold, even when the rights of others are reduced thereby.

Belief Trumps Reason – And Don't Ask Why

Second, the Memo forbids the government from “second-guessing” the reasonableness of a sincerely-held religious belief. As I mentioned previously, the Hobby Lobby plaintiff took advantage of that to claim that its corporate belief in the evil of contraception was not subject to judicial scrutiny, and the Supreme Court agreed.

For psychedelic churches, it's important to know that their beliefs shouldn't be scrutinized by the Courts for anything but the sincerity of the church's congregants. This is good, because there's no empirical basis for a religious principle like the belief that Ayahuasca is of divine origin, or that people who drink it have divine experiences.

So let's think briefly about where that puts Ayahuasca churches that are trying to get RFRA exemptions to consume Ayahuasca. Those churches don't have to prove their doctrines make sense, but they will have to prove that they have a doctrine. And the church will have to show that the congregants coming to drink together *share those religious beliefs* regarding the sacred value of drinking Ayahuasca. To satisfy the demands of a RFRA exemption application, it would be desirable to assert something more than that “those who drink Ayahuasca at our church have a general sacred intention.” So if you are thinking in terms of seeking a RFRA exemption for an Ayahuasca or other psychedelic church, you need to build a sense of communal belief and understanding in your congregation, so that when congregants are asked, “What do you believe about Ayahuasca?” their answers are congruent, not of course identical, but recognizably drawn from the same body of belief.

Let My People Get That Cash!

Third, the Memo tells DOJ lawyers that religious entities can't be denied funds or resources that secular groups are entitled to receive, so that provides a protection for psychedelic churches that seek to use public facilities or receive public funding for its educational arm. The Memo thus tries to open an avenue for more religions to seek government funding for their activities, while protecting the right of religious people to make “faith-based decisions” about issues like whether women can join the priesthood, or for that matter, whether to drink Ayahuasca to see the Divine Mother. While it may seem a far stretch to imagine the day when an Ayahuasca church gets a government grant, one unintended effect the Memo could be to bring that day closer.

Government Agencies Urged to Proactively Provide Tailored Law-Enforcement to Protect the Beliefs and Practices of the Religious

Fourth, the Memo advises all federal agencies to consider how to avoid burdening religious practice, and indeed, to attempt to proactively accommodate religious beliefs. The Memo tells government employees to be responsive to publicly-expressed concerns about religious liberty, and empowers agencies to engage in religious accommodation on a case-by-case basis. Although it doesn't require it, the Memo suggests that federal

agencies “appoint an officer” to review proposed rules with religious accommodation in mind.

This fourth point is important, because if the “[Guidance](#)” to those submitting exemption applications to allow use of psychedelics for religious purposes posted on the DEA website is any indication, the DEA has not yet staffed up to that job. Currently, the Guidance still directs applicants to submit their applications to “Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrisette Drive, Springfield, Virginia 22152.” Actually, ***Mr. Rannazzisi doesn’t work for the DEA anymore.*** He was forced out of the DEA in 2015 for busting too many pill-mills while making manful efforts to contain the opiate epidemic, according to the Chicago Tribune article entitled “[The drug industry’s triumph over the DEA.](#)” Probably not the ideal person to be reviewing applications for religious exemptions, actually, but an honest man at least. Whoever has the job now hasn’t bothered to update the “Guidance” in almost three years. The DEA should take a lesson from the Memo, and “appoint an officer” with some knowledge in the field of religion and spiritual psychopharmacology to review RFRA applications for exemption from the Controlled Substances Act. Additionally, it should update the Guidance and provide more substantive guidance on the procedure, plus some idea of how the proceedings are scheduled, and how long one can expect to wait to get a response. If the Attorney General’s word means anything to the DEA, it should take a much more proactive approach to providing service to the religious organizations seeking religious exemptions from the Controlled Substances Act, laying out a procedural roadmap, being transparent about who will evaluate the submission, and what the followup contact will be from the Agency.

Government Agency Must Not Target Religions for Enforcement Actions

Fifth, the Memo states that, “agencies may not target or single out religious organizations or religious conduct for disadvantageous treatment in enforcement priorities or actions.” Additionally, “agencies considering potential enforcement actions should consider whether such actions are consistent with federal protections for religious liberty.” As an attorney who has often been asked by Ayahuasca church members to forecast the enforcement actions of the DOJ, it was a pleasant surprise to find these words tucked away in the Memo. These provisions may help to dispel the concerns of those who believe that a wave of enforcement actions may be about to descend on the Ayahuasca church community because of the change of administrations. Indeed, I think quite the reverse – the Memo should give serious pause to hyperactive prosecutors eager to put out a press release trumpeting the arrest of “participants in a fake religious ceremony where DMT was being consumed for purposes of abuse.” That might turn out to be a career-limiting move.

All In All – Better Than A Poke In The Eye With A Sharp Stick

In summary, while the Memo wasn’t written to make the Ayahuasca churches of the United States happy, it provides some reason for optimism. Given the uses that RFRA

has been put to by the religio-corporate complex, it's hard to imagine that the plan to use religion to justify discriminatory conduct wasn't "baked in." But it's also the case that the [UDV Decision](#) remains the single, strongest judicial assertion of the power of RFRA since the statute was adopted, and no one who is a fan of RFRA, for whatever reason, would want to see that decision weakened. The social conservatives will, obviously, make much use of RFRA's negative potential. It is the job of psychedelic churches to fulfill the positive potential of the statute by using it to bend the Controlled Substances Act into a shape more consistent with the religious needs of humanity.