

# The Santo Daime Road to Seeking Religious Freedom in the USA

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The United States Constitution provides:

“Congress shall make no law respecting the establishment of religion or the free exercise thereof.”

In this paper, we will discuss freedom of religion regarding the use of ayahuasca as the sacrament of the Santo Daime Church, a Brazilian syncretic religion with churches in the United States.

It is useful to briefly trace the evolution of laws that criminalized entheogens in the United States. The extent of the use of visionary plants throughout European history has only recently been seriously investigated. The use of entheogens in Europe is thought, by most entheogen scholars, to have become greatly reduced by the time of the rise of post-Roman Christianity and especially during the great witch hunts of Early Modernity. European witches used various entheogens. Christianity has always stressed the unitary adherence to Christ's teachings and those of the Church or Churches. It was believed that any outside influence which might tend to cause people to stray from the strict constructionists' interpretation of the Bible was evil and should be avoided, and was even punishable.

In the United States in the early 1800's, an aggressive evangelical form of pietism was inculcated into Southern Protestantism. Pietism was the belief that Christians must follow the teachings of Christ and devote their lives to doing good, clean deeds and not have their minds wander from the path. Evangelical pietism held that requisite to any man's salvation is that he do his best to see to it that everyone else is saved, and doing one's best inevitably meant that the state becomes a crucial instrument in maximizing people's chances for salvation. In particular, the state plays a pivotal role in stamping out sin, and in "making America holy." To the pietists, sin was very broadly defined as any force that might cloud men's minds so that they could not exercise their theological free will to achieve salvation." Hence the beginning of the movement to control those natural plants and their extracts which could alter the holy text. Sin was very broadly defined as any force that might cloud men's minds.

This irrationality and the belief that the state should be the principle force to ensure purity led to drug control laws and huge agencies and institutions that spend billions of dollars on the war on drugs. It is ironic that the United States was the promised land to which people who had suffered religious persecution fled in the hope of finding religious freedom. It is the descendants of these immigrants who have now attempted to suppress minority/indigenous religious practices that have existed in North and South American for hundreds and perhaps thousands of years.

Below is a list of some events in United States history regarding entheogens and government control:

- 1600's - Farmers grew hemp because it was used for ropes and sails on ships. A good hemp industry was important to the shipping industry;
- 1700's - Hemp was the primary crop grown by George Washington at Mt. Vernon, and was a secondary crop grown by Thomas Jefferson at Monticello;
- 1844 - Cocaine was synthesized;
- 1870's - The first laws against opium smoking were passed in San Francisco and Virginia City. Opium itself was not outlawed and remained available in any number of over-the-counter products. Only the smoking of opium was outlawed, because that was a peculiarly Chinese habit and the laws were specifically directed at the Chinese. The white people in the communities feared that Chinese men were luring white women to have sex in opium dens;
- 1884 - Laws are enacted to make anti-alcohol teaching mandatory in New York schools;
- 1907 - The Pure Food and Drug Act;
- 1914 - The Harrison Tax Act was passed, effectively outlawing the opiates and cocaine;
- 1915 - Utah passed the first state anti-marijuana law;
- 1922 - Narcotic Drug Import and Export Act – intended to eliminate use of narcotics except for legitimate medicinal use;
- 1970 - The Controlled Substances Act (CSA), Title II of the Comprehensive Drug Abuse Prevention and Control Act.

### **United States Legal Framework**

The United States Constitution provides for three branches of government:

1. Legislative Branch – The Congress is responsible for enacting the laws
2. Executive Branch – The President and governmental agencies are responsible for carrying out the laws
3. Judicial Branch – The courts are responsible for interpreting the laws

As noted above, the first Amendment to the U.S. Constitution provides that the government shall not interfere with the freedom of religion. However, the Constitution also provides that federal and state governments can enact criminal laws to protect the citizens and foster public health and welfare. So, the pietists and others were able to move the states and federal governments to enact laws preventing distribution or ingestion of any substances that could enable a person to have an altered experience or hallucinate, convincing the legislators that these acts were to promote public health and welfare.

The U.S. Congress listed most entheogens, such as mescaline from the peyote plant and psilocybin found in some mushroom species, as being drugs of abuse that have no medical use. However, what they did was to lump all drugs, regardless of

form, as being of high potential for abuse without actually making any specific findings that any given chemical was dangerous. Indeed, one of the medical doctors involved in the legislative history of the Controlled Substance Act wrote that it was shameful that there had been no actual study about which of the drugs was bad under what circumstances and that the result of that failure was a failure to effectively advise the public of the real dangers of some of these drugs. Regarding ayahuasca, the United States never undertook any analysis of DMT in its natural form before ruling that DMT in all forms was a danger to individual and public health. In fact, the evidence is that the Congress was looking only at synthetic DMT. There is no testimony in the Congressional record to support making DMT in its natural form illegal.

The effort to challenge government agency interpretation of the laws is in the court system, and this is where the battle for religious freedom has taken place in the United States. However, the history of peyote legalization in the U.S. is of particular interest because it involved action by the Executive, Legislative and Judicial systems, and the same was repeated in at least one state in the United States. Native Americans have for hundreds of years used the cactus plant, peyote, as medicine and for spiritual enlightenment. Peyote has been the sacrament of indigenous tribes in the United States. In the 1900's a syncretic religion developed. Much like the Santo Daime, the Native American Church is a Christian religion with deep roots in Native American tribal traditions.

In 1965, the Drug Enforcement Agency of the United States granted Indians who were taking peyote as a sacrament an exemption, finding that the religious use of peyote by members of the Native American Church is "a non drug use." So this was an act of the Executive branch of government. Additionally, in the case of peyote, some state drug agencies and courts also granted exemptions. The reason for these exemptions can be traced to the special status of Native Americans in the United States. While Indian tribes were conquered by the invading Europeans, some degree of sovereignty has been preserved for Indians. It is this sovereignty that has assisted them in obtaining various exemptions.

Despite this special place that Indians hold in the area of religious freedom, a case came about in the late 1980's which had devastating impact on religious freedom in the United States. Two Native Americans who were state employees working in drug rehabilitation advised their employer that they were members of the Native American Church and had been participating in services ingesting peyote. They were fired from their jobs and deprived of collecting unemployment compensation because they were fired "for good cause." The U.S. Supreme Court ruled in 1990 that using peyote for religious purposes was not protected by the First Amendment.<sup>1</sup>

Prior to this decision, the United States Supreme Court had ruled favorably in religious freedom cases. In Sherbert v. Verner (1963), the Court stated: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses [by religious adherents], endangering paramount interests, give occasion for permissible limitation [on the exercise of religion].'" In Wisconsin v. Yoder (1972), the Court emphasized that the government's asserted interest must be truly paramount: "The essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of reli-

gion.” In his dissenting opinion in Smith, Justice Blackmun elaborated on the “compelling interest” burden the government must shoulder – a burden legislatively imposed by Congress when it adopted RFRA following the Smith decision:

The State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic . . . a government interest in ‘symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs,’ Treasury Employees v. Von Raab, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting), cannot suffice to abrogate the constitutional rights of individuals. (Emphasis supplied.) (Employment Division v. Smith, 1990)

The Court's prior decisions have rejected government speculation about potential harms and have demanded solid evidentiary support for a refusal to allow a religious exception. See Thomas v. Review Board (1981) (rejecting State's reasons for refusing religious exemption, for lack of ‘evidence in the record’); Wisconsin v. Yoder (1972, p. 224-229) (rejecting State's argument concerning the “dangers of a religious exemption as speculative, and unsupported by the record’); and Sherbert v. Verner (1963), ([T]here is no proof whatsoever to warrant such fears . . . as those which the [State] now advance[s]). In this case, the State's justification for “refusing to recognize an exception to its criminal laws for religious peyote use is entirely speculative.” Employment Division v. Smith (1990, p. 911-912) (Blackmun, J., dissenting). In Cheema v. Thompson (1994), the court found that a school district had no compelling interest in controlling what the district court characterized as an impact not realistically related to safety, “[T]he district has a compelling interest not in protecting students from all fears, but rather only those which are reasonably related to a real threat . . . [and] has provided no evidence . . . ” in that regard.)<sup>2</sup> See also Grosz v. City of Miami Beach (1983) (“The government must establish ‘proof in the record’ that such would undermine the policy objectives that underlie the regulation.”)

In Callahan v. Woods (1984), the court articulated a workable standard for evaluating whether the government has a “compelling interest” in prohibiting certain conduct, stating:

In determining whether the government has a compelling interest in a particular regulation, it is useful to look first at the importance of the value underlying the regulation, and second, at the degree of proximity and necessity that the chosen regulation bears to the underlying value. (See Giannella, 1967).

“Focusing on the degree of the interference factor, it is clear that when the government totally precludes religious conduct by imposing criminal sanctions, the burden weighs at its heaviest.” (Groz Grosz v. City of Miami Beach, 1983, p. 736) The Grosz court stated:

In [cases where religious practices conflict with the public interest], to make accommodation between the religious action and an exercise of state authority is a particularly delicate task [citations omitted] because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution. Wisconsin v. Yoder [citation omitted]. (Groz Grosz v. City of Miami Beach, 1983, p. 736)<sup>3</sup>

This test was very workable and provided good protection for minority religious practices in the United States. In the peyote case, however, the Court reversed the above test, holding that if the law was neutral on its face, the government did not have to show it had a compelling reason to apply it in the religious context. Thus, the Court ruled that: Religious conviction could no longer be an excuse for violating any laws.

This decision was anathema to the very foundation of the United States, which was settled by people who fled religious persecution in Europe. The decision was met with shock throughout the United States. Many religious organizations and churches lobbied the United States Congress to enact legislation and override the Supreme Court decision by bringing back the “compelling interest” test, placing the burden back on the government to establish why it had a “compelling interest” in interfering with a religious practice that was central to the religion. At that time, a Native American elder speaking before the United States House of Representatives stated:

We are here today with one simple message - we demand that our sacrament, the holy medicine peyote, be fully protected by law without qualification. We ask no more, we expect no more, and we are entitled to nothing less! (Snake, 1993)

Senator Kennedy, speaking for himself and Senator Hatch in support of the Religious Freedom Restoration Act (“RFRA”), noted:

Since Smith<sup>4</sup> [was] decided, governments throughout the U.S. have run roughshod over religious conviction. Churches have been zoned, even out of commercial areas. Jews have been subjected to autopsies in violation of their families' faith. In time, every religion in America will suffer. (RFRA Hearings, 1993)

RFRA gives every citizen the right to go into our federal courts to challenge any federal agency whose activities interfere with or burden a central religious practice.

### **The Santo Daime Church**

The religious practices of many indigenous tribes in the Amazon have for centuries involved the brewing of a sacramental tea often called ayahuasca, a Quechua term meaning “vine of the souls.” Missionary work in the 1800’s resulted in many indigenous tribes adopting aspects of Christianity. The “Santo Daime” religion came into being in the early 1930’s. Its founder was Mestre Raimundo Irineu Serra (“Mestre Irineu”), who, in the early 1900’s, worked as a rubber tapper in the Amazon forest.

From the very founding of the Santo Daime Church, a sacred tea called “Daime” has been used as the sacrament of the Church. The sacred Daime tea contains small amounts of endogenous dimethyltryptamine (“DMT”), which, in its synthetic form, is a Schedule I Controlled Substance under the American Controlled Substance Act. Importation, distribution or possession of DMT is a serious crime in the United States. However, neither the vine nor the leaves from which the tea is made is illegal. The Daime tea itself is not listed as a controlled substance.<sup>5</sup> Both teas are made by brewing the bark and stems of the *Banisteriopsis caapi* vine together with the leaves of the *Psychotria viridis* plant.

Mestre Irineu was first introduced to the sacramental rituals when living in Brazil and Bolivia with the local indigenous and caboclo groups. After participating in a number of rituals, he received within one such ceremony a powerful vision of a woman who he identified as an aspect of the Virgin Mary. He was directed to go by himself into the jungle for a week to fast and drink the tea, and was told that he had a spiritual mission to begin a new religion, called the "Santo Daime." The central practice of this religion would be the drinking of this same sacred tea, which was christened "Daime" (Portuguese for "give me"), meaning give me light, give me strength, give me love.

The sacramental Daime tea is believed by Church members to contain a divine being of the forest who represents Christ and who reveals His doctrines and teachings through hymns, which are the liturgy of the religion. This liturgy holds the same place in the Santo Daime Church that the Holy Bible does in other Christian churches. The holy Daime is not simply the sacrament, but embodies the Divine and is itself considered and prayed to as the Deity in a fashion similar to that which is associated with the ingestion of peyote in the Native American Church or the association of sacramental wine in the Catholic Church.

In 1985 the Federal Narcotics Council (CONFEN) of Brazil completed an extensive study of the Santo Daime Church and the UDV to determine whether the Brazilian government should permit use of the tea in such religious services. After traveling to many villages in the Amazon, visiting churches in various cities and observing Church services, members and their communities, the CONFEN found that Church members should be permitted to use the sacramental tea for religious purposes. In its 25-page report, CONFEN concluded:

The followers of the sects appear to be calm and happy people. Many of them attribute family reunification, regained interest in their jobs, finding themselves and God, etc., to the religion and the tea . . . The ritual use of the tea does not appear to be disruptive or to have adverse effects . . . On the contrary, it appears to orient them towards seeking social contentment in an orderly and productive manner. (Silva Sá, 1987, author's translation)

The Santo Daime Church is respected by the government and the community of Christian Churches in Brazil, and indeed the United States Government does not challenge the authenticity of plaintiffs' religious beliefs.

In May of 2000, the spiritual leader of a Santo Daime church located in Ashland, Oregon, in the United States was arrested for receiving the tea which was delivered to his home by federal agents who had intercepted the tea when it arrived in the U.S. For approximately six months thereafter, the Santo Daime Church negotiated with officials of the United States Department of Justice ("DOJ") in an effort to reach a Memorandum of Understanding ("MOU") permitting a structured program for the importation of the Daime tea and sacramental use of the tea in the United States. Then Attorney General Reno ordered an interagency task force to be formed to negotiate with the Church. The Church was able to get the Attorney General involved because one of the Church's experts was a close professional associate of the Attorney General and was thus able to get her attention.

In November 2000, under the direction of the Deputy Associate Attorney General, the Department of Justice established an interagency task force composed of most of

the federal agencies charged with fighting the "war on drugs," as well as the Office of the Solicitor General, Office of Legal Counsel, the Civil Rights Division at DOJ and other agencies, for the avowed purpose of seeking an accommodation for the sacramental practice of the Santo Daime Church tea with the hope of avoiding litigation.

Simultaneously, the Santo Daime Church filed a petition with the Oregon Pharmacy Board, which has jurisdiction along with the federal DEA to oversee use of controlled drugs, seeking an accommodation to allow the use of the Daime tea at religious ceremonies. The Oregon Pharmacy Board, after considering the petition and holding a hearing, ruled that the ingestion of the Daime tea as a sacrament was not an abuse of a controlled substance and that the Board, therefore, did not intend to regulate the sacramental use of the tea in Oregon. This was a significant event in the United States in that it was the first time that a state drug agency had agreed not to enforce its drug laws against the religious use of a controlled substance.<sup>6</sup>

The Santo Daime Church has had to operate underground in the United States. This replicates the terrible treatment of minority religions in Europe in the Middle Ages to the 20<sup>th</sup> century. One poignant example is that of a Brazilian with dual American citizenship who can practice her religion in Brazil but has to go underground to do so in the United States with the fear of being hauled off to jail. The United States admits that their actions in forbidding the importation of the sacramental tea constitute a "substantial burden" on the religious practices of the Santo Daime Church. Forbidding the practice of the central tenet of a religion constitutes irreparable injury. Money alone cannot compensate the aggrieved parties for such injury.

### **RFRA Amends the Controlled Substances Act with Respect to the Sacramental Use of the Tea**

RFRA was intended not only to benefit the Native American Church and Native Americans, "but rather to protect one of 'the most treasured birthrights of every American' - the 'right to observe one's faith, free from Government interference.'" (Senate Report, 1993) It is instructive to examine briefly the context in which RFRA was enacted.<sup>7</sup>

It has been noted that leaving "the most treasured birthright of every American...the right to observe one's faith,"<sup>8</sup> to the unreviewable discretion of government employees, neither trained nor institutionally focused on assessing the impacts of their actions on the practice of a religious faith, is unconscionable. RFRA explicitly provided for judicial review of government actions that burden a religious practice. In particular, Congress intended RFRA to bar overzealous application of the CSA to legitimate uses of a sacramental substance.

### **The Government does not have a Compelling Interest in Criminalizing the Sacramental Tea**

The United States government takes the position that the sacramental tea "may" be dangerous to public health, and if the tea is permitted into the country there will be

dire international diplomatic consequences for the United States. Therefore, they claim to have a “compelling interest” in prohibiting the importation of the tea. But the Government offers only speculation, not proof, regarding asserted state interests, and even the speculative interests asserted by the government are hardly compelling reasons for prohibiting a religion from using its sacrament in religious ceremonies.

**The Compelling Interest test.** Under RFRA, “Once the plaintiff shows a substantial burden on the exercise of religion, the burden shifts to the government to demonstrate that the application of the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest.” This provision of RFRA codifies and expands prior case law regarding the free exercise of religion. With these principles in mind, we turn to the United States’ purported “compelling interests” in criminalizing the sacramental use of the tea.<sup>9</sup>

**The Government has not provided proof of a Compelling Interest.** The Government argues that evidence demonstrating that ingestion of the tea is safe is merely “anecdotal” and does not prove that “ayahuasca is harmless.” This position misperceives the burden of proof under the “compelling interest” test. Under that test, it is the government that must demonstrate with clear and convincing evidence that allowing the tea in will actually harm individual and public health. But, the government can offer no evidence that the religious use of this sacramental tea has ever harmed anyone. Courts have found with respect to the religious use of peyote that the failure to provide concrete evidence of an actual public health threat from such use undercut the government’s claim of “compelling interests.” See State v. Whittingham (1973) (“[t]he State failed to prove that the quantities of peyote used in the sacraments of the Native American Church are sufficiently harmful to the health and welfare of the participants so as to permit a legitimate intrusion under the State’s police power”); People v. Woody (1964), (“[a]s the Attorney General...admits...the opinion of scientists and other experts is ‘that peyote...works no permanent deleterious injury to the Indian’”).

Our legal system does not require that the Church prove the absence of a health threat. Nevertheless, the Church has gathered declarations from distinguished experts on religion, drug policy, and international diplomacy for its negotiations with the Government to assist it in understanding the issues, and now for the court’s consideration in evaluating the government’s “compelling interest” claims.

**Use of the tea does not threaten public health.** The government’s experts can only offer that there “may” be adverse health effects from using the tea. The government asserts that use of the tea be further studied. It criticizes the few studies that have been performed, all of which have found no adverse health effects from use of the tea. Such a criticism hardly amounts to “proof” of a “compelling interest” in regulating the tea.

In Daubert v. Merrell Dow, Inc. (1993), the United States Supreme Court noted that:

Arguably, there are no certainties in science . . . (“Indeed, scientists do not assert that they know what is immutably ‘true’ - they are committed to searching for new, temporary theories to explain, as best they can, phenomena”); Brief for American Association for the Advancement of Science et al. as Amici Curiae 7-8 (“Science is not an encyclopedic body of knowledge about [509 U.S. 579, 10] the universe . . . . Instead, it represents a process

for proposing and refining theoretical explanations about the world that are subject to further testing and refinement.”) (Emphasis in original.)

While the government argues that because harmaline may cause "high frequency, generalized tremor of the trunk, head and limbs of rats..." the same effect will occur in humans. However the government cannot establish that one can extrapolate from rats to humans in this context. Courts generally require scientists extrapolating from animal studies to human effects to provide evidence to support the biological basis for such extrapolation. In Daubert v. Merrell Dow Pharmaceuticals, Inc. (1995), in striking the expert reports, the Court suggested that "the experts relying on animal studies might point to some authority for extrapolating human causation from teratogenicity in animals as a means of supporting their conclusion."

The government rests its resistance to permitting the tea, remarkably, on the relative absence of data on the sacred tea, arguing that the best evidence is "our broader experience with compounds that have pharmacological properties in common with the known components of ayahuasca," citing only LSD. So, for example the government's speculation that the tea may cause "persisting perceptual disorder" because that disorder occurs from LSD has no supporting "proof." Dr. John Halpern concluded from his actual studies of the Native American Church's use of peyote as its sacrament that:

With reference to the neurocognitive risks from Daime use, it might be helpful to consider similar evaluations of peyote . . . Preliminary data indicates that Native American Church members are just as neurocognitively healthy as non-peyote using controls . . . There are no published reports for either peyote or Daime indicating that their religious use causes Hallucinogen Persisting Perceptual Disorder. (Halpern, 2008). "[E]vidence to date supports continued intact cognitive functioning."

Dr. Halpern has noted that there is no empirical data to support extrapolation from LSD to ayahuasca in a controlled religious setting.<sup>10</sup>

Santo Daime experts have concluded that "[t]here is nothing particularly remarkable about the chemical structures of either DMT or the beta-carbolines that would suggest that these molecules would form chemically reactive species which could then go on to produce long-term cellular damage." Dr. Halpern provided additional insights into the government's speculation about the Daime tea. The speculation of "devastating psychological experience" has absolutely no empirical foundation as it applies to the Santo Daime religious experience: "I do not know of any studies or psychiatric textbooks that describe the existence of an LSD-induced persistent psychosis as 'schizoaffective' with 'visual disturbances.'" There is no support in the relevant scientific community for the hypothesis that extrapolation from LSD to the sacred tea has any scientific validity.

**The sacramental use of the tea is a non-drug use, has virtually no potential for abuse and will not result in illicit diversion and trafficking.** The former President of the Oregon Pharmacy Board, the state agency in charge of regulating controlled substances, instructed that:

The classic example of the importance of set and setting is illustrated in the recognition by the United States Drug Enforcement Administration (DEA) which lists peyote, whose active substance is mescaline, as a Schedule I controlled 'drug.' However, in granting an

exemption from the prohibition of taking peyote, the DEA has acknowledged the importance of set and setting by permitting the 'non-drug use of peyote' in Native American Church services. Thus, the DEA does not consider peyote a Schedule I Drug when it is used in the religious ceremony. Likewise, DMT cannot be considered a drug when used in the Santo Daime religious services for the reasons set forth herein.

Using the Daime (ayahuasca) in the context of the Santo Daime religious service causes no harm to the public welfare. My investigation revealed no instances of any aggressive, violent or any anti-social behavior in any persons who have taken the Daime. There is no evidence that the Daime is a cause of any problems to society at large.

There is no scientific journal article that suggests any known danger that the Daime poses to the public health. As noted above, it would appear that the Church members present a social, religious and cultural group that is highly stable and contribute to the good of the society.

From the perspective of the underlying drug policy considerations that exist to protect public health and safety, it is the opinion of many experts that there is no compelling reason to prohibit the members of the Santo Daime Church from taking their sacrament. The sacramental ingestion of the Daime tea as part of the Santo Daime religious doctrine and teachings facilitates the internal and external environments that promote positive spiritual, physical, and emotional health, which are goals that are central to the religious doctrine. Such a socially desirable non-dangerous tradition must be recognized and respected. There is no pharmacological evidence of ill health effects or danger of toxicity; virtually no danger of illicit drug use or diversion for recreational use; and no issue of addiction that would justify infringing on this sacred religious practice.

There is likewise no evidence of tolerance (need to increase the dose over time) or dependence (withdrawal symptoms following abstinence). Similarly there are no writings indicating addictive behavior among those taking sacramental Daime. The CONFEN report of the Brazilian drug agency undercuts this speculation:

Moreover, the typical reactions of vomiting and diarrhea (the latter being less frequent) leads us to suppose that ayahuasca does not lend itself to easy, indiscriminate or recreational use by the general public. Indeed, this can be verified by the fact that, despite receiving a good deal of coverage in major Brazilian newspapers, to date ayahuasca has not been fancied by hedonistic consumers. (Silva Sá, 1987)

Over 2 million peyote "buttons" are consumed annually in the United States without any significant evidence of diversion into illicit marketers, which illustrates that it is possible to safely regulate the wide distribution of an otherwise Schedule 1 hallucinogen in America when religious freedom hangs in the balance. Daime tea has never been reported to be associated in any way with illicit drug markets. It is doubtful that either peyote or Daime has ever been even a minor drug trafficking problem in the United States. Moreover, both the leadership of the Santo Daime Church and the NAC consistently state that they would inform law enforcement should they learn of any such illicit drug trafficking of their respective sacrament. These similarities may provide another layer of reassurance at the public policy level that Daime, like peyote, appears safe for human consumption when taken in strict accordance with bona fide, traditionally accepted religious practices.

No government official has ever been able to state that the Daime tea is part of the United States' illicit drug problem. And, of course, the Daime tea is even less well known than is peyote in the United States. One international drug traffic prosecutor has stated that in ten years of experience in prosecuting drug trafficking cases, he was not aware of any prosecution or investigation for illicit trafficking of the Daime or ayahuasca. Additionally, research has failed to reveal any published court decision affirming a conviction for trafficking in ayahuasca tea. The substance is clearly not attractive for recreational consumption. It therefore appears that there is simply no market for its illicit distribution. The Brazilian Government in the CONFEN Report also noted this.

Thus, it is clear that there is no trafficking in Daime in this country or in Brazil. Daime is not a recreational drug by any definition and is not likely to ever be a concern to the goals of drug enforcement for which the DEA has been chartered.

**The Government has failed to prove that importing the sacramental tea undermines any paramount interests of the United States.** One of the most interesting and intellectually dishonest arguments of the government is that importing the tea will have a devastating effect on the ability of the United States to negotiate future treaties and that it will damage its role as one of the leaders in the worldwide effort to combat illicit drug use. Discussing the relative value of the sacrament from a public policy perspective, one drug policy expert has noted that officials of the United States Department of Justice would be in violation of RFRA if they were to continue to threaten prosecution or actually prosecute members of the Church for drinking the Daime sacramental tea at Church services. Similarly, it would be a violation of RFRA for any official of the DEA to take any action to prevent church members from drinking the tea in Church services.

**Importation of the sacramental tea does not undermine the ability of the United States to continue in its efforts to combat illicit trafficking in drugs of abuse internationally nor undermine its ability to negotiate treaties in the future.** Perhaps the government's most bizarre reason for prohibiting the tea is that the importation would result in a violation of the International Convention of Psychotropic Substances, Vienna, 1971 ("Convention"). Several treaty experts have reviewed these ridiculous fears. The United States' leverage and power in treaty negotiations, and its ability to influence treaty compliance by other countries, will not be diminished by allowing a small religious group to use its sacramental tea, even if such use constituted a minor deviation from the letter of the treaty. It is ironic that the United States, which regularly flouts much more serious treaty obligations when it is in the country's "best interests" to do so, should suddenly "get religion" about treaty compliance when it needs a "compelling state interest" to justify prosecution of a small church using a harmless tea as a sacrament.

Further, the International Narcotics Control Board has taken the position that ayahuasca is not covered by the treaty and thus it would not violate the treaty for a country to permit the tea to be imported. The United States disagrees with this interpretation.

**A diminimus departure from the strict letter of the treaty is not considered worthy of condemnation.** Article 19 of the Convention provides the International Narcotics Control Board ("INCB") with the initial authority to consider steps to deal

with alleged treaty violations. Each year the INCB publishes an Annual Report regarding the state of compliance with the Convention. The 1998 Annual Report, Paragraph 162, provides guidance to signatory countries regarding their obligations under the Convention:

The Board must have objective reasons to believe that the aims of those conventions are being seriously endangered by the failure of any country or territory to carry out the provisions.

There is simply no way that the importation of the relatively small amounts of the sacramental tea can amount to "seriously endangering" the aims of the Convention and the government does not attempt to assert that it does.

**United States treaty violations.** In addition to the United States' disregard of the ABM Treaty, in *Nicaragua v. United States* (1986), Paragraph 80, the International Court of Justice found a "material breach which actually undermines the purpose and object of the treaty" when the United States laid mines and took military action against Nicaragua.

In the late 1980's the United States consistently violated the General Agreement on Tariffs and Trade (G.A.T.T.) by refusing to import yellow fin tuna from Mexico. The United States and Congress had passed the Marine Mammal Protection Act, which requires that the United States Government ban the importation of commercial fish or products from fish caught with commercial fishing technology that results in the incidental killing or incidental serious injury of ocean mammals. In 1991, a report of G.A.T.T. Secretariat Panel found that the United States had violated the G.A.T.T. Agreements. (GATT Dispute Panel Report)

In 1986, the government unilaterally changed Dronabinol, a synthetic form of Tetrahydrocannabinol (an active ingredient in marijuana), from Schedule I under the 1971 Convention and the CSA to Schedule II of the CSA, to permit it to be used in the treatment of nausea associated with chemotherapy. (See Rescheduling, 1986). While the motive for the rescheduling was legitimate, it was still a violation of Articles 2, 3 and 7 of the 1971 Convention. (See WHO, 1991, at 12). Noting its violation of the Convention, the United States' justification was:

[T]he existing requirements of Schedule II of the Controlled Substances Act can provide adequate controls and restrictions to comply with the obligations of the Convention on Psychotropic Substances. (Rescheduling, 1986)

Likewise, permitting the tea into the country for legitimate religious purposes under the same strict controls applied to Schedule II substances would meet the purposes of the Convention.

The government should not be heard to argue, in the face of the types of treaty violations that the United States engages in, that permitting a small amount of tea, under strict controls to serve the religious needs of two small churches, would result in disastrous international consequences.

**Importation of the tea will not undermine the leadership position of the United States in treaty affairs.** The government argues that its strong position of international leadership on controlling illicit markets in drugs mandates it not violate any drug treaties. It is errant nonsense to suggest that other nations would actually care,

let alone be deeply concerned. Permitting the legitimate sacramental use of the tea would neither inhibit nor prevent our government from utilizing the traditional panoply of diplomatic, economic, and military means to advance its interests in the war on drugs.

No one with any experience in international affairs should argue that the United States has such a compelling interest in not breaching treaties so as to justify its denial of fundamental human rights contained in the U.S. Constitution, Congressional legislation, and a solid body of international instruments. If the United States actually had a compelling interest in promoting compliance solely for compliance sake, that would lead to absurd, dangerous, and tragic results. Were this thesis ever to be accepted by the Executive branch, Congress could never justify legislation that conflicted with a treaty that has been ratified by the United States. Nor could Congress abrogate a treaty because of the compelling interest thesis articulated by Mr. Dalton. This position flies in the face of United States' diplomatic history as well as settled jurisprudence about legislation that conflicts with treaties.

**Other international treaties and United Nations declarations mandate that the government cease its threat of prosecution of members of the churches.** On September 8, 1992, the United States acceded to the International Covenant on Civil and Political Rights (CCPR), which provides in part:

Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in the community of others, and in public or private, to *manifest* his religion or belief in worship, observance, practice and teaching. (United Nations, 1966, emphasis added.)

The United Nations Human Rights Committee, which has responsibility for interpreting CCPR, declared that "[t]he freedom to manifest religion ... in worship, observance, practice and teaching encompasses a broad range of acts," including "ceremonial acts" and "participation in rituals." (See United Nations, 1993).

Article 2 of the CCPR requires that each member state "take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present covenant." (Emphasis supplied.) This mandatory requirement imposed an international obligation on the United States, not just to permit the range of religious activity contemplated by the CCRP, but to undertake whatever steps were necessary "to give effect to the rights." The only limitations that are permitted under the CCRP are those specific burdens that a country can demonstrate are "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." (See United Nations, 1993). The government has not come forward with any proof that regulation of the tea is sufficiently "necessary" to preserve the above-enumerated interests to justify removing the protection of the Covenant.

The "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief" was activated by General Assembly resolution 36/55 of November 25, 1981, and provides Article 3, in part"

Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.<sup>11</sup>

Article 2 prohibits "any distinction, exclusion, [or] restriction . . . having . . . as its effect, nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis." Certainly, the defendants' actions result in an impermissible "exclusion" of the UDV's and the Santo Daime's central religious practices. Article 42 provides "all States shall make all efforts to enact or rescind legislation where necessary to prohibit any such [exclusion]."

While the Declaration does not have the same legal enforcement status as a treaty, it was adopted after the Convention, and it can be safely assumed that the international community would recognize that its mandate, in combination with the CCPR and other United Nations declarations, weighs against any strict constructions of the "religious uses" reservation provisions of Article 32 of the Convention.

## **Conclusion**

The jurisprudence cited above is the legal framework within which the Santo Daime will present its case in federal court. Expert witnesses will provide the facts and opinions to the judge similar to those set forth in this paper.

The process in Court, in some ways, is quite simple. The Santo Daime will file a Complaint with the court stating that the government is threatening to arrest and prosecute members of the Santo Daime Church because they seek to engage in the central practice of their religion, the ingestion of the sacred Daime tea. The Church will seek a preliminary injunction, meaning a request that the court immediately and temporarily order the government not to interfere with the tea. This is justified in American law where the injury or potential injury is real and immediate and where the complaining party demonstrates a very strong case. The Santo Daime case is very strong, and thus it is expected that the court will grant a preliminary injunction against the United States Department of Justice not to arrest or interfere in any way with the importation of the tea pending a full trial on the merits. If a trial is necessary, then the expert will be presented to the court for both parties and the court will decide if the government has established a compelling interest in banning the tea. All of the evidence demonstrates that the government concerns are little more than pure speculation. We expect that the Court will rule that the government may not ban the tea.<sup>12</sup>

## **Epilogue**

This Epilogue is being written almost one year since completion of the main text. The Santo Daime communicated with the United States Department of Justice (DOJ) from January 2008- July 2008 attempting to convince the government that for the reasons I have offered in this paper, the Santo Daime was assured a victory if the Church was required to challenge the government in our Federal Court.

The DOJ's response last year revealed their concern that we would win the case, so they changed their tactic. They came up with a new position, which was for the Santo Daime to formally petition the government for an exemption, ignoring the fact that ten years ago the government sent an official letter advising us that it would not voluntarily permit the tea to enter the United States.

The new position was a fraud. It was telling the Church that it might get an exemption if it formally filed. But, it was very clear to me, that this tactic was to force the Church to have their petition heard by the government rather than the neutral Federal Court. I refused to petition the government and finally decided that there would be no progress possible with the government, absent a federal judge ordering the Attorney General of the United States to permit the importation and consumption of the tea.

The first question I faced when preparing to file in Court was whether or not to seek an emergency Order from the Federal Judge to provide immediate protection from any threats of or actual arrests of Church Members. To win such an application the Church would have to establish that they have a very strong case on the merits and that they were faced with immediate arrest and prosecution. Since there had been no direct threats in 9 years, I advised the Church that it was very possible that the Judge would not order immediate relief. However, by filing the Motion, either the Court would grant it or state that because there have been no immediate threats, he would deny the Motion but would consider it if there were any new facts. This then was a win-win situation. If the emergency relief was not granted, the Judge would be signaling to the government not to arrest anyone or the Judge would then consider issuing an immediate order against the Attorney General. The other reason to file the early application is because it is a way to get the entire case in summary form before the court. Thus, all our expert reports were part of the early presentation as was the UDV decision and our extensive recitation of the law to the Judge.

At the first hearing after I filed the case in early September, the Judge noted that there had not been any arrests, yet the government had delayed this case for years and that the Church was entitled to a speedy and just resolution of their claims. After the case was filed, the government alleged:

1. The government had a compelling health and safety interest in banning the use of ayahuasca.
2. If an exemption were granted for the Santo Daime Church to consume ayahuasca for ceremonial purposes, the government has a compelling interest in verifying the quantity of ayahuasca imported or manufactured and the concentration of DMT and all other active substances contained in the ayahuasca.
3. The government has a compelling interest in preventing the diversion of ayahuasca to non-religious use or to participants who are not sincere adherents to the Santo Daime Church.
4. The government has a compelling interest in requiring requests for exemptions from the CSA and/or for petitions for rescheduling to be addressed first through an administrative process.
5. That the government had a compelling interest to evaluate each person who wanted to practice their religion to determine, for each, if they are sincere.

The government was not able to establish a compelling interest in any of the above claims. There is no evidence of short or long term ill health effects, there is no evidence of any diversion of the tea into illicit markets and there was no evidence that the DEA is better equipped to analyze requests for religious exemptions than are our federal judges to whom our Congress delegated the reasonability.

It is the last one above, that I want to briefly comment on. The last one suggested that each person who chose to be a member of the Church might have to go to Washington and be interviewed by government agents who would determine if these people were sincere. This attempt by the DEA can only be seen for what it was: an attempt to move toward a dictatorship where religious freedom was only obtained under the control of the government. Religious freedom is obtained as a basic human right that comes with being alive. The attempt of the United States DEA to essentially license people to be able to attend a service had overtones of dictatorship that were frightening. Of course our federal court gave no credence to this un-American attempt to decide who can and cannot practice their religion.

The government hired very prominent scientists, including psychiatrists, pharmacologists and drug control experts. This group included experts being paid over \$400 per hour and one was from Harvard. The expert reports submitted by these scientists for the government were truly some of the worst expert reports I have encountered. They were disrespectful toward the Santo Daime and they speculated about possible ill health effects rather than offering reliable science that the tea, when taken in the context of the religious services, caused any harm to anyone.

These experts substituted “junk science” for the scientific method and their reports did not convince the judge of anything that defendants were urging. It was valuable in responding to the governments’ experts for me to have had significant prior experience in cases dealing with scientific information and opinion. Through such experience, one develops a bit of an expertise in looking through the superficiality of the experts’ conclusions to evaluate what the factual basis is for rendering the opinions. By way of example, one of the defendants’ experts testified that:

In my clinical experience with literally thousands of individuals whose lives had been damaged by drug use, it is sad to see these individuals make an attempt to resolve their life issues by turning to the same maladaptive solution . . . drug use. These individuals appear to be looking for a magical solution and CHLQ offers a quick fix, that may take advantage of vulnerable people. Prospective participants are screened by, and meet during their first work individuals who may have found a way out of their own life’s dilemmas by being involved in a religious ceremony where they will be given drugs on multiple occasions during four to twelve hour ceremony, at least three times per month. Sadly, this is little different than from the promises of those such as Professor Timothy L Magic Prankster’s in the “Electric Kool Aid Acid Test.”<sup>7</sup>

It is my view that this sort of insulting, disrespectful speculation angered the judge. The government was grasping for straws, as they had neither credible scientific nor drug policy evidence to offer. Indeed, because of the way these experts handled the case and the way the trial lawyers acted toward the plaintiffs, at the closing, Judge Panner stated:

I must say, in the testimony and the conduct in the courtroom throughout the trial by the various members, I'm impressed that they are a good cross-section of United States citizens.

The government refused to even acknowledge that the Santo Daime Church is a valid religion, and that the members of the Church sincerely believe in their religion.

The Judge issued his Judgment ordering the Attorney General of the United States not to arrest any Santo Daime members for bringing in the tea or consuming it at religious services. Since the order was issued I have been meeting with DEA officials in the United States to work our arrangements for importing the tea, including tracking the tea when distributed to other Churches. This is a minimal interference and because the Church does not want any of its sacred tea diverted from religious use, welcomes appropriate and limited oversight.

The Santo Daime (CEFLURIS) Church of Brazil is a valid religion recognized as such in Brazil, and now, in the United States.

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- 1 Employment Division, Dept. of Human Resources v. Smith (1990).
  - 2 See Clark (1969) ("The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarefied values inevitably makes the individual interest appear the less significant"); Pound (1943) ("When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane . . . [or else] we may decide the question in advance in our very way of putting it.")
  - 3 As we explain below, "the government can as easily achieve its policy objective without burdening [the] religious conduct, [and thus] the burden on the government is [virtually] zero and the scale necessarily reads against upholding the government action." (Grosz v. City of Miami Beach, 1983).
  - 4 Employment Division, Dept. of Human Resources v. Smith (1990).
  - 5 See Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC § 802 (1996).
  - 6 With the exception of Native American use of Peyote which involved significant issues regarding Native American sovereignty issues
  - 7 The focus in Smith was peyote and mescaline, both of which are listed as Schedule I Drugs with a "high potential for abuse." It is in this context, the religious use of an otherwise controlled substance, that Congress enacted RFRA as protection for a bona fide religion from the application of laws of general application if those laws burdened the religion's central practice.
  - 8 In Re Young (1998).
  - 9 Although at one time the United States considered abuse of alcoholic beverages to be at least as dangerous to public health as drug abuse, the government did not consider its war on abuse of alcoholic beverages sufficiently compelling to refuse to exempt the religious use of wine from that prohibition. See National Prohibition Act (1919).
  - 10 Dr. Halpern also notes the notion that all hallucinogenics have the same effect is like saying aspirin, which, like morphine, is an analgesic, would therefore have the same risks as morphine.
  - 11 Article 6 provides: The right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms: "(c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion . . ."
  - 12 Gonzales v. O Centro Espirita Beneficente União do Vegetal (2006)