

Protections for Native Spiritual Practices In Prison

NATIVE AMERICAN RIGHTS FUND¹

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Your rights in prison are restricted, but many still exist—particularly where your religious practices are concerned. This document will help you understand these rights and the laws that protect them.

Federal law in particular provides protection for your right to practice your Native religion in prison. Generally speaking, you may practice your religion unless doing so presents security, safety, health, or other serious concerns for the prison or fellow inmates. If your rights to practice your faith are violated, you may be able to seek relief in court. Before you pursue any legal action, however, you must normally go through the full internal grievance process available in your institution.

In this pamphlet, you will find multiple tools: (1) a summary of the federal laws that protect your Native spiritual practice (note, there may be additional state or other legal protections available); (2) answers to key questions you may have about these laws; (3) applications of these laws to specific Native religious practices; and (4) information about the procedure to challenge prison regulations.

Please note that the information provided in this pamphlet is meant to provide only a general understanding of the law and is for educational purposes only. It does not constitute legal advice, either generally or with regard to any particular matter.

Overview of the Law

Constitutional Protections

The First Amendment to the United States Constitution might be the most famous protection for religious practice in America, but it is typically not your best source of rights in prison.² Even if a regulation at your prison burdens your Native religious practice, it is likely to be upheld by courts against a First Amendment challenge so long as it is “reasonably related to legitimate penological interests.”³ This is a low threshold for a prison to meet, and courts often defer to prison officials under this standard.

¹ The original version of this guide was prepared with the help of the Stanford Law School Religious Liberty Clinic.

² U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

³ *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

Statutory Protections

You typically have stronger protections for your religious practices under federal statutes, which are individual measures passed by Congress. There are two primary laws that protect your right to exercise religion while incarcerated, depending on whether you are in a state or federal institution. If you are in a state or local prison, your rights are protected by the Religious Land Use and Institutionalized Persons Act (RLUIPA);⁴ if you are in a federal prison, your rights are protected by the Religious Freedom Restoration Act (RFRA).⁵ No matter which statute applies, however, both provide that the government may substantially hinder your religious practice but only if it has a good reason for doing so, and if the restrictions placed on you are absolutely necessary. These laws balance your right to exercise your religion against the government's interests in security, safety, health, and cost controls.

RLUIPA provides as follows:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person—

- (1) is in furtherance of a compelling governmental interest; and*
- (2) is the least restrictive means of furthering that compelling governmental interest.*

RFRA provides as follows:

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and*
- (2) is the least restrictive means of furthering that compelling governmental interest.*

As can be seen above, the two statutory tests are essentially identical.

Key Questions (and Answers) About the Law

Does my Native spiritual practice qualify as “religious exercise”?

To receive the protections of the federal laws, you must first have beliefs that are “religious” and “sincerely held.”⁶ Common Native spiritual practices are almost always accepted as sufficiently religious under the law. The federal government

⁴ 42 U.S.C. § 2000cc-1.

⁵ 42 U.S.C. § 2000bb-1.

⁶ See, e.g., *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007); see also *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008).

has stated that it “shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to *access to sites, use and possession of sacred objects*, and the freedom to worship through *ceremonials* and *traditional rites*.”⁷

You must, however, also show prison officials that you personally believe in the spiritual practice at issue. Courts find beliefs to be “sincerely held” when they are consistently followed. But even if you haven’t always faithfully adhered to your practice, a court may still find you are sincere.⁸ Sincerity becomes more difficult to prove if you have only recently adopted a new practice.

Do I have to be a member of a federally-recognized tribe?

Unlike some federal protections that are reserved for members of federally-recognized tribes, protections of most Native spiritual practices do not depend on federal tribal recognition. Courts instead consider whether your religious practice is sincerely held, as described above.

When can the government restrict my Native spiritual practice?

You, of course, have the right to fully believe in your Native religion, but the government has the ability, in some circumstances, to limit the way your belief is practiced. The courts, in prison cases, give great respect to the prison’s interests in security, safety, cost controls, and prisoner health. So, for example, if your Native practice threatens the security of guards or other inmates, the prison may legally restrict you from following that practice. If, however, the prison can accommodate your practice and maintain the safety of the facility, courts will sometimes require prisons to respect your Native spiritual practice.

An important thing to note is that each prison is generally allowed to implement different policies—that is, the law does not typically require prisons to maintain exactly the same policies. So, if you are aware of one prison that allows inmates to do something you would like to do in your own prison, a court will not necessarily require your prison to allow you to exercise that practice.

Below, you will find example cases where courts have ruled on important Native spiritual practices.

Application to Specific Native Practices

Ceremonial Tobacco Use

⁷ 42 U.S.C. § 1996 (emphasis added).

⁸ See *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (finding “the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere”).

Many Native Americans use tobacco for spiritual, ceremonial, and medicinal purposes. Because of the importance of tobacco to Native religious practices, most federal—and many state and local—correctional facilities permit ceremonial tobacco in some form, often after legal challenges.⁹ These accommodations have been made even where prisons otherwise have tobacco-free or smoke-free policies in place.

Smoke-free and tobacco-free policies have been implemented in prisons because of health concerns related to smoke and tobacco use. Some prisons have refused to allow any accommodations for tobacco use for Native American inmates because of these concerns. But Native American inmates have challenged outright bans on tobacco use, and both prisons and courts have begun to take the side of the inmates when those inmates can show that such bans substantially burden their religious practices.¹⁰ For example, South Dakota reversed its ban on tobacco use for Native American prisoners in 2013 after inmates challenged the ban in court.¹¹ Although South Dakota does not permit unrestricted use of tobacco now, it will allow smoking and ceremonial mixtures that have a small quantity of tobacco.

Hair Length

As of early 2014, prisons run by the majority of states, as well as those run by the federal government, either do not have any restrictions on prisoner hair length practices or, if they do, they have a system that allows for certain hair-length practices based on religion.¹² Check the policy that applies in your own prison, because you might already be allowed to maintain your hair in accordance with your Native American beliefs.

⁹ Public Health Law Center, *Tobacco Behind Bars: Policy Options for the Adult Correctional Population* 8 (2012).

¹⁰ See Special Rapporteur on the Rights of Indigenous Peoples, U.N. Doc. USA 7/2013 (June 5, 2013) (by Heiner Bielefeldt & James Anaya) (discussing how the State of Washington reversed its ban on tobacco use by Native American inmates after several tribes petitioned the state governor); Ken Bradley, *In South Dakota Prisons, Indian Inmates Get to Smoke—For Religious Reasons*, Reuters (Feb. 20, 2013), <http://blog.thomsonreuters.com/index.php/in-south-dakota-prisons-indian-inmates-get-to-smoke-for-religious-reasons/>; see also *Cryer v. Mass. Dep't of Corr.*, 763 F. Supp. 2d 237, 243-48 (D. Mass. 2011) (denying a prison's motion for summary judgment because of fact issues as to whether a total ban on tobacco imposed a substantial burden on the Native American plaintiff and whether the ban was the least restrictive means of furthering the prison's interest in security). *But see Adams v. Mosley*, Civil Action No. 2:05cv352-MHT, 2008 WL 4369246, at *12 (M.D. Ala. Sept. 25, 2008) (allowing a prison's total ban on tobacco because the Native American plaintiff “presented no evidence showing that the prohibition against tobacco use during worship activities is anything more than an inconvenience or incidental burden”).

¹¹ Ken Bradley, *In South Dakota Prisons, Indian Inmates Get to Smoke—For Religious Reasons*, Reuters (Feb. 20, 2013), <http://blog.thomsonreuters.com/index.php/in-south-dakota-prisons-indian-inmates-get-to-smoke-for-religious-reasons/>.

¹² *Knight v. Thompson*, 723 F.3d 1275, 1278 n.2 (11th Cir. 2013).

Nonetheless, where they exist, restrictions on hair length have been upheld by the courts.¹³ Prison officials have largely cited security concerns as the reason to restrict hair length. For example, in *Knight v. Thompson*,¹⁴ a federal appeals court upheld an Alabama prison policy that prevented Native American inmates from maintaining unshorn hair because contraband and weapons could be concealed in the hair, long hair could cover up medical conditions on the scalp, and prison officials could have difficulty identifying inmates.

But not all courts have accepted the argument that banning long hair is the least restrictive means of furthering the interest in security. For example, in 2005, a different federal appeals court held that the California state prison system did not adequately show that short hair was the appropriate means of furthering security interests because the state did not explain why it could not adopt the policy in place at the majority of prisons that do allow for long hair.

Smudging

Smudging ceremonies necessarily produce smoke, and this smoke can pose problems in prison. In fact, some prisons have implemented outright bans on smudging in indoor locations—including individual prison cells—because the smoke from the ceremony can trigger fire alarms or create health risks for other prisoners and guards in the prison. Courts, moreover, have generally upheld these bans.¹⁵

However, complete bans on *all* smudging may not be the least restrictive means of advancing the prison's interests in safety or prisoner health—the standard under RLUIPA and RFRA. At the very least, courts have indicated that allowing smudging ceremonies in outdoor locations is a reasonable accommodation.¹⁶

A recent case from Idaho illustrates the balance in protecting prison interests and Native American religious liberty. In the case—*Hyde v. Fisher*¹⁷—a Native American inmate complained that his prison violated RLUIPA by not permitting

¹³ See *Knight v. Thompson*, 723 F.3d 1275, 1284-85 (11th Cir. 2013); *Thunderhorse v. Pierce*, 364 F. App'x 141, 146 (5th Cir. 2010); *Hovenaar v. Lazaroff*, 422 F.3d 366, 371-72 (6th Cir. 2006) (reversing lower court order that struck down a blanket ban on long hair because the lower court failed to consider reasoned judgment of prison officials); *Diaz v. Collins*, 114 F.3d 69, 72-73 (5th Cir. 1997); *Hamilton v. Schriro*, 74 F.3d 1545, 1554-55 (8th Cir. 1996).

¹⁴ 723 F.3d 1275 (11th Cir. 2013).

¹⁵ See, e.g., *Chance v. Tex. Dep't of Criminal Justice*, 730 F.3d 404, 417 (5th Cir. 2013); *Hodgson v. Fabian*, 378 F. App'x 592, 593-94 (8th Cir. 2010) (per curiam); *Cubero v. Burton*, No. 96-1494, 1996 WL 508624, at *1-2 (7th Cir. Sept. 3, 1996); *Smith v. Beauclair*, No. CV-03-222-C-EJL, 2006 WL 2348073, at *9 (D. Idaho Aug. 11, 2006).

¹⁶ See *Chance v. Tex. Dep't of Criminal Justice*, 730 F.3d 404, 417 (5th Cir. 2013) (“Because [the prison] still permits Smudging outdoors and has offered uncontroverted evidence demonstrating the reasonableness of its determination to ban indoor Smudging, we conclude that its Smudging policy is the least restrictive means of achieving its compelling interests.”); *Hyde v. Fisher*, 203 P.3d 712, 729-30 (Idaho 2009).

¹⁷ 203 P.3d 712 (Idaho 2009).

any smudging whatsoever, either indoors or outdoors. The prison claimed that this policy furthered its interest in maintaining safety. The Court of Appeals of Idaho, however, disagreed with the prison. Among other things, the court held that the prison could maintain its interest in safety by directing the smudging ceremony outdoors.

Sweat Lodges

Prison policies on sweat lodges are mixed. Sweat lodges are important in many Native American religious traditions because of their role in providing purification. Some prisons understand that maintaining sweat lodges can have calming influences on prisoners and that they can make for a more orderly prison. As such, some prisons allow for sweat lodges, with the first reported sweat lodge appearing in a prison in 1976.¹⁸ You should check whether your prison already allows sweat lodges or whether it would be willing to do so.

Many prisons, however, do not allow sweat lodges. Those that forbid sweat lodges generally justify their policies on security and safety grounds.¹⁹ For example, in *Fowler v. Crawford*, a federal appeals court upheld a Missouri prison policy that banned sweat lodges, finding that “serious safety and security concerns arise when inmates at a maximum security prison are provided ready access to (1) burning embers and hot coals, (2) blunt instruments such as split wood and large scalding rocks, [and] (3) sharper objects such as shovels and deer antlers.” As the *Fowler* court explained, safety and security concerns are particularly acute in maximum-security prisons.²⁰ Another factor that influences prison officials to ban sweat lodges is the lack of supervision within the lodge.²¹

Use of Animal Parts

Animal parts are often a major component of Native religious practice. The use of animal parts in a prison setting, however, often presents security concerns for prison officials. Animal hides, for example, can be used to more easily scale barbed-wire fence. And talons and animal claws can be used as weapons.²² As such, these items are routinely banned from prisons.²³

¹⁸ Elizabeth S. Grobsmith, *INDIANS IN PRISON: INCARCERATED NATIVE AMERICANS IN NEBRASKA* 119 (1994).

¹⁹ See, e.g., *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008); *Hamilton v. Schriro*, 74 F.3d 1545, 1555-56 (8th Cir. 1996); *Haight v. Thompson*, No. 5:11-CV-00118, 2013 WL 1092969, at *12 (W.D. Ky. Mar. 15, 2013).

²⁰ See also *Hamilton v. Schriro*, 74 F.3d 1545, 1555-56 (8th Cir. 1996); *Hyde v. Fisher*, 203 P.3d 712, 728-29 (Idaho 2009).

²¹ *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008); *Hyde v. Fisher*, 203 P.3d 712, 728-29 (Idaho 2009); *Haight v. Thompson*, No. 5:11-CV-00118, 2013 WL 1092969, at *12 (W.D. Ky. Mar. 15, 2013).

²² *Haight v. Thompson*, No. 5:11-CV-00118, 2013 WL 1092969, at *24 (W.D. Ky. Mar. 15, 2013) (“Animal claws and talons hold a sacred significance for many Native Americans. However, the potential for use as weapons makes them generally inappropriate for possession in a correctional setting.”).

²³ *Morrison v. Garraghty*, 239 F.3d 648, 660 (4th Cir. 2001).

But some prisons will allow prisoners to keep smaller animal parts that pose a smaller security risk. Small bones and necklaces with animal teeth, for example, have been allowed in prisons.²⁴ Perhaps most importantly, prisons have allowed Native American inmates to also keep eagle feathers, although inmates must first demonstrate that they are part of a federally-recognized tribe, in keeping with federal law on eagle feathers.²⁵

The varied prison policies concerning the use of animal parts reveal the difficulty of predicting whether you will be allowed to keep a particular animal part in prison. As a federal appeals court in Texas noted in *Chance v. Texas Department of Criminal Justice*, “the availability of a less restrictive means is a subject that demands a fact-intensive inquiry.”²⁶ In other words, animal parts are likely to be addressed by prisons on a case-by-case basis.

Legal Procedure for Protecting Your Rights

If you feel that your prison has violated your right to practice your Native religion, there are important procedural steps that you need to go through before filing a lawsuit in court. Most importantly, a federal law called the Prison Litigation Reform Act²⁷ requires that you first try to resolve your complaint through your prison’s grievance procedures.²⁸ This step is called “exhausting your remedies.”

Each prison’s grievance procedure is different, but the basics are fairly standard. First, you will have to file a written description of your complaint with the prison. This complaint should include each claim you eventually want to raise in court and should mention each defendant that would be named in an eventual lawsuit. If the prison still refuses to allow you to practice your faith after it reviews your complaint, there may be an internal appeals process that allows you to ask the prison to reconsider its decision. Although the number of levels of appeals at each prison may vary, it is crucial that you appeal your grievance through each level that

²⁴ *Chance v. Tex. Dep’t of Crim. Justice*, 730 F.3d 404, 418 (5th Cir. 2013); *Cryer v. Clark*, No. 09-10238-PBS, 2009 WL 6345768, at *6 (D. Mass. July 9, 2009).

²⁵ See *Phillippi v. Skolnik*, No. 3:11-cv-00272-LRH-VPC, 2013 WL 5372352, at *13 n.20 (D. Nev. Sept. 24, 2013); *Smith v. Frank*, No. 07-C-83, 2009 WL 750272, at *3 (E.D. Wis. Mar. 20, 2009); *Means v. Lampert*, No. CIV-06-1137-HE, 2008 WL 4899227, at *6 (W.D. Ok. Nov. 12, 2008); see also *ACLU Secures Religious Freedom for American Indians at Wyoming Prison*, ACLU (July 30, 2008), <https://www.aclu.org/religion-belief/aclu-secures-religious-freedom-american-indians-wyoming-prison> (discussing a settlement involving the Wyoming State Penitentiary that allows Native American inmates to keep 4 eagle feathers within their cells and additional feathers in storage).

²⁶ 730 F.3d 404, 418 (5th Cir. 2013) (citation and internal quotation marks omitted).

²⁷ 42 U.S.C. § 1997e(a).

²⁸ See ACLU, *Know Your Rights* 1 (2011), available at https://www.aclu.org/files/assets/kyr_plra_aug2011_1.pdf.

is available at your prison. Only after you exhaust your remedies at your prison will a court be able to hear your claim.

Neither exhausting your remedies nor filing a lawsuit in court requires that you be a lawyer or that you hire a lawyer. Although legal expertise is certainly best and highly recommended, prisoners are allowed to represent themselves “pro se,” meaning that prisoners are allowed to handle their cases on their own. This might seem like a difficult task, but many courts—through the clerk’s office—routinely help pro se prisoner litigants.²⁹

For more information about your religious rights in prison, take a look at the following resources:

- ACLU, KNOW YOUR RIGHTS—FREEDOM OF RELIGION (2012), *available at* <https://www.aclu.org/prisoners-rights/know-your-rights-freedom-religion-november-2012>.
- COLUMBIA HUMAN RIGHTS L. REV., *Chapter 27: Religious Freedom in Prison*, in A JAILHOUSE LAWYER’S MANUAL (9th ed. 2011), *available at* <http://www3.law.columbia.edu/hrlr/jlm/chapter-27.pdf>.
- DONNA SIENSTRA, JARED BATAILLON & JASON A. CANTONE, ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURTS AND CHIEF JUDGES (2011), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/\\$file/proseusdc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/$file/proseusdc.pdf).
- PRISON LAW OFFICE, HOW TO FILE AN ADMINISTRATIVE APPEAL (2013), *available at* <http://www.prisonlaw.com/pdfs/AdminAppealsFull,Jan2013.pdf>.

²⁹ Donna Sienstra, et al., *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Courts and Chief Judges* 1 (2011), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/\\$file/proseusdc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/$file/proseusdc.pdf).