

National NALSA Moot Court Competition Problem
[All sources appear as endnotes at the end of the problem.]

In October 2007, pursuant to a federal grand jury indictment, FBI agents arrested Frances Blue Coat, Isaac Grey Eagle and Gene Smith for the illegal possession of eagle feathers in violation of the Bald and Golden Eagle Act, 16 U.S.C. § 668(a)¹ and the Migratory Bird Treaty Act, 16 U.S.C. § 707.² At the time of their arrest, all three individuals were in physical possession of eagle feathers and the eagle feathers were thus properly seized incident to their lawful arrest. At the time of their arrest and at all subsequent times, neither the bald eagle nor golden eagle was on the Endangered Species List.³

The arrests took place on the Red River Sioux Reservation, which is located in the State of New Dakota. Ms. Blue Coat is an enrolled member of the Red River Sioux Tribe, which is a federally recognized Tribe. Ms. Blue Coat is a long-time practitioner within the traditional religion of the Red River Sioux people and there is a stipulated recognition that her possession of eagle feathers was for the sole purpose of religious expression within the traditional religion of the Red River Sioux Tribe.

Mr. Grey Eagle is a full-blooded (four-fourths, 4/4) Red River Sioux Indian, but he is *not* a member of the Red River Sioux (or any other) Tribe. He was born in Paris, France when his full-blooded parents (who were members of the Red River Sioux Tribe),⁴ Isadore and Kate Grey Eagle, were guest artists as traditional Sioux singers and dancers at the Paris Repertory Theater of the Arts. The Red River Sioux Tribal Constitution in force when Mr. Grey Eagle was born in 1964 required anyone seeking membership in the Tribe to be at least one-fourth (1/4) Red River Sioux blood and to have been born on the Reservation or taken up residence there within three years of his or her birth. Isaac and his parents did not return to the reservation until 1969. Thus Mr. Grey Eagle was *not* eligible for membership in the Tribe at that time.

Isaac has resided continuously on the Reservation since 1969. The Tribe also amended its Constitution in 1980 and removed the residency requirement as a condition of enrollment. However

that amendment was not retroactive and it is therefore true that Mr. Grey Eagle has never been eligible for enrollment. As with Ms. Blue Coat, there is a stipulated recognition that Mr. Grey Eagle's possession of eagle feathers was for the sole purpose of religious expression within the traditional religion of the Red River Sioux People. At the request of various Tribal Chairmen over the years, Mr. Grey Eagle often offered a traditional Red River Sioux prayer to bless important proceedings of the Red River Sioux Tribal Council.

Gene Smith is a non-Indian, who is a teacher and long-time resident of the Reservation. He is a good friend of both Ms. Blue Coat and Mr. Grey Eagle. While he has attended many traditional religious ceremonies on the Red River Sioux Reservation, Mr. Smith does not consider himself a practitioner of the Red River Sioux Religion. It is stipulated that the eagle feathers in his possession were gifts from the families of Ms. Blue Coat and Mr. Grey Eagle to honor his contribution to the education of their children.

Of these three individuals, only one, Frances Blue Coat was eligible to apply for a federal permit to possess eagle feathers for religious purposes. These requirements, which are set out at 50 C.F.R. § 22.22,⁵ require, *inter alia*, that any applicant be a member of a federally recognized tribe. Ms. Blue Coat never applied for a permit. Despite his apparent ineligibility, Mr. Grey Eagle did apply for a permit with the federal Migratory Bird Permit Office sometime before his arrest in 2007, but has never received a decision concerning his application. Mr. Smith never applied for a permit, since he understood as a non-Indian that he was not eligible to receive one.

All three defendants were prosecuted together in a bench trial before the Honorable Judge Jane Roubideaux. Both Ms. Blue Coat and Mr. Grey Eagle asserted defenses relative to an improper infringement on their First Amendment right to the free exercise of religion.⁶ Mr. Grey Eagle also asserted an equal protection argument, contended that the Religious Freedom Restoration Act barred his prosecution and claimed that the permit system violated the Establishment Clause. Mr. Smith

argued that he had done no wrong, but merely accepted with gratitude a gift that honored him in a culturally significant way.

Judge Roubideaux found all three defendants guilty as charged. The only portion of her decision that was made part of the record was her finding that the federal government had a legitimate and compelling interest to protect the existence of bald and golden eagles, as unique exemplars of our national existence. She also found that the permit system – despite its bureaucratic cumbersomeness – did satisfy the ‘least restrictive alternative’ as required by the Religious Freedom Restoration Act.⁷

All three defendants have appealed to the XI Circuit Court of Appeals.⁸ Ms. Blue Coat’s appeal was dismissed on the motion of the United States for her failure to apply for a permit under 50 C.F.R. § 22.22 and thus not exhausting her administrative remedies. Mr. Smith’s appeal was likewise dismissed on the motion of the United States for failure to assert any free exercise claim as a matter of law.

Therefore, the sole appeal that remains before the circuit court is that of Mr. Isaac Grey Eagle.

¹ 16 U.S.C. § 668 states:

(a) Prohibited acts; criminal penalties

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than \$5,000 or imprisoned not more than one year or both: *Provided*, That in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than \$10,000 or imprisoned not more than two years, or both: *Provided further*, That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: *Provided further*, That one-half of any such fine, but not to exceed \$2,500, shall be paid to the person or persons giving information which leads to conviction: *Provided further*, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.

² 16 U.S.C. § 707 states:

(a) Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be

deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 or be imprisoned not more than six months, or both.

(b) Whoever, in violation of this subchapter, shall knowingly—

(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both.

(c) Whoever violates section 704 (b)(2) of this title shall be fined under title 18, imprisoned not more than 1 year, or both.

(d) All guns, traps, nets and other equipment, vessels, vehicles, and other means of transportation used by any person when engaged in pursuing, hunting, taking, trapping, ensnaring, capturing, killing, or attempting to take, capture, or kill any migratory bird in violation of this subchapter with the intent to offer for sale, or sell, or offer for barter, or barter such bird in violation of this subchapter shall be forfeited to the United States and may be seized and held pending the prosecution of any person arrested for violating this subchapter and upon conviction for such violation, such forfeiture shall be adjudicated as a penalty in addition to any other provided for violation of this subchapter. Such forfeited property shall be disposed of and accounted for by, and under the authority of, the Secretary of the Interior.

See also 16 U.S.C. § 703:

(a) In general

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

Note also that both bald and golden eagles are considered ‘migratory birds’ under the relevant statute and treaty convention provisions.

³ 16 U.S.C. § 1531 et seq. For a list of endangered and threatened species, see 50 C.F.R. § 17.11.

⁴ Mr. Grey Eagle’s parents passed away in 2004 and 2005.

⁵ 50 C.F.R. § 22.22 states:

What are the requirements concerning permits for Indian religious purposes?

We will issue a permit only to members of Indian entities recognized and eligible to receive service from the United States Bureau of Indian Affairs listed under 25 U.S.C. 479a-1 engaged in religious activities who satisfy all the issuance criteria of this section. We may, under the provisions of this section, issue a permit authorizing the taking, possession, and transportation within the United States, or transportation into or out of the United States of lawfully acquired bald eagles or golden eagles, or their parts, nests, or eggs for Indian religious use. We will not issue a permit under this section that authorizes the transportation into or out of the United States of any *live* bald or golden eagles, or any *live* eggs of these birds.

(a) *How do I apply if I want a permit for Indian religious purposes?* You must submit applications for permits to take, possess, transport within the United States, or transport into

or out of the United States lawfully acquired bald or golden eagles, or their parts, nests, or eggs for Indian religious use to the appropriate Regional Director. Attention: Migratory Bird Permit Office. You can find addresses for the appropriate Regional Directors in 50 CFR 2.2. If you are applying for a permit to *transport into or out of the United States*, your application must contain all the information necessary for the issuance of a CITES permit. You must comply with all the requirements in part 23 of this subchapter before international travel. Your application for any permit under this section must also contain the information required under this section.

§13.12(a) of this subchapter, and the following information:

(1) Species and number of eagles or feathers proposed to be taken, or acquired by gift or inheritance.

(2) State and local area where the taking is proposed to be done, or from whom acquired.

(3) Name of tribe with which applicant is associated.

(4) Name of tribal religious ceremony(ies) for which required.

(5) You must attach a certification of enrollment in an Indian tribe that is federally recognized under the Federally Recognized Tribal List Act of 1994, 25 U.S.C. 479a-1, 108 Stat. 4791 (1994). The certificate must be signed by the tribal official who is authorized to certify that an individual is a duly enrolled member of that tribe, and must include the official title of that certifying official.

(b) *What are the permit conditions?* In addition to the general conditions in part 13 of this subchapter B, permits to take, possess, transport within the United States, or transport into or out of the United States bald or golden eagles, or their parts, nests or eggs for Indian religious use are subject to the following conditions:

(1) Bald or gold eagles or their parts possessed under permits issued pursuant to this section are not transferable, except such birds or their parts may be handed down from generation to generation or from one Indian to another in accordance with tribal or religious customs; and

(2) You must submit reports or inventories, including photographs, of eagle feathers or parts on hand as required by the issuing office.

(c) *How do we evaluate your application for a permit?* We will conduct an investigation and will only issue a permit to take, possess, transport within the United States, or transport into or out of the United States bald or golden eagles, or their parts, nests or eggs for Indian religious use when we determine that the taking, possession, or transportation is compatible with the preservation of the bald and golden eagle. In making a determination, we will consider, among other criteria, the following:

(1) The direct or indirect effect which issuing such permit would be likely to have upon the wild populations of bald or golden eagles; and

(2) Whether the applicant is an Indian who is authorized to participate in *bona fide* tribal religious ceremonies.

(d) *How long are the permits valid?* We are authorized to amend, suspend, or revoke any permit that is issued under this section (see §§ 13.23, 13.27, and 13.28 of this subchapter.

(1) A permit issued to you that authorizes you to take bald or golden eagles will be valid during the period specified on the face of the permit, but will not be longer than 1 year from the date it is issued.

(2) A permit issued to you that authorizes you to transport and possess bald or golden eagles or their parts, nests, or eggs within the United States will be valid for your lifetime.

(3) A permit authorizing you to transport dead bald eagles or golden eagles, or their parts, nests, or dead eggs into or out of the United States can be used for multiple trips to or from the United States, but no trip can be longer than 180 days. The permit will be

valid during the period specified on the face of the permit, not to exceed 3 years from the date it is issued.

⁶ The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

⁷ Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-2000bb-4, provides:

§2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that –

- (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
- (2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
- (3) governments should not substantially burden religious exercise without compelling justification;
- (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
- (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are –

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its applications in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§2000bb-1. Free exercise of religion protected.

(a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

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.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§2000bb-2. Definitions

As used in this chapter

- (1) the term “government” includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term “covered entity” means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term “exercise of religion” means religious exercise, as defined in section 2000cc-5 of this title.

§2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

§2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the “Establishment Clause”). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term “granting,” used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

⁸ All parties concede that the Fort Laramie Treaty of 1868 (to which the Red River Sioux were a signatory) was abrogated by both the Bald and Golden Eagle Act and the Migratory Bird Treaty Act and thus provides no defense or applicable issue on appeal. *See, e.g. United States v. Dion*, 476 U.S. 734 (1986).