

# Memorandum

PPC: SB

cc: Koffsky  
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Subject

American Indian Religious Freedom Act

Date

February 19, 1993

To

From

Myles E. Flint  
Acting Assistant Attorney General  
Environment and Natural  
Resource Division

Paul P. Colborn *PPC*  
Acting Deputy Assistant  
Attorney General  
Office of Legal Counsel

The Office of Legal Counsel recommends that the Department send to OMB the attached letter identifying constitutional concerns raised by certain aspects of the draft Senate bill entitled the "American Indian Religious Freedom Act of 1993."

Attachment

cc: M. Faith Burton

Honorable Leon Panetta  
Director  
Office of Management and Budget  
Washington, D.C. 20503

Dear Mr. Panetta:

This letter provides the views of the Department of Justice on the draft Senate bill entitled the "American Indian Religious Freedom Act of 1993." Our comments are limited to identifying constitutional concerns raised by certain aspects of the bill.

The constitutional issues arise under the Establishment Clause of the First Amendment, which mandates that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The most problematic aspect of the bill is the requirement in section 104 that, when a Native American leader states that an undertaking will or may adversely impact a Native American religious practice or site, "the governmental agency engaged in the Federal or federally assisted undertaking shall immediately discontinue such undertaking" until the agency both consults with interested parties and completes an analysis of the impact of the proposed action.

By empowering religious groups to stop government action if they believe the action harms their religion, section 104 is analogous to the statute at issue in Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). In that case, the Supreme Court invalidated a statute that empowered churches and schools to prevent liquor licenses from being granted to establishments within a 500-foot radius of the church or school. The Court ruled that the statute violated the Establishment Clause because its primary effect advanced religion and because it "enmesh[ed] churches in the process of government," thereby involving an excessive entanglement with religion. Id. at 126, 127; see also Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (presenting three-part test for determining whether enactment violates Establishment Clause). Although the statute at issue in Larkin authorized churches to stop the government action indefinitely, rather than until completion of consultations and an impact assessment, we doubt that this difference would produce a different result in litigation challenging section 104. The crucial similarity between section 104 and the statute in Larkin is that both vest religious groups with unilateral authority to stop government action.

It may be argued that the unique relationship between the federal government and the Indian tribes justifies an exception to normal application of the Establishment Clause. The Supreme Court and lower courts have repeatedly stated that, in light of both the text of the Constitution (art. I, § 8, cl. 3, providing Congress with the power to "regulate Commerce . . . with the Indian tribes") and the unique relationship between the federal government and the Indian tribes, Indian tribes can be singled out for some forms of special treatment.<sup>1</sup> Although the Supreme Court has not had occasion to consider whether or not the Indian tribes' unique status affects the application of the Establishment Clause, a lower court has stated that "[t]he unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment." Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1217 (5th Cir. 1991) (upholding federal regulation that allows only members of the Native American Church to possess peyote); see also Rupert v. Director, U.S. Fish and Wildlife Service, 957 F.2d 32, 35 (1st Cir. 1992) (upholding statute that allows only members of Native American tribes to possess eagle feathers).

The Department of Justice has consistently taken a different view of the special relationship from that expressed by the court in Peyote Way Church of God.<sup>2</sup> We have noted that the special treatment of Indian tribes by the federal government does not stem from the unique features of Indian religion or culture. Rather, the special legal position of Indian tribes is grounded

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<sup>1</sup> See, e.g., Morton v. Mancari, 417 U.S. 535, 551-52 (1974) (noting special relationship); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 500-501 (1979) ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be offensive.") (quoting Morton v. Mancari, 417 U.S. at 551-52).

<sup>2</sup> See, e.g., Memorandum Opinion for the Chief Counsel, Drug Enforcement Administration, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Re: Peyote Exemption for Native American Church, 5 Op. O.L.C. 403, 419-20 (1981) (concluding that special relationship does not affect Establishment Clause analysis); Statement of Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, on S.J. Res. 102, before the Senate Select Committee on Indian Affairs, February 27, 1978 (noting that congressional preference for Indian over non-Indian religions could raise Establishment Clause problems).

in their unique status as political entities -- formerly sovereign nations that existed prior to the Constitution -- that still retain a measure of inherent sovereignty over their members. See Morton v. Mancari, 417 U.S. at 554 ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities."). The unique relationship between the federal government and the tribes thus revolves around issues of tribal authority and sovereignty; it does not appear to extend to religious observance.

Even assuming that the special relationship justifies an exception to normal Establishment Clause analysis, the scope of the bill nonetheless appears to exceed the terms of the special relationship by including Native Hawaiians, Alaska Natives, and terminated Indian tribes. See sections 3(2)(B), 3(3)(C), and 3(4). The Supreme Court has articulated the unique status as applying to Indian tribes, rather than to Indians as a race or to Native Americans generally. See Morton v. Mancari, 417 U.S. at 554 (preference granted to tribes, not race); United States v. Antelope, 430 U.S. 641, 645 (1977) (same). Although the Supreme Court has not addressed the argument that the special status of Indian tribes also applies to Native Hawaiians or Alaska Natives, the Court's emphasis on the unique legal status of tribes as the basis for the special relationship suggests that this relationship applies only to federally recognized tribes. As a result, the individuals who are outside of tribal structures do not appear to be subject to the special relationship.<sup>3</sup> Thus, insofar as the bill extends to people who are not members of particular tribes, it would not be subject to special consideration under the Establishment Clause.

Another provision of the bill that might be challenged on Establishment Clause grounds is section 102(b), which authorizes an agency to "temporarily close to public use" portions of federal land in order to protect the privacy of Native American religious activities. This provision could be viewed as authorizing special treatment (the exclusion of outsiders) for one set of religions, thereby conferring a benefit on those religions. Although allowing Native American practitioners

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<sup>3</sup> The Department discussed this issue several years ago in a letter to the Senate Select Committee on Indian Affairs, concluding that, under Morton v. Mancari and its progeny, preferential treatment based on membership in an Indian tribe is permissible, but such treatment based on membership in the Indian racial group is, like all racial classifications, a suspect classification for purposes of equal protection analysis. Letter to Senator Daniel K. Inouye, Chairman, Select Committee on Indian Affairs, from Thomas M. Boyd, Assistant Attorney General, Office of Legislative Affairs, January 30, 1989.

access to religious sites would probably be viewed as a permissible accommodation of religions and religious practices, see Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987), prohibiting the general public from certain areas might be held to be beyond the scope of permissible accommodation. See Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980) ("Issuance of regulations to exclude tourists completely from the [Rainbow Bridge National] Monument for the avowed purpose of aiding [American Indians'] conduct of religious ceremonies would seem a clear violation of the Establishment Clause."). On the other hand, a court might uphold section 104 because of the limited and temporary nature of the accommodation: the section requires that any closure affect the smallest practicable area for the minimum period necessary.

Finally, we also note that section 109, which imposes penalties on the defacing of Native American religious sites, would raise Establishment Clause concerns if it were viewed as treating one set of religions differently from all others.

Please let us know if we can provide assistance in drafting revisions to the draft bill that would address the constitutional concerns discussed in this letter.

Sincerely,

M. Faith Burton  
Acting Assistant Attorney General  
Office of Legislative Affairs