■ American Indian Religious Freedom Act

Date: August 11, 1978
Author(s): Major sponsors of the bill were Senator James G. Abourezk (Dem–SD) and Representative Morris K. Udall (Dem–AZ)
Genre: Legislation

Summary Overview

The American Indian Religious Freedom Act was a joint resolution passed by the US House and Senate, representing the determination of Congress to protect the rights of Native Americans—including American Indians, Alaskan natives, and native Hawaiians, in the free exercise of their religion without interference by the US government. The legislation had no enforcement mechanism and set no penalties for failure to comply. It called upon the president to direct all federal agencies to evaluate their policies and procedures to determine what changes might be necessary to prevent government infringement upon or interference with the free exercise of their traditional religions by native peoples. As a resolution, it lacked the full force of regular legislation, and the act was significant mainly as a symbol of changing sentiments about Indian religious freedom and an acknowledgement that the government had failed to protect these freedoms in the past.

Defining Moment

By the late 1970s, American society was beginning to more openly confront the injustices that confronted American Indians and other native peoples in many aspects of daily life. The nation was slowly awakening to the values of diversity and multiculturalism, and many Americans became more aware of ways in which the government had restricted the rights of American Indians to the free exercise of their own religions. Beginnings of this change in sentiment can be seen as early as the 1930s, when John Collier, the commissioner of Indian affairs under President Franklin D. Roosevelt, ordered Bureau of Indian Affairs (BIA) field workers to cease interfering with the religious practices of Indian people and directed that Indian students should be taught their native languages as well as English. Besides the issue of government action to suppress traditional religious practices, there had also been controversy over items used in rituals and ceremonies. Indians who used eagle feathers in religious rites ran afoul of conservation laws that forbade possession of feathers or other parts of endangered species. Members of the Native American Church and related groups that used peyote as a sacrament in their services were harassed by federal and state officials, who considered the plant an illegal hallucinogenic drug.

There were also problems about access to sites that Indians considered sacred. Such sites might not be on reservation lands, but often were on public lands managed by a myriad of federal agencies. Federal officials sometimes argued that granting access to these sites for religious services conflicted with other mandated duties, or perhaps might even constitute an unconstitutional establishment of religion. An example of a positive development along these lines came a few years before the American Indian Religious Freedom Act was passed, when Blue Lake, a site sacred to the Indians of the Taos Pueblo in New Mexico, was returned to the tribe after decades of protests. Another factor contributing to the development of a positive climate of opinion on such issues was the growing political power of Native Americans. While native peoples constitute a small percentage of the total US population, in states with a large Indian population, the support of Indian voters might constitute the margin of victory in a close race. The two sponsors of this resolution were both from states with sizeable Indian populations.

Author Biography

The major sponsors of this bill were Senator James G. Abourzek, a Democratic senator from South Dakota, and Representative Morris K. Udall, a Democrat from Arizona. Abourzek was born in Wood, South Dakota, on February 24, 1931. He graduated from the South Dakota School of Mines and after serving in the US Navy, graduated from the University of South Dakota Law School.

He was elected to the US House in 1971 and served one term before being elected to the US Senate. He served one term in the Senate (1973–1979) but did not run for reelection. After leaving the Senate, he returned to the practice of law in Sioux Falls, South Dakota, where he now resides. Morris K. Udall was born in St. Johns, Arizona, on June 15, 1922. He served in the US Army during World War II and graduated from the University of Arizona Law School in 1949. In 1961, he won a special election to fill the Arizona second district congressional seat vacated when his brother, Stewart Udall, resigned. He served fifteen terms in Congress, retiring in May 1991. President Bill Clinton awarded him the Medal of Freedom in 1996. He died December 12, 1998 in Washington, D.C.

HISTORICAL DOCUMENT

American Indian Religious Freedom Act

[Public Law 95-341 95th Congress; Joint Resolution]

Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the First Amendment of the United States Constitution;

Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion, and as a result, has benefited from a rich variety of religious heritages in this country;

Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition, and heritage, such practices forming the basis of Indian identity and value systems;

Whereas the traditional American Indian religions as an integral part of Indian life, are indispensable and irreplaceable;

Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;

Whereas such religious infringements result from the lack of knowledge of the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, there, were passed without consideration of their effect on traditional American Indian religions;

Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;

Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances banned;

Now, therefore, be it Resolved by the Senate and the House of Representatives of the United States of American in Congress Assembled,

That henceforth 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.

SEC. 2. The President shall direct that various Federal departments, agencies, and other instrumentalities responsible for the administering relevant laws to evaluate their policies and procedures in consultation with Native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

Approved *August 11, 1978*

The traditional homeland of the Yurok, Karok, Tolowa, and Hupa tribes exists in an area that includes the Six Rivers National Forest and the Klamath National Forest.

Document Analysis

In this resolution, Congress acknowledged that the federal government had often infringed upon the rights of native people to practice their traditional religions and announced a new resolve and determination that such interference should cease. The document reflects upon the significance of religious freedom in the United States and refers to the guarantees of such freedoms in the First Amendment to the US Constitution. Federal courts have traditionally interpreted these rights broadly, and as a result there has been a great deal of religious diversity in the United States.

Acknowledging these past injustices, Congress resolved that henceforth, the government should respect native religious practices and protect the rights of native peoples to the free exercise of religion. Congress called upon the president to direct federal agencies to examine their policies and make changes necessary to achieve these goals. One year after the passage of the resolution, the president was to report to Congress on progress on these matters.

While American Indian activists and reformers welcomed the passage of this act, since it was a joint resolution and not a regular piece of legislation, it had no real power behind it. For this reason, federal courts largely disregarded the intent of this resolution in cases dealing with American Indian religious freedom issues. In *Lyng v. Northwest Indian Cemetery Protective Association* of 1988, the Supreme Court allowed the paving of a logging road on federal land in California, despite protests from several tribes considered the land sacred. The court argued that the Indians' religious beliefs were not restricted, even though their ability to practice their religion might be inhibited by the road. In 1990, the Supreme Court decided the case *Employment Division v. Smith*, in which two men who were members of the Native American Church were fired from their jobs as drug abuse counselors because they consumed the hallucinogenic drug peyote during their religious services. They were denied unemployment compensation because the state argued that they were fired for work-related misconduct. The court upheld the denial of benefits, arguing that the law under question was not aimed at burdening any religion, but had a general secular applicability. Thus, if the intent of a law was not to deny religious freedom, the court believed such interference was permissible.

After a series of such rulings, Congress tried to address some of the weaknesses of this act by passing several amendments in 1994. Many religious groups— not just native peoples—feared that federal courts had abandoned the previous standard that the state had to prove a "compelling state interest" in order to justify limiting religious freedom. The act did provide some further protection for the religious freedoms of Native Americans and all Americans generally, but federal courts have not consistently applied the "compelling state interest" standard in subsequent decisions. Thus, while there have been some positive benefits since the passage of the AIRFA and its amendments, many American Indians and other native peoples still face significant challenges to the free exercise of their religion.

Essential Themes

This joint resolution of Congress acknowledges the significance of religious freedom in US history and in American culture and the commitment to the pursuit of justice and equal rights for all. But the resolution also frankly acknowledges that the US government had often interfered with the free exercise of the religion of native peoples. As such, it typified the epoch when it was written—coming out of the civil rights era and at a time when self-determination among colonial people worldwide was a commonly discussed topic. Congress acknowledged that the US government had not dealt justly with the native peoples of this nation. The resolution cited cases where laws that were passed for other purposes were enforced or interpreted in ways that infringed upon religious freedom. However, it did not directly address the fact that in earlier American history, government officials often purposely prohibited traditional religious practices such as dances, potlatches, and the use of peyote.

The theme of "unintended consequences" is unfortunately a common one in the relationship of the US government with Native Americans. As Congress acknowledged in this document, laws were sometimes passed to provide for protection of natural resources, such as endangered species, or to safeguard public lands, but these laws often had the unintended result of denying Indians the right to use objects such as eagle feathers in religious ceremonies, or to gain access to sacred sites on federal land. Some positive benefits have resulted from this resolution, as most federal agencies have adopted policies that try to minimize any conflict between their policies and native religious practices.

Unfortunately, the lack of any enforcement power in this resolution is a theme that has come to be closely associated with it. Even Representative Morris K. Udall, one of the sponsors of the act, admitted that it had "no

teeth." Federal courts thus felt no compulsion to take the will of Congress into account in deciding subsequent religious freedom cases involving Indians and other native peoples. Later amendments to the act (in 1994) addressed these problems but met with limited success.

—*Mark S. Joy, PhD*

Bibliography and Additional Reading

Brown, Brian Edward. *Religion, Law, and the Land: Native Americans and the Judicial Interpretation of Sacred Lands.* Westport, CT: Greenwood Press, 1999.

"Text of the US Supreme Court Decision: Employment Division, Department of Human Resources of Oregon, et. al. v. Alfred L. Smith et. al. 494 U.S. 872." *Journal of Church and State* 32 (Summer 1990): 691–718.

O'Brien, Sharon. "A Legal Analysis of the American Indian Religious Freedom Act." *Handbook of American Indian Religious Freedom.* Ed. Christopher Vecsey. New York: Crossroads Publishing, 1995.

Pever, Stephen L. *The Rights of Indians and Tribes.* 4th ed. New York: Oxford University Press, 2012.

Wunder, John R. *"Retained by the People": A History of American Indians and the Bill of Rights.* New York: Oxford University Press, 1994.