

Encyclopedia of  
AMERICAN  
CIVIL LIBERTIES

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**AMERICAN COMMUNICATION  
ASSOCIATION v. DOUDS, 339  
U.S. 382 (1950)**

In 1947, Congress added Section 9(h) to the National Labor Relations Act; this section required all labor union officers to sign annual affidavits stating that they did not belong to the Communist Party or support the unlawful overthrow of the U.S. government. Unions whose officers refused to sign noncommunist affidavits were denied access to the National Labor Relations Board for relief from unfair labor practices. Congress justified the affidavit requirement as necessary to protect the free flow of Interstate Commerce from political strikes. In *American Communication Association v. Douds*, the Supreme Court upheld the statute despite noting that it "discourag[ed] the exercise of political rights protected by the First Amendment."

In an opinion written by Chief Justice Vinson, the Court concluded that the affidavit provision was designed by Congress to regulate harmful conduct in the form of political strikes, but not harmful speech. Because the statute had what the Court viewed as only an indirect effect on speech, the Court applied a balancing test, rather than the clear and present danger test, to determine the requirement's constitutional validity. After considering the competing interests, the majority concluded that protecting the national economy from disruptive political strikes outweighed any burden on the ability of a "relative handful" of union members to express their political views.

The holding's precedential value today is questionable. While not explicitly overruling *Douds*, the Court invalidated a later version of Section 9(h) as an unconstitutional bill of attainder in *United States v. Brown*, 381 U.S. 437 (1965).

NICOLE B. CÁSAREZ

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**Cases and Statutes Cited**

*United States v. Brown*, 381 U.S. 437 (1965)

*See also* **Balancing Approach to Free Speech; Bill of Attainder; Clear and Present Danger Test; Interstate Commerce; National Labor Relations Board; Vinson Court**

**AMERICAN INDIAN RELIGIOUS  
FREEDOM ACT OF 1978**

Congress announced that the policy of the United States was to "protect and preserve" the rights of American Indians, Alaskan Natives, and Native Hawaiians "to believe, express, and exercise" their "traditional religions" in a joint resolution adopted in 1978, now known as the American Indian Religious Freedom Act (AIRFA). The AIRFA defined the practice of "traditional religions" to include, without limitation, "access to sites, use and possession of sacred objects, the freedom to worship through ceremonies and traditional rites."

The impetus for the AIRFA was a study conducted by the House of Representatives that concluded the federal government was restricting Indian religious freedom in at least three ways. First, federal agencies such as the U.S. Forest Service, National Park Service, and the Bureau of Land Management frequently prevented Indians from entering federal land where sacred sites were located. Moreover, the agencies refused to allow the burial of tribal leaders in tribal cemeteries located on federal land. Second, federal law-enforcement officials regularly confiscated substances, such as peyote, used by Indians for religious purposes, even though federal cases had protected the use of these substances as a bona fide religious sacrament. Federal officials also confiscated the use of animal parts from endangered species, such as turkey and eagle feathers, that Indians used in religious ceremonies.

Third, the House found that federal agents directly and indirectly interfered with tribal ceremonies and religious practices. For example, federal officers had a long history of opposing and restricting the practice of tribal religions through the enforcement of Bureau of Indian Affairs-authored reservation law-and-order codes that flatly prohibited most tribal religious ceremonies. These law-and-order codes were enforced in the Courts of Indian Offenses, with judges hand-picked by federal officers. Federal courts in cases such as *United States v. Clapox*, 35 F. 575 (D. Or. 1888), upheld federal regulations, thus allowing the prosecution of Indians engaging in traditional religious practices. On-reservation federal Indian agents, as a matter of administrative practice, obstinately remained on the grounds at Rio Grande pueblos during religious ceremonies requiring that no non-Indian be present. Federal law-enforcement officers would also do little or nothing to stop unwelcome on-lookers from interfering in tribal religious ceremonies. The House also found that federal officials had directly interfered or allowed interference in tribal religious practices because the officials rejected Indian religions.

As a mere joint resolution, the AIRFA does not have the full force of federal law. Importantly, it did not include an enforcement and penalty provision. This status has undermined the effectiveness of the act in tough cases, such as *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). There, the Supreme Court upheld a federal road project that would cut through the heart of tribal sacred sites located near the Hoopa Valley Reservation in California, even though the Ninth Circuit had determined that the project would destroy areas central to the religions of the Yurok, Karuk, and Tolowa tribes. The Court refused to enforce the act, largely because, without an enforcement clause, it had “no teeth in it.”

The Court evinced greater hostility to tribal religious practices in *Employment Division v. Smith*, 494 U.S. 872 (1990). There, the state of Oregon denied unemployment benefits to individuals who had been fired for good cause. The state denied benefits to two Indians who had been fired for using peyote as a religious sacrament outside of work. The Court upheld the regulation on the theory that the regulation was a neutral law not designed to restrict religion. As such, the Court applied the rational basis test to scrutinize Oregon’s action under the free exercise clause.

Congress attempted to reverse the holding in *Smith* and other freedom of religion cases by enacting the Religious Freedom Restoration Act (RFRA). This statute would require the Court to apply a compelling interest test, but the Court struck it down in *City of Boerne v. Flores*, 521 U.S. 507 (1997), as applied to state and local governments.

In 1996, President Clinton issued Executive Order No. 13007 that requires all federal agencies to accommodate access to sacred sites for Indian religious practitioners and avoid negatively affecting those sites. This executive order also does not contain an enforcement provision. In short, the AIRFA, along with Executive Order No. 13007, is little more than the imposition of a duty on federal agencies to take into consideration tribal interests, to consult with tribal leaders on the subject of Indian religion, and not to interfere with tribal religious practices.

MATTHEW L. M. FLETCHER

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*Native American Church of New York v. United States*, 468 F. Supp. 1247 (S.D. N.Y. 1979), aff’d, 633 F.2d 205 (2nd Cir. 1980)  
*People v. Woody*, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 814 (1964)  
*United States v. Clapox*, 35 F. 575 (D. Or. 1888)  
*Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), ccrt. denied, 464 U.S. 956 (1983)  
*American Indian Religious Freedom Act*, S.J. Res. 102, Aug. 11, 1978, Pub. L. 95-341, 92 Stat. 469, codified in part 42 U.S.C. § 1996  
*Religious Freedom Restoration Act*, 42 U.S.C. § 2000bb et seq

See also **Accommodation of Religion; *City of Boerne v. Flores*, 521 U.S. 507 (1997); Drugs, Religion, and Law; *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); Native Americans and Religious Liberty; Religious Freedom Restoration Act**

## AMERICAN REVOLUTION

### The Subjects of Liberty

The words “liberty” and “rights” had far different connotations for people in the American colonies, depending on their status as slaves, free blacks, Native Americans on their homeland, women, indentured servants, loyalists, conscripted soldiers, religious dissidents, radical patriots, or propertied white males. The term “civil liberties” was not a term used in the period between 1760 and 1783. Many of the colonists depended on the rights they claimed as English citizens. For those with limited rights based on their English origins, a new understanding of rights was required; for others, the rights they claimed had far different origins in their understandings as indigenous peoples of the American or African continent.