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MEMORANDUM FOR HONORABLE ROBERT J. LIPSHUTZ
Counsel to the President

Re: S.J. Res. 102 - "American Indian Religious Freedom"

This responds to your memorandum of February 16, 1978, with attachments, asking for our views on several legal questions raised by this joint resolution sponsored by Chairman Abourezk of the Senate Select Committee on Indian Affairs.

Your memorandum identified what we think are two substantial legal issues raised by S.J. Res. 102. The first is whether the resolution, by its apparent intent to grant to Indians an absolute right to practice their Native religion, would in certain situations grant an unconstitutional preference to Indian religion vis-a-vis other religions. We conclude that S.J. Res. 102 as applied in certain situations might create an unconstitutional preference.

The second question concerns the effect this resolution might have on existing law which presently impacts to some degree on Indian religious practices. We think that both the literal language of §2 of the resolution and the intent of Chairman Abourezk as expressed in hearings held by his Committee on February 27, 1978 indicate a purpose to modify all existing statutes which may impact in any way on the practice of their Native religion by Indians.

At those hearings, I stated the Administration's position, cleared by the Office of Management and Budget and concurred in by all concerned departments, opposing any legislative effort effectively to amend in wholesale fashion federal statutes that have not thus far even been identified. 1/ I also expressed

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1/ A copy of our prepared statement presented to the Senate Select Committee is attached.

the Administration's opposition to the extension of the resolution's substantive provisions to State laws and policies when it became apparent at the February 27 hearing that the resolution was intended to do so.

I. The Constitutional Issue

Although our research has identified only one case, Kennedy v. BNDD, 459 F.2d 415 (CA 9 1972), directly on point, we think its rationale would be fully applicable to many situations that would arise were S.J. Res. 102 to be enacted and that rationale suggests strongly that the resolution would be unconstitutional as applied to many situations.

In Kennedy, the Church of the Awakening and some of its members challenged the constitutionality of a federal regulation, 21 C.F.R. § 320.3(c)(3), which accords to the Native American Church and its members an exemption permitting them to use peyote "in bona fide religious ceremonies . . . ." The thrust of the argument against the regulation was that peyote was used for bona fide religious purposes by the Church of the Awakening and that it was unconstitutional under the Due Process Clause of the Fifth Amendment for the Government to permit peyote's use by the Native American Church but not the Church of the Awakening. The relief sought by the Church was a rewriting of the regulation to include its members within the exemption granted by the regulations.

The Ninth Circuit agreed with the Church of the Awakening that there was no sufficient basis for the distinction drawn by the regulation between its members and the members of the Native American Church and that the challenged regulation was unconstitutional. The court refused, however, to rewrite the regulation as requested, stating its view that inclusion of the Church of the Awakening would not render the regulation any more or less constitutional because, as rewritten, the regulation would then create an equally uncon-

stitutional distinction between the two churches then covered and "all other churches that use peyote in bona fide religious ceremonies." 459 F.2d, at 417.

We agree with the Kennedy decision to the extent that it holds that Governmental action taken in support of religious practices must not discriminate invidiously against one religious sect by denying to it benefits conferred on another religious sect. The Kennedy case is particularly poigniant here because Chairman Abourezk indicated at the February 27 hearing his view that S.J. Res. 102 would legislatively provide for American Indians an exemption permitting the use of peyote for religious purposes. 2/ We think the teaching of Kennedy is clear: where Congress grants preferred status to one religious sect, it must have extremely persuasive justification for denying that preferred treatment to other religious sects which are similarly situated. The use of peyote for religious purposes is only one example of a situation affected by this joint resolution in an unconstitutional manner.

II. The Repeal or Modification of Existing Law

As stated above, one of the Administration's objections to S.J. Res. 102 is that its purpose and intent is to repeal or modify existing statutory law without identifying in advance what statutes and programs might be affected. During the

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2/ We note that there would appear to be no statutory basis for the exemption granted to the American Native Church by 21 C.F.R. § 320.3(c)(3), which was first adopted by the FDA in 1968. The Drug Enforcement Administration informally takes the position that this exemption exists after Kennedy only by virtue of the exercise of prosecutorial discretion not to prosecute Indians under otherwise applicable law.

hearing on February 27, it was suggested at various times that the resolution would impact on the Endangered Species Act, various laws administered by the United States Customs Service, laws administered by the United States Forest Service, laws pertaining to the use of controlled substances, and others.

It was also suggested at the February 27 hearing that the resolution might be intended to affect State laws and policies which in any way impacted on the practice of religions by American Indians. We are in no position to catalog the number or type of State laws or policies that might be involved. We did take the position at those hearings that any attempt to preempt State law and policy should not be made without identifying the State interests involved and giving affected States the opportunity to submit their views.

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