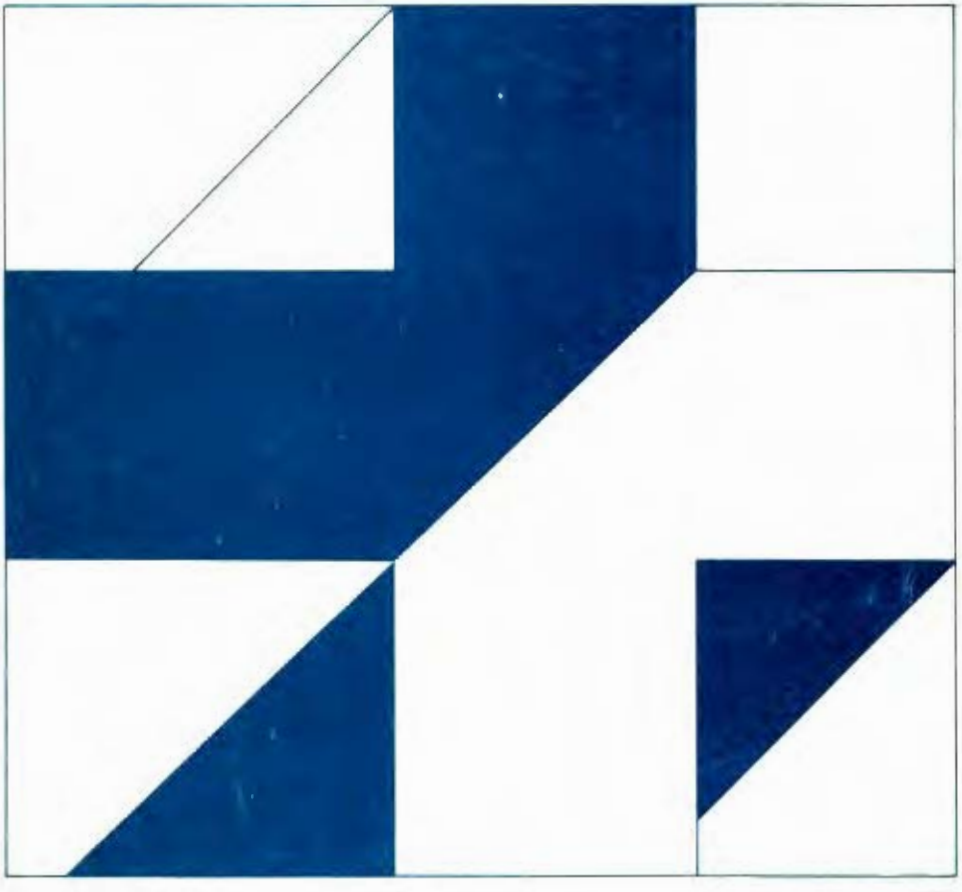
RELIGIOUS DISCRIMINATION:



U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or the denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denials of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUE

A CONSULTATION SPONSORED BY THE UNITED STATES COMMISSION ON CIVIL RIGHTS, WASHINGTON, D.C., APRIL 9-10, 1979

PREFACE

The United States Commission on Civil Rights sponsored a consultation on "Religious Discrimination: A Neglected Issue" on April 9-10, 1979, in Washington, D.C.

The focus of the consultation was on the civil rights issues, rather than the civil liberties issues, involved in religious discrimination. As was noted in the briefing paper for this consultation:

> Religious civil liberties issues cluster around the first amendment right to individual freedom of religion, including such issues as the right to hold or not to hold a religious faith, and the prohibition against the establishment of a religion by government. Religious civil rights, on the other hand, cluster around the equal protection and due process clauses of the 14th amendment, which prohibit discrimination against individuals which denies them equal protection of the laws, equality of status under the law, equal treatment in the administration of justice, and equality of opportunity and access to employment, education, housing, public services and facilities, and public accommodations because of their exercise of their right to religious freedom.

In planning this consultation, the Commission staff also noted the distinction between discrimination and prejudice. Properly, the role of government is concerned with acts of discrimination, not with prejudiced thoughts.

After discussions with leaders of national private civil rights agencies concerned with religious discrimination, the Commission decided to concentrate on two basic issues at the consultation: employment and the administration of justice. These are the areas where religious discrimination is most injurious currently and, given the time restraints of a 2-day consultation, they were all that could be covered in any depth.

Commission-sponsored consultations have taken several forms; usually, formal papers are summarized orally by the writers and then discussed by other authorities and the Commissioners. Occasionally, authorities make presentations from outlines or notes. The form of the consultation determines the format of the proceedings. So it is with these proceedings of the consultation on "Religious Discrimination: A Neglected Issue."

At this consultation, a number of the presenters and a number of the reactors had prepared papers; a number spoke from an outline

or notes. To provide a sense of internal consistency, the body of these proceedings contain the oral presentations and the ensuing comments and discussion; the formal papers are found in the prepared statement section.

This consultation was planned and managed by the Special Projects Division of the Commission's Office of National Civil Rights Issues: William T. White, Jr., Assistant Staff Director, then head of the Office of National Civil Rights Issues; Frederick B. Routh, then head of the Special Projects Division. Project Director for this consultation was Jessalyn P. Bullock.

In addition, the Commission acknowledges with thanks these other members of the Special Projects Division staff who participated in planning or managing the consultation: Clinton Black, Patricia Ellis, Alfonso Garcia, David Grim, Kenneth Harriston, Barbara Hulin, David Strotter*, Betty Stradford, Herbert Wheeless, and Celeste Wiseblood. The Commission also is grateful to its Office of Management for logistical and administrative support.

The staff of the Publication Support Center was responsible for final preparation of the document for publication.

*A summer intern, no longer with the Commission

WASHINGTON'S LETTER TO THE HEBREW

CONGREGATION OF NEWPORT, RHODE ISLAND
August 1790

Gentlemen:

While I received with much satisfaction, your address replete with expressions of affection and esteem; I rejoice in the opportunity of assuring you, that I shall always retain a grateful remembrance of the cordial welcome I experienced in my visit to Newport, from all classes of Citizens.

The reflection of the days of difficulty and danger which are past is rendered the more sweet, from a consciousness that they are succeeded by days of uncommon prosperity and security. If we have wisdom to make the best use of the advantages with which we are now favored, we cannot fail, under the just administration of a good Government, to become a great and happy people.

The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy; a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection, should demean themselves as good citizens, in giving it on all occasions their effectual support.

It would be inconsistent with the frankness of my character not to avow that I am pleased with your favorable opinion of my administration, and fervent wishes for my felicity. May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while everyone shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid. May the father of all mercies scatter light

and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy.

George Washington

[Editor's note: This Nation's commitment to freedom of religion goes back to the early days of the Republic, as exemplified by this letter from George Washington.]

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A Consultation Sponsored by the United States Commission on Civil Rights, Washington, D.C.
April 9-10, 1979

PROCEEDINGS

CHAIRMAN FLEMMING. I'll ask the consultation to come to order, please.

This consultation, held by the United States Commission on Civil Rights, will focus on the civil rights issues growing out of religious discrimination.

In other words, we are concerned with those acts which deprive individuals of certain rights because of their religious beliefs and practices, rights which are a part of the equal protection and due process clauses of the 14th amendment to the Constitution. Within the broad area of religious discrimination, we will concentrate on employment and the administration of justice.

We concluded that the time restraints imposed by a 2-day consultation would make it difficult to explore additional areas at this time. When the Commission holds a consultation it does so for the purpose of identifying issues in a particular area and then later determining whether or not those issues should be pursued, either by the conduct of field studies or by holding public hearings.

We invite persons from the outside to come in and help us in this process of identifying issues and in determining what additional steps we can or should take.

We are very happy to have as the first guest today, Mr. W. Melvin Adams, who is director of Public Affairs and Religious Liberty, Na-

tional Conference of Seventh-Day Adventists. He is going to provide us with an overview of religious discrimination.

STATEMENT OF W. MELVIN ADAMS, DIRECTOR OF PUBLIC AFFAIRS AND RELIGIOUS LIBERTY, NATIONAL CONFERENCE OF SEVENTH-DAY ADVENTISTS

MR. ADAMS. Thank you, Mr. Chairman.

I apologize for being a few moments late in getting here. While we very much appreciate the Metro, they do have problems with switching occasionally, and this was one of the mornings that switching problems were plaguing them and we were held up for some little time.

We appreciate the opportunity to meet with you, to bring some of our concerns to you, and I hope that we touch most of the problems in this overview; but there may be some very significant that we do not touch.

The fundamental convictions of our Founding Fathers in religious liberty formed that spark which ignited the bold experiment in democracy in this nation. The natural or inalienable rights of its citizens, they said, constitutes the cornerstone of this democracy. And as we follow down through, we find that President after President has proclaimed this same thing.

They almost all have followed in the footsteps of George Washington as he admonished that we preserve the sacred fire of liberty as our most serious responsibility.

It was John F. Kennedy who began his inaugural address with the observation that the world was different in 1961 than compared with 1789. Yet, he said, "The same revolutionary beliefs for which our forefathers fought are still at issue around the globe—the belief that the rights of men came not from the generosity of the State but from the hand of God."

President Carter, our own President, is no exception. He has made it very clear that he and his nation stand for religious freedom. This fact has been shouted from the housetops. It has been trumpeted in banner headlines in our newspapers. It has been paraded in dress review before oppressed peoples of the world.

It is the first amendment that makes the concept of religious freedom in the United States different from that of other countries. The two great principles enunciated there are the "establishment clause" and the "free exercise clause." Today, both principles continue to be tested in the courts. Although much is being said in courtrooms concerning the establishment clause, that is not our primary concern this morning.

I want to speak more specifically concerning the matter of the free exercise clause.

At this point, it is proper that we think of some definitions of terminology—the difference between civil liberties and that of civil rights, and for this I draw upon the excellent work of the staff of the Commission on Civil Rights. In one of their briefing papers, it is defined as follows:

> Religious civil liberties issues cluster around the first amendment right to individual freedom of religion, including such issues as the right to hold or not to hold a religious faith, and the prohibition against the establishment of a religion by government.
> Religious civil rights, on the other hand, cluster around the equal protection and due process clauses of the 14th amendment which prohibit discrimination against individuals, which deny them equal protection of the law, equality of status under the law, and equal treatment in the administration of justice.

Unfortunately, the free exercise proclaimed by the Constitution has become an empty promise to many people in the United States. Its acceptance or its absence has been accepted by many as the price for marching to the beat of a different drummer. A strange paradox has arisen in our country. It says that you may have your freedom as long as you are in the majority, or as long as you are in the mainstream. But if your beliefs are different, you may believe them but you may not practice them unless they do not conflict with the majority, or unless they do not conflict with a contract, or unless they do not conflict with the wishes of an employer, or unless they are not inconvenient to the employer.

How different, may I ask, is that from the philosophy of governments that give only lip service to religious freedom?

In 1964 when the Civil Rights Act first became law, it was encouraging to note that religion was included in the list of proscribed discriminations. Yet, it changed virtually nothing with respect to accommodating religious beliefs in the working place.

When the Equal Employment Opportunity Commission [EEOC] published its guidelines on July 10, 1967, many individuals saw for the first time that religious discrimination in the marketplace meant far more than being prejudiced against Catholics, Jews, Jehovah's Witnesses, Muslims, Baptists, or whoever they might be. It meant adjusting certain arbitrary work rules in order to accommodate a religious practice of an employee, unless such adjustment would work an undue hardship on the conduct of the employer's business. The burden of proof was placed solely on the employer, not the employee.

Following the decision of the Sixth Circuit Court of Appeals on August 11, 1970, serious questions were raised as to the intent of Congress concerning religous accommodation when it enacted the Civil Rights Law of 1964. The court said:

> Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC regulations which, in our judgment, are not consistent with the Act.

Thanks to the devotion and work of Senator Jennings Randolph and others in the Senate, the Congress of the United States got the message immediately.

In less than a year the Congress, in Public Law 92–261 adopted virtually the exact language from the EEOC guidelines in Section

701(j). As though in direct reply to the Supreme Court, the Congress seemed to say, "You misread our intentions. The EEOC guidelines accurately stated what we intended in enacting the Civil Rights Act of 1954."

Congress again reemphasized its intent recently when the flexitime law of Congressman Solarz became law. Since 1972 when 701(j) became law, a host of litigation has found its way through the courts relative to religious accommodation.

The courts generally have embraced the concept of reasonable accommodation. The Supreme Court enunicated its changed attitude when in *TWA v. Hardison* said, "In brief, the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship is clear...."

In order to underscore their position that the *Dewey* decision has been overturned, the court stated in footnote 9, "Clearly, any suggestion in *Dewey* that an employer may not be required to make reasonable accommodation for the religious needs of its employees was disproved by 701(j); but Congress did not indicate that 'reasonable accommodation' requires an employer to do more than was done in *Dewey*." Apparently they were preferring to leave that question open for a future resolution by EEOC.

In my judgment, most of the problems of discrimination can be lumped into the constant attempts by business management or government administrators to maintain rules or policies which apply uniformly to all concerned. These take a number of different forms but they all sound the same. Here are some examples:

All employees must take their vacation during the 2 weeks that the plant is shut down. No employees may take leaves of absence for religious reasons for more than 1 or 2 days at a time. All employees must dress uniformly. All employees must work 6 days a week. All employees must belong to the labor union under the existing contract. All inmates must eat the same food provided by the institution. All employees must pass a physical examination given by a medical doctor. All employees are subject to mandatory overtime under certain conditions. All inmates must use the same worship room. All must have the same length of hair. All children must start school at the same age. Sounds fair.

These work policies, labor union contracts, prison and army rules are an effort to be fair to all concerned. They are not intended to discriminate against others. However, sometimes it seems that they may be just administrative convenience. But rules, policies, and practices which interfere with religious beliefs and the practices of others, however fair in form and intent they may appear to be, are discriminatory in effect on certain employees with religious convictions.

Now, before I go on to be more specific about some of these discriminations, may I sharpen our concept of religious liberty and this issue of discrimination with the definition by Paul Blanchard: "Religious liberty," said this scholar, "in a nation is as real as the liberty of

its least popular religious minority." Hopefully we can keep that in our thinking as we go on.

Let's take more specifically, now, some of the different areas where discrimination crops up. Foremost is the matter of Saturday Sabbath observance. Perhaps the most numerous and most difficult type of accommodation to secure by employees has been experienced by those who observe the seventh-day Sabbath; that is, Jews, Seventh-Day Adventists, Worldwide Church of God, Seventh-Day Baptists, Seventh-Day Church of God, and other groups.

But, when we examine this priciple, we find that it is deeper than what appears on the surface.

Our country is geared to a Sunday day of rest. Most industries are closed on that day. The United States Postal Service has a built-in accommodation for Sunday observers.

In addition, a contract stipulating seniority procedures is said to take preeminance over any type of accommodation for religious convictions. In fact, it is alleged that religious convictions should take their place along with any other personal secular reasons when it comes to the adjustment of work schedules.

Religious convictions, thus, could more aptly be termed religious whims or preferences or inclinations. Religious convictions, however, as we look at them are beliefs which are deeply held, so deeply that people would die before they would violate their obligations to their God. It is convictions such as these that cause people to be willing to lose their employment, their livelihood, their homes, their retirement benefits, their financial security, even the education of their children, rather than violate their convictions.

Accommodation, unfortunately, is often viewed as a threat to the authority of the employer even when it causes nothing more than inconvenience.

John Grayson is an example. He was an employee in the Speedway Post Office in Indianapolis. He was given a mandatory upgrading in his classification which required that he work a Saturday schedule. He held deep religious convictions regarding his Sabbath. The Post Office fired him. He was denied unemployment compensation because the Post Office placed him on leave without pay when he appealed his dismissal to the Civil Service Commission.

He almost lost his house, if it had not been for members of his church coming to his aid. He went from employer to employer. Jobs were available but he was always asked the question, "Have you been fired from a job recently?"

His answer was, "Yes," he had.

"For what reason?"

"Because I could not work on Saturday, the Sabbath."

"Oh," was the answer, "I'm sorry, we can't use you, either."

After weeks of searching, after visiting about 40 different employers, about half of whom were hiring, he was able to find a part-time temporary job.

It took nearly a year for his appeal to be heard by the Civil Service Commission. They finally decided in his favor stating that an accommodation could have been made at the central Post Office in Indianapolis.

Bob Yarmon, another example, a Post Office employee in Englewood, Colorado, is currently going through exactly the same problem faced by Mr. Grayson. In fact, he is only one of several dozen others who are traveling down the road to dismissal today, while we are in this hearing, in the United States Postal Service.

We could go outside of the government area into industry, such as the auto industry. Take for example, Mr. B. who goes to work at an assembly plant. He is assigned to a second shift because of his lack of seniority. He requests an accommodation because he is assigned to work on Friday night. But he cannot work then because the Sabbath begins at sundown Friday night and goes through sundown Saturday night for him.

He is told that no accommodation is possible under the terms of the contract. The only way he can be accommodated is to work long enough to gain seniority to advance to the day shift. And they usually suggest, if you will work 10 or 15 years then you can get seniority and have your day off. But, if he could put his convictions on ice for 10 or 15 years or 20 years, obviously, he has no convictions. Because of his convictions, he goes to the unemployment rolls.

Nearly every industry with this type of system is closed to Sabbatarians. To add injury to insult, unemployment compensation boards across the country are beginning to deny unemployment compensation to these people who lose their job in employment because of their religious convictions.

Following the *TWA v. Hardison* decision by the United States Supreme Court, employers all over the country came to Sabbatarian employees warning them that because of the "law," meaning the Supreme Court decision, they no longer had to make accommodation.

Today employers are screening employees carefully to eliminate potential employees who need to be accommodated by asking such questions as, "Are you willing to work whenever you are assigned to work?"

Let's leave that and go to another one: labor union membership. Membership of several small religious bodies have experienced religious discrimination because of sincerely held religious beliefs that prevent them from joining or financially supporting labor organizations.

They are not freeriders, because they are willing to pay the equivalent amount of their dues to nonreligious, nonunion, charitable organizations. A number of such cases have been litigated under Title VII of the Civil Rights Act. Despite the favorable decision in *Cooper v. General Dynamics*, as well as *Burns v. Southern Pacific Railroad*, both of which were denied cert. by the United States Supreme Court, labor unions in various parts of the country still refuse to make accommodations, though the official policy statement of the AFL–CIO says that accommodations should be made.

Religious discrimination in housing. This is a minor issue in the context of the consideration for this Commission today, but it should

not be overlooked because I believe that any discrimination is too much in the United States.

Some Jewish families and possibly others are occasionally barred from buying homes in the country club-type residential areas because of their religious convictions. In some cases they are barred completely, and in others they are allowed to come in on a percentage basis.

Akin to this are the zoning laws that prohibit churches or church facilities to be built in the neighborhood. One is discrimination against individuals; the other is discrimination against a group of like-minded people. It has no place in this land of religious freedom.

Over a long period of time, the American Indian has suffered discrimination because of their religion. Many of us have not understood it because of our Judeo-Christian-related society. Hopefully, the new American Indian Religious Freedom Act of August 1978 will start things in the right direction. This act provides for access to sacred places such as burial grounds and ceremonial grounds and also provides protection in the use and possession of sacred objects. The law provides for various agencies to "evaluate their policies and procedures in order to determine the changes necessary to protect and preserve American Indian religious-cultural rights and practices." This report from these various agencies is to come to the President of the United States, and he is required to make a report to Congress this August of 1979.

What this means, in simple terms, is that Federal agencies responsible for enforcing laws that interfere with Indian religious practices should see whether they can accommodate these practices by a broader interpretation of existing laws and regulations. If not, they should report to the President, then to the Congress on what changes in the law would be necessary to accommodate these religious practices.

That is how it is supposed to work. We hope that it is successful.

The matter of religious attire or special attire comes in for trouble. Some employers have dress regulations for all their employees. What happens when dress regulations run contrary to religious practices of certain religious groups?

Some employers have dismissed women who would not wear slacks on certain jobs. In other instances, hair styles or head coverings have become an issue in employment. Again, the reasonable accommodation and undue hardship tests are called into play.

A 1971 case involved a Black Muslim lady employee who was discharged for refusing to refrain from wearing ankle-length dresses required by her religion. EEOC investigators found no evidence that the dress policy was necessary to the safe and efficient operation of the business.

Other female employees wore attention-getting clothing, such as miniskirts, but no disciplinary action was taken against them. EEOC found that the employee was forced to choose between her mode of dress required by her religious beliefs and her continued employment.

Of necessity, incarceration in a penal institution deprives individuals of many rights. Sometimes religious rights are included. Under the Constitution the question is asked, Can a prisoner be forced to perform

certain duties or functions, or be denied things that would cause him to violate religious convictions?

The American Indian, again, is a good example of religious discrimination in the prisons. Because of his native religion, which is not structured or organized as many of ours in this country are, it is often not recognized; and if it is recognized, it is usually thought of as a heathen religion.

This lack of status on the part of the Native Indian religion spawns other problems, such as religious advisors. A Catholic priest, a Protestant minister, or a Jewish rabbi cannot administer religiously to an Indian who adheres to his native religion. He needs his own religious advisor, or medicine men, as they are called.

These native-born Americans of our soil also use certain objects in their worship which are often denied them, and the length of their hair can also be a part of their religious practice which will often run into trouble.

Not only do they have troubles, but various groups of Muslims also have considerable trouble in the prisons. Because of their religious teachings, these people find it almost impossible to worship in a chapel where a Catholic, a Protestant, or a Jew would have no problem in doing so. They are sometimes denied their own religious literature and the type of food that their religion requires.

Another problem is the matter of wearing a beard. However, a judge allowed a Jew to continue to wear a beard in harmony with his religious requirements. The judge, however, stated that the prisoner could be granted a hearing to determine the sincerity of his beliefs.

But we find a certain bobbing back and forth in this between the courts. In 1974 a Federal district court judge granted an American Indian prisoner the right to wear long hair for religious reasons despite the prison's hair regulations. Yet in another case in 1972, a Federal district court judge disallowed another American Indian the right to maintain long hair. And in 1970, the Fifth Circuit Court required an inmate in the Florida State prison to shave twice a week and have periodic haircuts, contrary to his religious beliefs.

Concerning diet, the Fifth Circuit Court of Appeals in 1969 denied a Black Muslim prisoner the right to his dietary requirements, while a Federal district court judge in 1975 granted a Jewish rabbi prisoner the right to have kosher food.

During the past few days, word has came that members of an Adventist church in Reedsville, Georgia, who has been conducting weekly prison ministry visits were denied access to the prison. Only a few selected major church bodies were accorded the privilege. It is obvious that the whole question of religious liberty in penal institutions and discrimination there needs a very serious looking at.

In the area of education—in 1972 the Supreme Court of the United States reversed a lower court ruling concerning a Wisconsin law that compelled children to remain in school until age 16. The court held that the Amish were providing sufficient training to their young people to meet the interests of the State.

Today a new threat is looming: religious rights are at the very heart of it. Within the last few days a bill was introduced in the South Carolina Legislature that would require compulsory school attendance beginning at age 5 in kindergarten. A similar bill is about to be introduced in North Carolina.

A number of States already have bills requiring early age—such as 6 and a little before and so on. Many States set the minimum compulsory attendance laws. The concept expressed is that the State has greater jurisdiction over children than do the parents.

Now, when we compare this concept with the philosophy and the fact that numerous parents in this country have such deep religious convictions against compulsory early school attendance, and they are willing to risk going to jail rather than violate their convictions, they do not wish not to educate their children, They only wish to train them at home until the children have developed physically and emotionally to the place where they can better cope with school.

They feel that this is their God-given responsibility as parents and that it would be a sin for them to do otherwise. They are interested in good education and many of these parents send their children right through to the very highest of education in the long run but want to control the beginning point.

Let me give you an example: Judy Waddell, a Michigan mother, was one such parent. Two policemen came to her home, placed her under arrest, took her to the county jail where she was arraigned as a criminal, and what was her crime? Her concern for her boy. She has not placed him in school even though he had reached the compulsory attendance age because she felt that he was immature. This case is still pending in the courts.

Should these bills in Carolina and the laws that are already on the books continue, many concerned, conscientious parents will be in trouble and possibly in jail.

In conclusion, may I make these observations: The words "regulations," "conformity," "compliance," and "the majority dictates" are compressing free exercise of religion and extending discrimination in our area.

It is reassuring to note a ray of hope now and then concerning a return to some of the fundamental principles concerning the free exercise of religion and prohibiting discrimination.

It is my hope that the Commission in these 2 days of discussions will rededicate its efforts in the area of expanding freedoms, at a time when the trend is for more and more control and more and more conformity.

And then I would hope that this Commission would proclaim it so strongly that no legislature, no judge, no employer, no citizen could fail to get the message that our country's strength lies in its free and responsible exercise of religion without discrimination.

A few weeks ago, as a citizen of the United States, I ordered from my Congresswoman a flag that had flown over the Capitol of the United States. A phone call has informed me that it was to be hoisted over the Capitol this last Saturday and that I would be receiving it in a few days.

I am looking forward to it because I am proud of my flag. I am proud of my flag for it stands for protection, not only for the beliefs, the practices, the observances of the orthodox and the traditional religious groups; but it provides protection for the beliefs, the practices, the observances of any religion which, however unorthodox, however mistaken, however incomprehensible it may be to the average person is characterized by sincere and meaningful beliefs and respects the rights of others.

In conclusion, may I remind you of the words of the Protestant clergyman of Germany, Martin Niemoller:

> In Germany, the Nazis came for the Communists, and I didn't speak up because I was not a Communist. Then they came for the Jews, and I did not speak up because I was not a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I was Protestant, so I didn't speak up. Then they came for me...by that time there was no one to speak up for anyone.

Thank you, members of the Commission.

CHAIRMAN FLEMMING. Thank you very much.

Because of your difficulty with the Metro, our time for discussion has been cut back a little bit, but I will ask my colleagues if there are any questions that they would like to raise with you.

Commissioner Horn?

VICE CHAIRMAN HORN. Just one question.

I thought your statement was very thorough, so I won't pursue that, we will pursue that with other speakers; but one area, as you mentioned schools, interested me.

Commonly school programs, plays, athletic events, and band concerts, etc., are held on Saturday. Has this proved to be a problem for those that take Sabbath on Saturday? And are there any cases which you have you could file for the record on this issue?

MR. ADAMS. That is a very good observation. I have two men here, Mr. Lee Boothby, a legal counsel of mine, and Mr. Gordon Engen, my associate, and I would like to have them included in this and willing to respond if there are some.

I personally realize what you are talking about; there is that problem, but I think in most cases these are resolved by personal relations. There may be some cases that have to do with this, and—Mr. Engen, do you know of any?

MR. ENGEN. I have had some contact with people who have had this problem from the standpoint of students in schools not being able to participate. In fact, one student in one instance was lowered a whole grade because the student did not attend a particular function. It was not a class; it was an extracurricular function on a Saturday, an athletic function on a Saturday. And other teachers have had problems.

In one instance I recall dealing with this, and it came almost to the point of losing a job over it.

VICE CHAIRMAN HORN. Well, let me ask one more question.

I think one of the most extensive and serious problem, of course, comes with labor seniority contracts, and I wonder if the groups that observe the Sabbath on Saturday have come up with some models and examples as to how unions or large work groups might deal with this matter? I believe you cited the Indianapolis postmaster's action. It seems to me that it would be an easy problem to solve in a large organization where you could schedule hours at different times, and you could thus make appropriate accommodations.

Labor contracts are based on seniority and thus decisions are not going to be based on the fairness and equity to the workers, but rather they will be based on time served. Do you have some model that you have submitted or could submit which might help people solve those problems? If so, please file it for the record, should you want to go into it this morning.

MR. ADAMS. I believe that a little later in your session Mr. Boothby is going to try to cover that, so we might just leave that for this time.

VICE CHAIRMAN HORN. Fine.

CHAIRMAN FLEMMING. Commissioner Freeman?

COMMISSIONER FREEMAN. No questions.

CHAIRMAN FLEMMING. Commissioner Ruiz?

COMMISSIONER RUIZ. You mentioned that there are several court cases concerning discrimination in various phases that are following the appellate process. I wasn't able to get a definitive conclusion from you, but has there been progress, let's say, during the last 5 years in accommodating diverse religious, their beliefs and practices? Do you feel that progress has been made?

MR. ADAMS. Yes, I have to say I feel that there is progress being made. There are two steps forward and a slipping back.

The *TWA-Hardison* case very definitely caused a little slippage as far as the courts are concerned. However, in other areas such as *Burns v. Southern Pacific Railroad* and so on, that was cited in here in another area of discrimination, there is definite progress. So it is hard to classify, in my judgment, all in one lump sum. Some things seem to be moving ahead with some progress; others there seems to be sort of a standing still, and in the case of *TWA v. Hardison,* I believe a little slippage.

COMMISSIONER RUIZ. Another question with relation to religious denominations, Christians or non-Christians, are you able to specifically point out which of those are having the most difficulty with respect to protecting their constitutional rights? Of all of the religions, either Christian or non-Christian?

MR. ADAMS. You are talking about organized groups?

COMMISSIONER RUIZ. Organized groups whether from Asia, the Pacific Ocean people, or any organized group which is having the most—and I assume that the Indian religion is an organized group as well, although not structured?

MR. ADAMS. Yes.

COMMISSIONER RUIZ. Which of those are having the most difficulty?

MR. ADAMS. I would say right now it is a little difficult for me to respond to that from a standpoint of accurate tabulation, because I do

not have this available in my thinking right now, but I will respond to that in this way: the organized groups, the Christian, Judeo-Christian—organized groups in the United States usually have a hearing and a much better platform to come to; the country, the courts, the Nation, whoever it may be.

I have the feeling that some others that you referred to, the non-Christians, the Asians, and some others, because of the prejudice which we can't get into, which is an attitude and you're not dealing with prejudice now, but nevertheless it does control certain things because of certain general prejudices, because of lack of understanding, that some of these minorities from overseas and otherwise may be having a harder time being heard. However, they are also being heard in court, but they are having to fight their battles in a little harder way than some of the rest at this particular time.

CHAIRMAN FLEMMING. Commissioner Saltzman?

COMMISSIONER SALTZMAN. Two questions: One, do you believe that there is any necessity for further legislation from the Congress? And, two, how might we respond to the ambiguity of such terms as "reasonable discrimination," "undue hardship," or "accommodation?"

For example, I think of the age discrimination act where "reasonable discrimination" was in the context of the act, and the Commission recommended the omission of such an ambiguous term. Do you have a way of handling that? So, first, any further legislation? Two, how do you respond to the ambiguities in the present legislation and court decisions of such words?

MR. ADAMS. With regard to any further legislation, first, we have discussed that and are prepared through Mr. Boothby and other speakers coming on this morning to make some definite suggestions along that line, and maybe you would rather have it go that way.

COMMISSIONER SALTZMAN. Yes.

MR. ADAMS. We are not as well prepared at this point to address to your second question. I would say we have been waiting for—to see the EEOC's suggested guidelines which, hopefully, will be coming out pretty soon. And then no doubt we'll have some definite suggestions at that time, but I don't know if we can address ourselves to your second question at this time.

CHAIRMAN FLEMMING. Thank you very, very much.

MR. ADAMS. Thank you. Again, I apologize for this delay.

CHAIRMAN FLEMMING. We understand.

I am going to ask my colleague and Vice Chairman of the Commission to introduce the next panel and preside during the presentation by the next panel.

VICE CHAIRMAN HORN. The next panel is on religious discrimination in employment. Mr. Leach and Mr. Patton, if you would come forward, we would appreciate it.

We are advised that the court reporter has just arrived, so we will have a delay of a minute or so for setting up.

The first panel will discuss the topic of reasonable accommodation, undue hardship, affirmative action, enforcement, and latest experiences.

We will have a presentation from two Federal officials and then the responses of various organization representatives at 10:45.

Our first speaker is one who has appeared before the members of the Commission on several occasions, and we are delighted to welcome back Daniel Leach, the Vice Chairman of the Equal Employment Opportunity Commission, who will give us an overview response from the standpoint of the Commission.

Mr. Leach?

STATEMENT OF DANIEL LEACH, VICE CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

MR. LEACH. Thank you, Mr. Vice Chairman, Mr. Chairman, and members of the Commission.

There is no need to advise this Commission about what our specific mandate is under Title VII; you know it well. I would only say with respect to law enforcement under Title VII, regarding the issue of religious discrimination in employment that it does emerge in different ways.

For example, on my own I filed a charge alleging a pattern and practice of discrimination against Jews involving a major industry in the United States. That charge is now being investigated.

Senator Proxmire and others have spoken out on this issue. On the other hand, and I think what this Commission is more particularly concerned with are the more than 2,000 charges we received every year at EEOC alleging discrimination in the context of religious accommodation with regard to a work place, a given work environment.

These specific cases are brought by religious observers who are willing to press their claims and that raises the question you are most precisely concerned with, the question of accommodation: what responsibilities are involved, what rights are involved from the perspective of EEOC?

First of all, there is Section 703 of Title VII which makes it an unlawful practice for an employer, an employment agency, or labor organization to discriminate against any individual because of that person's religion. That means, among other things, that an employer may not fail or refuse to hire, to promote, or otherwise treat differently any employee or applicant because of his or her religious beliefs. Charges filed on this issue are processed in basically the same way as charges we receive alleging sex or race discrimination. But there is more to this issue.

The Commission's original guidelines on religious discrimination, which were issued in 1966 and amended the following year, 1967, stated that employers' duties not to discriminate on the basis of religion included, and I quote from those guidelines, "the obligation to make reasonable accommodation for the religious needs of employees and prospective employees where such accommodation can be made without undue hardship to the conduct of the employer's business."

For example, if an employer wanted to refuse to hire a Sabbatarian because its employees were required to work on Saturday, the employ-

er would first have to demonstrate how its business would suffer if the employee were given Saturday off instead of Sunday. The burden was on the employer to make that showing.

In the years following the issuance of these guidelines, the courts in trying to deal with the issue were split on whether or not an employer did in fact have the duty to accommodate employees' religious beliefs.

In 1972 Congress amended Title VII. In the course of those proceedings the distinguished Senator from West Virginia, the Honorable Jennings Randolph, sponsored a new section, Section 701(j) of Title VII.

Senator Randolph's amendment was approved and in effect it embraced, as part of the act, fundamental Title VII law based on EEOC's previous guideline interpretation of this point.

I should pause to make an observation, that Senator Randolph himself is a Sabbatarian; he is, I believe, a Seventh-Day Baptist.

The statutory section of the Randolph amendment provides the following terminology:

> Religion includes all aspects of religious observance and practice as well as belief. Unless an employer demonstrates he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

During the next 5 years in this continuing legal saga of the duty to accommodate, several cases on this issue worked their way through the courts. The questions under review included the definition of this expression, "undue hardship," what it meant, what it didn't mean to reasonably accommodate, and so forth.

In 1977 the Supreme Court confronted some of these questions in the case of Trans World Airlines against Larry Hardison. By way of background, I should say that Mr. Hardison worked as a clerk in TWA stores department, a department which is open around the clock every day of the year.

When he became a Sabbatarian, a Sabbath observer, the company, in fact, made several efforts to accommodate Mr. Hardison's religious needs. It tried to arrange voluntary job swaps or shift swaps; it suggested finding another job within TWA or swapping holidays. And I must say that this worked out for a while. But when Mr. Hardison bid on and went on to another job, he was required to work certain Saturdays. At this point a proposal was rejected by the company that Mr. Hardison be allowed to change his shift assignment.

The union involved was the International Association of Machinists; it was unwilling to violate the seniority provisions of the collective bargaining agreement, and the company, on the other hand, was unwilling to let Mr. Hardison work a 4-day week as they would then be required to pay another worker premium wages to cover the fifth day.

Faced with these particular facts, the Supreme Court held that TWA had in effect done enough to accommodate Mr. Hardison's religious practices; to require it to do more, the Court said, would require TWA to engage in an undue hardship.

In other words, the employer is not required, said the Supreme Court, under Section 701(j), the Randolph amendment, to deny an employee a shift preference guaranteed by a seniority system nor is an employer required to bear more than *de minimis* cost.

After this interpretation of *Hardison*, many employers and employees alike were confused as to the extent of their obligations and rights under the Title VII.

Many thought, in fact, that the court had so limited Section 701(j) that religious accommodation was no longer required.

At the Commission we were very concerned about this misperception and determined to discover what, in fact, was being done in the area of religious accommodation throughout the country in the wake of the *Hardison* case. Were employers still making efforts to accommodate? What was the experience? What was a *de minimis* burden anyway? What alternatives seemed to work best?

That led us to hold some hearings on this issue. In April and May of last year we went to New York City, to Milwaukee, Wisconsin, to Los Angeles. We heard testimony from private individuals who needed religious accommodation in their work environment. We heard from representatives of religious organizations, from representatives of local and State government and, importantly, we heard from private employees. Over 150 parties submitted oral and written statements.

We were heartened by the many employers who came forward and testified that they had developed alternative employment practices and could, indeed, accommodate their employees, most often without jeopardizing the efficiency of their business.

Here are a few of the alternatives that they mentioned to us in the course of those hearings: staggered work hours; adjustable work schedules, shifts, and hours; floating holidays; making up lost time at straight pay; changes in job assignments; lateral transfers; voluntary shift or holiday swaps; delegating responsibilities.

Some of these were worked out directly with the employees and some were negotiated with labor unions. But, on the negative side, the Commission also learned at these hearings that many individuals are still finding it difficult to get employers to make accommodations for their religious practices, that there's still widespread confusion among employers as to what their duty is since the *Hardison* decision.

Based on the information that we gained at these hearings, the Commission has decided to amend its guidelines on religious discrimination and analyze in depth Section 701(j), the Randolph amendment, in light of the *Hardison* case, and to provide better guidance to the public, to employers, and to victims as to the rights and obligations that continue to exist.

Our full findings and conclusions, I would say, will be incorporated undoubtedly as a preamble to whatever we recommend concerning refinements of our guidelines on this issue. Our office of policy at the Commission is deeply engaged at the moment to refine these guidelines in ways that will clarify the scope of the obligations that remain under the so-called Randolph amendment.

We have a meeting scheduled for Wednesday of our staff committee on equal employment policy. This is the first item on its agenda; it has been a continuing item on the agenda of that office for several months now.

We expect these guidelines to touch on the questions of what would be more than a *de minimis* cost on voluntary versus involuntary substitutes, on preselection inquiries as to the need for religious accommodation, on the evidence the employer would need to show that undue hardship would result, and on the obligations the union has in this area.

The agency is also considering putting into the guidelines the procedure an employer should follow when its employee asks to be accommodated, a procedure to help the employer decide at which point he has done enough to comply with what we believe Title VII requires.

In other words, this methodology, this rationale, that the employer goes through has become, in our judgment, quite important. For example, the interpretation of more than a *de minimis* cost. The *Hardison* language must inevitably be made on a case-by-case basis.

You recall that *Hardison* involved significant additional cost such as the regular payment of incremental premium overtime wages to a permanent substitute. In most circumstances, administrative costs such as those involved in rearranging schedules and recording substitutions for payroll purposes would not be more than *de minimis* cost, perhaps, while regular overtime expenses might be more than *de minimis.*

The infrequent payment of such expenses would not be, nor would the regular payment of such expenses for a short time during efforts for permanent accommodation were being made, be more than *de minimis.*

What I am saying is that this is an ad hoc standard that I think we are probably dealing with. It has to be applied to a specific work environment and whatever we as a law enforcement agency of the government confront in terms of that particular work environment.

In saying that, I want to now mention a larger issue, perhaps, that is still lurking in the background. The guidelines we issue will undoubtedly set out for the public a test that the Commission uses when faced with the question, "Is this a religious belief that must be accommodated?"

The Commission's policy is to use a standard set out by the Supreme Court in the *United States v. Seeger* which is a conscientious objector case. The belief in question must be a sincere and meaningful belief which is held with the strength of those holding more traditional religious beliefs.

In January in a case called *Gavin v. Peoples National Gas Company,* the Federal court in western Pennsylvania was presented with a case where a service station operator who was a Jehovah's Witness was fired because he refused to raise and lower the company's American flag.

The plaintiff argued that he was discharged because of his religion. The defendant made a motion for summary judgment in which it urged that Section 701(j), the accommodation section of Title VII, violates the establishment clause of the first amendment to the Constitution and is therefore unconstitutional.

To decide the issue, the court looked to the three-pronged test set out by the Supreme Court in the case of *Committee for Public Education v. Niquist.* It says this: "to pass muster," this is the test, "under the establishment clause, the law in question first must reflect a clearly secular legislative purpose; second, must have a primary effect that neither advances nor prohibits religion; and, third, must avoid excessive government entanglement with religion."

The court found that Section 701(j) runs afoul of the third test expressed in this area. The court should not be in the business of defining what is or what is not a religious belief for the purpose of religious accommodation. This, it was said, constitutes excessive government entanglement with religion. So, as matters stand now, this section of our law is unconstitutional, at least in the Western District of Pennsylvania.

Our Office of General Counsel intends to file an *amicus* brief supporting and defending the constitutionality of our statute when this case goes up on appeal, and it is my understanding that it will be appealed.

The Commission is concerned lest this set a precedent in the area of religious discrimination in the work place. Decisions as to what is a religious belief are not easy, perhaps, but with the *Seeger* principles, we believe they can be made.

The first amendment provides for the free expression of religion, at the same time that it prohibits governmental establishment of religion. Clearly, this is a fine line that must be walked to protect an employee's right to practice his or her religion, and not jeopardize employment rights without giving unconstitutional support to religion.

EEOC thinks that the Congress did a good job of walking that line when it wrote and later amended Title VII. The agency is working to give guidance on this language. We are enforcing it through our administrative process, through litigation, and we are defending its constitutionality in court.

I mentioned our meeting on Wednesday; I would like, with the permission of this Commission, to submit for the record the transcript of our hearings that were held last year in the three areas I mentioned. I would also think that perhaps the Commission would want an appropriate time to comment on any draft guidelines that we ultimately develop in this area. They will be developed through our coordinating responsibilities in the Federal sector. I am sure that that can be accommodated, should this Commission choose to comment.

VICE CHAIRMAN HORN. Without objection, the Commission will receive those items for the record.

I would like each Commissioner to be sent a set of the hearings, if they are then published, for background.

MR. LEACH. No, they have not been published yet.

VICE CHAIRMAN HORN. We will receive a copy of the transcript to draw on for our own consultation and perhaps summarize.

MR. LEACH. Very good.

We are also in the process of coordinating with the Office of Federal Contract Compliance Programs [OFCCP] testimony, which you will

soon be receiving, of their similar effort in seeking to develop guidelines in this area.

Two House bills I think were earlier mentioned, indeed, that have been introduced in this Congress on this particular issue. There is also a Federal policy involved that I think that this Commission ought to take a look at.

I received, for example, a letter on Friday afternoon late from Mr. Gordon Ingram, who is an official of the Seventh-Day Adventists, calling my attention to Federal policy and certain ramifications of that policy with regard to the Postal Service. In terms of the Postal Service's policy on questions of accommodation, I think it raises a serious concern. The Postal Service happens to be exempt from the new Federal law in this area. The Postal Service, however, is under the jurisdiction of Title VII of the Civil Rights Act. It must accommodate.

In response to that letter, I telephoned and tried to reach Mr. Bolger who is the Postmaster General. I reached someone who reports to him, who was most grateful for my calling to his attention this issue. He expressed great concern and said, I can be assured that he would meet with me and any other representatives on this issue at the very highest level of the Post Office Department or Postal Service.

In mentioning the Seventh-Day Adventists, I want to commend their participation and their contribution to EEOC's endeavor to define this issue in the wake of *Hardison*. They have been most helpful in the course of our hearing process and in the course of developing any guidelines that we ultimately will issue.

They, along with the Worldwide Church of God and with the conservative and orthodox Jewish organizations and other religious organizations, have been extraordinarily helpful on this issue.

That concludes my remarks.

VICE CHAIRMAN HORN. Thank you very much.

Our next presenter is the Chief of Regulations and Procedures for the Office of Federal Contract Compliance Programs of the United States Department of Labor.

Mr. Kenneth Patton, who will give us an overview from the perspective of the Office of Federal Contract Compliance Programs.

STATEMENT OF KENNETH PATTON, CHIEF, REGULATIONS AND PROCEDURES, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DEPARTMENT OF LABOR

MR. PATTON. Thank you, Commissioner Horn. Dr. Flemming and Commissioners, Mr. Nunez, respondents, and guests.

Before getting into the area of OFCCP's participation in strengthening the religious guidelines and regulations, I think I should take just a moment on behalf of the respondents and guests and tell them a little about what we are and the basic for our jurisdiction.

The Office of Federal Contract Compliance Programs is within the Employment Standards Administration of the United States Department of Labor, and the basis for our authority over certain employers is Executive Order 11246, as amended. This particular Executive order,

which has been effective since September 1965, prohibits religious discrimination in the same basis as it prohibits race, color, sex, or national origin discrimination by Federal contractors. That is, we have jurisdiction over firms who contract with the United States in amounts equal to $10,000 or more during the year and over subcontractors to those prime contractors.

Unlike the Equal Employment Opportunity Commission, that is a creature of Congress, we are an administrative agency and the thrust of our efforts is to go in and conduct broad-based compliance reviews of all the personnel policies and practices of a particular contractor or subcontractor and determine the extent to which they are living up to the equal employment opportunity obligations on all these bases.

Because we do go in on these compliance reviews, we seldom wait until a complaint is filed to undertake a review of a Federal contractor. As a matter of fact, we have a memorandum of understanding with the EEOC wherein we will refer to them individual complaints of discrimination which are filed with us, so that EEOC then can investigate and bring these matters to a resolution.

We estimate that there are approximately 300,000 companies in the United States that come under these regulations of the Office of Federal Contract Compliance Programs, either by virtue of prime contractor relationship or subcontractor relationship.

So the number is not few. In order to carry out our responsibilities, as some of you know, President Carter reorganized or consolidated the Contract Compliance Programs on the 5th of October 1978. Prior to that time, 11 different contracting and compliance agencies had jurisdiction over Federal contractors according to the industries within which contractor companies were assigned.

Since October then there has been a consolidated program within the Department of Labor under the leadership of Secretary Ray Marshall and Assistant Secretary Donald Elisburg and my immediate boss, the Director of the Office of Federal Contract Compliance Programs, Mr. Weldon Rougeau.

We have approximately 81 field offices scattered over the 50 States and approximately 1,480 personnel assigned to our total program.

I might just mention in closing these introductory remarks that in addition to responsibilities under the Executive order, we also have responsibility for overseeing the compliance of contractors and subcontractors with the handicapped and the Vietnam-era veteran regulations prohibiting discrimination.

Today I have been asked to provide an overview of OFCCP's regulations and compliance efforts dealing with religious discrimination in employment.

OFCCP's regulations, for those of you who would like to make a note of it, are contained in Title 41 of the Code of Federal Regulations at chapter 60, subpart 50, and they are entitled, "Guidelines on Discrimination Because of Religion or Nation Origin."

The purpose and scope of these regulations point out that Executive Order 11246, besides prohibiting discrimination based on race, color, sex, also prohibit discrimination based on religion and national origin.

In addition to nondiscrimination, the Executive order also requires that contractors and subcontractors undertake affirmative action to insure that equal employment opportunity prevails and is fostered in their respective places of business. In other words, it is not enough that they remain passively neutral in their nondiscriminatory attitude toward their employees, but they must in, an outreach sense, take affirmative action to insure that nondiscrimination is pursued.

This section also points out that many problems regarding religious discrimination and employment are found in middle management and executive level positions. It has been our experience in the conduct of compliance reviews and in review of complaints which come to us and are subsequently referred to the Equal Employment Opportunity Commission, that increasingly individuals find themselves dead-ended, frozen out somewhere around the lower middle management level in many, many companies in many, many industries.

The regulations then continue by stating that agency policy requires contractors to undertake outreach and positive recruitment efforts. Some ways of demonstrating affirmative action as contained in our regulations are: first, internal communication within the company, of the contractor's obligation to foster understanding, acceptance, and support of religious beliefs as they are affected by the work place.

Secondly, the development of internal company procedures to insure that the employer's obligation to provide equal employment opportunity without regard to religion is being fully implemented.

Thirdly, enlisting the support of all recruiting agents or recruting organizations, including educational institutions with significant, identifiable religious group members.

Fourthly, the establishment of meaningful contacts with religious organizations for advice and technical assistance.

And finally, the use of religious media for employment advertising.

We feel that these are all areas in which an employer who is a Federal contractor can engage in meaningful affirmative action towards bringing about the spirit as well as the letter of these regulations and guidelines.

Our regulations next address the subject of accommodations to religious observance and practice. A contractor must accommodate to the religious observance and practices of an employee or prospective employee unless it demonstrates that accommodation would cause undue hardship. And I might add, parenthetically, that our view of this parallels exactly that of the Equal Employment Opportunity Commission.

We have been consulting with them informally. We intend to do still more of it towards strengthening our regulations and our guidelines to parallel those of the Commission. The regulations specifically require reasonable accommodation to employees who regularly observe Friday, Friday evening, Saturday, or some other day of the week as his or her Sabbath. This also applies to those who observe certain religious holidays during the year and are conscientiously opposed to performing work or engaging in similar activity on such days.

Finally, OFCCP's regulations state that these provisions are subject to the same general enforcement procedures as are applicable to violations relating to race, sex, or national origin.

And I might digress here for just a moment for the benefit of the respondents and tell them the type of penalities that a Federal contractor might be subject to if they are found to be in violation of these guidelines.

First of all, we issue administrative complaints, and we give contractors opportunity to participate in administrative hearings before an administrative law judge and, if as a result of those hearings we find that the contractor has violated these regulations with regard either to religious discrimination or one of the other prohibited forms, then, with the approval of the Secretary of Labor, that contractor can be defaulted in his present contract or debarred from future contracts for an indefinite period of time, until such time as the firm comes into compliance with the guidelines and demonstrates that to the satisfaction of the Department of Labor.

Alternatively the regulations permit us to refer on appropriate occasions either to the Equal Employment Opportunity Commission, for their own consideration and enforcement activity, or to the Department of Justice, for similar formal judicial enforcement procedures.

Regarding compliance efforts, investigations for evidence of religious discrimination form a routine part of each of our compliance reviews. As earlier reported to the Commission on Civil Rights, during the period from 1976 until January 1979, OFCCP received over 100 individual complaints relating to religious discrimination; and in accordance with the memorandum of understanding which I mentioned earlier, these were referred to the Equal Employment Opportunity Commission for investigation and resolution.

OFCCP is currently revising both its regulations and its compliance manual which govern the manner in which our compliance officers conduct compliance reviews. Weldon Rougeau acknowledged early on in his tenure as Director of the Office of Federal Contract Compliance Programs that our earlier regulations, our earlier guidelines on religion, simply were not sufficient given the scope and nature of the problems being confronted.

Secondly, in the course of conducting compliance reviews by 11 compliance agencies which formerly had this jurisdiction, there was insufficient effort, there was insufficient time spent while in the contractor's place of business in attempting to monitor the contractor's efforts to comply with these guidelines; particularly the outreach portion having to do with the affirmative action aspects of it. As we revise all our regulations, we are strengthening the religious discrimination guidelines significantly as we revise and publish a manual for the conduct of compliance reviews. You may be sure that additional emphasis will be given to the steps that Equal Employment Opportunity specialists take in reviewing a contractor's practices and policies in this regard.

With both the regulations and the manual then, a great deal of interdepartmental and interagency consultation will be undertaken.

As most of you know, this past year the President signed Executive Order 12067 which designates the Equal Employment Opportunity Commission as the lead agency within the government for the purposes of determining EEO employment policy. While that executive order specifically requires a formal consultation period of 15 days, we are going beyond that and initiating contact with EEOC on an informal basis well in advance of the formal consultation period, so that both of us may benefit from the advice and experience of the other.

Our main goals for revisions as far as OFCCP discrimination guidelines are concerned are, first, requiring more contractor self-evaluation to be done on a continuing basis and to be made available to us during the course of compliance reviews.

Secondly, stronger affirmative action in outreach procedures.

And finally, more explicit rules regarding accommodation.

We agree wholeheartedly with comments made by Vice Chairman Leach a moment ago concerning the way in which we are going to have to view the *Hardison v. TWA* case. We, like EEOC, believe that that might be a very narrowly framed issue that we are going to have to treat on an ad hoc basis in each subsequent case that comes to our attention. And it may well be that the initial pessimism that resulted from the *de minimis* language of that decision may not be as restricting in our efforts to vigorously encourage reasonable accommodation.

Let me close then by saying that again, on behalf of Secretary Marshall and Assistant Secretary Elisberg and Director Rougeau, we recognize full well the need for additional energy and additional resources to be devoted to this very, very critical and important area of our America, and those of you here representing religious constituencies can be assured that we will vigorously pursue this.

Thank you very much.

VICE CHAIRMAN HORN. Thank you, Mr. Patton.

Now, if you gentlemen would remain, I think we have two extra chairs up there, Commissioner Freeman will call the next panel of four. They will then proceed until approximately 11:30 at which time the Commissioners, the original presentors, and respondents will have an opportunity for interaction.

Commissioner Freeman?

COMMISSIONER FREEMAN. Thank you.

The following panelists will respond to the presentations, and I ask them to come forward at this time. Mr. David Brody, Mr. Dennis Rapps, Mr. Steven Heard, and Mr. Lee Boothby.

Good morning, gentlemen.

Our first respondent is Mr. David A. Brody.

Mr. Brody now serves as chairperson of the Task Force on Employment for the Leadership Conference on Civil Rights. He has also served as a member of the Executive Committee and as chairperson of the National Civil Liberties Clearing House. A long-time advocate for civil rights, Mr. Brody actively worked for the passage of key civil rights legislation. He is a graduate of the College of the City of New York and the Columbia University School of Law, where he was an editor of the *Columbia Law Review*.

Mr. Brody.

STATEMENT OF DAVID A. BRODY, CHAIRPERSON, TASK FORCE ON EMPLOYMENT FOR THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

MR. BRODY. Thank you, Mrs. Freeman.

I find myself rather in an unusual position this morning. I've sat around the table for so many years with the members of this Commission as part of the executive committee of the Leadership Conference on Civil Rights and, with only one exception that I can recall, and that was after you held your consultation on the insurance companies, did I ever discuss the subject of religious discrimination. I don't know whether the fault lies with you people or myself since, as you know, I also represent the Anti-Defamation League of B'nai B'rith.

I am delighted to have this opportunity this morning to meet the Commission on this subject, and I think without in any way denigrating the efforts of the EEOC with respect to the forthcoming guidelines, I think what we have seen this morning reflects the role which this Commission has historically played. It has been a prod to the executive establishment, so I am delighted that on Wednesday morning the Commission will be meeting to discuss the guidelines. I am not saying that you wouldn't have done it anyway, Dan, but I think the fact that the Commission has this subject on the agenda today may have just prodded the Commission along.

There are so many things I would like to comment on, but with four panelists, I am going to necessarily have to restrict my comments.

First, with respect to the flexitime legislation, Dan, you are absolutely right in pointing out that the Postal Service is not covered by that legislation; and I think that the history of the Postal Service indicates—and I am sorry that nobody from the Postal Service is here today to hear me say this, but I think we have gotten more cases with respect to the failure to accommodate to the religious needs of employees in the Postal Service than probably any other agency in the government.

I sure Dennis Rapps will substantiate that.

It is interesting, Dan, that you have been in touch with the Postmaster General. I hope you have better success with him than I have had with people in the Washington office of the Postal Service.

I have a case now in Medford, Oregon, where the Postmaster says, "We have a problem that an agency which employs people on a nine-to-five schedule does not have. We work people around the clock. They can make accommodations, but we can't." It is just mind boggling to believe that an agency which employs people around the clock cannot make some accommodation.

"It is all right," the agency says, "for the individual to take annual leave, but we can't accommodate him if he merely wants to take 1 hour or 2 hours off on the Sabbath eve." I don't know what would happen to the agency if he took ill, but I just wish you well, Dan. I really think it requires some pressure from EEOC.

Now, with respect to the flexitime legislation, I noticed that in the afternoon on the schedule you will have representatives from the Office

of Personnel Management. I think one thing that will have to be impressed upon them is to see that we don't have administrative nullification of the legislation. The legislation requires the Commission, now the OPM, to issue regulations within 30 days after enactment, which I believe was the end of September. Those regulations, I believe, have not been issued yet, but during this interim period, I have had examples of government agencies which have been adopting restrictive interim regulations whereas the legislative history indicates that the Congress wanted to be liberal in the interpretation of this legislation. We've had instances of government agencies which have required the employees to take their compensatory time in a given period of time or have required all employees to take compensatory time during the same period. So I say what I think you ought to look at, you ought to ask the representatives from OPM—unfortunately I will not be able to be here this afternoon—ask them what they are doing with respect to the regulations to carry out the congressional intent of the legislation?

There are one or two other areas that I would like to discuss before the other panelists take over. I am sure that Mr. Rapp will talk about the North American Rockwell case involving the religious accommodations guidelines and the Randolph amendment.

OFCCP has been working for some time on a proposed executive order involving payment by government contractors of membership fees for their employees in discriminatory clubs. That cuts across all lines, it not merely affects members of religious minorities, but also blacks, women, Hispanics, and others.

Now, you may recall that in the outgoing days of the Ford administration the then Assistant Attorney General in charge of the Office of Legal Counsel issued an opinion in which he said it was all right for an employer to pay membership fees for his employees in discriminatory clubs, providing he paid membership fees for all his employees in all clubs. In effect, this was condoning a separate but equal provision. Incidentally, I know of no employer who pays memberships fees for all his employees, but only for a selected few in the kinds of clubs in this country which still make policy for American business.

Mr. Patton, I don't know what the status of that executive order is. I know the last time I checked you were busily involved in preparing the regulations, which of course were a priority matter, that of taking over the compliance enforcement responsibilities of the 11 executive agencies. But I think the time has now come to try to finalize the Executive order.

I am delighted, Mr. Patton, to hear that your new compliance review manual will deal with the problem of religious discrimination. I am sure in the afternoon session you will hear detailed comments from participants on the 3:30 panel who will point out that over the years the regulations regarding State and national origin have been there on paper but nothing more. And once again it will not be merely enough to include the regulations in the compliance review manual; but when OFCCP's investigators go out to a plant, I think it is important that inquiry be made about the subject of religious discrimination.

We have also from time to time brought to the attention of the Justice Department cases involving religious discrimination by State and local government agencies. However, we have been unable to get the Justice Department to bring a single suit charging religious discrimination against State and local agencies.

Now, I am aware of problems which the Civil Rights Division of the Justice Department has. It has a limited budget. It is certainly important to bring a pattern or practice lawsuit against a State or local government agency which discriminates against blacks or women or ethnic minorities, but I think it would be wholesome for a lawsuit involving religious discrimination to be brought in an appropriate case. We have brought cases to the attention of the Justice Department where the discrimination has been clear, and I think it would be, as I have said, wholesome for such a suit to be brought because it would put State and local government agencies on notice that they have to be concerned about religious discrimination.

At this time I think I will stop.

COMMISSIONER FREEMAN. Thank you, Mr. Brody.

Our next panelist is Mr. Dennis Rapps. Mr. Rapps now works as executive director and general counsel for the National Jewish Commission on Law and Public Affairs. He has earned a bachelor's degree from Brooklyn College, a master's degree from the City College of New York, and a law degree from New York University Law School.

Mr. Rapps.

STATEMENT OF DENNIS RAPPS, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL JEWISH COMMITTEE ON PUBLIC AFFAIRS [COPA]

MR. RAPPS. Thank you very much.

Mr. Chairman, Vice Chairman, Commissioners, I have listened very carefully to the comments here, and as usual, Mr. Adams and Vice Chairman Leach have done their usual job.

I would simply at this point like to supplement, if I may, with some observations from my experience in working with COPA, the National Jewish Committee on Public Affairs, in dealing with these issues.

I might say at the outset that I was very much taken with the working title "Religious Discrimination: A Neglected Issue."

I would venture to say that this area of the law is perhaps the most misunderstood antidiscrimination law that exists. I was listening before to various discussions about the application of the so-called, three-pronged test to determine whether a governmental action involves an establishment of religion, and I must say that the very idea of applying a test of that sort to a concept of antidiscrimination law is mystifying to me. I think it underscores the nature of the problem that this is a wholly misunderstood area. As most people are aware, this test was developed to determine whether or not various aid to religious institutions, mainly financial aid, violated the establishment clause and that this test, this mechanical test, got a life of its own and it was applied in different areas.

However, I think it is important to understand that the reasonable accommodation requirement that is imposed on employers is a defensive measure. It is not an aid to religion at all. It seems to me that the issue of reasonable accommodation should not be viewed in establishment clause terms because it simply enables an individual who wishes to practice his or her belief to do so and still be gainfully employed. And it seems to me, further, that the concept of reasonable accommodation is simply an articulation of religious freedom and an aspect of religious freedom.

It enables individuals to remain true to their faith and yet still be gainfully employed.

I grew up, as most of us here, with the concept of the melting pot, and when you take that to its ultimate extreme, it simply means that an individual is entitled in the United States to be like everybody else or look like somebody else or act like somebody else, but if he wants to retain his or her individuality, which is religious or ethnic or racial, this is somehow not favored in the melting pot concept.

I think this is why I believe the whole idea of religious accommodation and reasonable accommodation is misunderstood. And I think where this comes from is that we are not really looking at it the way it should be looked at. For example, why is it that generally that members of the nominal Christian faiths, Sunday observers, never had this problem? Why don't they have this problem? Why is all the ferment coming from Jewish groups and from Seventh-Day Adventists, Seventh-Day Baptists, Worldwide Church of God? Very simply, because Sunday observers' needs are taken care of by the simply virtue of regular societal practices. Businesses are generally closed on Sunday.

So the problem for Christians or Sunday observers never arose. But when it was applied, when the idea that the Saturday observer or another day-of-the-week observer would be entitled to not have to violate his own Sabbath, this was somehow looked upon as preference. It was looked upon as the giving of something to somebody; everybody else has to work, if necessary, on Saturdays. But now you were saying to the Saturday observers, "No, you don't have to work." This was viewed as preference when, in reality, all it was putting the Saturday observer, the Sabbatarian, in precisely the same position as the Sunday observer.

I think the classic example—I really bring this to the attention of the Commission—is the effort now in Pennsylvania to pass a bill that would extend protection for Sabbath observers from the public employment sector to the private sector. And interestingly enough, and this is the point I wish to make, this came on the heels of the highest court in Pennsylvania throwing out the Sunday blue laws there. And the issue became very important for most of the legislators; and they were falling all over themselves, if I can be colloquial, to pass this kind of protection because they are getting complaints from Sunday observers. And I suspect that—we as members of religious minorities—our salvation will come when Sunday observers are put in precisely the same position as we have been all these years.

And, I think, viewed in that perspective, all of this business about *de minimis* and undue hardship, the legalism that have developed in cases—and I have been involved in most of the cases—are all beside the point.

Chairman Leach and EEOC had hearings and I participated and I did extensive research and it is all beside the point. The question in one of attitude. Nobody ever required an employer to pay money for work not done; nobody tells anybody to do something that is really unreasonable.

It is simply a question of attitude. Where the efforts, bona fide efforts were made, these things were handled very easily; accommodations were routinely made.

We did surveys of various companies and while there were no, or very few, formal written policies in the various large companies, matters were done routinely.

When you start talking about whether it is *de minimis*, you start talking about other employees, you start asking these kinds of questions rather than taking the approach, well, why shouldn't somebody be able to work and still remain true to their faith? The answer is very simple: it is done on a regular basis.

Mention just a few minutes ago was made about this so-called "flexi-time bill" which was introduced by Congressman Solarz—I think he will be a panelist tomorrow in these sessions—that again was misunderstood, and what does it do? The idea that even the bill was needed, that the law was needed, is again mystifying. All it did was allow an individual to waive overtime payment. That is, the sum total of the effect of that law is to allow an individual to work more than 8 hours a day and not be paid overtime for that time.

And what is the effect on the employee? Without authorization, the employee would be required to lose 3-to-4, sometimes 5 hours of paid salary simply because they had to leave early on Friday and not be able to attend on certain days because of religious observances.

Now, again, I have to tell you, the Commission, that this had a torturous route. There were problems in various agencies of the government. One raised the establishment problem, one raised the effect if other employers would object. When all it did was allow an individual to practice their faith with absolutely no effect on the employment situation and simply have a full week's salary. I fail to understand why that is so difficult to fathom. And, yet, all of these issues are viewed with this jaundiced eye, that it is some sort of preference for religious observance, that it is the establishment of religion, and it is nothing of the sort.

And I think, again, when you emphasize the idea of *de minimis*, what is *de minimis* or what is not *de minimis*, overtime, etc., these are not the problems.

The majority of the people—I can say this without fear of contradiction—that the overwhelming majority of individuals who are helped by this legislation are not aided financially. There is no money involved whatsoever. I think, viewed from that perspective, we can deal with the fringe problems where there are in fact some money problems. But

I think the concept simply has to be engrained in 1979 in the United States that an individual, as a part of his freedom in this country, can practice his or her religion and still be gainfully employed. And I don't think that is a controversial subject. I don't think it is unique; but I think it is an idea whose time has come.

And I am happy to say, as was mentioned before and as I am sure Mr. Boothby will mention, cases that have come down subsequent to *TWA v. Hardison* have taken that point of view; except for some isolated instances where establishment problems have been raised: "Well, let's see what kind of accommodation can be made?"

And I say this again without fear of contradiction, when reasonable and bona fide efforts are made for reasonable accommodation, it is easily accomplished.

Thank you very much.

COMMISSIONER FREEMAN. Thank you, Mr. Rapps.

Steven Heard works for the Church of Scientology as public affairs representative. An ordained minister of the church, he also serves on the editorial staff of *Freedom*, the Church of Scientology journal. Mr. Heard is also a member of the Citizens Commission on Human Rights and has worked extensively for the rights of mental patients. He attended the Boston University School of Communications.

Mr. Heard.

STATEMENT OF STEVEN HEARD, PUBLIC AFFAIRS REPRESENTATIVE, CHURCH OF SCIENTOLOGY

MR. HEARD. Mr. Chairman, I want to thank the Commission for requesting that a representative of the Church of Scientology participate in this consultation. I hope that the information which we share with you, other participants, and observers proves valuable to the Commission in its laudable task to undertake an examination of religious discrimination. I feel that our situation is somewhat unique in light of the areas in which the Commission is focusing and, therefore, would like to take a few moments to provide some background on the Church of Scientology.

The church was founded in 1954 by L. Ron Hubbard. It is an all denominational religious philosophy in that members of the Church of Scientology can, and frequently are, members of other religious bodies as well.

The fundamental beliefs of Scientology are that man is basically good and that through the application of the religious principles of the church an individual is able to discover more about his spritiual nature and, thereby, gain a greater understanding of God, his fellow man, and the world in which we live. There are 247 churches and missions throughout the world.

The church also believes strongly that it is the duty of religious organizations to become active in human rights issues. For over a quarter of a century the Church of Scientology has sponsored various commissions and community groups to work within the system to seek

reforms in such areas as patients' rights, and particularly the rights of mental patients, as well as reform efforts in the area of criminal justice.

Over the years members of the church have provided information to both the media and congressional committees exposing violations of civil liberties which has resulted in criticism of various agencies and their policies. Consequently, the church and its members have found themselves the subject of unwarranted government scrutiny and reprisals for nearly three decades, which brings us to the topic at hand this morning.

For many years members of the Church of Scientology at various times have reported that they have been the subject of discriminatory actions, denial, or threats of denial of employment or promotion because of their involvement with the church. Likewise, the church itself has encountered many instances where it was being selected out for discriminatory actions or investigations. In each incident, the church was able to trace the problem to erroneous and prejudiced information recorded in a government file which had been broadly circulated even to the private sector.

Because of the frequency of such incidents, the church viewed the problem as a broad situation, and in 1974 began a comprehensive campaign to locate such false and misleading files and correct them.

The Church of Scientology has filed over 500 Freedom of Information Act requests, has engaged in over 20 FOIA lawsuits, and as a result, has received over 100,000 pages of files which literally dozens of agencies have kept on the church, its activities, and its members. The vast majority of these files range from simply inaccurate to grossly and maliciously false. There are several examples I could go into, but let me move ahead and save the time. With this background, I would like to share with you a number of specific cases of religious discrimination in the area of employment which resulted from such false files. I will be referring this morning only to cases where church members' rights to employment were infringed upon by Federal agencies. The following sampling of cases are supported by affidavits and further details. However, in the interest of protecting the privacy of and possible reprisals against any individual, the names and any identifying details will not be mentioned. I have met with the Commission prior to this and have shown them affidavits and these are available in coordination with church legal representatives if more details are wanted.

Case number one involved an individual in a New England State who, while attending a major academic institution, was doing work related to a department of the Federal Government requiring a security clearance. He had been taking a communication course at the Church of Scientology in his locale. This individual told fellow church members that upon learning of his interest in scientology, his superiors told him to have no further contact with the church.

He ceased his participation in the church. Less than a month later he informed the church that he had obtained his pay raise and change of security status, but only with the stipulation that he no longer be involved with scientology. This individual stated that "The government wants Scientology crushed." This occurred in 1977.

Case number two involved an individual who in 1978 had been involved with a Church of Scientology in the southwest part of the country. He had told church staff members that he was on leave from work with the Federal Government. This individual had indicated that he was pleased with how Scientology could help an individual and he had even discussed the possibility of doing some work with the church.

However, he later informed the church that he had been informed by the Internal Revenue Service's investigative branch that he could not work at the church. He said that he further checked with the FBI [Federal Bureau of Investigation] where he was told that Scientology activities were detrimental to the government.

The individual in this case said that he either had to give up any work for the Federal Government or give up his involvement in the Church of Scientology.

Case number three involves an individual from a mid-Atlantic State who became involved with the Church of Scientology in his area. This person has a degree from a major university and served in the armed services where he was introduced to the religion of Scientology by friends. On more than one occasion he stated that he enjoyed his studies very much and benefited from them.

Sometime later, however, he informed a church counselor that he would not be able to continue with his participation in Scientology because it has been ordered by certain government officials that he would have to discontinue his association with the church.

This individual explained to a legal representative of the church that he worked for a private industry that does contract work for the National Security Agency. According to the individual, his supervisor was at NSA headquarters and had mentioned that a person under his charge was involved with the Church of Scientology.

The individual's supervisor was told at NSA headquarters that the NSA could not allow this person to continue his association with Scientology without losing his security rating.

The NSA official's reasons were that Scientology had lawsuits against the FBI and IRS and that the NSA frowned upon anyone who is a member of the Church of Scientology and who is employed by the government. The NSA official reportedly stated that the Church of Scientology was currently on a blacklist, but that maybe in about a year Scientology won't have a black mark against its name, and the individual would be allowed to go back to church.

The individual in this case stated that during his involvement with Scientology he had seen nothing to indicate that there was anything about the church that would jeopardize security. However, he stated that he did not want to be out on the street without a job.

Case number four involves a person who was enrolled in a basic course in Scientology at one of the churches in the South. In 1977 one of the course administrators at the church received a call from this parishioner who stated that she had decided she would no longer be participating in the church because she had been turned down for the position she had requested with a private company, not because she

was unqualified, but because the company had run a check on her for security purposes and learned of her involvement in Scientology.

This person further stated that she had been told by an agent of the FBI during an interview that the Church of Scientology was a questionable organization, but that if she got off the church's mailing list and wrote a letter through the Attorney General's Office that maybe in a month or so she would be allowed to have the position she requested at this company.

Case number five involves an individual on the West Coast who was the subject of a U.S. Navy performance evaluation report in which Navy officials were evaluating this person's qualifications for reenlistment. The report referred to the person's keen intelligence and added that his physical abilities are exceptional. The report stated that the ratee actively supports the Navy's equal opportunity programs and added that he has a very high regard for the rights of other people regardless of race, sex, or religion. He tries to understand his fellow man in an effort to facilitate more harmonious and productive working conditions.

The report said that the ratee communicates clearly and concisely. However, at the end of the evaluation it is noted that this individual had become quite active in the Church of Scientology.

The report states that although the ratee is recommended for reenlistment, if he did reenlist he would have to subordinate his Scientology beliefs to his military performance in order to be an effective petty officer.

Additionally, I received a copy of a letter this past weekend which was recently sent to the church by a person in the army now living in Washington State. In his letter, this person stated that on May 26, 1978, he heard and observed the following: members of the personnel action center where he was stationed received a directive from headquarters to go through the personnel records of all soldiers and compile a list of names of anyone who listed Scientology as their religion. The directive, according to this individual, was assigned a priority rating and names were to be sent back up the chain of command.

The individual stated that he and others in personnel at the time felt that this action violated the privacy act and was grounds for civil action. And this individual, I believe, has never had any connection with the church but felt that the church should know about it and so informed church officials.

These cases are only a sampling. There are many others similar to these which also cover a broad geographical area. Should the Commission wish to see more specific details, this can be arranged in coordination with the church's legal representatives, since these incidents are currently part of a class action lawsuit.

After many years of research and documentation related to this issue, we can say with certainty that the source of such discriminatory patterns lies in the prejudicial views of a handful of government agents who decide to record their biased views in records and dossiers which then become part of the enormous Federal recordkeeping system. Obviously, files themselves do not discriminate; people do. But it is through

the use of files that one person can disseminate discriminatory and derogatory information which then becomes fact to thousands of others.

Indeed, one government report, which contained false and misleading information on the Church of Scientology and its members, was marked for distribution as follows: 5 copies to the Air Force; 3 copies to the Army; 20 copies to the CIA; 5 copies to the Navy; 10 copies to the U.S. Information Agency; 3 to the National Security Agency; 7 to the Department of Health, Education, and Welfare; with additional copies going to 7 other agencies.

It is important to point out that many Federal agencies and particularly the Justice Department have sought to prevent disclosure of erroneous files and have gone to great lengths to evade the provisions of the Freedom of Information Act. This is well documented by us and other groups.

Therefore, we urge the U.S. Commission on Civil Rights to recommend that the President issue an executive order instructing Federal agencies to greatly increase their efforts to honestly comply with the Freedom of Information Act, and further instruct these agencies to make every effort to accommodate religious groups who want to see their files, as well as facilitate efforts by religious groups to make corrections in these files.

Until the abuses of the Federal recordkeeping system are brought under control, every religious group which somehow earns the disfavor of a government official is potentially the target of the dossier disease.

Thank you.

COMMISSIONER FREEMAN. Thank you, Mr. Heard.

Our final panelist who will respond to the Federal representatives is Mr. Lee Boothby.

Mr. Boothby now serves as legal counsel for the General Conference of Seventh-Day Adventists. He has been a practicing attorney for 22 years, and an active member of both the Federal Bar Association and the American Bar Association.

Mr. Boothby was asked to present an *amicus* brief in the landmark United States Supreme Court case of *Wisconsin v. Hewlett* involving school attendance of Amish children. Mr. Boothby received an undergraduate degree from Andrews University and a law degree from Wayne State University School of Law.

Mr. Boothby.

STATEMENT OF LEE BOOTHBY, LEGAL COUNSEL, GENERAL CONFERENCE OF SEVENTH DAY ADVENTISTS

MR. BOOTHBY. Thank you Commissioner Freeman, Mr. Chairman, members of the Commission, and participants:

It should be recognized that the area of religious discrimination has a somewhat unique position in the legislative protective areas of Title VII, the Executive order, and the regulations that have been promulgated.

Discrimination on the basis of race, color, sex, national origin, and so forth usually affect a substantially large and identifiable class. Most of the Title VII cases covering these areas provide a fertile area for the civil rights attorney. Class actions are prevalent and defendants are subject to large awards in court.

Religious discrimination, on the other hand, generally involves only a one-on-one situation, the one person in a plant who wants to be excused from work on Sunday or Saturday in order to observe the Sabbath. The accommodations standard written into law in 1972 requires the courts to weigh the impact of specific employment practices on a specific individual's religious practices and then fashion an individual remedy.

In most civil rights litigation, you have statistical evidence, but that is not true in religious discrimination matters. So we are left to a factual determination.

Sabbatarians have long faced these built-in headwinds of an employment policy that requires employees, particularly new employees, to work on Friday night or Saturday. This practice operates to exclude Sabbartarians from employment.

One of the problems that we are facing more and more, and I have seen this in the last few months, is the policy of going to rotating schedules and that has really created a lot of problems for Sabbatarians. This can be done on possibly a monthly basis and it might be done on an annual basis.

Throughout the Nation, Sabbatarians have been denied the opportunity of employment because of an unwillingness of the employers to adjust their policy, and many times it is just that, just a policy, to the needs of the Sabbath observer.

Section 701(j) of the Civil Rights Act requires that an employer accommodate all aspects of the religious needs of employees unless the employer can demonstrate that he is unable to reasonably accommodate an employee's or a prospective employee's religious observance or practice without undue hardship to his business. Courts have extended that requirement also to the unions. As the case of *TWA v. Hardison* recently underscored, collective bargaining agreements exacerbate the difficulties of assessing the hardship of accommodation, because those contracts often restrict the interchangeability of manpower and facilities. Contract clauses often provide for shift preferences by seniority.

Collective bargaining agreements entered into between the employer and the representative of the employees have failed to take into consideration the special needs of the few within a plant who desire to exercise their religious convictions in a manner that may be different from the majority of those employed. Sabbatarians working in a plant governed by collective bargaining agreement often find that although they are generally protected under Title VII, they still face problems because of seniority rules contained in collective bargaining agreements.

In the handling of over 100 religious discrimination cases, several score of which include the problems of Sabbatarians, I have become convinced that solutions generally can be found if employees, employ-

ers, and unions will only seek, in good faith, to solve the problems rather than to amplify them.

It is important for us all to keep in mind that the problems today faced by Sabbatarians have in large part been created or complicated by government itself as a result of the passing of the National Labor Relations Act of 1935. This legislation permitted a union to represent all employees within a collective bargaining unit as to the terms and conditions of employment. The union thereupon became the exclusive bargaining agent in the negotiating of a labor agreement with the employer. I have seen employers say they could not talk to church representatives because of the labor act. The individual at the same time lost his right to bargain with the employer for things important to himself.

A company and union by agreement cast conditions of employment which make conditions for Sabbatarians difficult, if not impossible. These collective bargaining agreements generally provided for such items as mandatory union membership, a prescribed grievance procedure handled through the offices of the union, seniority rights, work schedule and shift preference, promotion, wages, and hours and other items and conditions.

Typical of the collective bargaining agreement was a provision that regardless of other factors such as merit, employees be given shift preference over employees with less seniority. Seniority generally also controlled layoff and recalls. When layoffs occur, employees having the highest seniority are to be given the available work. Such provisions also provide that in the event of a layoff, if the employee having seniority refuses to change his shift to another shift, he shall be laid off. This has created another spinoff problem that we find with Sabbatarians when they are laid off because they cannot work on the Sabbath, when they have been changed to another shift because of the bump off procedure. They apply for unemployment compensation and they have been denied unemployed compensation pay by many State agencies because they say, "Well, you have not made youself available for work."

It is true that a Supreme Court decision, *Sherbert v. Verner*, said that a person should be entitled to unemployment compensation. But let me just say without going into detail, we have received many complaints within the last 2 years indicating that not only have the various State agencies not followed this, but also some of the courts have, up to this point, not followed *Sherbert*, and I believe this is a potential problem that we will continue to face.

It is right and proper for Congress to have given particular attention to the religious needs of employees when Congress itself was responsible for granting to unions the power to be the exclusive representative of all employees within a specified employment unit. When by such legislation Congress made it more difficult for the individual to arrange with his employer for accomodation of his particular religious needs, it had the effect of inhibiting the accommodation of the free exercise of an individual's religious practices. It is therefore proper, in my judgment, for the Congress by remedial legislation to require the union, as

well as the employer, to accommodate the individual employee's particular religious needs.

I have handled scores of cases where initially the employer, the union, or both adamantly declared that no accommodation was possible. You would walk in and you would see the employer or the employer's legal representative and they would say, "It is impossible to work out an accommodation."

I will illustrate with a few cases:

R.S. was hired by the telephone company as a lineman. When he was hired he told his employer that he could not work on his Sabbath. Subsequently he was promoted to the job of combinationman and ordered to work on Saturday. The company claimed that it could not accommodate R.S. because of the union contract. R.S. notified the union steward and union president of his problem. Nevertheless, he was discharged without much negotiation for refusing to work on Saturdays.

After the commencement of a Title VII action, the company found that it could, in fact, accommodate R.S.'s religious convictions, and the union also decided that it really had no objection to any accommodation that the company might make to this particular individual with respect to his working on Saturdays. A consent judgment was entered by the Federal district court.

L.F. was employed by the department of public works of a city in Michigan. He was appointed to the position of heavy motor equipment mechanic. Shortly thereafter the city transferred him from the day shift to the evening shift which required him to work from 5 p.m. to midnight.

L.F. told his supervisor that he could not work on Friday evening because of his Sabbath. The city ignored his problem claiming that when he was promoted to this new job his seniority changed under the collective bargaining agreement and, therefore, it could not make any accommodation. They could not even let him take his old job and daytime schedule back. L.F. was dismissed.

It took a Federal lawsuit to get the attention of the employer and the union. Just a few days before the scheduled commencement of the trial in Federal court, the city and the union agreed to the entry of a consent judgment. This judgment provided that L.F. be restored to his employment with the city with all seniority rights to which he would have been entitled had he remained in the city's employment. The order also provided that the city accommodate the religious needs and practices of this individual and make reasonable accommodations.

W.P. was employed by one of the major automakers. The company policy provided for rotating schedules. W.P. was, thereafter, changed to the second shift after he had been employed for approximately 1 year requiring him to work on his Sabbath. He refused to violate his convictions and even though another employee in this same classification was willing to trade shifts, the trade was refused by the company. His employment was thereupon terminated in 1969.

This individual filed a discrimination charge with the Michigan Department of Civil Rights, and the hearing referee ruled that the auto

company had improperly discharged W.P. and it had failed to make a reasonable accommodation. The referee ruled that it would not have been an undue hardship to have the accommodation provided for. But even before the decision became final, and in fact it is still being litigated in the court of appeals in Michigan, the autocompany found that it could find a way to accommodate this Sabbatarian's needs. It offered him unconditional reinstatement. The irony is that he is now working in an accommodation provision for the company. And we are litigating the matter in the court of appeals, and the company is saying they cannot make an accommodation and we cannot even bring this into evidence because it was by way of a conciliation conference.

Given the unequal bargaining power of the parties and the economic dependence of the employee, the employer's inflexibility in its employment policies can have and does have a chilling effect on the employee's freedom to complain and negotiate.

We should recognize that religious discrimination, as I mention,ed, is a one-on-one situation, and that a threat of a class action is not a major deterrence to a company.

When there is not only inflexibility on the part of the employer, but an inflexible collective bargaining agreement that precludes any reasonable accommodation, the employee faces almost insurmountable difficulties.

In *Steele v. Louisville and N.R.R.*, the Supreme Court refused to let a white employee's union bargain to abolish jobs held by black employees. In *Steele*, the Court imposed a dual role on the labor union: besides representing the group, it had a statutory obligation to give fair representation to each individual within the bargaining unit. One of the prime forces behind the Court's new doctrine was the principle of exclusive bargaining. By empowering unions to serve as the exclusive bargaining agent, Federal law had deprived individual employees of their right to represent themselves.

It is submitted that when considering the union's duty of fair representation in the context—particularly of Section 703(c)(1) and (3) of Title VII, the union has a legal duty to bargain in good faith concerning the elimination of actual or suspected discrimination.

It is further submitted that it has the legal duty to bargain in good faith concerning the inclusion of provisions that will permit the employer to accommodate the religious needs of Sabbatarians.

Employers and unions should be put on notice that a collective bargaining agreement that is so inflexible as to prevent any accommodation for the religious needs of Sabbatarians may be illegal. At least the employer and the union should have the burden of establishing why a collective bargaining agreement, in order to satisfy the overriding legitimate business purposes of the employer and/or the union, have to be so drafted as to eliminate any acceptable alternative for the religious needs for Sabbatarians.

I might state that this concept of requiring the union and the company to engage in good faith on this issue and the requirement of flexibility in the collective bargaining agreement has been bought as a viable argument.

In one case in Oregon the union said, "Yes, we believe this is the trend, this is the way we should go." They agreed that the court enter a judgment, and the court even made such a finding in the case just last year.

After reviewing the various court decisions including the pronouncement of the *Hardison* case, I offer the following suggestions and recommendations:

First of all, that the employer has the affirmative duty of attempting to accommodate. This is pretty much the law today.

Secondly, where present accommodation does not appear feasible, an attempt should be made on the part of the employer to make a temporary accommodation prior to the discharge of an employee.

That further, during the period of time that the employee is being temporarily accommodated, the employer further explore all possibilities present for making a permanent accommodation. That during this period and prior to any employment discharge that the EEOC or the Office of Federal Contract Compliance [Programs] have direct involvement in the negotiations of accommodation for the employees and that the agency file and the testimony of the agency be made available at any hearing. Because, in my judgment, this is the only way that we can ferret out those items which are bona fide and which are feigned.

You can go into a situation and negotiate accommodation and you can see that even though they have gone through all the steps, it really has not been a good faith effort. I believe that this device could really be helpful to reduce court costs and delay entailed in this kind of litigation.

As I said, we don't have class action litigation in this type of an area, and it means that every person who is discriminated against is going to have to go in on a one-on-one situation and go all the way through the courts, and it just is not practical. It is not, unless they have an organization behind them, going to be accomplished.

As I mentioned, also, the statistical evidence is not available, and I think that the input from the direct involvement of the agency personnel will be helpful.

I believe that regulations should be provided that require that the burden should be on the employer to seek out the cooperation of employees. The regulations should also provide that the employer has a duty to formally consult with union representatives and attempt to work out either temporary or permanent accommodations.

The regulations should provide that an employer cannot sustain his burden of showing undue hardship without at least proving that he has made all efforts necessary to make that accommodation; that as the degree of business hardship decreases, the quantity of conduct which will satisfy the reasonable accommodation requirement increases; and that if the exemption from a work rule results in significant cost to the employer, the employer should then be permitted to impose alternative burdens on the employee as a means of accommodating the employee's religious needs. The alternative burdens, however, should not be excessive, because the employee should not be penalized for his religious nonconformity.

We find today that the employer will say, "Oh, yes, we will give you an alternative," and then he will make that alternative so onerous that it isn't an alternative that is at all viable.

In determining what alternative burdens would be imposed upon the employee, it should, however, be kept in mind that the least onerous alternative from the employee's standpoint be tendered to the employee because of the fact that the employee is in an unequal bargaining position, and I think, here again, the input from the agency representative would be particularly helpful.

It should be recognized that a union has the duty to fairly represent all employees within the representative unit, as I have indicated before. Correspondingly, the employer should be required also to bargain in good faith relative to the inclusion of provisions within a collective bargaining agreement that will permit the employer to accommodate the religious needs of its employees. Where company policy or a work rule results in an adverse impact on the religious requirements of an individual, the employer should bear the burden of justifying the policy or of the work rule.

In this industrialized society of ours, where the majority dictates more and more the affairs of life, it is vital to protect the interest of those who march to the beat of a different drummer. It is to the benefit of this great nation that we provide a home and haven for all religious thought. It is our nation's greatest heritage.

I give my thanks to the United States Commission on Civil Rights that they have taken the time today to give particular attention to this neglected area.

COMMISSIONER FREEMAN. Thank you, Mr. Boothby.

Before proceeding to interaction with presenters, the responding panel, and the Commission, I would like to give Mr. Leach and Mr. Patton time, if they choose, for a brief response to the panelists, any of the panelists.

Mr. Leach.

MR. LEACH. A very brief response, Commissioner Freeman.

I would only say to Mr. Brody, for a point of clarification, this matter is not scheduled on a full Commission agenda yet. It is being developed and we have an office—a committee of policy development for that purpose. It has been on the agenda of that committee for some time.

I think Mr. Brody, in his great wisdom, raises another point and that is that there has been delay in this matter. It is difficult to respond to that issue.

I would say that we have been proceeding deliberately. We were most interested, initially, in developing the hearing record and I think that hearing record now established will become increasingly valuable in this area. Two, we have set this matter on a very high priority status, but perhaps not as high as that enjoyed by other issues that the Commission has been working on in the policy development area. One, testing guidelines, a terribly important concern and I know you understand that.

Another issue that comes to mind, voluntary affirmative action guidelines in response to the *Weber* and *Bakke* cases.

We are proceeding, I think, in a thoughtful manner, however, and I think that our work product ultimately will bear out the fact that this lengthly process was with some justification.

EEOC has been critized in the past for the way it develops policy and what appeared, at least to the courts, to be a rather sloppy, haphazard approach.

We had to answer to that in the *Gilbert* case. When the Supreme Court struck down our guidelines on sex discrimination or, at least, a part of them, only to be rectified later by the Congress. That is my answer to a valid point that Mr. Brody raised.

To Mr. Rapps I would say he presents the issue in a manner that is just unsalable. I think he is absolutely correct in observing that we appear to be in a social area here that has dictated Sundays off for businesses and that in turn inures to the benefit of the majority. It ought not to be that way in the ideal world.

On the other hand, the courts are forcing and framing the issue. They have found it often easier to treat this as an area of accomodation. Particularly is that true with regard to the issue of Saturday observance. On other issues, such as raising the American flag and whatnot as emerged in the *Gavin* case, courts are likely to explore other aspects of the issue, perhaps.

But as always, Mr. Rapps' reasoning and rationable are splendid. As to the Scientology issue, I am not familiar with, frankly, any cases that have been filed with the Commission. That isn't to say that they are not there. We do receive on all issues, all bases of discrimination, about 6,000 charges of discrimination every month which we have to deal with.

As to the Seventh-Day Adventists, may I say in terms of the recommendations that have been put forth, they appear to track pretty much the way the staff has tracked the issue in terms of refining our guidelines, based upon what the hearing record has produced, revealed in terms of what we can do following the *Hardison* case.

Getting the agency involved at an early stage is important. I am not sure, mechanically, how it can be done, short of filing a charge with the agency. Preserving a person's job in this issue for a sufficient length of time so that we can examine the merits I think is most important.

In this past year, to that end, we have put our lawyers into our administrative offices. This actually touches on the issue that has been raised: whether or not the Commission can use the legal process in terms of seeking temporary restraining orders quickly enough to preserve jobs. It become more of a possibility under our new, reorganized scheme. This has been borne out already.

For the first time, in one single month the Commission obtained a number of temporary restraining orders. That's a new experience for EEOC.

Under the old organization scheme, very few, if any, TROs were ever obtained.

Getting the agency involved early enough to identify these issues I think it most important. That's about all I have.

COMMISSIONER FREEMAN. Mr. Patton.

MR. PATTON. I only have two brief comments. One I will direct to Mr. Brody: the subject of the private club issue, the country club issue.

There can be no question that your remarks are very, very well founded in fact as to the employment problems; that denial, whether formal or informal, whether codified or uncodified, affects religious minorities as well as racial minorities and women. There are few subjects, according to the people that have been around the Department of Labor for many years, that have generated so much mail, pro and con, both from the public and from the Congress, as this particular subject.

The Department's position on this is still being actively debated and I can't say at this time what it will be. However, those of us within the OFCCP have amply documented, we think, instance after instance where persons who were at or approaching that middle management level position and found that because they were denied access to the kind of places where business is done, for jobs at that level, it had a very, very deleterious effect on their career opportunities for advancement.

One other comment, only. I want to thank Mr. Boothby for some excellent comments that he made, some suggestions and ideas as to what we might do to beef up our tests of what is or is not reasonable accommodation and undue hardship. I particularly appreciate your point about the notion that a collective bargaining agreement which is so inflexible as to not permit any accomodation may be, in and of itself, unlawful.

I also liked very much your idea to require, let's say, under the affirmative action obligation to the Federal contractor some mandatory provision for temporary accomodation pending an exhaustion of all possible alternatives—I think that is a very, very good idea.

COMMISSIONER FREEMAN. Mr. Saltzman.

COMMISSIONER SALTZMAN. No questions. Thank you.

COMMISSIONER FREEMAN. Dr. Horn.

VICE CHAIRMAN HORN. I would like to ask both Mr. Patton and Mr. Leach some questions as to how one goes about enforcement in this area.

It's obvious when you have an individual complaint in terms of Sabbatarian practices. I think it is less obvious when you are examining employment patterns and practices as to the degree to which religious affiliation keeps one from being promoted. Now, as I understand, the United States Census is not permitted to ask a question as to religious affiliation. Therefore, we do not have accurate data, except some denominational claims, by State, by region, by labor market area as to the degree to which particular religions are practiced in one area as opposed to another. And when an employer is searching for particular positions and looking at national, regional, or local pools, it seems to me it becomes much more difficult for an enforcement agency to check patterns or practices when there is no data base. We have a data base for blacks, for women, for Mexican Americans, for American Indians,

for Asian Americans, for Pilipinos as murky as that is when you get to particular occupations on a regional or local basis.

And with EEOC pursuing more pattern or practice than individual hearings and—I think correctly—thus trying to make the greatest impact—I guess I am searching for advice as to how we tackle a problem like this and how much thought has been given to this problem by the respective Federal agencies.

MR. LEACH. Well, if I may, you have raised, Vice Chairman Horn, one of a number of very difficult issues that EEOC has over the years confronted.

As I indicated at the outset of my remarks, I had sought to and, indeed, did trigger a pattern practice investigation involving discrimination, mainly against Jews in one particular industry, linked up with, I believe, an ongoing court suit, and one of the initial inquiries that had to be made was how, in fact, the identification issue could be addressed.

Now, you have both at your table and in your audience here members of groups who have far more experience, I must say, with the identity question than does EEOC.

The Anti-Defamation League, among others, is represented by Mr. Ira Gissen, who I believe is on your program at some point. He has done an enormous amount of research into this question. We rely on work of that nature. I believe he has issued a report which covers at least certain aspects of this.

I am embargoed from, at this point, sharing with you by my own statute and the confidentiality provisions therein the progress of the investigation which I launched, and until we file a court suit, that information must remain confidential. It does, however, include this obstacle to characterize it your way, in terms of identifying victims of a particular pattern or practice case.

The Commission has probably not done enough in this area. But that, I would only say, is a question of allocation of resources over the years. I suppose most of our resources have gone into the issue of race and sex discrimination. That represents the bulk of our charge process, people who file complaints with us and they, in turn, have dictated to a large extent how agency resources are spent. So that you raise almost an unanswerable question as far as EEOC is concerned. We have not done enough in terms of identification and other issues in this area.

VICE CHAIRMAN HORN. How about OFCCP?

MR. PATTON. Likewise, identification or establishment of an accurate data base also presents some impediments to us. Over the years, prior to the consolidation of programs last October by the President, various compliance agencies in various parts of the country, whether experimentally or otherwise, attempted to require contractor firms to conduct a mandatory, self-census religious identification by employees and in all cases, Mr. Vice-Chairman, there was such a fire storm of outraged indignation by individual employees writing to their Congressmen, writing letters to the editor, that most agencies have stayed away from any serious consideration of a mandatory self-identification.

Now there are alternative means that are not as effective, but they are, nonetheless, means which can be done. For example, if we are

going into a particular metropolitan area to conduct a compliance review of a particular firm, we can, to begin with, look at the telephone directories. We can begin to find from the telephone directories not only the various religious faiths represented, but the number of chapels, synogogues, churches that may be located there.

Our compliance manual being revised is going to require us to doublecheck a contractor's assertion that he or she engages in outreach contacts with local leaders of religious organizations and churches, determine if, in fact, they have done so and with how much good faith and with what results. I am not talking about the perfunctory one-time contact that I am sure Mr. Leach remembers years ago when contractors would contact a particular source once a year and file a carbon and that would be it. I'm talking about an active, ongoing outreach program.

Finally, during the course of a routine compliance review, we conduct confidential individual interviews with a random cross section of employees.

We would expect that short of asking leading questions that suggest the answer we want that a mandatory part of each of these employment interviews should be to seek information as to whether or not, through either that individual's personal experience or general knowledge of that employment climate, problems of accomodation have arisen, if so, with what disposition?

Quite frequently, we find that an employer's professed or written policy is not always, of course, that which is actively pursued.

But I can only close by again echoing what Vice Chairman Leach has said: It is a problem and lacking such a data base, there are difficulties in data collection.

VICE CHAIRMAN HORN. Okay. Let me put the question just in a yes-no form to all six of you.

Yes or no, should the census of the United States collect information as to the religious affiliation of the American people, yes or no?

Start with Mr. Rapps.

MR. RAPPS. I would—I haven't given it that much thought, but I think there are problems either way you go, I don't put this yes or no, but I think, obviously, it would be easy to litigate a case, make Commissioner Leach's job easier, perhaps Mr. Boothby's and my job a little easier, but I think in the long run that would be counterproductive.

MR. BOOTHBY. I would say no. I would think the benefits would not outweigh the disadvantages.

MR. BRODY. I subscribe to what Mr. Boothby said. I would only add this with respect to what Mr. Patton said. While there are some problems, nonetheless, as you go into an area—let's say you go into New York, if you are investigating the employment practices of the banking industry, or the insurance industry in New York or Los Angeles, for example, we know there is a heavy concentration of Jews and Catholics in those areas. I think the employment profile, particularly with hiring largely coming from that area, should generally reflect the overall religious pattern of those communities.

VICE CHAIRMAN HORN. Mr. Heard.

MR. HEARD. I would definitely say no.

VICE CHAIRMAN HORN. Now, the gentlemen from the Federal Government, I take it, neither one of you has requested the census to do anything. Would your agency position be no?

MR. LEACH. I can only speak personally. My judgment is that the agency position would be no. It has been in the past, I think officially.

MR. PATTON. Of course, again, I can only speak for myself. I certainly don't make policy for the Department of Labor, but if asked to take a position, I would recommend against it on the same basis Mr. Boothby did, that while there are benefits, I do not think that the benefits outweigh the disadvantages.

Let me just add on one codicil: that in the course of conducting a compliance review—and we are talking about a cross section of employees who may have been life-long residents of the community and have worked for many, many years on a discreet and confidential basis—it is fairly easy to get a generalized idea of who is represented and who is not represented and informally, at least, the attitude of management with regard to the employment advancement of various religious minorities. Not an inaccurate estimate, I would say.

VICE CHAIRMAN HORN. That is all I have.

COMMISSIONER RUIZ. Mr. Heard, with relation to the Church of Scientology, what are the religious needs of a member of the Church of Scientology which may conflict with his rights to full employment under the 14th amendment?

MR. HEARD. I would see no conflict.

COMMISSIONER RUIZ. In the area of employment then, can you give us any cases where employers have been unwilling to accommodate a member of the Church of Scientology for employment?

MR. HEARD. There are other cases involving the Federal Government in addition to those which I brought up today. One of the interesting facets of this study which we have undertaken is that there have been no difficulties that I am aware of with employers except when the employer is a Federal agency or a company that has contracted with a Federal agency, particularly on matters which require some kind of security clearance.

I should add that it's been only recently that the churches have coordinated themselves to try and isolate and collect information on these various instances of employment discrimination by Federal agencies.

COMMISSIONER RUIZ. Have you called these specific cases to the attention of the Department of Justice where they have been excluded from employment?

MR. HEARD. The Justice Department is well aware of these. We have met with people from the Justice Department; these cases that I brought up will be part of, or many are already part of, a lawsuit against the Justice Department, the FBI—actually, eight agencies.

COMMISSIONER RUIZ. I understand that part. You went into the situation where, apparently, government agencies are trying to undermine or destroy the Church of Scientology. Now, I'm thinking of something else.

MR. HEARD. What are you thinking of?

COMMISSIONER RUIZ. I am thinking of the employment situation, whether—I think you stated that you were started in 1954, that you have 274 churches throughout the world, and that your membership is drawn from all sources.

Now, with relation to those members and with relation to the fact that employers may not accommodate Jews or other persons, does the membership of the Church of Scientology run into that problem, specifically?

MR. HEARD. No, it hasn't, and again, I will say what I think is an interesting point, it hasn't come up in communities other than with relation to Federal agencies.

COMMISSIONER RUIZ. Have you broken down your membership into the sources from whence it comes, such as, I would say, blacks, persons of Jewish background, persons of Catholic background, and so on; have you done that?

MR. HEARD. No, we have not.

VICE CHAIRMAN HORN. This data you are accumulating has nothing to do with ethnicity or race or sex or anything like that from which you draw your membership?

MR. HEARD. No. The data that I presented is based on one's religious involvement with the Church of Scientology and the cases where, because of that involvement, their rights to employment with Federal agencies have been infringed upon.

COMMISSIONER RUIZ. I noticed, Mr. Brody, you mentioned cases that have been called to the attention of the Department of Justice on religious discrimination, without any luck. I think this might be a proper place in the record to set forth the fact that you have done so when those cases have not gone forward, and I suggest to the Chairman that a place in the record be provided for a listing of those cases that are not going ahead too fast.

MR. BRODY. I will be delighted. Mr. Ira Gissen, who will be on the panel this afternoon, will be able, I think, when he appears this afternoon to provide you with the specifics of those cases.

COMMISSIONER RUIZ. Mr. Patton, with relation to compliance review, if I remember correctly, you said that you have had alternatives to do certain things, that you can refer to Justice for action, that you can refer to EEOC for action.

MR. PATTON. Right, our regulations say—

COMMISSIONER RUIZ. I haven't finished yet.

That you may have an administrative hearing within the agency itself. You, apparently, have several alternatives. Now, of the three that I have mentioned, preceding which I have just mentioned, which has been the most efficient, which has been the most successful in obtaining your objectives?

MR. PATTON. Sir, it would depend upon the kind of company and the kind of industry involved. If it were a company who relied heavily upon Federal contracts or Federal subcontracts for its income, then the threat of administrative sanctions through default and debarment would be—has been—in my judgment the most effective tool.

On the other hand—and I will cite the company since it is a matter of public record—if the company is in a single-source industry, such that we can't look to any other company or competitor for the goods or services the government needs, then the Department of Justice, in bringing a formal judicially enforced case, appears to be the best example.

For example, several years ago we attempted to conduct a compliance review of the New Orleans Public Service Company which, as you know, has the exclusive charter to provide gas and electric services within the city of New Orleans.

They denied that they were Federal contractors and, hence, were not subject to our regulations. In that case, of course, they are sole contractor. We must have gas and electricity in the city of New Orleans. We asked the Department of Justice to represent our interests in court and they subsequently did so successfully. So again, it would vary with the circumstances.

COMMISSIONER RUIZ. This is what I wanted to know, because you said, "We refer, we do this, we refer again, and then we have hearings" and the particular tool you use depends upon the particular problem that you have.

MR. PATTON. Yes.

COMMISSIONER RUIZ. Mr. Leach, will the EEOC guidelines affirmatively include, by way of suggestion, the various alternatives that may be used, such as staggered hours, holidays, other transfers, or would that be included in a separate manual?

MR. LEACH. I believe they would be—the way they are being developed they would be included in the guidelines themselves. Although lately we found that in terms of issuing guidelines, the more specific how to type of advice to the employer and the employee.

COMMISSIONER RUIZ. That's what I was thinking of.

MR. LEACH. Well, we have just used a question and answer format which we publish in the *Federal Register* and make available to the public and that is a rather new way of getting out to the public, to the affected areas of the public, exactly what we think would be appropriate specifics in terms of those seeking to comply. The guidelines represent a more general statement of policy while the questions and answers respond to the how to's—cross the "t" and dot the "i."

COMMISSIONER RUIZ. In any respect, the issue is a live one.

MR. LEACH. One way or the other, they will be included.

COMMISSIONER RUIZ. As to which will be the best?

MR. LEACH. Yes.

COMMISSIONER RUIZ. Thank you.

COMMISSIONER FREEMAN. Mr. Chairman.

CHAIRMAN FLEMMING. I just have one or two questions. One on the pattern and practice.

Is this the first of its kind as far as EEOC is concerned?

MR. LEACH. Mr. Chairman, since I have been there, it's the first of its kind. I would yield to Mr. Brody and Mr. Gissen to speak in terms of the history before that time.

In the past 3 years, certainly, it's the only charge of this nature.

MR. BRODY. I believe it is the only case of its character.

CHAIRMAN FLEMMING. Personally, I am very much interested. I have been watching with a great deal of interest. I was also interested in the dialogue between Mr. Brody and Mr. Patton relative to membership in the clubs. Just where is that issue at the present time? Where is it going? Under what circumstances is it going to come to a head?

MR. PATTON. Well, I think I predicated my remarks by saying that no departmental position has yet been reached, although it is actively under consideration and it appears that—again, my opinion, I am not a policymaker for the Department of Labor—that we are not getting—we have no jurisdiction to get the club membership practices themselves. We feel we do clearly have jurisdiction over a situation where, because of an employer, a contractor sponsorship, either directly or through expense reimbursement, the participation of an employee in an outside club or organization which by charter or on a de facto basis restricts or limits membership, and where we can show that that participating employee is garnering some career-enhancing benefit by virtue of his or her participation and we see a corresponding denial to a similarly placed minority, be it religious or race or woman, sex, then we feel that there has been a denial of equal opportunity under our regulations in those circumstances, and it would be identified as a violation subject to enforcement.

Now, that is my opinion of the direction we should be taking.

CHAIRMAN FLEMMING. Are there certain cases that are under active consideration at the present time that will bring this policy issue to a head?

MR. PATTON. Not to my knowledge. I am a little more conversant with it than the average person at the OFCCP because, prior to consolidation, I had been in managment of Treasury's contract compliance program and we noted particularly within the banking industry that the practice is very, very flagrant both as to social clubs, country clubs, and civic clubs. And as I indicated in my earlier remarks, it is a highly controversial thing; people tend to have very strongly held emotions about it.

CHAIRMAN FLEMMING. Well, if you find that there are any specific cases making their way up the line, so to speak, in the Department of Labor on this, I would appreciate very much if you would furnish that information for the record.

VICE CHAIRMAN HORN. Before you leave that issue, could I ask a question?

CHAIRMAN FLEMMING. Yes.

VICE CHAIRMAN HORN. You mentioned the banking industry. It reminds me that the Bank of America, I believe, withdrew any reimbursement for its executives in private clubs that discriminate, as I recall, 1 or 2 years ago.

And just so I get the record clear in my own mind, could your briefly recapitulate what the law is as to the Federal Government's jurisdiction over membership in private clubs; are they excluded, as are fraternity-sorority membership in the 1964 act?

MR. PATTON. To my knowledge, Mr. Vice Chairman, the Federal Government has no direct legislative or administrative jurisdiction over these practices. If we adopt a policy along the lines that I suggested, it will be that the employer's policies or practices in a particular fact situation—for example, suppose we have a white male commercial lending officer of the bank who by virtue of his participation in the local Kiwanis Club, that's an example, makes the kinds of contacts with his counterparts with other companies who would be in a position to influence where very profitable commercial loan applications might be placed, and if we have a religious minority, a racial minority, or a female similarly placed within the bank who by virtue of his or her inability to go to places and participate to make those kinds of contacts suffers some diminished expectation of promotion because, let's fact it, in the banking industry those who place profitable commercial loans find themselves getting ahead very rapidly; and those who don't stagnate.

The same thing could be true of some of the recreational dining clubs that you find on the tops of bank towers where females may only attend as guests. In the event of religious minorities, you will seldom find a codified rule that specifically excludes Jews or any other religious minority but, in practice, you will find—

VICE CHAIRMAN HORN. But you will be able to do this only provided the firm reimburses the employee. The employee could still continue under the employee's own private funds which does not necessarily limit access and—

MR. PATTON. Right.

VICE CHAIRMAN HORN. —reasons for contacts and promotion, etc.

MR. PATTON. That's true. Our experience, however, has been particularly in the civic clubs and, to some extend, in the country clubs that the overwhelming majority of employees who did participate did so with their employers' financial backing.

VICE CHAIRMAN HORN. Since you came from Treasury, I think, where the IRS sits supreme, it is of interest to note that some clubs have desegregated because of the fear of losing, at least at the State level and presumably down the line at the national level, tax advantages which are given as a result of their status, and I wonder if that isn't the appropriate avenue to pursue in terms of the States, at least liquor licenses and so forth, in terms of access, since there are certain governmental advantages.

MR. PATTON. I would agree that that is a worthwhile avenue to pursue. But I would argue that given the extensive nature of the problem that that should not be the exclusive avenue to pursue.

CHAIRMAN FLEMMING. I appreciate very, very much your elaborating on this issue, which I think will be interesting, very definitely.

May I express to all the members of the panel our appreciation to you for coming here, making the presentations that you have, carrying on the dialogue in the way you have on these issues, and I know it has been very, very helpful to us. It has made it a very worthwhile morning. Thank you very much.

MR. BRODY. We want to reciprocate with our thanks to you, Mr. Chairman.

CHAIRMAN FLEMMING. We are in recess until 1:30 p.m.

Afternoon Session, April 9, 1979

CHAIRMAN FLEMMING. I will ask the consultation to come to order, please.

This afternoon we are going to focus, in the beginning, on some State agency experiences in this particular area.

I am going to ask my colleague, Commissioner Saltzman, if he will introduce the panel and preside during the discussion that will take place with the members of the panel.

Mr. Saltzman.

COMMISSIONER SALTZMAN. Thank you, Mr. Chairman.

Presenting the State agency experience, the handling of complaints, and their procedures will be Mr. Homer C. Floyd, executive director, the Pennsylvania Human Relations Commission; Arthur L. Green, executive director, Connecticut Commission on Human Rights and Opportunities; Galen Martin, executive director, Kentucky Commission on Human Rights; Mauricio R. Munoz, Jr., commissioner, California Fair Employment Practice Commission; Thomas J. Peloso, Jr., chief deputy director, Michigan Civil Rights Commission; and Alton R. Waldon, deputy commissioner, New York State Division of Human Rights.

Gentlemen, we are pleased that you are with us.

Suppose we start on the extreme left, Mr. Martin.

STATEMENT OF GALEN MARTIN, EXECUTIVE DIRECTOR, KENTUCKY COMMISSION ON HUMAN RIGHTS

MR. MARTIN. It is a real pleasure for me to be with the United States Commission. I welcome this opportunity to share with you the Kentucky commission's experience in this area.

This is my third time to be with you, I believe. I particularly enjoyed being with you when you were in Louisville, because you were a great service to our community on a most important issue, that of school desegregation. I hope you come back. We need all the help we can get.

I do have a prepared text. I will leave out a lot of it but try to talk more about some of the things I think will be of greatest interest to you.

CHAIRMAN FLEMMING. You are giving me an opportunity, Mr. Saltzman, to make an announcement.

I was requested whenever any of the participants have a written or prepared statement, we would appreciate if you would make sure to leave a copy with a member of the Commission staff, and also, those

who are participating in the consultation, we hope that before anyone leaves for good that they will fill in the evaluation form that is in the kit and leave it with a member of the staff.

Pardon me.

MR. MARTIN. Kentucky seems to have an unusually high number of religious discrimination cases. I don't know, maybe it is that we are in the Bible Belt or because people take their religion seriously in Kentucky, but for whatever the reasons, religious discrimination cases have long been a part of our work intake, investigation, conciliation, hearing, and appeal, certainly. The numbers are not as great as in California, for example, but since our enforceable statute was passed in 1966, we have had 25 cases charging discrimination in this area.

Our statute parallels the Federal statute. The Federal provisions on religious accommodation were added to the law in Kentucky in 1974. Unlike EEOC and many of the State's acts, the Kentucky Civil Rights Act authorizes us to release the terms of conciliation agreements and information about completed cases. And so I do want to share that with you today.

There is one case that I will mention that is still in progress that we can't talk specifically about.

One of the more interesting cases we have had involved a minister, a man who had been a pots and pans washer for a Baptist hospital in Lexington, Kentucky, for 22 years. He had been a Baptist minister at a small church near Berea, Kentucky, for about 20 years. The Baptist hospital brought in a company that I would characterize as an efficiency group to manage their cafeteria, and they worked out one of these rotating schedules that has been referred to earlier in which Rev. J.C. Beard was going to be expected to work two Sundays out of seven. He was terminated when he said he couldn't do it.

We had to schedule the case for public hearing, but like many cases, it was settled just before the public hearing was held. We got Reverend Beard a backpay award of $4,800 and $2,250 in compensatory damages and a change in hospital policy. Someone said that they did not want to go to hearing, because they did not want to see a case characterized as Baptist versus Baptist.

I have enclosed a table of cases that we have conciliated, eight of them, and I won't comment on most of those. Of the 25 religious discrimination cases that we have had, we have gone to public hearing on two, we have conciliated eight, the rest are withdrawn, dismissed, or pending.

Seven complainants were members of the Worldwide Church of God. Their Kentucky membership is about 1,800 people. If we receive cases at the same rate from the rest of Kentucky's population, we would have had about 12,000 more cases, to give you some perspective on the relative numbers.

We have included in our statement two documents put out by the Worldwide Church of God which I think will give people some understanding of how they approach this matter of Saturday work and that it is very crucial to them. One is a prepared form letter that the members of the group can give to their employer to set out in a written way

their situation. The most unusual case we have had is one involving *Paul Cummins v. The Parker Seal Company.* It's especially unusual, because it did go to the United States Supreme Court with no evidentiary factfinding hearing ever held, except for one held before our commission.

In the staff's view, the commission members did not decide that case right, and soon after they decided it, a former staff member of ours went with Paul Cummins to the Federal court. In the Federal district court, Mr. Cummins and the Parker Seal Company agreed that the record before the commission was all right and so the district court took that record and it went all the way up with no other evidentiary hearing.

Cummins was one of three supervisors, and I think the Commission members did have some difficulty with that in terms of the situation and felt that the company had accommodated Mr. Cummins under the circumstances.

The district court decided the same way the commission members did. The Sixth Circuit found no substantial evidence to support the district court's conclusion that accommodation of Cummins' religious preference would have imposed an undue hardship, and they said that the company had shown no dire effect upon its operations.

The case was argued before the United States Supreme Court which remanded it to the court of appeals in the light of *Hardison.*

Another case that we are especially interested in, one that kind of went up and down in relation to these other cases, is the case of *Linda Nunn Bailey v. the State's Hazelwood Hospital and the Department of Human Resources.* This one took 4 full years. Linda Nunn Bailey was a high school graduate, undertook to get a job in the hospital to be one of 134 nurses' aides. After she had passed all the tests and was in the process of being put to work, she told them that she couldn't work on Friday night. And on this initial notice, they told her that they could not make any accommodation to her and that she could not be off from work.

One thing that is of interest to us—and I think it is very relevant in terms of EEOC—is that the State sent her a notice saying that unless she took some further steps that she wouldn't have any more standing as a State employee, and she wrote back to the State merit system and said, "Please keep me in your merit system. I am fighting for that job."

The State department of personnel said that that did not constitute enough for an appeal, and so they never gave her any remedy.

I mention this because Dave Brody referred this morning to the difficulties and problems with State and local government and how they handle religious cases. Why this is so important right now is that EEOC is on the threshold of deferring cases to State and local personnel systems throughout the country. I think this is a clear illustration of what is going to be happening to a lot of public employees if their cases are deferred to State and local personnel systems rather than handled by strong enforcement fair employment practices commissions.

Our commission found that there had been discrimination because Hazelwood Hospital had made no effort to accommodate Miss Bailey's

religious preferences. The department for human resources appealed the commission decision to the Franklin Circuit [Court]. Franklin Circuit first found for the commission on June 15, 1977. The next day the United States Supreme Court decided *Hardison* and so a few weeks later the court in Franklin reversed itself in the light of *Hardison*. Much later we were able to get the Kentucky Court of Appeals to reverse that and to find that the department for human resources had not made any effort to accommodate and that they had to accommodate.

Of course, we believe very keenly that out of 134 people they could accommodate with certainty a lot less than a *de minimis* effort.

Miss Bailey received a comparable State job and $5,055 in backpay.

We have a current case that we would like to share with you. I can't talk about the details. This is a case that we think will fairly test *Hardison*.

As you know from *Hardison*, the court said than an employer was under no obligation to override an existing seniority system and deprive workers of their rights under a collective bargaining agreement. And also that an employer was not obligated to bear more than a *de minimis* cost in his efforts to accommodate.

What we have, basically, is a case in which a man is 1 of 14 quality control workers. There is no seniority system. There is no union here. The plant is a part of a large national firm, but they are not working under the kind of seniority system that they were in the TWA situation.

We think this is a very clear situation in which there would be no additional costs. In fact, in this situation, if they did not require this man to work and used one of his coworkers, they would probably save money because he has been there so long, his seniority is so high, and anyone else that they got to work instead of him is almost sure to cost them less money. He had been there 6 years, was recently baptized into the Worldwide Church of God, and within 6 months after his baptism he was out, because they would not accommodate his religious preferences.

We have also had some religion in dress cases that are mentioned in the outline that I gave you. Let me share with you, in concluding, a few observations that we have.

Employers continue to demonstrate a lack of sensitivity to the beliefs and practices of minority religions. They don't show elementary tolerance of religious differences. They see them as obscure or ridiculous. They just don't see them as a part of civil rights law. They balk at requests for accommodations and frequently assert that if they accommodate one employee they will be overrun.

I think anybody that makes that kind of statement, as the State hospital did, just doesn't understand at all the nature of the Worldwide Church of God and the kinds of commitments that people have to make to become a part of that faith.

Kentucky employers that we have dealt with have been easily able to accommodate with a minimum of effort and expense and with very rare exceptions.

We believe it is especially unfair to employers, as it is to covered groups for this area of the law, to be yo-yoed the way it has been in

terms of the recent decisions, and we very much hope that this will be clarified through early amendment or court decision.

COMMISSIONER SALTZMAN. Mr. Green.

STATEMENT OF ARTHUR L. GREEN, EXECUTIVE DIRECTOR, CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

MR. GREEN. Thank you, Mr. Chairman, members of the Commission.

The Connecticut Commission on Human Rights and Opportunities is delighted to have an opportunity to share with you our views and our experiences in the area of religious discrimination and the latest subject matter of accommodation and the related issues.

I guess most of our experiences at the State and local level are perhaps bound into the notion of whether or not there is accommodation as opposed to discrimination. The Connecticut courts particularly dealt us what we consider to be a very serious blow in this area. The State agency in 1968 processed a complaint from a Seventh-Day Adventist. In this case I am referring to, the key case in our State which takes us out of the arena of deciding whether or not the accommodations shall apply. The case I am referring to is *Corey v. Avcoy*.

Mrs. Corey complained to us and we so agreed, that she had been relieved of her job because of her religious preference, wishing to leave on Friday and return on Saturday, or observing a Sabbath that was different than the majority of our State.

She did, indeed, try to on several opportunities to get the company to accommodate her religious preference, and they denied her and finally terminated her when she, on her own, did not show up for work one Friday morning. When she filed her complaint with us, she had already filed a complaint with the union and this brought into the picture a very complex problem for us.

The union did take her complaint to arbitration and the arbitration award was that there was no discrimination. That was important later on, because when she filed her claim with our agency, we found a violation of her rights because of her religion and certified the public hearing, and the hearing officer subsequently agreed that there had been a violation of her religious rights.

Of course, respondent appealed to the court, the appeals court, and on to the State supreme court.

The lower appellate ruled in favor of the respondent employer: there was no violation, that the company was not duty-bound to accommodate, no provision in the Connecticut law for accommodation.

Further, the appellate court ruled that the arbitration award or the arbitrators action, indeed, precluded the commission from acting on the same issue, particularly from acting that would somehow contravene the other arbitrator's award.

So the notion of estoppel and, also, of course, the collateral defenses that the union raised, the State supreme court finally ruled that the commission could not act once the arbitration award had been decided on exactly the same issue.

That case, *Corey v. Avcoy*, has been troublesome to us since 1968. We have tried to get the Connecticut Legislature to write law that would acquire accommodation. It has refused to do so on the ground that it would, of course, be undue hardship and a burden on the employers of the State of Connecticut.

Our experience then has been to refer such matters, or defer such matters, to the EOC. They seem to have a stronger position on this.

The State did pass a law, though, requiring the State board of mediation arbitration to hear such matters and to preclude employers from discriminating on the basis of religious accommodation, but that becomes a matter of arbitration as opposed to a matter of a statutory right. Our commission holds that there is a distinction between what the arbitrator does and what we do. What we are doing is not subject to a collective bargaining agreement but rather a matter of basic constitutional or statutory right.

We have had a total of—well, since 1965—of 173 cases that we have processed to conclusion, mostly involving persons of the Jewish faith and the next highest number were Seventh-Day Adventists. Of that total number, 173, most of the complainants are male and the second largest group are female.

We have probably succeeded in 80 percent of those cases finding cause, so we have not had to go the extent, again, of the court to make judgment or an appeal on these cases. We have been able to settle them.

This is interesting, given the *Corey* decision. You would think that respondent employers in Connecticut would use that decision to buttress their defense or response to our investigations, but for some reason, which we can't help, they have been acceding to the conciliation grievance we have offered. I am not suggesting that either the caseload, the 173 complaints filed, or the observation we made that the employers are conciliating with us suggests that there is no problem in the State. I don't think the caseload figures ever indicate adequately the percent of any problem, and I don't think, for example, all persons experiencing the feeling of lack of accommodation or being told that, really file. So I don't think the numbers tell you much, yet, you don't have a sense of all the variables that are operating that would perhaps encourage people to file or not file.

I don't think the fact that employers in our cases may be conciliating suggests they have had a change of mind; they have seen the error in their ways. I think there are a number of things operating. The fact that EOC, the Federal presence, if you will, in Connecticut which is effective, I think, has a lot to do with the fact that most of the employers are attempting to accommodate, from our experiences.

Our staff has been trained to try to understand, as best as it can, the distinction between accommodation and discrimination. That's a very important, I think, set of concepts that we all must deal with. The various courts, at least in Connecticut, have not defined that well. Yet, we all know what we mean by discrimination, both intentional and the effect of it in terms of past practices. So when we investigated these

cases, we applied the standard notions and ideas and concepts with respect to discrimination.

When it comes to accommodation, there is another problem since our law does not allow us to do that. Yet, we have been successful, I think, in bringing about some kind of accommodation with regard to the employers of our State.

Thank you.

COMMISSIONER SALTZMAN. Thank you, Mr. Green.

Mr. Peloso.

STATEMENT OF THOMAS J. PELOSO, JR., CHIEF DEPUTY DIRECTOR, MICHIGAN DEPARTMENT OF CIVIL RIGHTS

MR. PELOSO. I have prepared remarks. Like Mr. Martin, I will leave with you—I won't read them in their entirety.

I'm happy to be here this afternoon with you to discuss the Michigan Department of Civil Rights' experience in handling complaints of religious discrimination and to give you a few examples of the way in which the department handles these complaints.

Michigan's current law, the Elliott-Larsen Civil Rights Act of 1976, provides that the opportunity to obtain employment, housing, and other real estate and a full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, or marital status is recognized and declared to be a civil right.

In 1972 the Michigan Department of Civil Rights adopted the U.S. Equal Employment Opportunities Commission's guideline on religious discrimination. We recognize the need for employers to make reasonable accommodations to the religious needs of Sabbath and religious holiday observances when it will not create an undue hardship on the conduct of the employers' business.

The proof of undue hardship lies with the employer. We are currently in the process of revising these guidelines to reflect current changes in Michigan and Federal law and significant court decisions.

We have processed Sabbath and special religious holiday observer complaints in the employment and educational areas; complaints of Jews excluded from the executive suite jobs and religious groups excluded from housing, public accommodations, or refused public service.

We have not handled questions relating to zoning sanitation raised by Mennonite groups, nor have we formally dealt with the exclusion of stereotyping of religious groups in textbooks.

The current law allows us to challenge the liquor licenses of private clubs that refuse to admit or serve Catholics, Jews, or other religious minorities, but it does not allow us to challenge the licensing of these private clubs when they exclude the same people from membership.

Certain types of complaints relating to separation of church and State, such as prayers or religious celebrations in schools or governmental units, have normally been handled as first amendment questions through the Federal courts by individual or other private civil rights and civil liberties organizations.

Over the past 10 years, over 436 complaints have been filed claiming a religious discrimination. Many of the complaints are not recorded in the above number because someone alleges two or more reasons for discrimination, such as race and religion, when filed by a Black Muslim. These complaints are not a very large part of our annual claims load. They usually amount to between 40 and 50 cases and account for about 1.6 percent or less of the claims filed per year.

Thirty percent of the 102 cases filed in the past 2 years have resulted in favorable adjustments for the claimants.

There is no clear trend to the complaints of religious discrimination. Discharge of the employee amounts to half of all cases; unfair working conditions, another one in five; and refusal to hire in 9 percent of the claims. Layoff or recall problems, training and upgrading discrimination, and in unions, failure to represent account for between 4 and 7 percent of the claims.

I would like to give you three examples of cases that we have handled. The first one, Michigan Department of Civil Rights, *Joan Muskovitz,, the claimant, v. Whitmore Lake Public Schools*, the issue in this case was disciplinary action because of the complainants' religion.

She was an elementary school teacher and a conservative Jew. In 1972 and 1975 she requested time off to observe the first day of Passover. Permission in each instance was refused by the superintendent and she was docked a day's pay and charged with the cost of a substitute teacher.

The respondent argued that the claimant's requests were denied because of the union contract. In a superintendent's bulletin interpreting the contract, teachers were not allowed a day off which came within 2 days preceding or following a holiday, unless there was a certified emergency.

Under the bulletin, not more than two teachers could take personal leave days on the same day, except for valid and acceptable reasons. The claimant in each instance had used her allotted two personal leave days to observe other religious holidays.

While the claimant was not granted permission for her religious observance, other teachers were allowed to take the day off without penalty, due to death in the family or car trouble. Respondents set apart religious observance from other reasons for being absent from school.

Hence, the claimant suffered discrimination in being denied the opportunity to observe her religion without penalty.

It was further determined that the rules imposed in the bulletin had a disparate effect on any teacher, of any religion, who wished to observe a particular day as a religious holiday.

Finally, it was concluded that the respondent could have accommodated the plaintiff's religious beliefs without undue hardship in that substitute teachers were normally called when any teacher was ill or took a personal business day.

In an order of the commission, the claimant was reimbursed monies deducted from her salary and all references to unauthorized absences for Passover in '72 and '75 were removed from her personnel file.

The respondent was ordered to modify any contract provision or superintendent directive which prohibits claimant or any teacher from observing a religious holiday, and in regard to compensation or denial of same for a teacher, treat requests for a personal leave day for religious observance in the same manner as for an additional personal business day.

In another case, Michigan Department of Civil Rights with the claimant *June Brown v. the Michigan Masonic Home*, the issue was discharged because of religion, and a second issue, entitlement to wage increments from the date of discharge and computation of backpay awards was also involved.

In this case the claimant, a Seventh-Day Adventist, was hired on March 23, 1970, as a laundry room employee. At the time of her employment she informed the respondent that her religious beliefs prohibited her from working sundown Friday to sundown Saturday.

On May 3, of 1973, the claimant was ordered to work on Saturday, May 5, by her supervisor, Mr. Sager, and she declined and was terminated.

Sager testified that illness and various other reasons were sufficient excuse for not working Saturdays. Claimant's Sabbath observance, however, was not considered a justifiable reason for being absent. Hence, the claimant's religious beliefs were singled out for different treatment, which resulted in her dismissal.

The respondent in this case had argued that the church doctrine allowed the claimant to perform Sabbath work directly related to patients' health, safety, and well-being and that the claimant's laundry room function fell within the permitted categories. The respondent further questioned the sincerity of the claimant's concern, since the the claimant's job did not bring her in direct contact with patients. It was determined by the commission that the laundry room work was outside the scope of permissible Sabbath work.

Testimony from the claimant and her pastor indicated she had faithfully attended Sabbath worship services consistently, followed the church doctrines, and made Sabbath observance paramount in her decision not to work on Saturday when requested by the respondent. Such evidence demonstrated the sincerity of her religious belief. On the issue of damages, it was determined that the claimant was entitled to any wage increment from the date of discharge when computing the backpay award.

The purpose of the backpay remedy was to make the aggrieved party whole and to restore to such party his or her rightful economic status, absent the effects of the unlawful discrimination. It was determined that the backpay award must reflect any wage increases which the claimant would have received in order to restore her to the economic position which she would have had, had there been no discrimination.

In this case, the commission ordered the respondent to immediately reinstate the claimant with full seniority to a position comparable to that from which she was terminated and to pay her backpay wages less other interim wages and benefits. Through the Gratiot County Circuit Court the claimant was awarded $4,500 in damages.

The last case that I would like to present to you has to do—it is a housing case, actually, but it ties into employment because the claimant in this case was looking for a place close to his employment.

The claimant, Otto Feinstein, filed against Cutler-Hubble Company which was a property management company.

The issue here was refusal to rent because of religion. The claimant had attempted on two occasions to rent an apartment from the respondent. On the second occasion, in January of 1972, he was recommended by a former tenant but was told there were no vacancies by the respondent.

After filing a complaint with the Michigan Civil Rights Department, the claimant was rented an apartment by the respondent. The referee found that the claimant had previously been denied rental because he is a Jew. The referee recommended the claimant be awarded $7,500 as damages for embarrassment, humiliation, emotion distress he suffered as a consequence of this unlawful discrimination.

The commission expanded the referee's findings of fact. It noted that there had been no Jewish tenants in the building in question between 1966 and 1972 and that respondent had inquired as to the claimant's nationality and religion before refusing him the unit.

The commission also found that two apartments were available when the claimant applied in January 1972 and that he incurred $25 a month higher rent for the 4 months because of the respondent's refusal to rent to him, in addition to $260 in moving costs necessitated by the delay.

The recommendation of $7,500 in damages was struck down by the commission since its authority to award damages under the Fair Housing Act at that time expressly limited the amount of damages to $500.

In this case, the commission's order was that the respondent cease and desist from discriminating against the claimant and all other tenants or prospective tenants for unlawful considerations of race, religion, color, or national origin; that the respondent pay the claimant the sum of $360 in actual damages; the respondent make quarterly reports for 1 year to the commission on the name, race, and religion of all new tenants and applicants in each apartment building owned and operated and managed by the company.

In concluding, I would like to say, Chairman Flemming and members of the Commission, that our State legislative mandate in Michigan is very broad. Yet, we have not received a large number of complaints of religious discrimination considering the total number of complaints that we handle on an annual basis.

In the area of employment, we probably handle over 90 percent of the religious discrimination complaints filed with the State and with private and public agencies.

What we have done in the course of enforcing the Michigan civil rights laws against discrimination because of a person's religious belief has made a difference, yet, there is still much to be done to end this type of unlawful discrimination. There is very little information available on the extent of this problem, because people are reluctant to identify their religion based upon the strong belief of separation of church and State and/or the right to privacy.

We believe that this hearing is a good beginning point. Perhaps the public hearing route is one of the better methods of gathering data about the problem. We believe that people are unaware that religious discrimination in employment is covered by many local, State, and Federal civil rights laws.

We all have a duty to better advertise this area of protection. We believe that Title VI of the Civil Rights Act of 1964 should be expanded to cover religious discrimination in federally-assisted programs.

Federal enforcement, which transcends State boundaries and can apply a uniform method of regulation, would do a lot to further eliminate discrimination based upon a person's religious belief or lack of same.

We also feel that the tax laws should be revised to remove tax exemption privileges from those broad base, or broad membership private clubs that exclude Catholics, Jews, and other religious minorities as a class from their membership. There should also be some change in the way that the IRS handles business deductions allowed where companies pay for an employee's membership in these clubs which are discriminatory.

I thank you for your indulgence in my over extending my time.

COMMISSIONER SALTZMAN. Thank you, Mr. Peloso.

Mr. Munoz.

STATEMENT OF MAURICIO R. MUNOZ, JR., COMMISSIONER, CALIFORNIA FAIR EMPLOYMENT PRACTICE COMMISSION

MR. MUNOZ. Thank you Commissioner Saltzman.

Chairman Flemming, members of the Commission, I would thank you for inviting us to participate in your consultation.

The California Fair Employment Practice Commission [FEPC], established by statute in 1959, is the principal official policymaking body for equal opportunity efforts in employment and housing in the State. Its seven members, appointed by the Governor, set standards and issue regulations for the enforcement of California's civil rights legislation which is administered by the State division of fair employment practices.

The commission decides cases of discrimination brought before it in public hearings. Division attorneys prosecute the case, and after hearing testimony from both sides, the commission renders a decision.

The commission has multiple jurisdiction covering discrimination in employment based on race, color, creed, national origin, ancestry, age, sex, marital status, medical condition, and physical handicap and in housing on the same bases except age, medical condition, and physical handicap.

To focus on employment cases—in terms of percentages, for the past several years our employment complaints have held approximately as follows: cases based on race and color, 42 percent; on sex, 26 percent; on national origin, ancestry, 15 percent; on age, 10 percent; on physical handicap, 5 percent; on religious creed, 2 percent.

For religious complaints, this breaks down in actual figures for the past 2 years as follows figures for 1978 are not available—in fiscal year 1976 there were 58 religious discrimination complaints docketed; 21 Jewish, 19 Protestant or Catholic, 18 other. This was out of a total of 3,538 cases docketed. Additionally, there were four housing complaints docketed on a religious basis.

In fiscal year 1977, there were 66 religious discrimination complaints docketed; 18 Jewish, 14 Protestant or Catholic, 34 other. This was out of a total of 2,823. Also, there were three housing cases docketed on this basis.

Additionally, of course, some religious discrimination cases were resolved on an informal basis—as many cases are—and, therefore, not docketed.

Compared to other types of discrimination cases we receive, religious discrimination cases are relatively few, but I trust we will never reach the point where sheer numbers alone dictate the extent of our concern.

Only recently we conducted a public hearing in one religious accommodation case. The complainant was a bank teller who had taken leave from her job in order to attend a religious convention. She thought she had received prior approval for such a leave. However, when she returned, she was terminated.

During the course of our investigation, the bank reinstated the teller, but refused to provide backpay.

It was the finding of the FEPC panel that backpay should be awarded. The commission decision also pointed out that the FEP law "...imposes an affirmative obligation on an employer to make reasonable accommodation to an employee's religious needs, unless the employer demonstrates than an undue hardship makes accommodation impossible." The language of that decision raises some questions I will get to later.

In another case a rapid transit district refused to hire a man because his religious beliefs prevented his working on Friday evenings or Saturdays. During conciliation a settlement was reached involving not only monetary compensation but an agreement as to a procedure for handling the religious accommodation needs of other present and prospective employees.

In this case, whether or not the job applicant could have been accomodated in his religious needs was never reached. The division found in favor of the complainant, because the employer had made no effort to determine whether accommodation was possible, and the complainant refused the job offer on the assumption that no accommodation could be made.

Even though our experience in the area of discrimination based on religious accommodation is limited, it has been sufficient to raise a number of questions, some questions suggested by the two cases cited above I would like to briefly pose them here:

Number one, how do we define "reasonable" accommodation and at what point does the accommodation necessary become unreasonable or the hardship on the employer undue?

Number two, to what extent can we expect other employees to bear the burden accommodation may require?

Number three, how do we resolve the conflict that may arise between a bona fide seniority system established by union contract and the need to accommodate a person's religious beliefs?

Number four, is it possible to differentiate between religious conversion based on the convenience of the preferential treatment that results and religious conversion based on commitment to religious conviction?

Number five, if an employer finds it possible to accommodate the religious beliefs of some number of employees, how can he avoid charges of differential treatment if business necessity precludes a continuation of such accommodation when others ask for special consideration because of religious beliefs?

Number six, does a job applicant have the obligation to inform an employer that he or she can't work certain hours, or does the employer have the obligation to make this inquiry at time of hire?

If the nature of the business is such that an employer needs people who are available for overtime or extra hours, wouldn't a preemployment inquiry as to availability covertly screen out the very persons the law was designed to protect?

These are just a few of the questions that surface as we try to apply laws that are unclear on this issue.

After evaluation of wider experience, perhaps a more definitive set of guidelines will emerge. The California FEPC is presently grappling with these problems and is in the process of developing regulations relating to religious discrimination.

Conferences such as this one should be helpful to our effort. Thank you.

COMMISSIONER SALTZMAN. Thank you very much.

STATEMENT OF HOMER C. FLOYD, EXECUTIVE DIRECTOR, PENNSYLVANIA HUMAN RELATIONS COMMISSION

MR. FLOYD. Mr. Chairman, members of the Commission, I am delighted, also, to have this opportunity to appear before your Commission and discuss the vital issue of religious discrimination and to share with you some of our experience in dealing with the problem in Pennslyvania.

It is our view that just focusing attention on the problem as you have and entitling your 2-day consultation "Religious Discrimination: A Neglected Issue," I think, in and of itself, shows a considerable amount of sensitivity.

It is not only a neglected issue, it is a misunderstood issue. It is also an issue in which there is a lack of uniformity in dealing with the problem, which also compounds the problem for all of us as we begin to pursue remedies and approaches to solution.

Our view in Pennsylvania is that despite the longstanding provisions of our statute protecting persons against religious discrimination, such provisions are not fully utilized by the victims of such practices when compared with other areas of our jurisdiction such as sex, race, handi-

cap, and some other new areas that we are dealing with. There are many reasons for this, some of which I will get into later.

The Pennsylvania Human Relations Commission is the official State agency in the Commonwealth of Pennsylvania with law enforcement authority for identifying and eliminating unlawful discrimination. Our commission not only deals with employment discrimination but housing, public accommodations, as well as education. And as such, has the authority with respect to race, sex, ancestry, national origin, religious creed, handicap, and disability as well.

As we look at and review our approach in dealing with unlawful discrimination in the area of religion, an employer in Pennsylvania is prohibited from refusing to bar or to employ an individual on the basis of religion or to discriminate against an individual with respect to compensation terms, conditions, or privileges of employment. Also, labor organizations and employment agencies are prohibited from either excluding persons from membership or in some way discriminating in the referral. That's in the broad section of the statute.

We also have another section that deals with public employment and religious observance under section 51: religious observance, public employees.

With regard to religious observance the law says that the State or any political subdivision is prohibited from preventing, disqualifying, or in any way discriminating against a person because of any belief or attempt on their part to observe their religious Sabbath. Also, the law goes on to say that the only exception would be in cases of an emergency where there is justification shown that such individuals could not be or an employer could not utilize or perform his business without having such individual there.

We also process the complaints against private employers as well. As you may know—and one of the speakers earlier today commented—in Pennsylvania there is an attempt now being made to amend our State statute in this area because the Sunday blue laws were declared unconstitutional. In Pennsylvania many of our employers were closed on Sunday primarily because of the laws of the State which required businesses to be closed.

Not long ago, there was a Supreme Court decision which indicated that that law was unconstitutional. Now, there is a move afoot to amend our statute so as to provide similar provisions of religious observance—private employees—as we do in the State for public employees.

With respect to the filing of complaints, it should be pointed out that while filing formal complaints with our commission has greatly increased in the last 22 years of our experience, complaints of religious discrimination have remained relatively low, ranging from 25 to 38 cases per year in recent years.

In the fiscal year ending June 30, 1978, out of the 18,822 formal complaints filed with our commission over the year, only 454 or 2 percent of the complaints were filed on the basis of religious discrimination. As of February 28, 1979, an additional 17 religious complaints were filed during this fiscal year.

The overwhelming number of religious discrimination complaints have been filed in the area of employment—400—as compared to 27 in housing, 24 in public accommodations, and 5 in education.

The commission has gone to public hearings in several cases involving these kinds of problems, but we do not feel that the number of religious discrimination complaints filed with our agency is an accurate reflection though of the degree to which discrimination is occurring against persons in Pennsylvania on the basis of religion.

Our experience suggests that there are many aggrieved individuals who are inhibited from filing complaints of discrimination on the basis of religious creed; not the least of which are, one, a lack of knowledge of the law and their rights under the law; two, fewer organizations that at the local level call attention to the problems and little support to victims as a civil rights entitlement.

I think it is important to point out that many religious organizations that are involved now in the civil rights field are not necessarily set up to deal with discrimination on the basis of religion as a civil rights entitlement. For example, we have a lot of religious organizations having social action committees that deal with race discrimination, but there are very few organizations in our State that are set up solely and exclusively to deal with religious discrimination, even though religious discrimination is happening to their own members. The notable exception, of course, is Jewish organizations that have long had a history of fighting religious discrimination against their members. One of the things you will see from the complaints that I identify is that over half of our 454 complaints are from Jews who have been victims of discrimination of some kind or another.

I think this relates directly to organizations that have activities that are pointing out the problem and supporting persons who have in some way been denied their rights.

In addition, we found that there is fear or concern for calling attention to personal religious beliefs in the workplace where such religious beliefs or observances are not commonly known by everyone concerned.

There is difficulty in proving discrimination in certain types of religious cases, thus perpetuating the feeling that the results to be achieved may not justify the effort that has to go into it, and in some instances, the lack of success.

Roughly, 33 percent of the cases that are filed we are able to find remedy in terms of getting backpay or whatever for an individual. There are some difficult issues that arise, such issues as undue hardship, business necessity, and a variety of other kinds of reasonable accommodations. Employers hide behind these kinds of reasons as to why, and the agency has to then prove that this is not the case in order to remedy some of these practices.

Also, there is an absence of clear precedents and concise body of law establishing legal precedence in the area of employment discrimination cases involving religion. There is ambiguity in the law, as has been discussed earlier, all of which create a certain amount of problems.

In addition, traditional methods of case processing have sometimes proven inadequate for establishing class discrimination in religious cases. In some instances it's the difficulty of identifying who is the protected class—that is a problem—and thereby limiting the effective class based relief that we pursue in sex discrimination, in race discrimination, and so forth. As a result we have found that in dealing with religious discrimination, sometimes we have to use different approaches, different statistics, go out in different ways to deal with it.

Forty-five percent of our cases are based on dismissal and in the 400 religious discrimination cases in employment mentioned earlier, 45 percent or 180 are based on dismissals from employment. One hundred twenty-five are based on terms and conditions of employment, and the overwhelming number in that category relate to religious observance and the fact that employers, in some instances, will blatantly not permit any time off at all, ranging to other factors such as your having to take your annual leave or having to take compensatory time or, in some instances, take time off without pay. In many of the more blatant cases, obviously through negotiation and so forth, we can secure the backpay and a change in policy so that in the future it will not, hopefully, reoccur.

However, there is another area that I think we have only skirted around, that there should be some attention given to. Only 47 complaints have been filed in the 22-1/2 years on the basis of refusal to hire and, therein we feel is a very significant area that needs to be dealt with.

There are many reasons why complainants do not file complaints in the area of refusal to hire. Primarily though, because they may not know to what extent their religion plays a part.

Whether it is their name, whether it is a variety of other kinds of methods that employers have to identify their religion, whether it is questions like "Will you be able to work in shift?" Whether it is—there are many methods that are used to screen out applicants for employment thereby limiting the number of persons being employed within a work force in the first place.

Another area that I would like to refine a little bit deals with the kind of employment that is offered.

We have recently gotten involved with discrimination in the executive suite: the professional executive, top-level officials, and managers within corporations. We find that particularly in that area a great deal of discrimination is taking place, but it is so sophisticated and it is so subtle that it is extremely difficult to deal with.

Recently—and I say "recently," it's been 2 years ago, now—the Philadelphia chapter of the American Jewish Committee filed a complaint with our Commission against an insurance company in Philadelphia, charging the company with religious discrimination as it relates to Jews and highly professional, executive official managers' positions within the corporation.

One of the things that we first found out was that there is not much data on a pattern and practice discrimination in regard to religion. We first sought information from EEOC and several sources and we found

that there had not been at that time, in '75 when the complaint was originally filed, that there had not been the kind of data collection that is necessary in order to deal with pattern discrimination cases.

We, therefore, had to begin to approach the problem ourselves and, as a result of a successful conciliation agreement that involved goals and timetables on the part of the insurance company, in November 1977 the American Jewish Committee issued a press release in which they hailed the agreement that our commission had established with this insurance company as being a precedent-setting agreement which included goals and timetables, affirmative action efforts, recruitment training, and a variety of other efforts that the company was to make. And in looking at the first year's report, they pointed out that two Jews had joined top level executive managers and officers positions, that five more had been employed at the upper level of administrative positions, and finally, a significant portion of the special training program had been set up for talented, nonmanagerial personnel so as to bring more into the corporation.

The goal that was set for a 3-year period in the top-level executive position was 5.3 percent. In the other category, in the second year they had moved to a 12 percent in their employment.

But one of the things that I think is significant is that there has been very little organized enforcement effort dealing with that kind of affirmative action. What kind of goals should be established? What is going to be your data base? We had to rely a great deal on information that we had from a number of sources, including the American Jewish Committee. We have some statistics, while other information came from the schools and colleges.

There are areas that you have under consideration, such as housing, correctional institutions, and places of public accommodation. All, I think, are areas where additional inquiry and study need to be made.

We have done some things with the correctional institutions in Pennsylvania. I would like to be able to share with you some documents that deal with the rights of prisoners in terms of their religious rights and so forth that are currently being implemented. This does not mean, though, in Pennsylvania we are not having problems. All the way from the food, its preparation, and how such can violate the religious beliefs of certain prisoners, and not only Jews, but Muslims and other areas.

We also have problems in terms of the kinds of religious services that can be provided and opportunities that can be provided to inmates.

These are certain areas where we think a great deal more attention has to be given. I think that in some instances, though, we made the problem too difficult. We have tried to hide behind the factor of undue hardship and we now are hiding behind a union agreement. When we found that the union agreement consummated between the company and the union perpetuated discrimination, we would not allow that union agreement to prevent blacks from transferring from one department to another, or women who were segregated in various departments, we would not allow those union agreements to stand in their way.

Now, our courts are trying to limit—to say that the rights of individuals have somehow been taken away, or at least they have been altered by the union agreeing to a discriminatory agreement that excludes certain opportunities for religious persons, persons to practice their religious beliefs.

We think that that is absurd and that there ought to be a very strong effort made to begin to deal with these kinds of problems.

Thank you.

COMMISSIONER SALTZMAN. Thank you, Mr. Floyd.

Did you indicate that you had additional documents you wanted to submit?

MR. FLOYD. Well, particularly in the area of our bureau of corrections which has established rights for prisoners and so forth.

COMMISSIONER SALTZMAN. If you will give them to one of our staff members, without objection, they will be entered into the record.

Thank you, sir.

Mr. Waldon.

STATEMENT OF ALTON R. WALDON, DEPUTY COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS

MR. WALDON. Commissioner Saltzman, Dr. Flemming, Commissioners, distinguished co-panelists, Kahil Gibran, my favorite poet philosopher, in his masterpiece *The Prophet*, when speaking to friendship, stated, "Your friend is your need's answer."

We, who are in the area of human rights, are friends to the downtrodden, to the politically impotent, to the aged and forgotten, to the recent immigrant to our nation's shores, to those of color who have been here for centuries and who are yet denied full citizenship in America. We are their friends because the needs that they have, regrettably, have not been nor can be answered many times in any other forum than that of the human rights process. We are the friends of these disadvantaged people. Through our professional discipline, dedication, and inclination we have developed expertise in knowledge that allows us to address their problems and, hopefully, redress the enigmatic dilemmas they oftentimes face.

I ask you, would it be possible for a person who seeks an apartment and is denied such because of sex discrimination too have her need answered without those of us who are of the human rights discipline? Would it be possible for someone who is wheelchair-bound and desires a furthering of his or her education, but is unable to enter into the halls of learning to have the question answered "Why is this building not accessible to me?" Without you and I, who are human rights specialists?

I ask, would it be possible for the native American who is perhaps the most disparately impacted by racism and its byproducts, prejudice and discrimination, to aspire to equal treatment under the law, if it were not for the Equal Employment Opportunity Commission, State divisions of human rights and municipal agencies which are dutybound to fight for those who are victims of discrimination?

There might be an answer, but it certainly could not be so quickly responded to, addressed, and resolved without the human rights agencies and without the deep concern of those of us who are the professionals in this more important than ever area of American society.

I am prepared today to speak to the provisions of 296.10 of the New York State Human Rights Law, where it is stated that "it is an unlawful, discriminatory practice for any employer to prohibit or discriminate against any person because of his observance of Sabbath or other holy day in accordance with the requirements of his religion."

Section 296.10 was originally limited to public employees. The statute was extended to all employees in 1971. The statement of legislative purpose adopted in 1967, as a preamble to this law, states that the statute was enacted to clarify and insure the rights of an employee to observe the Sabbath and holy days of his religion.

The statute, like the human rights law itself, is to be construed liberally. Under this law, employees are entitled to unpaid time off for religious observance, subject to exceptions for emergencies, for indispensable employees, or positions dealing with health and safety or positions where the employee's presence is regularly essential.

Another exception would be if an employer can establish that undue economic hardship would result because of accommodation of Sabbath observance.

In *State Division of Human Rights v. Carnation Company*, the New York Court of Appeals defined undue economic hardship as a palpable increase in cost or risk to industrial peace. The burden of proof would be on the employer to establish the evidence of this hardship. However, because of the variability of the employment situation, reasonable accomodation cannot be easily defined. A small office or store would have different problems meeting the needs of its employees than a large concern whose terms and conditions of employment are negotiated with one or more labor organizations and which might operate on an around-the-clock basis.

It might be helpful for me to share with you some statistical indices of what's been going on in New York State regarding religious discrimination.

During the 7-year period from January 1972 through December 1978, the State division of human rights received 1,216 complaints alleging unlawful discrimination on the basis of creed. Approximately 87 percent of these cases related to employment, 5 percent each to the areas of housing and public accommodation, and only 3 percent concerned education and all other areas of division jurisdiction combined.

The caseload of religious discrimination complaints comprised 3.2 percent of the division's total caseload of 37,445 during that 7-year period. The range of this percentage varied only slightly from year to year, from a low of 2.0 percent in 1977, to a high of 4.1 percent in 1973, and again in 1976.

Approximately 55 percent of the complainants filing religious discrimination charges with the division in recent years were Jewish, 10 percent were Seventh-Day Adventists or Jehovah's Witnesses, 12 percent belonged to various Protestant churches, 6 percent were Roman

Catholic, and 4 percent were members of Islamic sects. The remaining 13 percent were distributed among a wide variety of religious groups and also included persons who charged discrimination on the basis of atheism or nonmembership in particular religious groups.

The rate of beneficial redress to complainants which includes cases successfully conciliated—those where the outcome of public hearings favored the complainant and—those cases withdrawn with reported benefits was 23.0 percent.

The protection extended to Sabbath observance is just as germane to our human rights law as that extended to race, sex, disability, age, marital status, or national origin. We, therefore, intend to carry out the statutory mandate to protect the interests of individuals who observe a particular day as a requirement of their religion.

My conversations with Herb Wheeless in preparation for coming here today—he mentioned the fact that there is a concern regarding prisoners' rights and discrimination vis-a-vis prisoners indicated that should be addressed during this consultation.

Except for very limited areas in regard to licensure and employment of ex-offenders, under article 23(a) of the New York State Correction Law and 160.50 of the Criminal Procedure Law, our division of human rights is specifically precluded from addressing the needs of prisoners. That is, their needs regarding acts of brutality by criminal justice personnel which could be included, theoretically, under the umbrella of human rights activity. However, my conversations with Herb prompted me to look into this area of concern.

Consequently, I contacted David Rothenberg the executive director of the Fortune Society, which is an organization of ex-convicts and other interested persons in the New York metropolitan area, which was founded to address the needs of those who are, who have been, or who may become convicted criminals and/or prisoners.

Dave Rothenberg shared with me some of the bottom line concerns of the Fortune Society. I could speak to some outstanding cases in New York State, for example, *Sostre v. McGinnis* or the later case which distinguished the 1967 matter, *Sostre v. Rockefeller.* These cases allowed the plaintiff to have redress from actions of the New York State Department of Corrections which the court basically held were cruel and unusual punishment, because Sostre articulated religious and political beliefs which the correction authorities found difficult to accept.

Rather than tell of the past egregious wrongs which were perpetrated against Sostre, a practicing Black Muslin, I will briefly share with you the concern revealed to me by members of the Fortune Society.

The Rockefeller drug law is a law which requires mandatory imprisonment for activities regarding certain quantities of dangerous drugs. There is no latitude afforded a judge if the person is a first-time offender or, if in the opinion of the probation officer, the person convicted is not in any form or fashion a threat to society. Mandatory sentencing is the watchword.

One thousand eight hundred people are presently incarcerated in New York State under this particular statute. The media has spoken out against the wrongs of this statute. Those who support the Fortune

Society have spoken out against the wrongs of the statute. Hopefully, the legislators of the State of New York will soon hear the pain and suffering resulting from this too severe penalty, incarceration for life of persons who are not the hard-core drug traffickers for profit.

This is not an area where the New York State Division of Human Rights can involve itself, jurisdictionally, but it is an area where I, in my official capacity and as a private citizen—

VICE CHAIRMAN HORN. Excuse me. You said incarceration for life on first offense?

MR. WALDON. First offense.

VICE CHAIRMAN HORN. First offense is life and this is if he is a pusher?

MR. WALDON. If you are accused of selling a drug—and there is a possession preamble—if you have a certain amount, the presumption is that you are possessing it for sale; the mandatory required sentencing by the judge is life imprisonment.

COMMISSIONER RUIZ. Did you say 15 to life?

VICE CHAIRMAN HORN. I heard him say life.

MR. WALDON. Life imprisonment, the automatic binder is that you must do at least 15 years before you are eligible in New York State for parole.

VICE CHAIRMAN HORN. So it isn't a determination sentence. It's life with a minimum of 15, subject to parole. Well, that's what I wanted to get straight for the record.

MR. WALDON. But in other jurisdictions, subject to parole may mean before the 15-year period is served you can come out. As I understand it, in New York State you must do at least 15 years.

COMMISSIONER RUIZ. That's the minimum?

MR. WALDON. That's right, unless clemency is given by Governor Carey, in his wisdom. This is not an area where the New York State Division of Human Rights can involve itself jurisdictionally, but it is an area where I, in my official capacity and as a private citizen, feel morally bound to become involved.

The cost of housing a prisoner in the State of New York is in excess of $26,000 per year, I am advised. It seems to me that a halfway house or rehabilitation program for those who have been convicted of involvement with drugs is much less costly and is the far better option than the one presently enforced.

I am in no way advocating reducing the penalty for those who, by design, criminal propensity are the predators of this society via drugs, but there are many other people, regrettably, who have been ensnared by this law, who are merely supporting their habit or venturing into unknown waters or have been the girlfriend of or the wife of a drug trafficker, and they are going down the tubes because of that relationship and not by their personal criminal design.

I don't know if any of this today can impact the Legislature of New York State, but I would hope that you would recognize that there is a need to reconsider the laws that are on the books, regardless of jurisdiction.

If these laws are so severely punitive as to result in cruel and unusual punishment instead of effective law enforcement procedures, I would hope that those of us who are in the professional class of the human rights community would prevail upon those governmental officials in positions to change our laws within our respective jurisdictions so that the egregious wrongs of laws like the Rockefeller statute would soon be redressed.

A person who goes to prison or who becomes a convict still has a heartbeat, still has creature comfort needs, still needs the companionship of persons who care. I would like to think that we are friendly people and would befriend those, as did the good Samaritan, who are strangers to us.

The convicts and prisoners of American society, in my opinion, if they are ever to become productive law-abiding citizens, must have their needs answered. Are you willing to make a commitment to them? I am.

Thank you.

COMMISSIONER SALTZMAN. Commissioner Ruiz, would you like to address questions?

COMMISSIONER RUIZ. Yes.

You mentioned a Mennonite—

MR. PELOSO. Yes.

COMMISSIONER RUIZ. —in your dissertation. I, personally, do not know too much about that religious faith. Are they self-contained, economically?

MR. PELOSO. Not in all cases. The case that brought that comment in the discussion that I had here today—

COMMISSIONER RUIZ. Are they self-contained socially?

MR. PELOSO. Not in all cases, generally. In this particular instance, the family occupied a house that had all the American plumbing facilities. However, due to the tenets of their religion they could not use those. Therefore, they built an outhouse and that was the cause of the problem in the community.

COMMISSIONER RUIZ. Now, let's assume that there is a Mennonite location where we have Mennonites in a large community. Is that community self-contained, more or less, economically?

MR. PELOSO. Yes, that would be. There are communities like that in the Mennonite Church. They are not entirely that way, though.

COMMISSIONER RUIZ. Now, are there any particular State laws, special laws that allow for their religious practice—public schools, things like that?

MR. PELOSO. This is another area where certain religious groups, Mennonites included, run into problems as far as education of the children are concerned. Where they do not believe in educating the children in the public schools, a tenet of their religion, therefore, in many cases, if the State presses charges, then they have no choice but to leave the State.

That has been a continuing problem with many of the minority religious groups that do have very strict laws within their religion.

COMMISSIONER RUIZ. Now, with relation to this continuing problem to which you are making reference, how is that manifested in the sense that—how is it accommodated for by the State government?

MR. PELOSO. If there are teachers in the Mennonite or whatever the community is that are capable of teaching the things that are required in public school, in most cases nothing happens.

COMMISSIONER RUIZ. In other words, there is really no type of persecution from the State with relation to this particular type of a situation?

MR. PELOSO. As far as my own personal experience is concerned in Michigan, that hasn't come to my attention.

COMMISSIONER RUIZ. Outside of your personal experiences, has it come to your attention—by reading—by matters that come to your unofficially?

MR. PELOSO. Yes. In most cases outside—in all cases outside the State of Michigan. I don't recall reading anything pertaining to that problem within the State.

COMMISSIONER RUIZ. Mr. Munoz, I notice here you are a member of the International Association of Human Rights Organizations, and I notice that some of your colleagues likewise belong to that international association. Does this refer to organizations that are located outside of the United States?

MR. MUNOZ. Maybe one of my fellow panelists could answer that.

COMMISSIONER RUIZ. One of them is on the board, I believe. There, you have three board members—I would like to know the answer to that question: is it just called "international" or is it a true—

MR. FLOYD. Well, we at one time and still do, for that matter—the Canadian provinces at one time were official members. Their status at this point is somewhat up in the air. There has not been an official resolution of that, but we do have membership outside the United States.

COMMISSIONER RUIZ. Is anything being done through this international organization relative to the stand taken by the United States, Helsinki, or other places having to do with international human rights, Mr. Green?

MR. GREEN. Yes. As the Federal liaison for the organization, we have had recent discussions with the Department of State's Human Rights Division.

We have taken a close look at the Helsinki Agreement and we have suggested to our member agencies—the association, by the way, is an organization of agencies of government, not individuals, unlike some other professional organizations—we suggested to our member agencies that they attempt to look at their respective jurisdictions to see where we may be in compliance or out of compliance, our State and local governments, with the Helsinki Agreement.

The State Department has asked the international to try to gather data nationwide with respect to the States' or the country's posture on the Helsinki Agreement. We are just starting to do that.

COMMISSIONER RUIZ. Our Staff Director last week appeared before a subcommittee in the Congress concerning human rights and their international aspect and made reference to Helsinki.

I would suggest that since you have some of the members, you might call a board meeting and take a look at that to get something synchronized and started in that direction, because it is becoming very important.

MR. GREEN. We spoke to that meeting also last week.

COMMISSIONER RUIZ. You did, thank you.

COMMISSIONER SALTZMAN. Ms. Freeman.

COMMISSINER FREEMAN. I have no questions.

COMMISSIONER SALTZMAN. Chairman Flemming.

CHAIRMAN FLEMMING. I would like to pursue a little bit the issue that Mr. Floyd raised in the areas of affirmative action.

If you were here this morning and heard the testimony from Mr. Patton, Federal Contract Compliance, you will recall that he put a good deal of emphasis on affirmative action requirements in connection with this whole area of religious discrimination.

I am wondering whether any of the other States that are represented on the panel have had experience in trying to negotiate affirmative action agreements with particular employers or trying to get movement underway which would result in employers' conscientiously seeking positive ways to increase the number of persons that they have working for them and who come from certain religious groups?

MR. GREEN. The law in Connecticut requires State agencies to have affirmative action plans and our commission monitors and enforces that law.

Now, since the basic law itself prohibits discrimination upon which the affirmative laws are based in our State, that requirement passes on to the private sector: that is, that the State agencies are doing business in any way with a private firm and that private firm may be engaged in employment practices that may be in conflict with our affirmative action law. In the respective agencies, by virture of having to have a plan with our approval, we must ensure that the private sector is also in compliance; so we monitor indirectly, then, what the private sector is doing in affirmative action as we do in a primary sense with State agencies.

MR. WALDON. In New York State—

CHAIRMAN FLEMMING. Pardon me. Have you found that this particular approach has proved to be helpful in getting results?

MR. GREEN. Not so much with respect to the problems of religious discriminations. As my colleagues have all noted somewhat, we do not one, receive a lot of complaints in the area; and two, normally people don't, I don't think, file or raise the question itself. So that in the area of affirmative action application, the problem doesn't come up; that's all.

MR. PELOSO. In Michigan we have it on the basis of housing complaints alleging religious discrimination, although in the conciliation process on any complaints alleging religious discrimination, we do

attempt to work out some remedial steps that will apply to others in the class. That would be in the field of affirmative action.

CHAIRMAN FLEMMING. You would work on the development of goals and timetables and so on in the religious area as well as in the racial area.

MR. PELOSO. That's right. For instance, in the one case that I cited in the housing, that's the respondent in that situation managed a large number of apartment buildings in the metropolitan area of Detroit, and by getting a reporting system going with him that had to do with the admission of minority group people, religious minorities in particular in that situation, that we were able to effect some changes.

CHAIRMAN FLEMMING. Mr. Waldon.

MR. WALDON. In New York State we have two separate administrative acts which the Governor implemented. In the fall of '76, he implemented executive order 40, the purpose of which is to have an affirmative action program throughout all State agencies.

Naturally, incumbent in that administrative action is consideration for religious observance. We don't have any problem in terms of getting the State agencies to conform to that requirement. Once we have gotten the data in and brought them into conformance with our guidelines, the division of human rights monitors that.

And in 1977 the Governor wrote executive order 45, which deals primarily with the construction industry of the State of New York, and that's in litigation now.

But despite the fact that it is in litigation, meaning that the unions have gotten together to say that we cannot tell them to one, have a minority in their work force, a work force either in their prime contractors or subcontractors, reflective of communities in which the particular State installation is being built or the job situation is being let or whatever—I lost my train of thought—let me back up.

Okay, despite the fact that it is in litigation, last year we were able to get $5 million plus in jobs. The fact that it is in litigation they are still going along with us until the court has decided whether or not we can force them to conform. We can force them to hire a certain number of minorities. Built into that administrative action is consideration for creed. You cannot discriminate. They must be built into the work force.

CHAIRMAN FLEMMING. Is there an affirmative goal? Is there a goal as far as religious groups are concerned, goals built into the plan?

MR. WALDON. It comes under the umbrella of overall goal and timetable of the administrative action meaning—let's take a hypothetical: if it is in Rochester, and, if in Rochester there are a certain number of religious observers who are the skilled craftsmen, then they have to be considered a part of the work force, so the contractor—subcontractor would have to accommodate them within the work situation.

CHAIRMAN FLEMMING. Mr. Floyd.

MR. FLOYD. When we began the case that I identified in terms of where we negotiated goals and timetables, when we tried to begin to look into how you do it, what's the kind of experience that has been had, we found that, basically, it's as Mr. Green has pointed out; that, basically, the religious area doesn't come up a great deal and you have

to first get the attention of the employer. That is a problem and then there is the lack of admission. Well, how do I know how many people are out there of various religions and so forth in the company that I identify?

We ultimately had to say, "Well, all right, sit down and survey your work force. Ask everybody." And after that reluctance, he finally went ahead and did it, and while there was some reaction, when they found out the purpose for which it was being done, there was overall support for what was being done and it was in regard to a complaint and agreement that had been entered into with our agency. But we found that there was a great reluctance to enter into identification of persons who could benefit or who may have been excluded because of religion.

CHAIRMAN FLEMMING. I know you were dealing basically with the executive suite problem that is coming up a little later, but in the affirmative action plan was there a requirement, for example, that in recruiting that they call job openings to the attention of religious groups and that they utilize religious publications in order to call attention to job openings?

MR. FLOYD. Yes, we identified specific groups that they—with respect to that complaint I mentioned—should contact, also, the media, the Jewish newspapers as well in their recruitment efforts.

CHAIRMAN FLEMMING. Right.

Yes, Mr. Martin?

MR. MARTIN. Let me share from our situation a little bit different perspective, perhaps.

I think it is fair to say that there is no assumption in Kentucky that an affirmative action plan with goals and timetables would have the same application to religious denominations or to age groups or to handicapped groups as it would have to women and racial minorities. The country's performance in terms of goals and timetables for women and racial groups is so abominable that we have some question about the dilution of resources by adding those other coverages into all goals and timetables.

We are making significant progress in dealing with the Nation's largest coal companies in Kentucky in terms of a goal of one woman for every three men to work in the coal mines until they reach 20 percent women. But for us to come along and tell them that they should, at the same time, be dealing with goals and timetables for hiring members of the Worldwide Church of God or some other denomination, I think is unrealistic, and it is based on an assumption without basis.

We believe in the concept of different strokes for different folks and dealing with real practical problems. There has been so much paper talk and so little delivery in terms of race and sex and that we in Kentucky have not required these other coverages in goals and timetables, nor do we believe that they really lend themselves to this as is almost assumed here.

CHAIRMAN FLEMMING. How would you get at the executive suite problem, going back to Mr. Floyd's illustration where they use it for the purpose of getting at that problem.

MR. MARTIN. I don't have any trouble getting at that where religious discrimination is charged and found, but what I am talking about is trying to add in goals and timetables for coverages other than race and sex so that every employer who is covered is supposed to come in with a goal and timetable to cover every conceivable group that is in the State's coverage. This would weaken what little things the country has done for racial minorities and for women, and it seems to us in Kentucky to dissipate the effort.

CHAIRMAN FLEMMING. I can certainly see your point there, but in dealing with a specific type of situation, such as Mr. Floyd was dealing with, you might utilize this particular approach.

MR. MARTIN. To fit that situation, but not to try to pattern a remedy for all situations that are based on facts other than those in the executive suite. I have no trouble with executive suite considerations at all, and that type remedy for there. But to me, it makes no sense to establish religious goals while trying to get women hired in coal mines.

CHAIRMAN FLEMMING. Well, I gather that is the approach that Mr. Floyd has taken and his people have taken, but I don't know about Mr. Waldon and New York State.

MR. WALDON. Basically, our policy is very similar to what my colleague has described, but New York State is very different than other States because of New York City. We have such a very large Jewish population in New York City, and we have an extremely active Black Muslim population, so we are taken to task on a daily basis—you have to address our needs.

CHAIRMAN FLEMMING. Just one other area. I would like to have Mr. Floyd—or, no—Mr. Waldon mention the correctional institutions—of course, we are getting into that tomorrow and we will also have some of the witnesses tomorrow who will deal with the State experience in that area—but if any of you have had any experience in dealing with the issues of religious discrimination within the correctional institutions, I think we would be interested in hearing about it. Maybe not in detail now, but you might want to supplement your statements along that particular line.

I am not clear whether your jurisdiction extends to allegations of discrimination on the basis of religion within a correctional institution. How about that? Does, generally speaking, jurisdiction go that far?

MR. PELOSO. Yes.

MR. GREEN. Yes.

CHAIRMAN FLEMMING. How about you, Mr. Martin?

MR. MARTIN. Jails and prisons are included in our public accommodations coverage and religious discrimination is prohibited, but we haven't had cases on this. Our attorney general's office once told us that a policeman's nightstick was not a place of public accommodation. We have had cases on racial discrimination in a jail, or prison, but we have just not had the case development that some other States may have had on religious discrimination in correctional facilities.

CHAIRMAN FLEMMING. One other area that is, again, not related to employment, but a couple of you just touched on it statistically, but I

gather that you have not had a great many cases filed alleging religious discrimination in connection with admissions to educational institutions.

Somebody used a very small 1 percent or 2 percent, something of that kind, in connection with your overall statistics. Is it a fair generalization that you have had very few complaints in that particular area?

MR. MUNOZ. As far as California is concerned that is very accurate.

MR. PELOSO. True in Michigan.

MR. GREEN. I think that is generally true across the board, however, for some sociological reasons though. I believe we may be attempting to compare the scope of racial and perhaps sex discrimination with religious and it differs, the outcomes are different, really, because of the different sociocultural consideration involved and black people served who you know.

See, our agencies are probably the place to go with your problem whereas persons with religious problems will have other resources, avenues, many times turning to their group for resolution. So I think there is a different basis for comparison of our problem.

CHAIRMAN FLEMMING. Thank you.

COMMISSIONER SALTZMAN. Commissioner Horn.

VICE CHAIRMAN HORN. I am glad Mr. Martin said what he said, because I think there is confusion here about how we get at these different issues on employment discrimination.

It is one thing to talk about the executive suite. It is another thing or perhaps similar to talk about Saturday Sabbatarian rights, but I want to make very clear for the record this basic question, so we can proceed from there, and that is: do any of you gentlemen, six State agency heads, know of any affirmative action plan in your jurisdiction that is either voluntarily entered into in accordance with affirmative action policy of the State or the national government or is courtordered, that provides for underutilization statistics on a religious basis, similar to the underutilization statistics that are required in affirmative action plans that relate to protected categories: blacks, Hispanics, women, etc.? Now, does anyone know of one plan?

MR. GREEN. The guidelines that State agencies must use in Connecticut require the identification of all the protected classes under the law; that includes religious creed, that means the question has to be asked, and inquiry made of the employee, "What is your religious position?" The employee can decline to answer the question, but we feel we ought to have the question asked.

So if you get the data served, then you can have some reasonable judgment as to the employment pattern of the employer. If you don't get the data, then you can't make judgments about underutilization or overutilization. If you can't make those judgments, you can't make goals and timetable requirements.

VICE CHAIRMAN HORN. Let's take Connecticut, now. In Connecticut is your percent of declination on that question greater than or less than your percent of declination on ethnic female identification?

MR. GREEN. Considerably less, less than race or sex.

VICE CHAIRMAN HORN. You mean less want to identify?

MR. GREEN. Absolutely, yes, less identify.

VICE CHAIRMAN HORN. More people feel that is a private matter and none of the State's business?

MR. GREEN. More people say, "I won't answer the question."

VICE CHAIRMAN HORN. Do we have any idea, a fourth of the people, a third of the people, a tenth of the people?

MR. GREEN. I don't have the measurement data but most of the State employees we're talking about, because that's what the law applies to, State agencies, 90 percent of the State. Employees will say it's none of your business.

VICE CHAIRMAN HORN. 90 percent?

MR. GREEN. At least, yes.

VICE CHAIRMAN HORN. How many say, "None of your business" for being black, Hispanic, female?

MR. GREEN. The same response doesn't come, sir, because you are more readily able to identify, so you don't ask the question the same way—that's all.

VICE CHAIRMAN HORN. All right.

Well, when in reality, in the State of Connecticut there is no way that you could have any affirmative action plan under that State order that relates to underutilization for religious groups—

MR. GREEN. I don't think you could have a very good one, a very viable one.

VICE CHAIRMAN HORN. I don't think you could have any based on your answer.

MR. GREEN. I think you could have some. You could have a situation where a given agency might have a greater respones, might listen to a greater respone to the question "What is your religious position?" than another agency. But overall, I said, the vast majority, close to 90 percent of the total government employees say "no." You don't answer the question.

VICE CHAIRMAN HORN. I take it the Connecticut Commission on Human Rights and Opportunities does not gather data which gives the decline—to—respond statistics by agency, or do you?

MR. GREEN. No, we don't gather that. We don't keep that.

VICE CHAIRMAN HORN. I thought—I saw another hand up.

New York does?

MR. WALDON. Under executive order 40, the supervisor, who is to conduct the interview, is required to make a visual observation or give us this information from any other source that he or she may be able to gather.

VICE CHAIRMAN HORN. A visual observation on religion?

MR. WADON. No, and I'll clarify that. The Muslim sect wears very different dress than other blacks that would come to the work situation on many occasions, and that can be included in giving us this information.

Also, certain holidays, it is very difficult for us not to make a certain kind of assumption, anyway, at the time of Yom Kippur and other religious holiday, where, obviously, a certain percentage of—

VICE CHAIRMAN HORN. I understand all that, but what I'm getting down to are basics. The basic question is should there be assured

employment opportunities based on one's religion. We set goals at the entry and the middle management level. If you are talking about the traditional protected categories, such as blacks, Hispanics, Pilipinos, Asian Americans, American Indians, and women that Mr. Martin is talking about and that we have all been spending years worrying and trying to do something about, then at least you have some sort of data base to determine agency underutilization.

Now, are you telling me that in the State of New York you have a plan by agency that describes religious distribution across that agency and you can make judgments on underutilization?

MR. WALDON. Executive order 40 requires every area that we are covering statutorily to elicit information from the employees in the government work force which would, naturally, include creed.

VICE CHAIRMAN HORN. Now, how many nonrespondents do you have in the State of New York?

MR. WALDON. I can get Preston Israel to print all of that out for you. I will send it down to you.

VICE CHAIRMAN HORN. I would like it entered at this point in the record because, frankly, I think as I listen to the discussion we are kidding ourselves.

I am not saying we should or we shouldn't. I am just trying to find out what is the current practice, what are the operational problems of engaging in such identification.

Based on the Connecticut response, I think many people feel there is a grave individual privacy situation where it is none of the State's or the State's agents business to know what his religion—well, if that is an overwhelming attitude and you do not throw people in jail for failing to respond, you then get to the obvious question: "How do you know religious discrimination is occurring on other than a specific case-by-case individual basis?" How do you do it on a class action case across an agency unless you get down to the specifics of executive suite discrimination?

Now, perhaps some of you were here this morning and you heard the question I raised because the U.S. census does not collect information on religion. It was the unanimous view of the two government witnesses and the other witnesses that the U.S. census should not collect information as to one's religion. Is there anybody on this panel that disagrees with that view?

Yes, Mr. Green?

MR. GREEN. Yes, I do. I think the government, as any of us, could ask the question. We can ask you the question; you can decline to answer. Your declining to answer, I think, places the government or any other organization wishing to correct for a certain past practice—and that is my definition of affirmative action—to not have that information places the government in a position where it can not help to change things very much.

I don't think that's invasion. It's only invasion if you are forced to answer the question, and it's further worse invasion if your answer is somehow used against you.

But to ask the question gives you the freedom not to answer, I don't see the problem. And if we don't hold to that view—I found the government's comments this morning very interesting—three people—because I turned to Mr. Floyd, I said, "I wonder what they would do about the question we all put to black people and other groups, we ask other people the question very readily?"

I suspect they do too for the same identical purpose. So there seems to be on their part, as I listen to that, a bit of inconsistency. We do ask those questions of other people in other areas. HEW requires it, 11246, if you register for college or university in this country today, you are asked the question.

VICE CHAIRMAN HORN. But as you suggest, and you are right, you don't have to respond.

MR. GREEN. That's all the Census Bureau can do, sir, is ask the question.

VICE CHAIRMAN HORN. I am just carrying in my pocket my own university statistics on this and I notice that there is a 25 percent nonresponse rate among the student body and the question then comes: is that spread evenly?

You assume all groups—the 75 percent who have reported—provide a fair reflection, but maybe you do not have such a reflection. Maybe one group feels some sense of "you're not going to find out what I am" more than others, and so you really are operating with imperfect data on the voluntary basis.

MR. GREEN. That's right.

VICE CHAIRMAN HORN. Let me ask just one last question for clarification, Mr. Waldon.

I listened to the comments on what you described as the Rockefeller drug law and maybe I missed the linkage.

How is that related to religious discrimination?

MR. WALDON. I don't recall making the comment.

VICE CHAIRMAN HORN. Well, you were objecting to the sentences imposed by the Rockefeller drug laws. I recall you said 1,800 people have been put into the New York prisons, originally, for life. I might have missed the linkage, but I was wondering—I just want to make sure I am not forgetting something—is that at all related to religious discrimination?

MR. WALDON. No.

VICE CHAIRMAN HORN. Thank you very much.

COMMISSIONER SALTZMAN. Gentlemen, we heard from the grass roots today, I think, and we are very appreciative of your contribution this afternoon. Thank you so much.

Mr. Chairman?

CHAIRMAN FLEMMING. Thank you, Commissioner Saltzman.

I am going to ask Commissioner Ruiz if he will introduce the next panel and conduct the discussion with the members of that panel.

COMMISSIONER RUIZ. Yes. Religious discrimination which constitutionally excludes one from climbing the economic ladder to the executive suite was even mentioned in the prior panel and a lot of us are anxious to get to that.

First, the panelists: Ira Gissen, Seymour Samet, Michael Schwartz, Charles A. Reams, Jr.

We will start out with Mr. Gissen.

Mr. Gissen is the director of the National Discrimination Department of the Anti-Defamation League of B'nai B'rith. He has worked previously in the Federal civil rights programs of the Defense Department, the Community Relations Service of the Justice Department, and has been the director of the Northeastern Regional Fair Housing Office within the Department of Housing and Urban Development. He received a bachelor's degree at the University of Kansas and a master's degree from New York University Center for Human Relation Studies.

MR. GISSEN.

STATEMENT OF IRA GISSEN, DIRECTOR, NATIONAL DISCRIMINATION DEPARTMENT, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

MR. GISSEN. Mr. Chairman, Commissioners, you have received a copy of my statement. I would like to take a few minutes simply to touch upon the highlights of it.

Religious discrimination in employmment in the executive suite is the end product of many causes. In the few minutes allocated to me, I shall attempt to identify some of the root causes, explain why they continue to flourish, and suggest how they can be corrected.

This problem appears to be intransigent because of the indifference of employers. But it is also true that employers are aided and abetted by the monstrous failure of most Federal civil rights agencies to execute the mandates assigned to them by the Congress of the United States and by the President.

One year after the late President John F. Kennedy established the President's Committee on Equal Employment Opportunity, the head of that committee sent a memorandum to George Reedy, in which Hobart Taylor recommended that they do some work on anti-Semitism.

Sixteen years later Weldon Rougeau, the Director of Office of Federal Contract Compliance Programs, informed us that no progress had been made.

Although the failures of Contract Compliance are too numerous to catalogue here, the blame is not theirs alone. Many corporate executives began their careers with small companies, companies whose life is dependent upon access to the credit market. In August of 1976, the Board of Governors of the Federal Reserve System held hearings on regulations for the Equal Credit Opportunity Act. In response to the question "Does the act prohibit religious discrimination?" the Assistant Attorney General for Civil Rights of the United States Department of Justice replied, "I don't know." The fact of the matter is that the Equal Credit Opportunity Act does prohibit religious discrimination, but the Assistant Attorney General did not know.

On March 14, 1979, the Assistant Attorney General for Civil Rights testified before the Subcommittee on Civil and Constitutional Rights of the Committee of the Judiciary of the House concerning the Civil Rights Division's authorization. Nowhere in his testimony of 17 pages

did he mention religious discrimination or anti-Semitism. The consistency from Attorney General to Attorney General is altogether remarkable.

Many corporate leaders began acquiring experience for their future corporate careers by working for the government. Such opportunities are limited for Jews because of anti-Jewish employment discrimination in governmental agencies. It is a matter of fact and a matter of indisputable record that the Employment Section of the Civil Rights Division of the United States Department of Justice has never in its history represented a Jewish victim of government employement discrimination, despite the fact that United States Equal Employment Opportunity Commission has investigated such cases, made determinations of probable cause, and as required by Federal statute where conciliation failed, they referred such cases to the Department of Justice

In recent months, the Anti-Defamation League has addressed its attention to discrimination cases involving the government of the State of North Dakota, the government of the City of St. Louis, and the government of the State of New Jersey.

Without exception, we have been told by the Department of Justice that the reason they do not represent Jews is because the body count is not high enough. To my way of thinking, such reasoning is the very antithesis of minority protection. If our body count were high, we would not be a minority group.

I have asked the Department of Justice "What is your numerical standard, is it an absolute number or a proportion, and if it is a proportion, a proportion of what?" I have yet to get an answer to that question. If they will not represent two Jews in New Jersey, why won't they represent one Jew in North Dakota? What is the statistical base?

Similarly, the Law Enforcement Assistance Administration of the United States Department of Justice has refused to initiate any action against local government recipients who have been determined to be practing anti-Semitism by the United States Equal Opportunities Commission.

To put it bluntly, when we have gone to the Law Enforcement Assistance Administration and said to them "What if anything, are you doing with respect to these local governments who are receiving yours funds and are discriminating against Jews in employment?" The LEAA has slammed the door in our face.

Ten years ago the Social Security Administration conducted a voluntary, anonymous survey of the employment of Jews and Catholics in the executive suites of the major insurance companies in the United States who were Medicare underwriters. They collected priceless data which they promptly filed and forgot. It was necessary for the Anti-Defamation League to utilize the Freedom of Information Act to unearth that information.

The reason that it was buried became apparent. One of the companies about which we had critical information was Nationwide Mutual Insurance Company of Columbus, Ohio.

Ten years ago a survey was conducted among its top 70 executives. They employed a grand total of one Jew. We determined from sources

within the company that 30 years ago, among their top 70 officials, they employed one Jew. We have ascertained that today they also employ one Jew among their top 70 officials and in no case is it the same Jew. That is a remarkably consistent example of tokenism.

The Social Security Administration study has had no effect, simply because it has been buried and, yet, that case is not unique.

Last year the Office of Federal Contract Compliance Programs, in cooperation with the United States Department of Interior, conducted a major investigation of anti-Semitism in employment in the Standard Oil Company of California. We obtained a copy of the investigatory report.

The Office of Federal Contract Compliance Programs and the Department of Interior had been accused by a Jewish former employee of SOCAL that they were derelict in the enforcement of the prohibition against religious discrimination in employment.

The investigatory report was an extraordinary work of fiction, a complete whitewash which deliberately ignored or misrepresented the facts and grossly distorted the statistics. It produced a relatively clean bill of health for the corporation. Why? Was it to cover up anti-Semitism, or was it to exonerate the Office of Federal Contract Compliance Programs from the charge of malfeasance?

Ladies and gentlemen vast areas of enterprise in American life are conspicuous by the absence of Jews among the corporate leaders. For example, contrary to the historic stereotype of the Jewish banker, Jews are conspicuous by their absence in the field of investment banking, and they are conspicuous by their absence in the commercial airlines, automobile manufacturing, the shipping industry, mineral extractions, steel and aluminum manufacturing and the list goes on and on. The Jew who seeks a corporate career and aspires to the executive suite faces a path filled with pitfalls of discrimination. For example, classic discrimination occurs when a corporate recruiter avoids going where the Jews are or where he uses the old-boy system to avoid interviewing them.

The Jews who aspires to ascend the corporate ladder frequently bangs his head against the Jewish ceiling. You can be promoted so high and no higher if you are of the wrong religion. And indeed, the stereotype job assignment continues to be a very live, very real factor in American corporate life today where it is assumed that Jews can be assigned to the research department because they are supposedly smart, or they can be assigned to the accounting department because they are supposedly good with figures or they could be assigned to research because they like to study things. But outside of those traditional stereotyped areas, the Jews are few and far between as you go up to the corporate ladder.

We continue to be confronted by insensitivity to employee's religious observance requirements. I won't dwell on this because it has been discussed by others, but it is a source of continuing amazement to me when I study a multinational, multibillion dollar corporation and I ask them "What is your policy on religious observance for your employees?" And they tell me they don't have any and I say, "You mean you leave it up to individual supervisors?" And they say, "That's right."

Another major pitfall is the maintenance of corporate memberships in discriminatory clubs. It is a fact of industrial history of the United States that the United States Steel Corporation was organized on a private golf course outside of Pittsburgh. In my judgment, contractors who subvent memberships in discriminatory clubs should be disqualified for maintaining segregated facilities. The Internal Revenue Service has recognized this problem, and the tax code now provides that no club can maintain tax exempt status if it discriminates.

It is a marvelous regulation, but it may as well not exist because the IRS refuses to enforce it, unless the discriminatory language appears in the constitution and bylaws of the club.

If it is simply the practice to keep all blacks out, to keep all Spanish Americans out, to exclude women, to exclude Jews, to exclude Catholics, but it is not in writing, the IRS won't do anything about it. What makes this situation even more unbelievable is the fact that they don't even audit to find out if it exists in writing. They will only deal with it if they chance upon it, if they come across it accidentally in the course of an audit. They will not look for it specifically. It may as well not exist.

All of these factors which I have described coalesce into a vicious cycle: the executive suite discriminates againse Jews. Jews know that. Therefore, they are discouraged from seeking career ladders that lead to the executive suite.

Consequently, few of them apply for jobs that would serve as stepping stones toward the executive suite, and in further consequence, industry officials erroneously conclude that Jews are not really interested in such jobs. What recommendations might one make when confronted by this problem?

Certainly, the time has long been at hand when the President of the United States ought to convene a White House conference on religious discrimination. Certainly, there is evidence enough dating back to the President's Committee On Equal Employment Opportunity up through this very day to indicate that the President of the United States must order enforcement of these laws and regulations which have been so long and so sadly neglected.

It is altogether appropriate for the President to establish a cabinet-level monitoring committee chaired by the Vice President. This type of action has been taken before, in the past, with similar problems.

And the time is at hand for the General Accounting Office to report on the enforcement of the prohibition against religious discrimination in employment.

We would call upon the Congress of the United States to convene hearings to which they would invite the heads of all agencies responsible for equal employment opportunity and then develop appropriate legislation to make up for these extraordinarily persistent deficiencies.

Mr. Chairman and Commissioners, we do not merely want to criticize, we want to help correct the present inequities in employment opportunities.

We in the Anti-Defamation League of B'nai B'rith stand ready to assist both industry and government in the effort to eliminate these discriminatory employment practices.

Thank you.

COMMISSIONER RUIZ. Thank you very much, sir.

Now, we will proceed with Mr. Seymour Samet. Mr. Samet is the national director of the Domestics Affairs Department of the American Jewish Committee [AJC]. He has worked as director of the southeast area region for the American Jewish Committee, executive director of the Community Relations Board of Dade County, Florida, and chief intergroup relations officer for the Justice Department's Community Relations Service. He has received a bachelors degree from New Jersey State University and a masters degree from the University of Miami.

You may proceed, sir.

STATEMENT OF SEYMOUR SAMET, NATIONAL DIRECTOR, DOMESTIC AFFAIRS DEPARTMENT, AMERICAN JEWISH COMMITTEE

MR. SAMET. Thank you.

I must say that unlike some of the others who have appeared before you, I am not delighted to be here. It is never a pleasure to expose the warts that appear on the backside of our society, and I am afraid that is really what we are responsible for doing in these hearings and which you are responsible for reacting to.

I told a member of your staff not too long ago, just before this meeting, that I have just returned from the West Coast, from San Diego. Before leaving New York I was asked by a member of my staff to give his regards to his mother. He noted that his father had just passed away. His mother decided she did not want to live alone in New York so she had gone to San Diego.

I asked, "What is she going to be doing there?"

He said, "She's going to be the west coast distributor of guilt."

My purpose here is not to point the finger of guilt, but to report on what are some of the issues that are of concern to my organization, the oldest human relations organization in America concerned with the civil and religious rights of minority groups.

First, I believe it might be useful for us to have some kind of a definition of what we are talking about. In general terms, I think that when we talk about executive suite and social club discrimination we are talking about the unequal treatment of equals.

The *Encyclopedia Of Social Sciences* makes reference to this in a definition which they refer to the alteration of the competitive power of those presumed to possess a competitive status.

I think it would be useful for me to identify what it is that the American Jewish Committee believes, so that there will be no concern about the implications of my further comments.

We have stated publicly and in writing the following:

The American Jewish Committee does not believe that executive suite discrimination can be solved by a quota system of hiring, promoting, or upgrading Jews or other minority group members in numbers

proportionate to their share in the population or in any other fixed ratio. The committee does believe, however, that a reappraisal of many company practices and a change of attitude towards the hiring of minorities in management posts is called for in the U.S. business community.

Some facts: Last month an American Jewish Committee sampling of 35 presidents of *Fortune's* 500 corporations indicated that they agreed that it was important to expand opportunities for Jewish executive employment opportunities. They recognized that there was a problem.

Our research reveals that among 1,200 of the largest industrial and financial corporations only a few have more than one or two top executives who are Jewish.

Eight years ago, 10 percent of all colleges graduates were Jewish, but less than 1 percent of the corporation executives were of that religion. In last year's study by Slavin and Pratt, those figures remain the same. In addition, they pointed out that corporation recruitment, a prime source of executive talent, continues to be primarily on campuses with very small Jewish student bodies.

That 1978 survey noted in its conclusion, and I quote, "It is highly ironic that in the age of affirmative action Jews, who have long been victims of discrimination, are now counted in the white majority." The studies all show that Jewish and other minority youth believe, quite correctly, that big business discriminates against them.

Some of the most blatant anti-Jewish discrimination exists in large New York City banks. I would like to expand upon some of the comments of Mr. Gissen.

A survey last year which was made by the New York State—then New York State Attorney General Lefkowitz showed the following:

One, there was not one Jew among the 22 officers who are also directors of seven of the largest New York area banks.

Two, only 3 of the top 86 officers, meaning the executive vice presidents and above, were Jewish.

Three, of 345 senior officers, including senior vice presidents, there were a total of only 15 Jews.

Four, and this is so despite the fact that 50 percent of the college graduates in New YOrk City are Jewish, And as you know, this is the prime requirement for those recruited for such employment.

There has been little change since the American Jewish Committee' 1967 study titled "Patterns of Exclusion from the Executive Suite in Commercial Banking." At that time Jews were 1 percent of the executives of the Nation's leading commercial banks.

The American Jewish Committee's sponsored study at Harvard University School of Business Administration indicated that among business executives, 76.3 percent felt that Jewish religious background was a hindrance to promotion of executives.

In the area of social discrimination, it is our belief that the exclusion of entire groups from club membership, without regard to individual merit, is to impute group inferiority.

This, as you know, is a concept repugnant to a democratic society and one which is well calculated to keep Jews, among others, "in their place," and that place is outside of the executive suite.

The ACJ's-sponsored studies in this area indicate that business clubs, social clubs, country clubs, university clubs, athletic clubs, all of these are, in fact, used as extentions of the corporation. These studies also show that acceptance by the best clubs is directly correlated to employment by and promotability within the major corporations.

One cannot merely talk about the social clubs as being extensions of the living room. They are much more than that.

We would recommend to the Commission that the following might be considered as appropriate actions either by the Commission or by other governmental agencies with which you have considerable influence:

First, there is a need to upgrade the studies made by private sector organizations to determine corporate practices regarding the recruitment, training, employment, and promotion of Jews in the executive suite in major industries within the United States. Most of those studies are now dated. There are fragments from universities all over the country which ought to be brought together and new studies made to determine what the situation will be in the world of the eighties.

Second, a similar study should be made of the most prestigious clubs of America to ascertain the degree of racial, religious, and sex discrimination currently being practiced.

I would like at this moment to publicly commend Senator Proxmire and the Banking Committee which is doing a piece of that job right now. As you know, they have asked for and the Federal Home Loan Bank has now requested that FDIC [Federal Deposit Insurance Corporation] insured banks report on what their practices are regarding the payment of the dues of their executives for membership in discriminatory clubs throughout America.

Third, I would recommend that there be an analysis of the practices of government antidiscrimination agencies to determine if they are enforcing the requirements of nondiscrimination as they relate to religion.

Fourth, in the area of regulation and legislation, recommendation should be made to the OFCCP and EEOC that they prohibit government contractors from paying for membership dues of its executive staff in clubs which discriminate by reason of sex, race, creed, or color. For a long time there has been a dispute on this issue among various agencies of government, and it ought to be considered officially once again.

Fifth, there should be a requirement that government contractors maintain statistics showing the number of Jews employed in executive capacities. A guide for how this can be done in an anonoymous and what we believe is a constitutionally legitimate fashion is contained in an AJC guidebook which was listed in your bibliography of materials.

Sixth, as we understand it, the White House has ordered Federal personnel not to conduct any official business in clubs which prohibit attendance at such meetings because of race, creed, color, or sex.

However, we are told it is perfectly legitimate for a cabinet member or other government employees to conduct government business in a club that discriminates on the basis of race, creed, color, or sex in its membership requirements.

We think that the White House ought broaden its instructions to forclose this possibility.

VICE CHAIRMAN HORN. Excuse me, I'm missing a criterion there. Would you go over that again for me.

MR. SAMET. Surely. Club X is restricted. Jews are not permitted to be members. However, if you, as a government agent, want to hold a hearing in that club and the club will permit me to attend that hearing, you are permitted to do so under the regulation, as I understand it. I am saying that that is not enough. If the club discriminates against Jews in its membership policies, you ought not be authorized to hold a meeting in that place. It is hostile territory.

Right now, even though the club restricts membership, government officials may have official meetings there as long as those meetings are open to everybody.

VICE CHAIRMAN HORN. I guess the obvious question is: How about government officials speaking there?

MR. SAMET. As long as they speak there in their official capacity, they should not be permitted to do so in what I am now recommending to you.

VICE CHAIRMAN HORN. Okay, that's what I wanted to make clear.

MR. SAMET. Seventh, I would urge that State Advisory Committees to this Commission hold similar meetings to this one in order to ascertain what the practices are on a State-by-State basis.

Eighth, government compliance offices should be given instructions and training on how to deal with religious discrimination issues and then be required to elicit the information necessary to determine if regulatious discrimination is being practiced.

It is my understanding that the training and orientation given to employees of the various contract compliance operations is only minimally, if at all concerned about religious discrimination. This ought to be rectified.

Ninth, laws have been passed in some States which deprive discriminatory clubs of the right to such privileges as obtaining liquor licenses. A compilation of such laws should be made by the Commission and studied with a view toward determining if the Federal law or regulations of a similar nature are feasible. As an example, should a discriminating club continue to be entitled to tax exemption as a nonprofit organization?

In 1965 we recommended to then Secretary of Labor Willard Wirtz a four-point program for government action. The four points were these:

(a) To make clear that government's equal employment programs were concerned with religion as well as race;

(b) The contractors should be required to report on where they stood;

(c) The staff should be assigned to develop needed programs; and

(d) Procedures for compliance reports should be revised.

The first and only really significant attempt to comply with that recommendation as a result of the statements by Secretary Wirtz was made when the Social Security Administration did so with the new Medicare program that was introduced at about that time.

Later, Secretary of Labor Wirtz reminded all government contractors of their responsibilities to do likewise and to use resources of the OFCC, if they needed assistance. There is little evidence available to us, at least, that that was done.

On a positive note, and I come to the conclusion of my statements, there are some rather impressive activities going on in various levels of corporate concerns regarding this issue.

The new president of the American Telephone & Telegraph Company, Mr. William Ellinghaus, has given some very significant leadership in determining that religious discrimination will not be tolerated by his corporation.

Banks, such as the Bank of America, have publicly indicated that they will no longer pay for its executive memberships in restricted clubs. This kind of action needs to be encouraged by government action.

I leave with you three documents, all of which you have listed in your bibliography. The one that I just referred to is titled, "A Guide to Federal Requirements Under The Discrimination." Another one, "The Unequal Treatment of Equals," deals with social club discrimination, and the third, "The Case of the Missing Executive: How Religious Bias Wastes Management Talent and What is Being Done About It." They are not new publications. Neither is the discrimination to which they direct attention. What they have to say is, unfortunately, as relevant today as when they were first published.

We commend them to your attention. Thank you.

COMMISSIONER RUIZ. Thank you very much. The honing and refinements that are being called to our attention will all be made part of the record and we certainly are grateful for the input that you gentlemen have brought with you to this meeting.

Now, we would like to hear from Michael Schwartz, associate executive director, Catholic League for Religious and Civil Rights.

Mr. Schwartz has been the associate executive director of the California League For Religious and Civil Rights for nearly 2 years. In that position, he helps coordinate information and litigation opposing discrimination and addressing other areas of the Catholic concern. Mr. Schwartz has worked as editor for publications of religious organizations and has written several articles on the civil rights of Catholics in relation to employment problems. He has received a bachelors degree from the University of Dallas and has done graduate work in Hispanic studies at that institution.

Mr. Schwartz.

STATEMENT OF MICHAEL SCHWARTZ, ASSOCIATE EXECUTIVE DIRECTOR, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS

MR. SCHWARTZ. Thank you. Good afternoon, Chairman Flemming, Commissioners. Thank you for giving me the opportunity to be part of this panel.

The Catholic League is a private, nonprofit organization founded 6 years ago to respond to defamation of Catholics and their beliefs and to defend the religious and civil rights of Catholics and others.

I joined the staff of the Catholic League 2 years ago, and while I was already aware of the problem of anti-Catholic sentiment and its negative impact on the rights and interests of the Catholic community, I must confess that I was surprised to learn that—even at this date—some people are still denied jobs and promotions commensurate with their abilities, simply on the basis of their religious or ethnic background.

It is common knowledge that in past generations Catholics suffered an open discrimination in employment, but over the past 30 years, Catholics have made great strides in socioeconomic terms, so that today they are generally above the national average in educational attainment and income. Yet, there is sufficient evidence to indicate that Catholics are still seriously underrepresented in certain high-paying and prestigious occupations and, in general terms, it seems that the more prestigious the position, the more difficult it is for a Catholic to attain it.

Considering the relatively high socioeconomic status of Catholics, the only reasonable explanation for this is a continuing bias against Catholics in the upper reaches of the business, professional, and academic communities.

The evidence at hand is far from exhaustive and it is not uniform. In some cases, it deals with members of the Catholic Church; in others, with graduates of Catholic schools; and in still others, with members of ethnic groups that are overwhelmingly Catholic. But the paucity of evidence is, in itself, indicative of the extent of the problem. Sociologists and government agencies have tended to overlook this issue, and their not-so-benign neglect has made it more difficult to identify religious discrimination in employment and to initiate efforts to overcome it.

Nevertheless, there have been enough studies to make a prima facie case that Catholics, particularly those from identifiably Catholic ethnic groups, have not been getting high-prestige jobs in numbers anywhere near their expected proportions.

In 1973 the 106 largest corporations in the Chicago area were surveyed to find out how many persons of black, Hispanic, Italian, and Polish heritage were among their officers and directors.

It is widely recognized that black and Hispanic people have been subject to discrimination, and even though much remains to be done to eliminate such discrimination, the government has at least made a serious effort to address this problem.

But people of Italian and Polish descent, who are overwhelmingly Catholic, have been given no support at all by government agencies in fighting discrimination, and in this respect, the law has been enforced unequally.

The survey found that people of Italian ancestry accounted for only 1.9 percent of the aggregate 1,341 directors of those Chicago-area corporations, and one man of Italian heritage sat on the boards of nine of those corporations. If he had been counted only once, the Italian American representation among those directors would have been only 1.3 percent. Italian Americans accounted for 2.9 percent of the officers of those same corporations, yet, they make up approximately 8 percent of the Metropolitan Chicago population.

This underrepresentation of Italian Americans pales in comparison with the problems Polish Americans face in gaining leading positions in those Chicago corporations.

Among the 106 corporations surveyed, there were only four Polish American directors, 0.3 percent, and 10 officers, 0.7 percent, even though the Chicago area has the largest concentration of Polish Americans in the Nation, an estimated 16 percent of the metropolitan population.

In the following year, 1974, the Ethnic Heritage Studies Center of the University of Michigan conducted a similar survey among the 100 largest corporations in the Detroit area and found a similar pattern.

Italian Americans accounted for 3.0 percent of the directors and 2.5 percent of the officers of the corporations in the study, while Polish Americans represented 1.9 percent of the directors and 1.4 percent of the officers.

One reason for the relatively better showing of these ethnic groups in the Detroit study, as compared with the Chicago results, is that the Detroit corporations were not as large as those surveyed in Chicago.

Among those Detroit corporations with annual sales over $500 million, Polish Americans held only 4 of 554 positions, 0.7 percent, ranking behind both blacks and Hispanics.

The Polish American community represents an estimated 14 percent of the population of Metropolitan Detroit.

A Harvard Business Review study, published in December 1976, indicates that this situation is not confined to those two Great Lakes cities. More than 80 percent of the 444 top executives surveyed said they were white Protestants.

The major commercial banks seem to be a stronghold of discrimination against members of minority groups. The most striking evidence for this appears in a survey of the senior executives of commercial banks with 50 or more employees conducted by the Massachusetts Banking Commissioner. Slightly more than half the population of Massachusetts is Catholic; and in the out-State areas, Catholics held 28 percent of the senior banking positions, a relatively respectable showing.

But in the Boston banks, in addition to a virtual absence of women, blacks, and Jews, the report found that only 6 percent of the senior executives were Catholics in a city whose population is 75 percent Catholic.

The relatively higher representation of Catholics in the out-State banks is sufficient to belie any claim that the scarcity of Catholic

executives in the Boston banks is due either to lack of interest or lack of talent.

The legal profession is another area where Catholics have troubling rising to the top. The Catholic League has been supporting a lawsuit by Attorney John Lucido against the prestigious New York law firm of Cravath, Swaine, and Moore, for whom he worked from 1965 to 1972. Lucido alleges that his religious and ethnic background was the sole reason why the firm denied him a partnership and, in effect, his job. In its entire history, the firm had never had an Italian American partner.

In preparation of an *amicus curiae* brief filed in support of Lucido, the Catholic League surveyed the 20 largest law firms in seven major cities and found that only 2.3 percent of the partners and 3.6 percent of the associates in those firms had Italian surnames, and 0.7 percent of the partners and 1.5 percent of the associates had Polish surnames.

Moreover, graduates of law schools affiliated with Catholic universities were rarely found in those leading firms. For instance, in the 20 New York firms surveyed nearly two-thirds of all the partners and associates were from either Harvard, Yale, or Columbia. While the University of Virginia, alone, had 59 graduates in those 20 firms, all the Catholic law schools in the country, including two in New York City, had a total of just 62 graduates in those firms.

Catholics also meet resistance in the academic community, as illustrated by the Ladd-Lipset report on the American professoriate in 1975. Catholics are by far the largest single denomination among college graduates, representing 26 percent of the college-educated population.

Yet in the prestigious major universities that receive most of the research grants, Catholics represents only 12 percent of the faculty members, ranking behind Presbyterians, Methodists, and Jews. In the smaller colleges, the proportion of Catholic faculty members is much closer to their representation in the population, so that they make up 18 percent of the total American professoriate.

All of the foregoing studies reveal the same pettern: the larger and more prestigious the institution, whether it be a university, a law firm, or a corporation, the more difficult it appears to be for a Catholic to succeed. This pattern points inexorably to one of two conclusions: either recruitment policies are inadvertently discriminatory against Catholics, or prejudice places a barrier to the advancement of Catholics. In either case, corrective action is called for.

Two other recent studies confirm the anti-Catholic bias in academic hiring. Last year Dr. Richard Aliano was denied tenure in the Political Science Department of Queens College in the City University of New York System, and he alleged that it was a case of religioethnic discrimination.

The Italian American legislators of New York City commissioned a study of the City University System and found that while approximately 25 percent of the students in the system were of Italian heritage, only 5 percent of the faculty and staff positions were held by Italian Americans.

Currently, the American Catholic Philosophical Association is completing a study of job prospects for recipients of Ph.D. degrees in philosophy from Catholic universities.

Catholic graduate schools grant approximately 15 percent of the doctoral degrees in philosophy each year. Graduates of Catholic universities represent 59.8 percent of the philosophy faculties in Catholic colleges and universities in this country. Among the faculties of public colleges, they represent only 5.3 percent, and in private non-Catholic colleges, they account for only 2.3 percent of the teachers of philosophy. The conclusion, of course, is that graduates of Catholic universities are at a disadvantage in the job market.

A Harris Poll examining the public perception of various minority groups was recently commissioned by the National Conference on Christians and Jews, and it helps to explain the dynamics of anti-Catholicism.

The poll revealed that only 4 percent of non-Catholic Americans believe that there is any discrimination against Catholics. Yet, when these same people were asked their opinion of Catholics on specific questions, an alarming number of them held negative stereotypes of Catholics. For instance, 35 percent considered Catholics to be narrow-minded and under the influence of church dogma and only 50 percent rejected this view.

When it comes to professional advancement, a stereotype like this can be crippling, especially when the person holds it does not recognize it to be an anti-Catholic attitude. The implication is that anyone who believes in the teachings of Catholicism is incapable of independent thought and such an incapacity would obviously render him unsuited to a position of responsibility.

When we add to this the negative stereotypes that burden so many predominantly Catholic ethnic groups, the situation is even worse. Polish Americans are typed as stupid and crude; Italians as devious and dishonest; Hispanics as violent; Irish as irresponsible and alcoholic.

Obviously, stereotypes and prejudices are not recognizable by the law, but their effects in the form of jobs and promotions denied are. And there is sufficient reason to believe that anti-Catholic and anti-ethnic attitudes are depriving some Americans of the advancement they deserve.

The Civil Rights Act guarantees citizens protection against discrimination because of religion or national origin. And the presence of these categories in the legislation means that regulatory agencies, including this Commission, have an obligation to attempt to eliminate such discrimination.

Yet, so far the responsible agencies have not even studied the matter, much less taken any concrete action on it; so no one can even say with certainty how widespread religious discrimination is.

So far I have focused my discussion on the statistical underrepresentation of Catholics in certain positions. This is discrimination based on who we are, simply as members of the Catholic Church or of a predominantly Catholic ethnic group or as graduates of Catholic

schools. But there is another type of discrimination, operating in individual instances, based on "what we believe."

A Catholic employee of the Internal Revenue Service has brought a discrimination suit against the IRS because he has been repeatedly passed over for promotion because of his alleged "lack of objectivity." This man's job is to decide whether or not to grant tax-exempt status to organizations applying for that privilege. And in this capacity he is required to exercise his discretion in applying the tax laws as written. His alleged "lack of objectivity" arises from the fact that he has recommended against the granting of tax-exempt status to abortion clinics and certain organizations promoting liberalized abortion and rights for homosexuals. According to his superiors, it is objective to rule in favor of these organizations but unobjective to find against them.

Precisely, because this man is known as a Catholic to have religiously based convictions regarding the particular issues those organizations were concerned with, he has been deemed incapable of exercising a fair and reasonable judgment. This man has been held back, not for holding opinions, but for holding the wrong opinions.

In California a religious brother who holds a doctoral degree in psychology has taken a State examination three times seeking certification as a high school guidance counselor. All three times he has been asked what he would do if a student came to him with a problem pregnancy, and all three times he has replied that he would call in her parents for consultation. All three times his examiner has given him a failing grade for an alleged lack of familiarity with the law on this point.

But the law is, at best, unclear on this point and is still in the process of being formulated. Regardless of what the examiner's personal preferences for what the law ought to say, the answer that this candidate gave was at variance with neither sound legal or psychological practice. The examiner has taken a matter of opinion and elevated it to the position of a standard of measurement which he uses to exclude from his profession those who disagree with him.

In New York State a nurse, a member of the Christian Reformed Church, has refused to participate in abortions as is her right under the law. The hospital administration has transferred her out of the maternity ward. This discriminatory form of retaliation is so common in some places that it is regarded as standard operating procedure.

The University of California at San Diego has operated a residency program in obstetrics and gynecology in such a manner as to deny positions to applicants who were unwilling to perform abortions, in favor of less qualified who would perform abortions.

Last year the superintendent of schools in Miami let it be known that if any public school employees sent their children to nonpublic schools their jobs would be in jeopardy.

It is obviously unjust to require a person to give up his or her rights of conscience or any other constitutionally protected rights as a condition for attaining or keeping a job or for receiving a promotion. Yet,

this is a position in which many Catholics and others find themselves today.

In addition to addressing statistical imbalances and other broad problems of discrimination, I urge the responsible government agencies to give the highest priority to protecting the religious freedom rights of employees who find their livelihoods unnecessarily and arbitrarily threatened simply because they choose not to abandon their religious or moral values.

My organization and many others concerned with religious freedom have been disappointed in the past with the apparent lack of interest on the part of this Commission and other government agencies in overcoming religious discrimination. There has been a tendency in the past not to take this issue seriously. I was very much heartened last year when Eleanor Holmes Norton of the Equal Employment Opportunity Commission took such resolute action on the matter of religious accommodation in employment. I am even more heartened that this Commission has taken an interest in the matter of religious discrimination.

It has been my purpose today to persuade you that religious discrimination in employment is a serious issue that warrants attention. I make no pretense that it is the most serious or the most widespread form of discrimination.

Catholics, at least, are not on the unemployment lines in disproportionate numbers. But some people are being denied jobs or promotions because of their religious beliefs. And if that happens to just one person, it is to the shame of our nation's tradition of tolerance and freedom of conscience.

I am convinced that this problem can be substantially alleviated if only the responsible agencies will let employers know that they expect the law to be followed in this regard. So far, I know of no case in which a government agency, including this Commission, has even inquired into possible discrimination on the basis of religion, much less initiated any positive action to eliminate such discrimination. Because of this, employers have had no incentive to examine and where necessary, to correct their hiring and promotion policies.

I suspect that a good portion of the religious imbalance in some areas of employment may be inadvertent and can be corrected merely by a serious showing of governmental interest in the subject. It is my hope that this consultation will be the beginning of such a serious showing of interest. But if this is a matter that will merely be talked about and not acted upon, then today's proceedings will have been nothing more than window dressing, an opportunity for the witnesses to vent their frustrations and for the Commission to allay some of its critics. And if that is permitted to happen, it would be even more disappointing than the previous policy of neglect.

Thank you very much.

COMMISSIONER RUIZ. The next speaker and panelist, Charles A. Reams, Jr., who is president of the Humanists Association of the National Capital Area. Mr. Reams is a charter member of the Humanist Association of the National Capital Area, has served as treasurer, and is now president of the organization. A member of the Unitarian Church

since 1946, he is currently the chairman of the Social Action Committee at the Davis Memorial Unitarian Church. A recipient of an undergraduate degree plus graduate work in geology from Ohio State University, and a certificate in ecology from the graduate school, USDA [U.S. Department of Agriculture], Mr. Reams has worked as a petroleum geologist and intelligence research analyst and an environmental analyst.

Please, Mr. Reams.

STATEMENT OF CHARLES A. REAMS, JR., PRESIDENT, HUMANIST ASSOCIATION OF THE NATIONAL CAPITAL AREA

MR. REAMS. Mr. Chairman, and Commissioners, I want to say that I'm happy to be here and I'm surprised that the Commission is finally recognizing the Humanist Association as a religious minority. For those in the audience that are still surprised that I am here—because we represent Atheists and Agnostics—and for those that still question it, I want to state that the Supreme Court in 1961 cited Humanism as a religion in the context of the first amendment's free exercise and no establishment of religion clauses in the case of *Torcaso v. Watkins*, 376 U.S. 488.

In researching this paper, I had trouble. I didn't even get to the high executive positions. If there are any Atheist or Agnostics high in management, they're in the closet or they've joined the Ethical Culture Movement, the Unitarian Church, or in the case of Jewish Atheists, Humanistic Judaism.

But I came across several interesting cases of employment discrimination against Humanists because their theological orientation was Agnostic or Atheistic. Now, I deliberately used the word "theological" instead of religious because the theology of Humanism—that is Agnosticism or Atheism—is but a small part of a greater value, ethical moral system, but those that have come out of the closet, so to speak, have probably learned some bitter lessons in these enlightened days of religious liberty.

I was reminded of that quote from Paul Blanchard this morning that said, "Religious liberty in a nation is as real as the liberty of its least popular religious minority." I think the Humanists take that title, more than any other groups on this panel.

Case number one: a female member of our Humanist chapter, a Mrs. D.W., until recently worked for PEPCO. After she let it be known that she was an Atheist, there was a complete change in the office attitude. She was ostracized. Management magnified all her mistakes which tended to create more, which led her to quit or she felt she would have a nervous breakdown.

But she could prove nothing—so she thought. But from what I have heard in this panel discussion, maybe she has more grounds to file discrimination charges than she thought. Maybe we don't know what to do, this is the problem. This is what I have learned today.

Case number two: Mr. Torcaso of *Torcaso v. Watkins* fame said that he had numerous incidents when he applied for a job, and when his

name was recognized, the conversation or the interview was cut short. But what could he do? He could prove nothing, he says.

Case number three: Mrs. L.M.W., a Humanist minister/counselor. Now, that may be a surprise to some of you, too: the organization is incorporated; it has counselors/ministers that perform weddings, dedications, and memorial services as do traditional religions. This Humanist minister/counselor, legally recognized in Maryland, was recently rejected by a county judge in Virginia from becoming legally registered. A week later in an adjacent Virginia county, another judge ruled she could perform marriages in Virginia. So it was a case of the left hand not knowing what the right hand was doing type of thing.

So the clerk of courts routinely gave her an oath with a "so help you God in it." Now, since this Humanist minister had a wedding to do—it's coming up this month—she didn't want to buck the system. So Mrs. L.M.W. took the oath.

The *Torcaso* case took a long time and cost a lot of money.

Case number four: Jefferson County, Missouri, a public school teacher lost his job for teaching evolution, as I understand. This teacher is not a member of AHA nor a member of a local Humanist chapter nor is he an unafilliated Humanist. He was a science teacher doing his job, but since most Humanists believe in evolution, that the earth is round, and in the scientific method, the Fundamentalists of Jefferson County said the teacher is a Humanist and, therefore, an Atheist and, therefore, cannot work for Jefferson County.

This is a current case under litigation and any additional information will have to be obtained from our AHA president, for which I will give a telephone number.

Case number five: In '65, '66, a Mrs. B.C., who is a biologist and was also at one time on the Humanist board, complained to the Spokane, Washington, school board objecting to the teaching of a Fundamentalist interpretation of biology; that is special creation and the flat-earth theory as biological science.

When this news hit the front pages of the Spokane newspapers, and got back to the U.S. Fish and Wildlife Regional Office in Portland, Oregon, Mr. C's boss wrote him to do nothing that would embarrass the U. S. Government.

Of course, this is putting it mildly. I got the impression from talking to this woman that there was extreme pressure put on Mr. C. by an Interior Department superior, to stop his wife in this complaint.

The Cs took this matter to the Washington State ACLU [American Civil Liberties Union] affiliate, which agreed that religion, not science, was being taught in Spokane schools. The Cs were beleaguered with crank calls and threats for 4 years thereafter by townspeople calling them "Atheists." During the course of this dispute, local public school biology teachers confided in the Cs that they were often told to soft-pedal evolution, as parents objected to it as being Atheistic. Some teachers considered this veiled threats, although they were not Atheists or Humanists themselves.

Case number six: Dade County, Florida, and this is my last case.

A public school teacher in Dade County, Florida, was found reading a Humanists magazine by the principal and was told that no Atheist will ever work in his school, that the Humanist magazine is Atheistic and if he finds out that she's an Atheist, she'll lose her job.

This teacher in question was in the process, or still is in the process, of applying for a counselor minister status through the AHA, but because of the circumstances in Dade County, requests that her name not be published in AHA counselor literature where all of the counselors are listed for those that need them. In other words, she'll become another closet Humanist counselor/minister. This case is current, so I have used no names, but the facts can be checked through AHA headquarters.

My recommendations are as follows:

1. Non-Theist should have the same rights as Theists.

2. The U.S. Commission on Civil Rights should continue to recognize the Humanists Association as a religious minority as cited in the 1961 Supreme Court case of *Torcaso v. Watkins.*

3. The IRS should remove the tax-exempt status of organizations that discriminate.

COMMISSIONER RUIZ. This has been a most interesting panel.

Prior to asking for Commissioner reaction by questions to the panelists, I'll ask each member of the panel—any of you—if you would like to comment upon or ask a question of any other panelist?

[No response.]

COMMISSIONER RUIZ. I noticed that Mr. Schwartz was making notes when somebody was talking; was some thought prompted?

MR. SCHWARTZ. I just wanted to gather all the ideas here. I see discrimination against particularly Catholics and Jews as following a basically similar pattern; so I was very much interested in what Mr. Samet and Mr. Gissen has to say, and also, particularly in their recommendations, because that is an area that needs to be explored.

COMMISSIONER RUIZ. Are there any more inquiries? Vice-President Horn, do you have any inquiries to make or questions?

VICE CHAIRMAN HORN. You've just promoted me.

I would like to comment first, Mr. Reams, about your case in Jefferson County, Missouri. As I listened to it, I thought that Jefferson County would be a place where Thomas Jefferson would be very unwelcome today.

Let me ask you, gentlemen, is there an assumption that those of a religious group are to spread themselves evenly over types of economic associations? We've had statistics on banking and investment banking, etc. When you look at affirmative action underutilization for blacks, Mexican Americans, Hispanics, women, etc., we try to look at the number; if we have the data and it's the very poor, who are in particular occupational groupings on a local, regional, or national basis, or for example, if we are recruiting faculty members in a university, then we have a nationwide recruitment for those faculty members.

If we are recruiting secretaries, we have a local, perhaps regional, recruitment depending upon availability. And you would try to ascertain what is the respective proportion of a particular group that has the

necessary credentials which in the case of faculty is the doctorate or appropriate terminal degree. Now, then you try to make a judgment given those data of the degree to which you are under or overutilized.

Now, what I'm curious about is how are we to judge underutilization when we're dealing with religious discrimination? Have you got any thoughts on that? Given the paucity of data, you know, it's bad enough in the traditional categories where I think the Federal Government has been abysmally poor in collecting the data to help all of us in the affirmative action plan; but what do we do in this area?

MR. GISSEN. Let me try to answer first, if I may.

First of all, I think the threshold problem is not the one that you pose, Commissioner Horn. For me the threshold problems are the active, overt instances of discrimination which are being neglected or badly handled by agencies which are authorized to treat them. I would put that on my priority list ahead of what I think is implicit in your question.

But now to address myself to your question: I would say this, no, there is no idea or concept of proportional representation or even distribution.

However, in an industry or in a major corporation where there is a conspicuous absence, where there is zero, or where there has only been one for decades, I would address myself to the zero condition, to the condition of continuing tokenism.

I think, based upon my experience, that once the total exclusion is ended, once we go beyond a tokenism, the problem will begin to correct itself. What has to be overcome is this extraordinary inertia that has persisted for a variety of reasons for so many years.

VICE CHAIRMAN HORN. Well, that's an interesting point. I think it's probably a good approach because, as I listen to the discussion, we're talking about the discussion in the more traditionally discriminated categories of the discouraged workers. How does a worker know opportunities exist—and as I heard your testimony, you're saying, "Let's take the Jewish population, that avenues seem closed in the executive suite, therefore, other avenues are pursued." And I think you can apply that in the testimony as to Catholics, etc., possibly Humanists—although I think it's a little more obvious in these other two recognized, long-standing categories.

I wonder, Mr. Gissen, Mr. Samet, just to round out the record and to deal with the typical Jewish stereotype, if you have the data for the record which would show what percent of the Jews are in the medical profession, and what percentage are in the legal profession and are those percentages out of proportion to their numbers? What the record is showing today is that in certain industries and executive suites that your organizations have analyzed, there's a paucity of individuals of the Jewish faith in those areas. Do you have such data for lawyers and doctors?

MR. SAMET. I do not, but I would remind you that in both those professions there is an entrepreneural situation in which individuals may establish their own practices. Given the opportunities to make one's own way in a competitive world where your skills as an entrepreneur

are the criteria by which you will get ahead, large numbers of American Jews have entered into the private practice of medicine and law.

However, this is not the issue. What we are concerned with is whether a person's religious convictions should be allowed to prevent him or her from obtaining employment.

Regarding this last circumstance, we have done a number of studies which I suggested earlier that needed to be updated. We have analyzed whether or not Jews have an interest in becoming part of the corporate community. There has been a stereotype saying, "Jews are not really interested in executive employment. They want to go into business for themselves." All of the evidence indicates large numbers of Jews, no less than non-Jews, are anxious and willing to participate in corporate community activity.

We asked the question as to whether Jews actually take the training so that they are qualified? What is their proportion in the graduate schools of business? Are there a significant number of Jews in those training institutions?

The answer is yes. A disproportionate number come through those educational experiences and offer themselves up for employment. But they don't appear in significant numbers in the executive employment record.

Another question is, do Jews stay when given the chance or do they quickly leave once they've gotten the skill? The answer is they stay. Obviously, something is operating to keep us out, and that needs to be once again studied, updated, and validated. I believe such a study will show that the condition which keeps us out is, in fact, discrimination and prejudice.

VICE CHAIRMAN HORN. Okay.

See, what concerned me was your earlier statement, when you began your testimony, that 10 percent of all college graduates were Jewish, but only 1 percent of the business executives are Jewish; that doesn't follow, necessarily. What follows would be to isolate types of businesses and say, what percent of business school graduates are Jewish, either MBA [masters in business administration]—which is the traditional entry degree for the major American corporations—or, if you're talking about small business in the small town practices or CPA's [certified public accountant], whatever, perhaps B.S.'s [bachelor of science] and B.A.'s [bachelor of art]—in undergraduate schools of business and then analyze that through.

I agree with you on your recent comments and I think what we have here is a very difficult thicket to try to figure out psychologically, whether there is discouragment, whether—how many years it takes to change preconceptions within a population as to where opportunities are, once opportunities are provided. And that's why I get down to that first question I asked, is there an assumption that those of a religious group are to spread themselves evenly over types of economic associations?

Some civil rights enforcement officials, I think, probably do make the assumption that given the ideal world people in various ethnic or

religious groups or whoever will spread themselves evenly over occupations.

I'm not so sure that's a valid assumption, very frankly, but that is one which can be made and that's what I want to deal with.

MR. SAMET. I would say this, there are studies which give the percentage of Jews who have gone through these graduate schools. These studies have been done at Harvard and Michigan. I am sure that the Commission upon investigation can get this information. I don't know how recent they are, but they are available.

I would agree that there's no need nor desire on our part, at least to recommend that there should be an equal distribution of religious groups in all occupations and all industry, but there does appear to be a continuing practice over several decades to exclude some of the eligible from opportunities. This is not a recent phenonmenon. This is not something that has just currently been brought to the attention of American industry. I suggested earlier that we did some pioneering work—as far back as two decades ago that was brought to the attention of the American corporate community. They indicated that they would take it under advisement, and they are continuing to do so, but they are not continuing to do anything with the advice.

VICE CHAIRMAN HORN. Anybody else wish to comment?

MR. SCHWARTZ. Yes, Mr. Horn, I would add I would agree with Mr. Samet's statement that we would not like to see a quota system or anything like that in practice, either.

Since my testimony was so heavily statistical, I think it's incumbent upon me to respond to the point you raised, because I think I might have touched it off and my use of those statistics was not so much to say that Catholics ought to occupy 25 percent of every job category in the country; it was rather to indicate that they are so far out of line in fairly widespread categories that it makes it apparent that there's a problem somewhere along the line. I don't know what. If there were no such thing as anti-Catholic discrimination, I don't know what the percentages might be, but I'm pretty sure they wouldn't be what they are.

MR. SAMET. Could I just add a comment to my earlier statement?

Earlier you heard from the director of the Pennsylvania Human Relations Commission about a case that the American Jewish Committee had brought to its attention regarding discrimination in an insurance company of that State. At that time we indicated that over a considerable period of time we had attempted to negotiate with the company to open up their doors, because there were no Jews that we could ascertain had ever worked in its executive suite. When we brought this to the attention of the Pennsylvania Human Relations Commission, their investigation validated our charge and they came up, as was indicated to you earlier, with a proposal for how the corporation was to change its practices.

What you were not told was that in the earliest recommendation for a settlement of this we were asked by the commission to accept a recommendation that a quota be established in order to bring Jews into the corporation within a given time span. We indicated we would not

accept that, that we were unalterably opposed to quotas, and that what they were proposing violated our own view about the appropriate solution to the condition which existed.

It was only after a series of protected negotiations which followed, that they changed this into a goals-and-timetable proposal which worked out well. It was not merely a substitute for quotas, but was an honest attempt at affirmative action which worked and which we think can and should be replicated elsewhere.

VICE CHAIRMAN HORN. That's all I have.

COMMISSIONER RUIZ. Commissioner Freeman?

COMMISSIONER FREEMAN. Gentlemen, I have a further concern, and I would like to ask all of you who are experts if you could perhaps suggest some extension of your program? As I have listened to you throughout this day, this has really been very helpful because we have identified and our panelists have identified cases of religious discrimination.

We know we have in this country, as you know, extensive discrimination on the basis of race and sex. And it occurred to me as I look at the Jewish committee's very good pamphlet on the guidelines as to how we could do a multipronged attack on the program.

Could you suggest ways in which the problem of discrimination on the basis of race, sex, and religion, on all of them, can be attacked at the same time? Because one area that has always troubled me is the extent to which one group is played against the other, and that is, of course, damaging to everybody. And actually the result is that the discrimination against all groups continues, and we would certainly not want to have that continue further if there's something that even this Commission can do that would eliminate it.

And so I would like to ask if each of you could speak to that? Any suggestions as to ways in which we can deal with the total problem and not appear to be dealing with one, in isolation from the other, or without recognizing the existence of the other?

MR. GISSEN. Speaking from my own experience, I would say that simply including the question about religion in the course, for example, of a compliance review would be extremely constructive, not that it would displace any emphasis upon race or sex or national origin or what-have-you; but in most cases, the employer to whom the compliance official is speaking usually has a surprisedly positive response: "Oh, I didn't know you were interested in that, also." And all of a sudden, what they had perceived as being the interest of a special interest group or two, suddenly becomes a broad-based American concern: that all minority groups are treated with fairness, with equity. And the results can be surprisingly dramatic; results can be produced rather quickly.

I know the question inevitably comes up about religious census or survey. I have never found an employer who didn't know the religion of people who work for him; I have never found a supervisor who didn't know who on his staff was going to take off what holiday. And when they profess ignorance on this subject, I submit to you that they are playing with the truth, of course they know.

It's not necessary to conduct an individual survey. I have from time to time sat down with top executives in major corporations and spread out the management organization chart in front of them and said, "Oh by the way, any people on here Catholics or Jews?" They'll give you a geneology, "Well this one is a Scotch Irish, and the parent was Catholic; I think the great-grandfather was Jewish, but it looks like he's going to the Methodist Church now." It's amazing, utterly amazing, and they don't refer to files for this; it's all in their head; they know this. I think it's an inevitable part of working together with people.

VICE CHAIRMAN HORN. Mr Gissen, if I might interject—just so you will have met one who does not know the religious practice of employees, since I have 3,500 employees; I want you to know that I don't have the slightest idea of what their religion is. It was 3 years before I found out that my vice president for academic affairs was Jewish. So you have just met one, and I would suggest that not every employer in America worries about the religious practice of his employees. I could care less, to tell you the truth.

MR. GISSEN. Now, let me illustrate: some time ago I did a study of discrimination in the executive suites in the major commercial banks of New York, and I spoke to one vice president of personnel. Under the law it's permissible to keep religious identification on post employment records. I asked him if he had any idea how many Catholics and how many Jews he employed in the upper executive levels; and he said, "Of course, we have records on every one." I said, "Why do you keep records on every one? And he said, "So we can plan ahead for religious holidays, and in the event someone dies on the job, we know what clergyman to call."

I went to see his counterpart in another major commercial bank and I asked him the same question: "Do you keep religious records?" And he looked at me as if I was crazy, and said: "What in heaven's name for?"

So I gave him the reasons that the other chap gave me. He said, "That's stupid." He said:

> Every supervisor knows the religion of the people who are working for him. That's just a natural byproduct of human interchange. So there's no problem about planning ahead for absences; and as for dying on the job, I've been here 20 years and it has yet to happen.

MR. SAMET. Some of those people were probably dead for a long time.

COMMISSIONER RUIZ. Any more?

MR. SAMET. Yes, I would like to comment:

Thank you, Commissioner Freeman, for identifying us as experts. I'm not so sure that I appreciate the title since I remember somebody talking about the word "expert" as having two parts: "ex"—an unknown quantity, and "spurt"—a drip under pressure.

I would suggest to you that there are some things that would alleviate the problems that you refer to, they are not necessarily related to what we have been talking about today. I refer to the need to expand employment opportunities. As long as you have unemployment, as long

as you have people competing for jobs, as long as you have a society that doesn't provide enough opportunities, you're going to have intergroup conflict. One form it will assume is for preferential treatment of some groups.

There is also a need to expand training opportunities for the disadvantaged so that they can compete for job opportunities on the basis of merit. The successful Recruitment and Training program [RTP] is one of the examples that I would like to see expanded.

I think that there is an increasing need for public officials to make public statements about the fact that everybody is going to be given a fair shake in the application of antidiscrimination laws. There exists a view among large numbers of people that if they are discriminated against there's nobody to represent them, and under those circumstances, there's an animosity created which opposes official efforts to defend the rights of others.

This is bad, and it will remain a matter of tension until it is clear that antidiscrimination laws apply equally for all people. In that context, I might say that Galen Martin, who appeared before you earlier, makes the very important expression of concern over the fact that there just aren't enough resources available for those who have to administer all the antidiscrimination laws. I believe that he was suggesting that because of inadequate funding we should consider triage. That is with limited resources you target only those who are in the greatest need,—and the rest will have to figure out how to shift for themselves. If that is the way the situation is, because commissions, national and local, have had added to their burdens the responsibilities of being concerned about the handicapped, women, the aged, and religious groups. Then the solution is not triage. It is not correct to conclude that certain people are going to have to shift for themselves. Rather it is our task to obtain support for expanding those resources, and this Commission ought to recommend that this be done.

And finally I suggest once again that there is a need for professional training. Government staffs need a greater sensitivity to the fact that in addition to the traditional minorities, large numbers of workers in America feel discriminated against and believe that they are unrepresented.

MR. REAMS. Another example of discrimination that I thought of is in the military. An example would be the forced chapel attendance required at Annapolis and possibly other military academies. Here, if an Atheist didn't want to go to chapel, he would be identified. This could be used to identify the religious affiliation or the nonaffiliation, and you probably wouldn't get very far if your superior officers were religious. This may preclude moving up in the military. I also think forced chapel attendance is unconstitutional.

CHAIRMAN FLEMMING. I think Mr. Schwartz has got a comment to make; we're now running about 15—20 minutes behind. We have another panel to hear this afternoon, but we'll be delighted.

MR. SCHWARTZ. I'll just take a moment.

I think that the perception among those Catholics who are suffering executive suite discrimination is that the equal opportunity laws are

very good things, but they're not to protect them. They are not losing these jobs to people who are less qualified than they are in most cases, because at that level qualification is pretty much the same; and so they are reluctant to make complaints or ask for any kind of redress.

I noted the small number of religious discrimination claims that all the State commissioners mentioned earlier this afternoon, and I think that if the Commission would do what Mr. Gissen recommends, ask the questions, and make it known publicly that enforcement agencies are interested in guaranteeing the religious rights of people, that in itself will be a long step forward.

CHAIRMAN FLEMMING. I want to express appreciation to this panel, because it's clear that in our laws we have included religious discrimination. I think the subject for our consultation is a correct one.

There has been neglect,—you've called attention to that. You given us some very specific recommendations as to steps that might be taken to deal with that neglect, and I'd just like to make this comment: I appreciated Mr. Samet's additional background information relative to that Pennsylvania insurance case, because it seems to me you identified an evolution there that is very important. Apparently it started out with what you found and others felt was a proposal for quotas. Then by negotiation, dialogue, and so on it evolved into a goal and timetable situation; in other words, a true, affirmative action type of program.

And I am going to ask the staff if we can get some additional material relative to that particular case, both from the Commonwealth of Pennsylvania and also from you, in view of the fact that you did initiate it in the beginning, because it seems to me that that's a hopeful sign, and it does indicate that if we come to grips with some of these situations, on a case-by-case basis, we can make some progress.

But, again, I do want to express gratitude to each member of the panel for the contributions that you have made.

VICE CHAIRMAN HORN. We would like the panel on American Indian Religious Freedom Act to please come forward. Mr. Echo-Hawk, could we limit the discussion by this first group to approximately a half-hour? I am advised that Mr. Gettman must leave by 6, which would give us 20 minutes for Mr. Gettman's commentary.

Mr. Gettman, please come forward, if you like, and sit with the panel.

Let me first introduce Mr. Walter R. Echo-Hawk, who's the staff attorney for the Native American Rights Fund. He has directed Indian corrections projects for the Native American Rights Fund, is now co-director of the American Indian Religious Freedom Project, a graduate of Oklahoma State University and later the University of New Mexico Law School.

We are glad to have Mr. Echo-Hawk with us. Please proceed.

STATEMENT OF WALTER R. ECHO-HAWK, CODIRECTOR, AMERICAN INDIAN RELIGIOUS FREEDOM PROJECT

MR. ECHO-HAWK. Yes, I am very pleased to be here, to receive the invitation to come to Washington today, and I hope my remarks will be of some assistance to the Commission.

Prior to coming today, I had an opportunity to prepare some written statements.

VICE CHAIRMAN HORN. If you would furnish that, we would be glad to include that in the record at this point, and please proceed and summarize it. And perhaps if there's enough copies for the Commissioners, we can browse through that as you're talking.

MR. ECHO-HAWK. In addition, I do have a recent publication put out by our legal organization which sets forth the background of the American Indian Religious Freedom Act itself and historical background and a description of our project.

VICE CHAIRMAN HORN. We'll be delighted to include that in the record at this point. If the Commissioners can get these items and distribute them, we'd appreciate it.

MR. ECHO-HAWK. I guess, at the outset, I would like to say that I think this consultation with regard to religious discrimination is very timely, extremely timely, I think, from the standpoint of Native Americans. And the reason it is timely is because of the recent passage by Congress of the American Indian Religious Freedom Act.

The American Indian Religious Freedom Act was signed by President Carter in August of last summer, 1978. And this act has resulted in the present day a governmentwide review of statutes, agency procedures and policies in consultation with traditional native religious leaders to determine areas of change which would be necessary to protect native religious freedom in this country.

This governmentwide review, which I just referred to, is presently being coordinated by a Federal task force, which is chaired by the Secretary of Interior and Ms. Susan Harjo here, who I am sure will be able to bring the Commission up to date as to the status and activities of that task force.

But my intent here today is to review with you general areas of religious discriminations against Natives of this country, and I guess at the outset I should make some general remarks regarding the nature of Indian religion, or Native religion, and go from there.

And in making these remarks, I should caution that—or just note that I am not known as a spiritual leader or anything like that; I'm merely speaking as a lawyer who has worked in that area in the past.

I think that the religion or religions of the red man have never been understood in this country. They've never been understood by the soldiers, the missionaries, or government bureaucrats, and because of this mystery of what we call Native religion or the religion of the red man, it has just never been understood; so I just want to give some general factors concerning the nature of Indian religion.

The first factor or thing that should be noted is that there are probably as many tribal religions in this country as there are Indian tribes and, you know, that may be over 300 or so, and they're all

different. But there are some elements that are common threads that run throughout.

None of these religions or religious tenets have ever been reduced to writing in a document, a written document, such as the Bible or the Koran. They are passed down and practiced solely and strictly pursuant to oral tradition; that in order to learn about Native religion, one must necessarily go to the practitioners themselves for information.

None of these religions also have ever had any churches in the Judeo-Christian sense, no man-made structures. Rather, the places or facilities of worship or the worship itself was practiced or conducted in nature, outside at various sacred sites. At times this will be a temporary structure, such as a sweat lodge or a teepee that will be erected, but there's never been a structure such as a temple or a church in the sense that we're all familiar with.

As to the religious beliefs themselves, they're generally tied to nature, the spiritual elements and powers, forces of nature; they're tied to the plants and the creatures that make up the environment. And Natives are dependent upon these things of nature in the practice of their religion, and many of their ceremonies and rituals and religious observances are just intimately tied to these things that were given to us by the Creator.

A final point about Native religion is that the religion and the culture are virtually inseparable. I guess the closest thing that we know of in this country to that relationship is perhaps the Amish people that we are familiar with; the same is the case in terms of Natives: their appearance, the way they dress, the way they talk, the relationships they have between people, their daily lives are intimately tied to religion in the traditional way of life.

Because of the ignorance of the non-Indian of these unique factors with regard to Native religion, the Native religions up until the present have either been banned, suppressed, or discriminated against in this country; and I want to just get into a little bit of that history up until the present if I could.

I think personally it's sort of an appalling history, but after the military conquest of the tribes, the Native peoples were placed onto reservations which, in many instances, were administered by missionaries who were the Indian agents for the reservations, and I realize at the time that the establishment clause of the first amendment was in effect, but it apparently didn't apply to Natives at that time.

After being placed on the reservations, Natives were forbidden to speak their language, to practice their rituals; they were forbidden to leave the reservations, without permits or anything, to gather religious materials, or to go to their holy sites.

Children were forced to cut off their hair and to look and dress just like white people.

The sun dance ceremony of the plains, the ghost dance religion that spread throughout the country, the peyote religion, and other religions were actively banned by Federal statute, by military force, and the withholding of rations by the Indian agents.

And this active religious suppression which I just referred to was practiced up until perhaps 50 years ago. During this period of active suppression, Native religion essentially went underground where many of the religions remain today.

For example, in my written statement I refer to the practitioners of the peyote religion, where today the practitioners are subject to arrest for many offenses at any given time; for example, they could be arrested for the use of peyote, the illegal possession of bird feathers or fans, the illegal cutting of teepee poles from Federal lands. They could be arrested for even violating local fire permits or noise ordinances.

So because of this discrimination, this religious discrimination, Congress apparently found that the first amendment protection, the first amendment by itself, was inadequate for Natives and found that remedial legislation was necessary in order to effectuate the protections of the first amendment for Native people in this country.

And so the American Indian Religious Freedom Act reads as follows:

> 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.

So that is the stated policy now in 1978 of the United States Government with respect to Indian religion. And my law firm is the Native American Rights Fund, and it is presently coordinating a project working closely with Ms. Harjo; and this project is—was created pursuant to this new Federal policy to assist in identifying religious discrimination, religious problems, and to explore possible remedial solutions.

So I want to share with you areas of religious discrimination that I'm aware of. And at the outset I would say that the religious discrimination with regard to Natives is not—is leveled at fundamental religious practices, rather than, you know, perhaps secondary observances or tenets or something like that. An Indian, perhaps, is not discriminated because he's a member, perhaps, of a particular religion, insomuch as his religion is discriminated against to the extent that he can't even practice it without it being illegal or something like that.

In the area of criminal justice, the Federal Bureau of Prisons and LEAA [Law Enforcement Assistance Administration]-funded State prisons are perhaps the most obvious and widespread discriminators against Indian religion. Today I'm aware of live controversies regarding Native religious freedom in 14 Federal and State penitentiaries across the country, and these deprivations include the right to receive fundamental religious materials, fundamental religious items, which are necessary to the practice of Native religion. This would include feathers, fans, gourds, sacred pipe, medicine pouches, sage, sweet grass, cedar—a lot of these things are being denied in Federal and State prisons.

Another issue regarding a live controversy in our prisons today involves the denial of fundamental Native religious ceremonies inside the prison and that Indians are denied access to the most fundamental of their ceremonies, and that is the sweat lodge ceremony. A number of prisons have denied that, and this is presently a controversy, a subject of one pending litigation against the Federal Bureau of Prisons.

VICE CHAIRMAN HORN. Could you define the sweat lodge ceremony a little more fully? I think for the non-Indians that's a difficult term to understand.

MR. ECHO-HAWK. The sweat lodge ceremony is probably, well, has been universally used throughout this continent among virtually all the tribes in the country. It's basically a purification ceremony used in a facility which is somewhat like a sauna or a steam bath. All the elements of the ceremony represent all of the elements of the earth and of nature and everything is brought together in that ceremony. And the person who participates in that is cleansed spiritually, and it's either a religious ceremony unto itself or a mandatory prerequisite for other observances.

Other issues involve the denial of the right of Indian prisoners to wear their hair in a traditional Native fashion for religious purposes. Other issues involve the denial, the outright denial, of access of prisoners to medicine men and spiritual leaders. And then there has been identified, also, a denial of the right of Native prisoners to sing Native traditional ceremonial and or sacred songs on a regular basis in prisons.

This areas has been the object of pretty, fairly extensive litigation; and I'll just briefly cite some cases: *Teterud v. Burns*, 522 Fed. 2nd 357, Eighth Circuit, 1975, was a hair case where the court held that the rule prohibiting the wearing of long hair by a Native prisoner violated his religious belief.

There is a case called *Bender v. Wolf*, unreported, but the civil number is R–770055 BRT, District of Nevada, Order of July 5, 1977; also a hair case arising out of the Nevada State prison.

Crow v. Ericson, No. 72–4101, District of South Dakota, Order of April 4, 1975. This was a broad-based religious discrimination case which basically encompassed all these issues that I have just previously referred to.

Indian Inmates of the Nebraska Penitentiary v. Vetuck [phonetic], No. 72–L–156, District of Nebraska, Order of November 1974; likewise similar to the *Crow* case in that it was a broad-based religious discrimination case.

Little Raven v. Hess [phonetic], No. 77–165–C, Eastern District of Oklahoma, Order of November 14, 1978; also a broad-based religious discrimination case against Oklahoma State Penitentiary.

The sweat lodge case that's presently pending is called *Bear Ribs v. Taylor*, and presently I don't have the citation to that, but I'm sure maybe Warden Taylor will be here tomorrow and can refer to that.

And also, *Battle v. Anderson* [phonetic], which was brought by the Justice Department, also against Oklahoma State Penitentiary.

In the area of criminal courts, to give you an example of the problems, or some of the problems that we have encountered, I'm presently

aware of two examples within the last 2 years where the question of whether or not to recognize traditional Native marriage ceremonies for purposes of applying the husband-wife privilege of confidentiality was at issue in two criminal proceedings.

In the area of law enforcement, I'm aware of three State criminal arrests and prosecutions since last fall of Native American church members who were charged for the possession of the sacrament peyote.

In the area of parole, there has been numerous studies which indicate that Natives have a more difficult time in receiving parole. My theory or analysis of the situation is that perhaps religious discrimination is one factor there, in that one of our findings is that Native religious activity is misclassified at the prison level, or denied at the prison level. And the Native practitioner, his religion is never taken into account by parole boards, Federal or State, as one of the factors in determining whether or not that person is rehabilitated to the extent that he's ready to return to the community after parole.

Another area of religious discrimination in parole arises in the parole conditions that are routinely given to parolees which prohibit them from the use of drugs while on parole. This provision, on its face, discriminates against Native American church members who are entitled by Federal law to use peyote for religious purposes, and I might add that the Native American Church is perhaps the largest intertribal religion among Native peoples in this country, composed of about at least 60,000 members on the Navajo Reservation alone.

In the area of employment, traditional Natives—while I'm sure that they don't suffer too much from executive discrimination—because there are very few executives, that's just not really a problem for Natives I don't think, but traditional Natives have the same problems in the area of employment as other minority religions in the area of obtaining religious leave or religious holidays to the same extent as is granted by employers for major Judeo-Christian religious observances.

And hopefully the Federal Employees Flexible and Compressed Work Schedules Act for 1978 will alleviate this problem, at least with regard to Federal employees.

Another problem in the area of employment—religious discrimination for Natives naturally involves the religious observance of wearing traditional hair styles by Native religious practitioners which may lead to discrimination or disciplinary action taken against them because of their hair styles.

Now, this is clearly the case in the armed services, where I'm also aware of a recent incident where the United States Marines denied the enlistment of a Native American Church member the use of peyote on the grounds that the Marines require that their people be alert at all times.

In the area of education, the primary religious problem of Natives that I'm familiar with involves, again, school grooming codes for Native children who are required to cut their hair in order to receive an education. And what concerns me presently is the HEW [Health, Education and Welfare] policy now which has basically said that hair styles are a fad or a fashion; therefore, we'll not bring any more school

hair cases. And this policy of HEW fails to take into account the longstanding traditional Native religious beliefs concerning personal appearance.

Additionally in the area of education, like the Amish people, there are some instances where compulsory education laws violate the religion of children, or the parents of children of traditional Native families.

In addition to these areas, there are two other areas that are presently being studies, and these involve the denial of access to Native religious places. As I mentioned earlier, Natives have no churches in this country. We have no churches at all. Rather, Natives worship outdoors and in nature, and because of this fact, this country is dotted with Native holy sacred sites. These sites consist of ceremonial areas that have been used, from time-untold, to burial grounds, herb and plant-gathering sites, vision questing sites, and other holy places.

Because of our churches, if you will, being located outdoors, and the loss of the land on our part, many of these sacred areas now find their way into the possession of various Federal agencies, State agencies, and private ownership. This raises problems in the practice of Native religion in terms of access to these areas for the religious worship ceremonies, protection of these areas from desecration and from commercial development and access to these areas for ceremonial harvesting of certain natural products for use in the religious practices and one final, general area involves access to sacred objects.

Natives are utterly dependent upon products from nature in the practice of their religion. These products are essentially animal parts, bird parts, herbs, various woods, etc. Many of these items are difficult to obtain or illegal to possess as a result of various Federal policies with respect to the use of public lands and, also, as a result of the various conservation laws which were enacted to protect endangered species which had been slaughtered by non-Indians. These laws make it illegal to possess necessary religious items for Natives and none of the laws have any religious exemptions for Natives, with the exception of the Bald Eagle Protection Act. And so this is also an area of difficulty in discrimination, and I would say also with regard to the practice of Native religion.

Thank you.

VICE CHAIRMAN HORN. Thank you. Let me just say, since you did read all of your statement, I'm reversing my previous order: we won't include your statement in the record, since it is already in the record and it's in bigger print since you've read it.

Ms. Harjo, let me ask you: do you have a prepared statement, or how long do you think it will take you for your remarks; because I might ask you to defer a moment—but just tell me?

MS. HARJO. I have no prepared statement, and I can talk for as short or as long a period as you would like.

VICE CHAIRMAN HORN. Well, what I would like to do, if we might, if you could give a brief overview and then we could hear Mr. Gettman and then I could come back and then we'll put all the relevant testimony with the correct section,—if you wouldn't mind?

But apparently you have a 6 o'clock commitment, so we are willing to stay. So please, if you could give us an overall view, then we'll move to Mr. Gettman. Then we'll get back to you.

MS. HARJO. Okay—unless you would like to take those gentleman first?

VICE CHAIRMAN HORN. Well, I might say—if you were willing, fine, let us do that.

Mr. Seymour Gettman, as your notice says, Chief of the Office of Leave and Pay Administration Policy, Compensation Division, Office of Personnel Management [OPM]. He's been with the Civil Service since 1966, where he came from the Federal Aviation Administration, and been in personnel work for almost three decades, has his bachelor's and master's from Syracuse University.

We're delighted to welcome you to this consultation. We've heard a lot about the Federal Employees Flexible and Compressed Work Schedules Act of 1978 and, perhaps, you can summarize that for the Commission and where we are on it?

STATEMENT OF SEYMOUR GETTMAN, CHIEF, OFFICE OF LEAVE AND PAY ADMINISTRATION POLICY, COMPENSATION DIVISION, OFFICE OF PERSONNEL MANAGEMENT

MR. GETTMAN. If it's okay, I'd like to read this prepared statement.

VICE CHAIRMAN HORN. Okay, go ahead.

MR. GETTMAN. Mr. Chairman, members of the Commission, I am pleased to appear before you today to discuss Title IV of Public Law 95-390. Title IV is entitled "Adjustment of Work Schedules for Religious Observances."

The purpose of Title IV, as its title indicates, is to allow Federal employees to adjust their work schedules so that they may comply with the religious requirements of their faith without having to use personal leave. More specifically, it provides that a Federal employee may elect to engage in overtime work for the purpose of taking compensatory time off from his or her scheduled tour of duty when the employee's personal religious beliefs require the abstention from work during certain periods of time. It also suspends premium pay entitlements for such overtime work.

Congressman Stephen J. Solarz of New York, was the sponsor of a series of legislative initiatives on this subject. Mr. Solarz finally proposed an amendment to H.R. 7814 in the last Congress which became Title IV of the Federal Employees Flexible and Compressed Work Schedules Act of 1978. The act was signed into law by the President on September 29, 1978.

As a technical point, it should be noted that Title IV of the act is permanent legislation and bears no relation to the 3-year experimental program of flexible and compressed work schedules otherwise authorized by the act.

It is relevant to note certain statements of legislative intent at this point. The intent of Congress was clearly enunciated in Senate Report

No. 95-1143, submitted jointly by the Committee on Human Resources and the Committee on Government Affairs. To quote:

> The Committee find that the provisions of Title IV are necessary because of problems faced by the religiously observant in the Federal service in accounting for time taken out from work as a requirement of their faith. The Committees find that existing Federal work schedules unnecessarily discriminate against Federal employees who are members of religious minorities and whose personal religious beliefs require the abstention from work during certain periods of time which conflict with their normal tours of duty. Although the Federal Government in most instances grants leave to employees to meet their religious requirements, religious minorities are penalized for adhering to the tenets of their faith because the time they must take off for religious reasons is either deducted from their salary or their annual leave. As a result, members of religious minorities must occasionally choose between meeting the requirements of their faith and suffering a reduction of income or a loss of vacation time. The committees believe it is unnecesarry, in most cases, to force any Federal employee to make such a choice.

The report noted that ample precedent existed for allowing an accommodation of the time off needed for religious observance. For example, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on religion. More specifically, Section 701(j) of that title, added in 1972, requires an employer to make reasonable accommodations to the demands of an employee's religious observance and practice as well as belief.

Certain relevant conceptual bases for Title IV provisions should also be discussed. For example, as Congressman Solarz pointed out on the floor of the House, although the provisions authorize the use of overtime to obtain compensatory time off for religious purposes, it was not intended that this would be the only way an employee could make up for such lost time. The authority would only become operative, he emphasized, if the employee elects to ask for the overtime work. Moreover, any overtime work required by the agency would be subject to the normal compensation rules.

Congressman Solarz also noted that Title IV does not compel any Federal manager to automatically accept an employee request for compensatory overtime work to meet religious needs. He said, "If the provision of overtime compensatory work provides an undue hardship on the agency or interferes with its efficiency, the agency need not grant such work." In this connection, the report of the Senate committees offered the following additional clarifying guidance, "The Committees anticipate that circumstances requiring an employee to forego such time off for religious observances will be quite rare. Mere inconvenience to an employee's agency will not justify refusal of an accommodation."

It also should be noted that Congress expected that the overtime worked for religious observances would be useful and productive work. The overtime is to be worked either in anticipation of time which will be needed on account of religous observance, that is prospectively, or

after the fact to make up for time already taken for that purpose. The Senate report emphasized that the amount of accumulated time to be made up must be limited to a reasonable number of hours. OPM has so far left the determination as to what is reasonable to the agencies.

The Office of Personnel Management,—then the Civil Service Commission,—issued interim regulations to implement Title IV of the act for executive agencies on October 2, 1978. These regulations were published in the *Federal Register* on October 6, 1978, with a retroactive effective date of October 2, 1978. They were also promulgated in Federal Personnel Manual Letter 550–71.

These regulations were issued very quickly for two reasons: one, because of the immediacy of certain days of religious observance for some Federal employees in early October; and two, the specific requirement in Title IV of the act that the Office of Personnel Management prescribe regulations within 30 days of enactment.

The Office of Personnel Management regulations apply to executive agencies. Agencies of the legislative and judicial branches and the Government of the District of Columbia are required to issue their own regulations for the implementation of Title IV.

There are four significant elements of the Office of Personnel Management regulations which I should describe for you, as follows:

One, an employee who elects to work compensatory overtime for the purpose of religious observance shall be granted, in lieu of overtime pay, an equal amount of compensatory time off, hour-for-hour, from his or her scheduled tour of duty.

Two, the overtime pay entitlements provided by Title V United States Code, and the Fair Labor Standards Act of 1938, as amended, do not apply to the compensatory overtime worked for this purpose.

Three, an employee may work the compensatory overtime before or after the grant of compensatory time off. It is significant to note that this is the first such authority where an employee may take advanced compensatory time before the overtime is actually worked. Agencies were advised that a grant of advanced compensatory time should be repaid by the appropriate amount of compensatory overtime work within a reasonable amount of time.

And lastly, the Office of Personnel Management interim regulations include the exception provided in Title IV of the act that an employee's election to work compensatory overtime or to take compensatory time off to meet his or her religious obligations may be disapproved by an agency if such modifications in work schedules interfere with efficient accomplishment of an agency's mission. In this regard, however, agencies are expected to accommodate to an employee's request to work compensatory overtime or to take compensatory time off for this purpose. Agencies are advised that if no productive overtime is available to be worked by the employee at such time as he or she may initially request, alternative times should be arranged for the performance of the compensatory overtime work.

It is of interest to note that during the consideration and development of the interim regulations, one major issue needed to be addressed. Specifically, Is it necessary or feasible to define what is a personal

religious belief, and should it be done in terms of established or well-recognized religious practices?

Early bills on the subject contained such language as "an employee who is a member...of a bona fide religion." The Civil Service Commission, in reporting on these earlier bills, indicated that the reference to "bona fide religion" violated the prohibition of the first amendment of the Constitution against passage of laws respecting an establishment of religion. As a result, this language was later modified by the bill's sponsor to read, "an employee whose personal religious belief requires the abstention from work during certain periods of time."

Thus, the application of this provision, as it is presently worded in Title IV of the act, is not based on the employee being a member of a bona fide religion. Its focus is placed on the employee's personal beliefs rather than upon the dictates of any specific theistic body. It is our position that the Office of Personnel Management should not attempt to distinguish between a formal religion and something which might be viewed as less than an established religion or religious practice.

Furthermore, in our view, it is not up to the Office of Personnel Management to define what constitutes a personal religious belief, nor is it for an agency to question whether an employee's personal religious belief is in any sense a legitimate or accepted religious belief. The only requirements are: one, that the employee's personal belief be of a religious nature; and two, that the employee's personal religious belief requires the abstention from work during the period the employee is requesting time off.

In conclusion, I would like to quote Congressman Solarz again regarding the high-minded purpose of Title IV. He emphasized that this provision of law is designed to guarantee that all Federal employees are treated equally regardless of their religion and to make sure that no Federal employee is discriminatorily or unnecessarily penalized because of their devotion to their faith.

Thank you for this opportunity to discuss this new employee benefit and the Office of Personnel Management's implementing regulations.

I would be pleased to answer any questions you may have.

VICE CHAIRMAN HORN. At this point I would like to ask Mr. Echo-Hawk and Ms. Harjo if they have any questions of Mr. Gettman based on the applicability of this legislation as it applies to American Indian religious practices? Do you have any questions you would like to ask him?

Eventually we would have had an interaction between all of you.

MR. ECHO-HAWK. Well, I think it's a good act, you know, and I think it will go a long ways to protect Native religious observances by Federal employees and I'm just wondering—and we're looking into the act and how it's being implemented presently. But one concern that I do have is that the act apparently leaves a lot of discretion with the agency heads to determine what religious leaves are reasonable and whether the agency mission can be accomplished in an efficient manner.

I'm just wondering, has the Bureau of Indian Affairs—or what agencies have promulgated the implementing regs under this?

MR. GETTMAN. We're not aware of all of the agency regulations that may have been issued. Our understanding is that this information was properly disseminated by the agencies. We did issue what is referred to as a Federal personnel manual letter containing the information that goes to all holders of the "Federal Personnel Manual," which is nationwide. There are thousands of holders of these manuals throughout the government. But we don't have specific information about, nor copies of, what agencies themselves have issued.

MR. ECHO-HAWK. So then, OPM has no responsibility to see that other Federal agencies enact regulations that implement this? Or just implement the OPM regulations?

MR. GETTMAN. Well, the OPM regs, of course, are applicable across the government and become binding on the agencies. The agencies, in fact, don't have to issue anything in addition to the OPM regulations.

The Office of Personnel Management, of course, does have a compliance and enforcement staff located both in Washington as well as in each regional office, and they are responsible for assuring that agencies comply with all provisions of law, personnel management law and regulations. This would be encompassed within that function.

VICE CHAIRMAN HORN. I think Mr. Echo-Hawk has asked an immensely important question and I would like to pursue it just a moment.

I take it that an agency can either base its decisions on the OPM letter which has gone out across the country as to what is reasonable, and then it becomes an ad hoc decision by individual supervisors, or the agency could promulgate more specific regulations setting a reasonable limit which would require, for example, that an individual take the time in advance or after the fact within a 30-day period?

MR. GETTMAN. Yes. As a matter of fact, that was done within OPM itself, a 30-day requirement was established.

VICE CHAIRMAN HORN. Does OPM collect the agency interpretations which have been made up to this point and does it have them in one place?

MR. GETTMAN. No. We have not systematically collected them at this point.

VICE CHAIRMAN HORN. So that this Commission could get a reasonable idea of how agencies are defining what is reasonable, would you suggest that we ask each agency, or should we ask you or what—I'm thinking of the major agencies, the major cabinet departments?

MR. GETTMAN. We could collect that material for the Commission, if you wish, from the major departments and a few of the large agencies.

VICE CHAIRMAN HORN. I think we would just like to narrow it down specifically to how is reasonableness defined, if it is reasonable, so we can complete a record. We don't want to make work unreasonably for your agency, but I think this would be of interest to the Commission.

MR. GETTMAN. Yes. I don't think it would be a problem for us to collect—

VICE CHAIRMAN HORN. Well, without objection that exhibit will be included in the record at this point.

Do any of my colleagues on the Commission have any questions of Mr. Gettman—or, I'm—sorry Ms. Harjo, do you have a question first?

MS. HARJO. Not a question, just a comment: the Office of Personnel Management has not been a participating agency to this point in the Task Force to Implement the American Indian Religious Freedom Act, and this issue has come up in our consultations with Native American traditional religious leaders.

And because it has come up in consultation which is mandated by the act and has come up here, I think it might be appropriate for the Office to reassess its participation in that Task Force. Perhaps that's something we could discuss later.

MR. GETTMAN. Well, I'd be glad to discuss it later.

I don't know offhand which office of the Office of Personnel Management would be the participating office, but we can discuss that later.

MS. HARJO. Okay.

VICE CHAIRMAN HORN. Any members of the Commission have a question of Mr. Gettman?

COMMISSIONER RUIZ. Yes.

The words, "belief of a religious nature," were apparently substituted for "a bona fide religious belief" or something, I think you stated as they started out originally.

Now, after listening to another panelist earlier today who said that a nonreligion could be classified as perhaps a religious belief in nature, I'm just wondering, on this process of defining and redefining, where you think we are going to end up?

MR. GETTMAN. That's a difficult question.

We, in fact, did not feel that we could go much beyond what the wording of the law itself, in this case, this Title IV provision, actually stated. It was our view and the view of the general counsel's office in OPM that the term needed to be viewed as self-explanatory. Personal religious belief could not be further defined, partly, I think, because of an interpretation of the Bill of Rights provisions.

COMMISSIONER RUIZ. Interpretation of conscience, how you feel, something like that?

MR. GETTMAN. It's a very difficult question.

We tend to approach these things, I'm sure you're aware, in a somewhat legalistic and regulatory manner and we just–

VICE CHAIRMAN HORN. Wasn't your testimony very clear on this and the law? In answer to Commissioner Ruiz, the answer is: it's whatever the employee says it is, and that is not subject to question.

MR. GETTMAN. Yes.

VICE CHAIRMAN HORN. It then gets down to the agency deciding when is it reasonable to make up for the time that the employee claims to need for his private religious purposes?

MR. GETTMAN. That's exactly correct, yes.

CHAIRMAN FLEMMING. It seems to me that the Office of Personnel Management arrived at a good decision here.

MR. GETTMAN. Thank you.

VICE CHAIRMAN HORN. Commissioner Freeman, do you have any questions?

COMMISSIONER FREEMAN. No. I have no questions.

VICE CHAIRMAN HORN. Chairman Flemming, have any?

CHAIRMAN FLEMMING. No.

VICE CHAIRMAN HORN. We will include in the record at the end of your formal presentation this Federal personnel manual system, FPM letter 550–71, which was issued October 2, 1978.

Thank you very much for coming.

I would like now to move back to Susan Shown Harjo, who I feel is now almost a professional witness for this Commission, having appeared at our Indian rights hearing recently.

Ms. Harjo is Special Assistant Secretary of the Interior for Indian Affairs. She also serves as coordinator of the Task Force to Implement the American Indian Religious Freedom Act. She has been legislative liaison for the Native American Rights Fund for which Mr. Echo-Hawk is an attorney, a Whitney Fellow, and communications director and legislative assistant to the National Congress of American Indians.

We are delighted to have you back with us. Please feel free to take as much time as you would like to lay out what's been done by your task force.

Thank you.

STATEMENT OF SUSAN SHOWN HARJO, SPECIAL ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS AND COORDINATOR, TASK FORCE TO IMPLEMENT THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT

MS. HARJO. Before the President signed S.J. Resolution 102, the American Indian Religious Freedom Act, into law on August 11, 1978, and, before the House had passed the Senate's resolution, the Bureau of Indian Affairs, the Office of the Assistant Secretary for Indian Affairs, the Administration for Native Americans in HEW, and the Community Services Administration entered into an interagency agreement, the purpose being to fund two Indian legal associations to carry on a parallel review that would be required by the Federal agencies should the Religious Freedom Act be passed. And we selected the Native American Rights Fund—I'm glad you mentioned other organizations I've been associated with, so this doesn't sound as inbred as it might because of its litigating and research capability and the fact that it has represented many Indian tribes on questions of maintenance of religious and cultural integrity—and the American Indian Law Center at the University of New Mexico, in Albuquerque—for similar reasons the law center is more research oriented than litigation oriented.

We asked if the two legal associations would form an advisory body of Native traditional religious leaders to facilitate the Federal task force work, once it got underway, and to identify concerns that were appropriate under the Religious Freedom Act to the Federal agencies from the religious leaders and to translate some of those concerns into suggestions for statutory change, administrative change, timing, and to work very closely with us as we worked to implement the act itself.

And the reason we began—the three agencies and four offices began—this process prior to enactment of the bill was because we knew

how long it takes the bureaucracy to move sometimes, and we wanted to have a mechanism for the parallel, nongovernmental review in place as the Federal agencies began their review.

All of that worked out, and Mr. Echo-Hawk, here, has related the work of the task force in part. HEW imposed an additional requirement on the project, which was to develop a mechanism for ongoing consideration of Indian religious interests by the Federal agencies, so that this would not be a one-shot effort and so that the Federal agencies would not simply have reviewed, for a certain time, policies of the past and then continue to make the same mistakes in the future that have been made in the past.

Most of those mistakes, with the obvious exception of some of the more egregious initiatives regarding the ghost dance and sun dance with which we are all familiar, have been a question of neglect, an issue of neglect.

The Indian interests, as it is considered governmentwide, is not adequately addressed in any area, particularly an area about which so little is known as Indian religions. And it was hoped that through the task force process more Federal agencies might become more aware of the Indian interest generally, not simply the religious interest. But this seemed a good place to start.

And part of that awareness within government is simply having something like two rubber stamps; one saying, "excluding Indians," and the other saying, "including Indians"; and as any piece of paper goes past a desk in any Federal agency, you keep the Indian interest in mind. This dam that we're about to build, might it impact on an Indian interest, might it disturb Indian bodies that are buried, who are the direct, not-so-distant ancestors of the people living just near that area?

It's a problem of awareness and of making certain that the policy of the United States is declared loudly to the local levels where policies are implemented or not implemented. And I would like to point to the work of the Customs Service as an example of the way to turn a broad and general policy into very specific action.

The Customs Service has established a task force on Indian issues, particularly Indian religious issues, and each of its regional offices on the borders of Mexico or Canada have members of this task force. And they are meeting with Indian people to look at those cross-border issues such as Indian medicine people, who from the United States or from Canada or Mexico are going in any direction across those borders carrying very sacred items that should not be touched, and actually cannot be touched by anyone not in that family or not having been provided an instruction or who is not authorized to touch a medicine bundle, arriving at a border crossing and having a border guard say in his mind, "I'm looking to stop drug traffic this week and have to examine every single article that could contain some controlled substance." And then taking a medicine bundle, despite protests of the person carrying it, rendering it useless for any future purpose to that religion or to that family or to that clan or to that tribe and, ultimately, not revealing much that would be interest or or significance to the person looking at it.

Customs is looking to ways to resolve that kind of practical problem which has occurred on many occasions. How do the Indian religious leaders identify themselves or how are they identified, and how are they separated from people who may be bringing something illegal into a country, for which there are rules? This calls for serious consideration when you get to the point of how a law is implemented, and I think Customs is doing a very fine job in this regard.

A number of the other agencies are looking at problems that concern them. NOAA [National Oceanic Atmospheric Administration] is examining problems as part of their ongoing work as well as this task force regarding ceremonial fisheries and subsistence fisheries. The task force, which has approximately 50 agencies participating, is about to subdivide and hold regional and issue-oriented consultations with Indian religious leaders on questions of ceremonial fisheries, for example, and issues to do with prisoners' rights. The land manager agencies will hold separate meetings and consultations concerning access to religious sites, the potential for waiver of license fees, and kinds of arrangements that can be made. All of the agencies are attempting to develop procedures that work for that agency and then join with their like agencies to standardize policies and procedures so that Indian people don't have the rules changing from agency to agency or from day to day, depending on the area they're in or the jurisdiction they've stepped into.

The law, in addition to declaring that it's the policy to respect and honor Indian religions and declaring that Indian religions are constitutionally protected, mandates a study, a report to the Congress from the President at the end of 12 months' time. Our report goes from the President to the Congress in August of this year.

Mandated in the act is an internal review by each Federal agency, department, or instrumentality which is an appropriate entity with relevant laws. Mandated in the act is the consultation with Native traditional religious leaders. The report, as is specified in the law, is to include a record of administrative change, timing of administrative change, and recommendations for statutory change.

The first problem of the Secretary of the Interior in establishing the task force was to determine which agencies are appropriate agencies with relevant laws and rules and regulations and procedures. So a simple form was sent to every Federal instrumentality simply asking for positive or negative declaration that blank agency, instrumentality, or department is an appropriate agency, or is not, and asking for a task force representative. And the responses themselves point to part of the problem in that more agencies with direct relevance to Indian religions consider themselves not appropriate agencies than do the number of agencies that responded positively.

The range of issues is stunning, although when people first encounter this problem and this issue and the work of this task force they think it's a very simple problem to take a look at most of the governing documents of any agency and say, "No, nothing here appears to do damage to any Indian religious interest." But nothing in our governing documents or procedures or practices is spelled out saying "Indian," so probably nothing impacts on the Indian interest. With most agencies,

the absence of the word "Indian" or "Native" is the problem, because there is no protection.

Native religious leaders are not readily available to Federal agencies, and we realize that this has been a problem in the past. Each tribe goes far to protect our religious leaders, and there's no directory of Native American religious leaders. There's no post office box, generally, and the consultation has to be taken outside of Washington and into tribal areas and tribal territory in order to get to the actual people who are having the problems.

The record of relations between the Federal Government and the religious leaders has not been a good one, and that is something we are trying to change.

I really feel that the people who are working on the task force have approached this task very seriously, are making an effort to comply with the spirit, not simply the letter, of the law and are applying all their skills and expertise to resolution of some of the really ticklish problems, establishment problems, and so forth.

And I would be happy to supply you with the names of the people in each of the agencies who are representing those agencies if you'd like.

VICE CHAIRMAN HORN. I think that would be useful. Let's insert in the record at this point a list of the members of your task force, because I noticed in the dialogue you had with Mr. Gettman that apparently OPM has been invited, but they have not been participants; is that correct?

MS. HARJO. This is right.

VICE CHAIRMAN HORN. You might add to that list those Federal agencies which have been invited by you, as chairman of the task force and which have not participated, so that we see the total record.

MS. HARJO. Okay.

VICE CHAIRMAN HORN. Without objection, that will be inserted at this point.

MS. HARJO. I'll provide the name of the Civil Rights Commission as well as all the others that have not participated.

VICE CHAIRMAN HORN. Okay.

Have you completed your statement?

MS. HARJO. Yes.

VICE CHAIRMAN HORN. Well, that's immensely helpful.

Let me ask my colleagues, are there any questions?

COMMISSIONER RUIZ. No.

COMMISSIONER FREEMAN. No.

VICE CHAIRMAN HORN. I would like to thank both of you for what I think is very thorough and constructive testimony. I think this has been an eyeopener for most members of the Commission because, while we pursue the Indian Civil Rights Act of '68, we really have not been familiar with this legislation as much as we might have been. So it's been a very helpful discussion.

I'm particularly grateful for the case which Mr. Echo-Hawk put into the record which our staff will pursue.

MS. HARJO. Commissioner Horn, if you would like, I have a copy of the law, the signed statement of the President and the letter from the Secretary establishing the task force that I would leave for the record.

VICE CHAIRMAN HORN. Very good, I would like that included with the list of the membership on and off the task force.

So I'll turn it over to you to announce tomorrow morning's session.

CHAIRMAN FLEMMING. Again, may I thank you also for very helpful testimony. The consultation will be in recess until 9 o'clock tomorrow morning.

[Whereupon, at 6:20 p.m., the hearing was recessed.]

Morning Session, April 10, 1979

CHAIRMAN FLEMMING. I'll ask the consultation to come to order.

I'm requesting Commissioner Freeman to introduce the first panel and to conduct the discussion in connection with the presentation of the first panel this morning.

Commissioner Freeman?

COMMISSIONER FREEMAN. Good morning.

The following panelist will discuss the rights of the incarcerated in the Federal correctional system. The first panelist is Clair A. Cripe, who has served as General Counsel for the Bureau of Prisons since September 1975 and has worked for the Bureau of Prisons since 1962. He is a graduate of Oberlin College and Harvard Law School; he has written numerous articles on the privacy and religious rights of prisoners and the changes taking place in correctional facilities.

Mr. Cripe.

STATEMENT CLAIR A. CRIPE, GENERAL COUNSEL, BUREAU OF PRISONS, DEPARTMENT OF JUSTICE

MR. CRIPE. Thank you, Commissioner Freeman. Chairman Flemming, Commissioners.

It's a pleasure for me and for the Bureau of Prisons to be invited to participate in this consultation.

I believe you have in your materials a paper that I prepared for the American Correctional Association titled, "Religious Freedom in Institutions," which traced for another group, for the use of correctional administrators, the history, as I saw it, of religious activities in prisons and particularly the flow of lawsuits in the last 20 years in this area. I'll not go through that history but will comment on some more recent developments based on that paper's analysis.

The first amendment, of course, has the two prongs, and my concerns, as opposed to those of my colleagues from the Bureau of Prisons,

will be to look at the courts' analysis, at the constitutional framework on which religious activities in institutions are based.

The two prongs of the first amendment test are, of course, the establishment phrase and the free exercise phrase. The establishment clause that Congress shall make no law respecting an establishment of religion is as one might expect, less subject to challenge or lawsuits by inmates. There have been very few attacks on the activities that are provided.

Some inmates have challenged the use of government monies to provide religious services, religious activities. I would just note that, at least in dictum, we have approval from the Supreme Court for the necessity of providing inmates, as we do the military, with chaplaincy and other services at government expense.

There are some very tough questions in the establishment area, some in which courts have gone both directions. Probably the most significant is that of reference to inmate religious activities in reports that are made on them which may be considered by staff members, by parole authorities, in making decisions with respect to the prisoners.

As I say, the courts have split on that issue when it has been infrequently raised.

As I note in my paper, I think Justice Brennan's formula is an excellent one that the State, by the dictate of the clause, must attempt to maintain neutrality in its relationship towards religion which means neither favoring nor disfavoring the activities of an inmate in the religious area.

And of course, putting that into practice is an extremely difficult task, because to say that absolutely no comment can be made in reports about an inmate's religious activities means that, in my view, there is discrimination against the inmate who chooses to be active in religious matters in that one can look at the reports about his activities in prison and get a complete picture of what he's doing, with one exception, and that is we have a total gap as to what he may have done in the religious area.

That is a very difficult one to solve, however, and the courts have recognized that.

My main comments will be on the free exercise clause. The Constitution says Congress shall make no law prohibiting the free exercise of religion. It is pretty clear from the century of cases in the Supreme Court that citizens have an absolute right to their religious beliefs and no discriminatory action can be taken against them because of those beliefs.

However, citizens do not have absolute right to any activities they may wish to engage in, based on their religious beliefs. And it is, of course, in that latter area, where we run into tension and conflict in the prison setting.

I will just comment on two or three that we have had in recent years.

First, as to appearance: there has been a line of cases dealing with the right of inmates to have their hair or their facial appearance in whatever manner they may want under the dictates of their religion. The

Bureau of Prisons, until just a couple of years ago, prohibited the growth of beards. They required inmates to be clean-shaven.

In a case entitled *Moscowitz v. Wilkinson* in the district of Connecticut, the court first looked at what is the entry question, and that is whether there is a valid religious interest in the individual right, and said yes, this was an Orthodox Jewish prisoner who had a strong individual interest—even though he had perhaps not always observed—in not shaving his face.

Then they applied the balance, if you would, shifted to the government and they applied the test that the government must meet in order to regulate that individual religious interest.

There have been different standards applied by the courts, but I believe this is a middle-of-the-road and a fairly common one now used and that is that first the government must show that there is an important or substantial interest that they are pursuing in the regulation; and second, that the regulation is reasonably adopted to achieving that objective of the government.

Now, in meeting that double test, which is something that one might apply in any area where correctional administrative interests come into conflict with individual interests, one might have expected the first part of the test to be more difficult to meet, but the courts quite readily found that there was a substantial interest, that administrators did have a legitimate concern and a substantial correctional interest in identification of inmates for security, to prevent escapes, to be able to identify people, and not have rapid change of appearance through the growing or shaving of beards. And so the first part of the test was met.

However, as to the second part, the court found that the government had not met its burden and could not show that its ban was reasonably adopted to achieving its security interest. And the court in saying that there was no rational adaptation in this case, did note that this was probably a fairly small group and that the determination of the prisoners' bona fide religious interest could be made by prison authorities in allowing beards. In other words, very strongly giving permission to allow some inmates to have beards and others not.

Despite that authorization from the court, I believe I can say that we found great difficulty in arriving at a formula whereby we could distinguish a bona fide religious beard from a non-bona fide religious beard, and as a result of that case, we allowed beards for all inmates.

However, I would note that the issue is still alive. Another religious group—an inmate at the Lewisburg Penitentiary, claimed to be a Rastafarian, that he had been converted to that during a trip to Jamaica. The Rastafarians, he indicated, are required to let their hair grow and never to touch it, to comb it, to in any way unsnarl it. As a result, it grows naturally into long strands or rings which are called "dread locks." And there was an indication that the hair could not be adequately inspected as to whether there was anything hidden in it. And the court, after receiving testimony from a number of people, agreed with that and said that was a security concern and the inmate had to come up with some way to comb out, to clean out, his hair so that the prison authorities could make certain that there was nothing secreted in it.

As to diets, of course, the lead case now is the case of *Kahane v. Carlson*, where the Second Circuit looked at the requirements for kosher diet for observant Jewish inmates, and the court concluded that the prison authorities would be required to provide a diet which was sufficient to meet the religious dictates, the religious requirements, of the inmate group and maintain them in good nutrition, nutritious health.

Later court opinions implementing that formula noted that that did not mean that inmates were entitled to any particular items that they might prefer. There was a case which raised the question as to whether Jewish inmates should have comparable items when those items were served to other inmates. In other words, if the inmates in the general population on a meal were receiving fried chicken, that they would have a kosher chicken or at least a kosher poultry meal. In other words, the items would be as comparable as could be planned for that particular meal. And the court analyzed that and said, "No; that was not required." There were correctional administrative concerns in providing an ongoing diet and all that was required was that kosher items be provided to meet their religious dictates and that the diet be balanced to maintain them in good health.

Finally, I would note, as to religious services and activities, the most basic probably religious activity that we think of is that of group or congregated meetings and ministry being provided by leaders of the religious group. In that area, there is not frequent conflict any more in courts that I see, but I will note a couple that have come up: one, of course, is the problem of inmate-generated or inmate-created religions. There is considerable case law in that area arising primarily out of a group called the Church of the New Song which was founded by a Federal inmate when he was at Marion, Illinois. It is a religious body, in his explanation, which is geared towards convicts as to being for the worship and group activities of prisoners.

And that has been litigated, but I understand will be covered by the second—during the second session—you have this morning; so I won't go into it.

Although there has been a good deal dealing with the Federal prison system, the one I will comment on and then close is the Metropolitan Community Church. The MCC is a church as described in the case of *Lipp v. Procunier*, which is conducted primarily for members of homosexual orientation and the question—applying the formula that one must under the first amendment protection, the formula is whether the activities of that church would pose a concern, a legitimate concern, to the security of the institution, the safety of the people in the institution.

That matter is in litigation, both with the State system and the Federal system. We have a class-action suit pending in the northern district of California dealing with the activities of that group. Again, as I see it, it's a question as to whether the government has a security or institutional interest in regulating the activities of that group, applying the standard which I first referred to out of the *Moscowitz* case.

Thank you very much.

COMMISSIONER FREEMAN. Thank you, Mr. Cripe.

Father Richard A. Houlahan is presently the Federal Prison Systems Administrator of Chaplaincy Services responsible for developing and furthering policies and procedures relating to religious programs throughout the Federal prison system. He has worked as prison chaplain in both Federal and State prisons and was named the correctional chaplain of the year in 1976. Having received a bachelor's degree in philosophy and master's degree in theology and criminal justice, Father Houlahan has written numerous articles and papers dealing with the correctional ministry.

Father Houlahan.

STATEMENT OF RICHARD A. HOULAHAN, PRIEST AND ADMINISTRATOR, FEDERAL PRISON SYSTEMS CHAPLAINCY SERVICES

FATHER HOULAHAN. Thank you. Commissioner Freeman, Chairman Flemming.

I thought that I would address my remarks to the chaplaincy services in the Federal prison system and you have, I believe, in your materials, a policy statement that is current, entitled "Religious Beliefs and Practices of Committed Offenders." And I'll read the policy statement introduction:

> It is the policy of the Bureau of Prisons to extend to committed offenders the greatest amount of freedom of, and opportunity for, pursuing individual religious beliefs and practices as is consonant with the requirements of maintaining security, safety, and orderly conditions in the institution. It includes distributing, as widely as possible, available resources among the many kinds of services and activities which contribute to these aims.

The Federal prison system at this time employees 63 full-time staff chaplains. These chaplains represent varied religious backgrounds, numbering approximately 23 Christian denominations other than Roman Catholic. Among the Roman Catholic denominational chaplains, there are priests from various religious orders and from various dioceses in the United States.

At the present time we have one Jewish chaplain. Sixteen precent of the chaplains are minority or of female background. We have Oriental, black, Mexican-American, and female chaplains.

The chaplains are responsible for carrying out, under the jurisdiction of the warden, the executive office of the institution, the policy statement. It is their goal to provide the resources of religion to the committed offenders.

The chaplains, interestingly enough, although they come from the denominations represented in the United States, are general practitioners; we do not employ clergy persons of a specific denomination. We do not have a quota system.When I say they are general practitioners, we hire clergy persons as chaplains; they are secondarily Roman Catholic, Protestant, Jewish, whatever. They are responsible for providing the resources of religion to all inmates—those who have a specific religious need, those who have no religious affiliation.

I prepared a very brief list of some of the religious groups that the chaplains deal with from day to day. And I think that would illustrate the fact that they must be general practitioners.

We recently have had groups known as the Aquarians, the Cornucopians; we have Buddhists, we have members of the Church of the New Song, Hari Krishna, Hindus, Holy Order of Man, Jehovah Witnesses, Nassarites, Metropolitan Community Church, Unification Church, Universal Life Church, Rastafarians, Satanism, Scientology, Witchcraft, Sikhs, etc.

In recent years we have had a sizeable number of men and women who are incarcerated and profess the Islamic faith. We count in the Federal system at the present time, within the Islamic faith groups, the Hanafi Muslims, the Moorish Science Temple of American, the Five Percent Nation of Islam, Sunni Muslims, and the World Community of Islam in the West. And of course we have members who profess the Native American religion.

The chaplains are the ones who must insure the inmates' access to the resources of their religion. This, means of course, to the clergy persons who represent their religious beliefs and practices, to the literature, to the necessities for the worship services that the various groups carry out, etc. Some of the problems that generally come up in doing this, of course, is the disparity from religion to religion concerning diets, concerning religious wearing apparel, such as headgear, concerning religious holidays, concerning the various prayer practices, etc.

With the Native American Indian religion this is rather new for some of the chaplains. We've had members of the Native American religion, but recently, we are more aware of their needs and we have instances where information is needed concerning the provision of medicine men, prayer pipes, medicine pouches, and various other things. Some of the ceremonies, such as Yuwipi ceremonies, drums, buffalo skulls, buffalo robes—and on and on and on.

So it is incumbent upon the chaplain to see that all of these things are available within the restrictive atmosphere of a correctional institution. We use members of the religious community, both by hiring them as contract persons to bring them into the institutions and as volunteers from the religious community of the various faith groups.

When someone is identified as belonging to a specific faith group that we do not have resources in the institution at that time for, we search the community for those resources and we do the best we can.

As I say, the chaplains must be general practioners, they must be available at all times for both the men and women who are incarcerated. This means that they are available for religious counseling. If the counseling that they are able to personally provide is not acceptable, and other counseling is available which is acceptable, we do our best to provide that.

They are there for emergency crisis intervention, situations of difficulties with the families; they are there as resources for the religious community outside of the institutions; they are there to translate the religious needs of the prisoners to the administration.

It's a very different type of chaplaincy than that found in the armed forces.

Again, I illustrate the fact that the men and women that are in the chaplaincy services are general practioners.

COMMISSIONER FREEMAN. Thank you.

Our third panelist is Larry F. Taylor. Mr. Taylor has worked with the Federal Bureau of Prisons since 1966, and presently serves as warden for the Federal Correctional Institution in Lompoc, California. Prior to that assignment, he was the warden at the Metropolitan Correctional Center and the Federal Detention Center, both in New York, and Executive Assistant to the Director of the Bureau of Prisons in Washington.

He received a degree in correctional administration from Michigan State, and has done graduate work at Eastern Michigan University and California State University.

Mr. Taylor.

STATEMENT OF LARRY F. TAYLOR, WARDEN, FEDERAL CORRECTIONAL INSTITUTION, LOMPOC, CALIFORNIA

MR. TAYLOR. Thank you, Commissioner Freeman.

Mr. Chairman, first of all, let me state that Lompoc is a maximum security institution designed to accommodate about 1,200 offenders. We are really two institutions in one, because, in addition, we have a minimum security camp for 420 inmates serving relatively short sentences.

Persons confined in the major institutions are serving relatively long sentences for drug offenses, trafficking in drugs, bank robbery, homicides, hijacking, kidnapping, and all the kinds of offenses that you would expect to find at a major institution.

We have a mixed racial group: about one-third of our population black, one-third white, one-third Chicano, and about 100 Indians at any one time, Native American Indians.

I think it's important to say that the exercise of religion in an institution of this type cannot be absolute and I think it's subject to reasonable regulations designed to protect the welfare of the staff and the inmates, the welfare of the community, control and discipline of the inmates, proper exercise of institutional authority in scheduling activities, etc., and reasonable economic considerations.

I don't think, for example, we can provide clergy for every kind of religion represented in our facility; we can't provide facilities for every type of religion represented in our facility. There are some difficult religious issues which a prison administrator has to face each day: first of all, what is a religion? Thank goodness I don't have to decide what a religion is. You've heard the list of religions that are represented in the Bureau of Prisons. That's decided for me by general counsel and by several court cases.

But another difficult issue is what are ceremonies, artifacts, and symbols that are mandated by certain recognized religions? And can we make those available to the inmate population?

Areas of concern for us have to do primarily with security. Can we operate a safe humane institution and yet allow a number of these kinds of things into the institution?

Of course, our goal is to try to be as flexible as possible and allow the greatest amount of flexibility in exercising religion wherever we can. We are concerned about diets and, you know, it is easy to prepare 1,600 meals three times a day if we're preparing the same thing for everybody; but if you have seven or eight different groups who need, who have different kinds of diet requirements, then that task becomes much more difficult. When certain requirements are accepted or recognized, the question of having the necessary experts there is still to advise us on proper preparation. This has been particularly troublesome with the Jewish inmates and also troublesome with Muslim inmates who have special diet requirements.

We have a similar problem with what is consider proper religious wearing apparel. Special clothing also becomes a security problem when going in and out of our visiting room. Head gear and items of this sort need to be carefully searched when a man enters or leaves the visiting room.

Mr. Cripe indicated one example of Rastafarians, where we've had some difficulty searching their hair for drugs and things of that nature. Symbols often cause racial tension within our institutions for various reasons. The recognition of holy days and when they should be celebrated is another sensitive issue. Are the inmates allowed off work during those holy days? If one group has the day off from work, then all groups would like their days recognized, and be off from work on that day.

Scheduling of prayer hours so they do not interfere with counts and other institutional functions is also important. Chanting, for example, isn't very popular early in the morning, yet, some of our inmates believe that they must chant at sunrise. In one case at Lompoc, one man assaulted another man because of the noise that was being made and the invasion of privacy.

Special instruments used in the practice of religion is another area that we have to be concerned about. For Native American Indians we allow drums into the institution and although we haven't in the past, we are now looking at allowing a peace pipe into the institution.

Incidently, in the past when the peace pipe was allowed, there was a conflict in which the pipe disappeared. About 40 or 50 inmates decided that that pipe was not going to be returned to its proper place. As a result, there was a great potential for violence and disruption of prison routine because of that incident. Many times, it's a question of what is required of a man's religion as opposed to what he prefers. A question of individual preference over mandated requirements. Clergy don't always agree, courts don't always agree, and certainly prison administrators don't agree on what's required.

One thing that's important to remember: whatever we do for one religious group, we must be willing to do for all religious groups, and so wherever we give a little in one area, we also have to be willing to give in another area. I think the primary barriers to the exercise of

religion as far as the Native Americans are concerned is the lack of knowledge, lack of knowledge on my part, lack of knowledge of many administrators who are charged with the responsiblity of running the prisons. What is the Indian religion? The same lack of understanding was true of Muslims in the sixties when we first started running into those kind of issues. The Indian religious issue is further complicated by the lack of written definition. I think most Indian religion is passed down by word of mouth and only after making some effort and doing some research have I become a little more comfortable with some of the requirements of the Indian religion within our institutions. I think there is a lack of documented history. The Indian religion is a combination of cultural, medical, recreation, and social needs. It serves all those purposes as far as I can understand and so, sometimes, what may seem to be a social event may have, indeed, some very serious religious significance for Indians.

I remember when we first started talking about Indian religion at Lompoc, one of the demands that was handed to us by the inmates was that they wanted more sponsors for outside trips. I found it difficult to understand how that would make it easier for them to practice their religion. It sounded more like of a social interest on their part to get outside the institution. However, when you look at what we offered inside the institution, then it becomes understandable because we offered very little and the facilities for practicing the religion laid outside the walls.

They wanted a special mediator. A person who could explain to us what their needs were. They wanted an elected inmate, grievance officer; they wanted more religious ceremonies like the peace pipe ceremony, the sun dance, sweat lodge. They also wanted arts and crafts instructors and they wanted a teacher for cultural studies. Well, sometimes it's difficult for a prison administrator to understand what all that has to do with religion. Why should this group of people be offered programs of this nature when other groups with religious interests are not being given the same consideration? If we were, in fact, to provide these programs for all groups, could we afford it? The answer to that question is no. We probably could not.

In a court case in Nebraska, the judge ordered a certain percentage of the religious budget for the entire institution to be spend on special Indian programs. The percentage was to be determined by the number of Indian inmates in the facility. So, if there were 15 percent Indian population, 15 percent of the religious budget had to go to that kind of activity. He also ordered steps to instruct the employees on Indian beliefs. He ordered a recognition of a spiritual-cultural club. He also ordered an affirmative action plan for hiring Indians and other minorities in the institution. He ordered an advisory committee on recreation, movie selection, and he ordered a credited course on Indian culture.

One might ask as a prison administrator, what does this have to do with the right to exercise one's religion? Some of those things seem clearly not to be significant as far as religious exercise is concerned, but if you look at Indian religion, again, if you do a little research, you'll

find that most of those things are very much involved in the Indian's religious beliefs.

When we were first approached at Lompoc about having a sweat lodge, our reaction was no, we're not going to have a sweat lodge. They're too secret; they're a fire hazard; they're a security hazard; because after all, they do go into these little huts and they're dark, and staff is not allowed inside; at least, that was our belief. And the other concerns we had were where would the lodge be located? How would we protect it from other inmates who didn't believe in a sweat lodge? What specific preparations would have to be made? We didn't know anything about sweat lodges. No one in our staff knew how to put one up or take one down or whether you could put them up or take them down. What special materials had to be used, none of us knew. How often is it put up? How often is it taken down? Who can use it? Has there been any incidents as a result of misuse of the sweat lodge by nonbelivers? Can correctional staff enter at anytime to search or observe? How often is the sweat lodge used? How many different tribes use it? Are practices the same for all tribes? Have there been any incidents related to the lodge by believers? In other words, have they used the lodge to take drugs or get involved in other illegal activity, because it is kind of a private place.

Are there written standards anywhere? Will inmates abide by the agreement, if we do reach an agreement, because they did not abide by the agreement that we reached in the peace pipe ceremony?

Is there an outside consultant who works with the institution? Who will bear the expense of a consultant medicine man? All these questions had to be answered by us before we were willing to say, "Yes, maybe a sweat lodge is feasible at Lompoc."

While unfortunately, we had to be faced with a court case before we did the research, we have done that research now and have agreed to provide the Indians of Lompoc a sweat lodge. We are offering to try the sweat lodge for a period of time as a settlement in that court case. We opposed it because, initially, we thought we wouldn't be able to satisfy all the different interest at Lompoc. We have 18 to 20 different tribes represented within our population; we weren't sure that one sweat lodge would satisfy all those different tribes. We are sure now, based on some of the research that we've done. I've already told you about the incident that we had with the peace pipe, and we were reluctant to get involved in another ceremony that we didn't know anything about because of what happened with the peace pipe. Incidently, we've reached an agreement there and the peace pipe is coming back into the institution under controlled circumstances that we can all live with. We don't know what else will be required if we get into the sweat lodge. Are there other kinds of ceremonies that then follow that have to be a part of the sweat lodge ceremony?

I think we are also concerned about what kind of a precedent it would set. We don't build synagogues for the Jews in our population; we don't build mosques for Muslims in our population; we have interdenominational worship facilities. We felt that that would be adequate for the Indian population as well. We have since learned, however, that

the sweat lodge is a very integral part of the religious belief of Indians, and they cannot participate in other ceremonies until they go through this purification process.

A sweat lodge ceremony cannot take place indoors, and so, under those circumstances, we felt that we could build one outside and not set the precedent that we've been concerned about. I don't think it leads to the building of other kinds of facilities for other religious groups.

I'd like to tell you that Lompoc does provide a number of services for inmates to practice their religion; we do allow all kinds of symbols and artifacts in the institution, whenever it doesn't violate security. We would be concerned, for example, in the Indian religion about allowing medicine pouches in or the use of peyote. I believe medicine pouches are sacred and can't be opened and inspected. Even if they're made inside the institution, once they're sealed they cannot be opened again without violating their sacredness.

We would be concerned about anything that we couldn't inspect. In our business, I guess, we get a little paranoid. We are suspicious of everyone and everything that can't be inspected. We do like to look into any concealed container of any type and not being able to would cause a problem for us. We allow traditional hair styles; we have interdenominational facilities; we have religious reading material; we have access to all clergy of recognized religions, including the medicine man; we have two full-time religious coordinators, extensive volunteer programs, and visiting programs sponsored by various religious organizations. We have special religious crusades and religious furloughs so that a man, who is qualified, can go out in the community to practice his religion with members of the community. We have accredited courses in cultural studies; we have spritual-cultural clubs.

We also have special meals when and where required, and we have yearly banquets for all religious organizations in which special foods can be brought in for whatever purpose is deemed important. Specifically, for Indians, we'll have the peace pipe. It started lask week. We have a medicine man; we have semiannual banquets and regular ritual dances; we have a drum ceremony, Indian cultural program, and the recognition of the Tribe of Five Feathers, the council of elders organization that brings all the tribes and institutions together under one roof.

I think the Supreme Court has said we must provide a reasonable opportunity to practice religion within our institutions, and I think we're doing it at Lompoc. I think that the barriers to the exercise of religion in any institution, whether it's the Native American Indian religion or Muslims, is often a lack of knowledge on the part of the administrators. If we're going to run these places it seems that we have to be experts in a number of different religions. We don't always interpret the mandates of those religions correctly, and we're not always able to determine whether its individual preference as opposed to religious requirement. For an example, a Rastafarian at New York, when I was the warden at that facility, said that his religion required him to have a vegetarian diet. I'm not sure that's a requirement of his religion or not; it seemed to me that it was a cultural preference of his.

Another judge ordered us to provide a man from Vietnam with a rice diet because he said, after all, if we could provide Jews with kosher food, we ought to be able to provide this man with a rice diet. Well, any time we make special arrangements for an inmate or group of inmates it becomes a problem for us, an administrative problem, a budget problem, and a time problem.

Thank you.

COMMISSIONER FREEMAN. Thank you.

And now, I'll give the Commissioners an opportunity for interaction.

Commissioner Saltzman.

COMMISSIONER SALTZMAN. Mr. Cripe, how do you think, in response to what you've told us, the system can be improved, if you deemed that improvement is feasible and possible? What specific steps might be taken to improve the availability of religious life for inmates in Federal institutions?

MR. CRIPE. I think I might be the wrong person, Commissioner Saltzman, to be attempting that, because I think that is an administrator's problem and not a lawyer's problem.

Unfortunately, we tend to get into the cases when there is the clashing of individual interest and governmental interest. My guess would be and my personal response would be that as with so many things, it's a question of resources. There are more things that could be done, but all programs of a correctional system must be justified to the legislature and appropriations made for different activities. Religious programs, of course, are just one of a great number of programs and activities made available to the entire inmate population.

The Federal system now with some 26,000 inmates must provide for a wide range of interest, and an area we're talking about today of the diverse groups which are represented in Federal prisons, certainly—and I'm sure Father Houlahan would back me up on this—there are areas where, with additional resources, we could be providing some additional things.

COMMISSIONER SALTZMAN. Father Houlahan, can I get a clarification on the statistics you gave us. You have how many chaplains full time in total?

FATHER HOULAHAN. We have 63 at the present time.

COMMISSIONER SALTZMAN. Sixty three. How many are Protestant, can you tell me?

FATHER HOULAHAN. Protestant would be about 41.

COMMISSIONER SALTZMAN. How many are Catholic?

FATHER HOULAHAN. Catholic, about 21.

COMMISSIONER SALTZMAN. You have one rabbi?

FATHER HOULAHAN. One full-time staff rabbi.

COMMISSIONER SALTZMAN. And then how would they divide down further.

FATHER HOULAHAN. They would be on training and they would be Protestant chaplains. The rest would be staff chaplains, but not at a specific institution; they're in training.

Seven-tenths of 1 percent of the budget of the Bureau of Prisons is allocated, that's concerning salaries and all expenses to the religious budget.

COMMISSIONER SALTZMAN. In the area of full-time chaplains, you have 23 Protestants, 18 Catholics, and 1 rabbi. Now what, 42 more. What are the categories of the remaining chaplains?

FATHER HOULAHAN. I'm sorry; I was giving you the denominational differences. I don't have a break down in front of me. Most of the chaplains would be Protestant, among the Christian chaplains, with the rest being Roman Catholic and one Jewish chaplain.

COMMISSIONER SALTZMAN. So full-time chaplains are basically the traditionally Catholic, Protestant, and Jewish?

FATHER HOULAHAN. I don't know if I'd use the term "traditional" representative among the Protestant denominations. We have the traditional and nontraditional. We have representatives from the American black churches, the AME [African Methodist Episcopal], the CME [Christian Methodist Episcopal] Churches; we have members of very small Protestant denominations, any one who can meet the qualifications, the education qualifications, for the Federal prison system is considered for employment and subsequently hired.

So we have several nontraditional Christian chaplains.

COMMISSIONER SALTZMAN. But all of them are hired as general practitioners in accordance with the job?

FATHER HOULAHAN. Yes. We have several institutions where there is only one person on the chaplaincy staff. That person may be Roman Catholic or may be Protestant.

COMMISSIONER SALTZMAN. And the hiring has nothing to do with the religious denomination; or am I overstating that?

FATHER HOULAHAN. No, I don't think you're overstating it; no, it has very little to do with it.

We have one Jewish rabbi who is a general practitioner. He's coordinating the religious activities of several different religious groups. We have only one Jewish clergyman, basically, because we have so very few Jewish inmates in the Federal prison system, and in recent years, we've only had three requests for employment from the Jewish community.

COMMISSIONER SALTZMAN. So there is some relationship to the religious denomination of the inmates and the nature of the religious committment of the chaplain?

FATHER HOULAHAN. Very little, very little. We have had several religious groups seeking employment in the chaplaincy, and these groups have not been able to meet the educational requirements; so the ones who can meet the requirements are the ones who are hired. Without regard to specific denominational ties, as I said earlier, we don't have a quota system of so many Methodists, so many Lutherans, so many Roman Catholics, etc.

COMMISSIONER SALTZMAN. But would you say that there's a general kind of goal in the area of so many Christians, so many Roman Catholics—let me break it up into Roman Catholics, Protestants, etc. My concern is with the criterion. Are you precluding the servicing of some

of the minority, nontraditional religious groups by educational requirements that may not have reference to the religious conviction and life of the inmates?

FATHER HOULAHAN. We are precluding them on the basis of educational requirements as civil service staff employees. However, we meet these needs as best we can by means of contractual arrangements, by hiring these individuals, such as a medicine man.

To come into the institution where we have that particular faith group, however, we could not exclude a medicine man from becoming a chaplain, if he had the educational requirements.

COMMISSIONER SALTZMAN. I understand from Mr. Taylor the concern he has that part of the problem the Federal correctional institutions face is the lack of knowledge. Is the chaplaincy program helpful to the administrative staff in securing adequate information about the religious needs of the various groups within the prison and then helpful to the administration to enhance the ability of the administration to respond to the needs?

FATHER HOULAHAN. Hopefully, it is the chaplaincy staff who normally translates to the administrator, such as Mr. Taylor, the needs of the population. It's normally the chaplaincy staff who goes into the community to seek out the experts within that particular field in which they, the chaplains, are deficient and brings them back to the administration.

COMMISSIONER SALTZMAN. Mr. Taylor, I was impressed by the effort your institution seems to be making to respond to religious needs. I'd like to ask you the same question I asked Mr. Cripe. Do you see areas where further improvement and further responses are necessary within the Federal prison system?

MR. TAYLOR. Well, it's difficult to keep up with all the developments in new religions coming on the scene today, and the area where I think we need the biggest improvement is some sort of a centralized place where we can get more up-to-date information on just what is religion, what are the mandates of that religion, etc., so that we don't have to deal on an individual basis with different medicine men at different institutions. For example, in the Native American Indian religion there is some disagreement between one medicine man and another medicine man.

What we need to deal in are kind of absolutes. We have to know what's required and what's individual preference. That information just simply isn't available.

COMMISSIONER SALTZMAN. Have you found that the chaplaincy department has been helpful in advising you?

MR. TAYLOR. Immensely helpful.

I think though the problem is, and I think Father would agree with me, they're also always trying to catch up with new developments. I see us with the Native American Indians today where we were in the 1960s with the Muslims; where we knew very little about the Muslim religion. We know very little bit about the Native American religion in prisons today. The fact that I'm here testifying for the Bureau of Prisons is an indication of that. I'm a novice and, yet, I'm the best we

have in the Bureau of Prisons, I suppose. It's an indication we don't have the information system to make those kinds of decisions in a timely manner.

COMMISSIONER SALTZMAN. Thank you very much.

COMMISSIONER FREEMAN. Dr. Horn.

VICE CHAIRMAN HORN. Mr. Taylor, you've very capably answered a number of questions I was going to raise on the Native American religion and the variety and from the standpoint of an administrator trying to work your way through understanding the process and then meeting particular needs. I'm just curious; has the Federal Bureau of Prisons ever thought, and I would like to know the pluses and minuses of this, of the possibility of allocating prisoners to particular correctional facilities based on religious beliefs so that those religious beliefs needs could be met more appropriately given the limits on resources?

MR. TAYLOR. Well, we really don't designate institutions based on a man's religious belief; rather, we designate institutions based on his security requirements and his geographical location. We try to keep people as close to home as possible; however, the way things work out, generally, most of the Indians, for example, are in a small—relatively small number of institutions in the Western United States. Most of the Jews are in institutions on the East Coast, and the Muslims are generally spread throughout the country. So it does turn out that way somewhat. However, there's always going to be one or two Indians who find their way to an East Coast institution where, again, they're faced with the problem of people not understanding their relgion and what are its requirements.

VICE CHAIRMAN HORN. What is the feeling of the Bureau of Prisons as to how one defines a religion? I wasn't quite clear from the testimony. Last night we had a witness from the Office of Personnel Management who reviewed with us the legislation that pertains to the adjustment of work schedules for religious observances within the Federal Government. What that boils down to, as defined by Congress, is that an employee decides what is one's personal religious beliefs and then may take off appropriate time provided it's compensated before or after to pursue that belief. Has the Bureau of Prisons definition of what is religion become dependent on what the individual prisoner says it is, or is there an attempt made to try to see if it is, quote, "a recognized establishment religion, or however one wants to define it?" unquote.

MR. CRIPE. In my view Dr. Horn we're somewhere between those two. No, we do not accept the individual's determination; and I think anyone can foresee the difficult path that might throw us into, nor do we try to establish any list of recognized traditional religions.

As a lawyer, I am slightly bemused by the difficulty the courts have when they have to tackle this question. They seem to me to avoid it as long as they can, and I have sympathy for them because I think it's an extremely difficult question to answer.

Two cases I'll refer to: in an early Muslim case decided here in the District of Columbia, Judge Matthews felt compelled to come up with a definition of religion, since the correctional administration was questioning whether it was entitled to religious protection, and she said that

the essence of a religion is belief in a Supreme Being. In the *Lipp* case, the Metropolitan Community Church case in California, the court there said there were two requirements: that there be a belief in a Supreme Being and religious descipline or some kind of tenets to guide one's daily life flowing from those beliefs.

We, as I indicated, have great difficulty in testing. I realize one gets into a matter of individual conscience and the testing of individual sincerity as was suggested to us by the court in Connecticut. As I have already indicated, I find it an extremely difficult and hazardous road. So we were scorched quite thoroughly in another religious area when a witness from the Bureau of Prisons made reference to recognized religion as a basis for our considerations in this area, and I think that's appropriate. I think we cannot be limiting ourselves to recognized religions. I don't think that's what the Constitution was talking about; so for want of something better, I would, I guess, go to those two court definitions.

VICE CHAIRMAN HORN. Let me get back to the degree to which all Federal prisons have made progress in this area. I think we all understand that usually in hearings an agency's best witnesses are trotted out to talk to congressional hearings or civil rights hearings. Mr. Taylor, I know that you're a very progressive prison administrator, maybe you can't answer it. Director of Prisons Norman Carlson is not present who probably could answer it, but is the degree of progress which Lompoc has made characteristic of the Federal prison system or is Lompoc ahead of other prisons within the correctional facilities, within the Federal prison system?

MR. TAYLOR. No. I think Lompoc is probably on par with what other Federal institutions are doing around the country, with different areas of religious concerns. East Coast institutions are more concerned about Jewish and Muslim prisoners, but I think in every area where we've had to face those concerns we've tried to provide as much flexibility as possible for people to exercise their religion.

VICE CHAIRMAN HORN. From your knowledge as a professional in corrections, would you say that the States and the localities are far behind the Federal Bureau of Prisons with regard to adequate policies in the area of religious practice for prisoners?

MR. TAYLOR. I think most States don't have to deal with the number of different kinds of religions that the Federal Government has to deal with and, in some area, the States are much further ahead of us. I think some of the institutions on the West Coast, California and South Dakota for an example, are further ahead of the Bureau of Prisons on Indian religion. We're catching up to them.

In other areas they would be much further behind us. In some States, if they were to receive a Muslim demanding his religious rights, I think they would wonder what to do with him.

VICE CHAIRMAN HORN. Father Houlahan, I think I know the answer, but I want to make sure I understand it. Those that joined the prison chaplaincy service, I take it, are civil servants?

FATHER HOULAHAN. Yes, sir.

VICE CHAIRMAN HORN. They have a career, then, within the chaplaincy corps for—what's the average tenure, 10, 20 years?

FATHER HOULAHAN. The chaplains come under the mandatory retirement clause of age 55. We are restricted from hiring anyone who has completed their 35th birthday. It's a hazardous duty agency, so many of them do complete a career; some do not.

VICE CHAIRMAN HORN. That ought to give our Chairman something to pursue on behalf of age discrimination.

What's the turn over in the chaplaincy corp?

FATHER HOULAHAN. The turn over among Roman Catholic priests is rather high; the turn over among the other Christian chaplains is very minimal.

VICE CHAIRMAN HORN. Can the order pull out a member of the faith?

FATHER HOULAHAN. Yes, they can.

VICE CHAIRMAN HORN. Is that the problem in the Catholic situation? How about the Protestants?

FATHER HOULAHAN. The Protestant men are released by their endorsing agency much the same as with the military and are expected to pursue the chaplaincy as a career.

Roman Catholic clergy, on the other hand, traditionally have not been career chaplains either in the military or in civil service. It's only in recent years that we are developing a cadre of career chaplains with degrees in criminology who are staying with the Bureau.

VICE CHAIRMAN HORN. Okay. I'll now yield to let you two moralists discuss why a 36-year old cannot join the chaplaincy corps.

FATHER HOULAHAN. That would be something to pursue.

COMMISSIONER FREEMAN. Before I recognize the Chairman, I have a couple of questions I would like to ask Father Houlahan and that is, I believe it would be helpful if you could put into the record the qualifications for service—educational qualifications—you've referred to that a number of times.

FATHER HOULAHAN. Why don't I give you that document. Would you want me to read them out?

COMMISSIONER FREEMAN. Well, is it that long?

And then you've indicated that of the 63 chaplains which you have, they do not necessarily service their own denominations. For instance, a rabbi could serve several other religious beliefs. So for that reason, I would like to know if you could give a breakdown of how many Muslim chaplains—what is the breakdown as to race and sex of the chaplaincy?

FATHER HOULAHAN. We have seven black chaplains, we have one Mexican American chaplain, two female chaplains, two Oriental chaplains. The rest would be—

COMMISSIONER FREEMAN. White male?

FATHER HOULAHAN. White male and female.

COMMISSIONER FREEMAN. You only have two females?

FATHER HOULAHAN. Yes.

COMMISSIONER FREEMAN. Are those females white?

FATHER HOULAHAN. Both are white, yes. Pardon me, we have two white females on staff, and we have one black female in training. Staff chaplains right now, two white females. We've had very few female applicants.

COMMISSIONER FREEMAN. You have 53 white chaplains?

FATHER HOULAHAN. Yes, correct.

COMMISSIONER FREEMAN. I'm sorry, you have 55 white chaplains?

FATHER HOULAHAN. Counting training chaplains, yes; we have 53 white staff chaplains and 10 minority staff chaplains. In training, we have one black female chaplain and two white chaplains.

COMMISSIONER FREEMAN. Do you have any Muslims?

FATHER HOULAHAN. We have no full time staff Muslim chaplains. We have had three applications in the last 2 years from Islamic clergymen, but they were unable to meet the educational requirements.

COMMISSIONER FREEMAN. What specifically is the educational requirement. I believe we need to have that read. I don't think it should be that long.

FATHER HOULAHAN. Applications:

> Applicant for appointment as chaplain shall meet the following qualifications: one, a bachelors degree from an approved and accredited college and an earned graduate degree in the discipline of theology or sacred studies from an accredited institute or seminary; ordination by a recognized ecclesiastical body; written approbation and current endorsement of the appropriate official ecclesiatical body; 2 years of ministerial experience following ordination, or an acceptable equivalent experience in that the applicant has fashioned a firm pastoral identity; a period of supervised pastoral experience is preferred; practical parish, military, or institutional experience may be an acceptable substitute for this training.

COMMISSIONER FREEMAN. Father Houlahan, has there ever been a challenge to the qualifications which you have listed as not being job related?

FATHER HOULAHAN. Not to my knowledge.

COMMISSIONER FREEMAN. Thank you.

Now, I'll recognize the Chairman.

CHAIRMAN FLEMMING. THANK YOU.

We certainly appreciate the testimony that you have given.

I just have one basic question. I'm very appreciative of the fact that my colleagues over the years have become sensitized to this issue of "ageism" and that they recognized it immediately when it was indicated that persons beyond 35 could not apply and that people are retired at 55. It's a good example of ageism and it's a good illustration of the kind of issues that we still need to deal with in that particular area, but I was very much interested in the figure, which I think is correct, that seven-tenths of 1 percent of the total budget of the Bureau of Prisons is set aside for the chaplaincy service.

Mr. Cripe, from your testimony, it's clear that the courts have recognized the rights of prisoners in the area of religion. Do you feel, on the basis of your experience, that there is any relationship between the lack

of resources in the chaplaincy service and the inability, at times, of the prisoners to really have their rights in this particular area served or protected?

MR. CRIPE. In my view, Chairman, I would think that there is, but it's a small factor, that relationship is a small factor. I believe, if our budget amount in dollars were to be tripled or multiplied by 10 or 20, there would still be the conflict that is inevitable between individual interest and the correctional interest in maintaining a safe, orderly, and humane institution which is another phrase for the security interest of corrections, and I believe that's the problem. I have been in this work for 17 years. My very first day I came to work I was sent over to the court house because they said there was a novel case coming up involving what were then called the "Black Muslims," The Nation of Islam. So I got my first hour, virtually, at work in this business.

The correctional administration lost that case; the court said they had to allow Black Muslim activities and that didn't solve things. They put a lot of resources in and a year later, there were over 200 cases pending in court from that group in the District of Columbia. So I don't believe that merely increasing resources solves the problem. I believe, as Warden Taylor indicated, there is a problem of knowledge, of getting information, communication, setting up that kind of relationship and resources don't—the resources may help, but they don't answer all that.

CHAIRMAN FLEMMING. But isn't there a relationship between the ability to provide the wardens with that kind of information and the resources that might be available in the chaplains office. I was very much impressed with the evolution that you've gone through, Mr. Taylor, in connection with the religious life of the American Indians. As Commissioner Horn indicated, we took testimony yesterday relative to some of those issues from representatives of the American Indian community and, as I listened to you, it seemed to me that this was a good illustration of where it might have been possible, from a central source, to have provided you and other wardens with a good deal of the basic information which it was necessary for you to get on your own.

Incidently, our testimony yesterday related to the Indian Religious Freedom Act. Is the Bureau of Prisons represented on the interagency task force that is working on the implementation of the Indian Religious Freedom Act?

MR. CRIPE. To my knowledge, the agency—our agency is the Department of Justice, and the Department of Justice, I believe, has a single representative on that task force.

CHAIRMAN FLEMMING. But as far as you know, the Bureau of Prisons, as such, hasn't been tied into that operation up to the present time?

MR. CRIPE. Not as to official representation. We have been made aware of and have received some communications from that group.

CHAIRMAN FLEMMING. Right. Well, just go back to my point, I'm sure that there are heads of other correctional institutions who are confronted with the same kind of problems that Mr. Taylor was confronted with and, if that could have been developed at some central source and fanned out, it could be a great deal of help and it seemed to

me that the fact that that hasn't been done up to the present time probably means that the religious rights of members of the American Indian community have not been recognized and implemented as effectively as they should be.

That was where I was getting to, trying to see whether or not there was some interrelationship between the resources made available for this particular type of service on the part of the Bureau of Prisons and the basic rights that are at stake here.

MR. CRIPE. I think you're very perceptive, Mr. Chairman, because you arrive very quickly at the understanding I think we had from our experience. Mr. Taylor's description of his, of course, is just symptomatic, although it is a central institution as far as American Indian activities. But over a period of some time, Mr. Echo-Hawk, who I think will be making a statement later or already has, has been in touch with us, and I think he and I arrived at exactly the same conclusion and we have been open to that and we hope that exactly what you have mentioned can be established. And that is apart from the formalized structure under the public law that there be established a method of communication. And Mr. Echo-Hawk has agreed to do that from the Native American Rights Fund that we would have, in effect, a means of ongoing communications so that we could become educated as to the needs of that group.

CHAIRMAN FLEMMING. May I express to each one of you our appreciation for your being here. I understand that you possibly plan to stay throughout the morning, so that after we've listened to the other panels, there might be some other questions that we would like to address to you. We appreciate that very, very much. Thank you.

I'll ask Commissioner Horn to call the members of the next panel.

VICE CHAIRMAN HORN. The next panel concerns State policy and practice.

Will Mr. William Collins and Mr. Harold J. Smith please come forward.

Mr. William Collins is director of the Correctional Law Project of the American Correctional Association. He's produced a series of workshops and publications in this role which has been utilized by administrators of various correctional facilities.

For 8 years from 1970 to 1978 he was assistant attorney general of the State of Washington working primarily on litigation as counsel to the State's correctional institutions. During that time he was on the Human Research Review Board for the Washington State Department of Social and Health Services.

He's a graduate in 1969 of the University of Washington Law School.

We are glad to have with us, Mr. Collins. Please make any opening statement you would like.

STATEMENT OF WILLIAM COLLINS, DIRECTOR, CORRECTIONAL LAW PROJECT OF THE AMERICAN CORRECTIONAL ASSOCIATION

MR. COLLINS. Thank you, Dr. Horn.

I've been asked speak about the litigation history as it applies to the States, and what means the States have developed of dealing with these problems. Finally, what responses or reactions the American Correctional Association has taken.

I should point out that your introduction is correct as to my title and my name tag, which lists me as director of the American Correctional Association, exaggerates my importance. I enjoy that, but I don't think my boss would appreciate his demotion.

I'm not a theologian, and I'm not particularly an expert on the legal aspect of religious issues in prison. I can describe myself better, I think, as a correctional law generalist who has been involved in and observing various sorts of correctional issues since the early 1970s.

The State experience is, in large measure, similar to the Federal experience. It parallels the Federal experience, I think, both in time and in issue. Religious freedom, both freedom to believe and freedom to practice for prisoners, I think, is an ideal that most prison administrators would agree with, and they would hope, I think, that there could be no more restrictions imposed on prisoners in the exercise of their religious beliefs then are imposed on persons of the general community.

While this is an easily stated goal, it's a difficult concept to implement as the first panel I think was indicating, and there have been obviously a great many problems that have come to light, particuarly in the last 15 years, approximately.

Some of these problems have arisen from legitimate institutional concerns. Unfortunately, some have arisen from less legitimate sorts of concern. Some progress has been made, but it seems to me that the path to establishing a just balance between religious demands of various individuals and institutional concerns that would limit those demands is a rock path, and we have some distance to go before we reach the end of it. If, indeed, there is an end point that can ever be reached.

Historically, I think one can say and, historically, I'm looking back again about 15 years, you can say in the beginning was the word, and the word was warden.

Change, as particularly change from external sources, was not a familiar concept for institutional administrators whose policies and practices often were solidly entrenched in their mind, as the walls around the institution might have been. I think, particularly at the State level, depending on the State and circumstances, institutions often were simply victims that were run by the administrator who was subject to comparatively little control, even from his own central department of corrections.

However, late in the 1960s, there was a drastic sudden upheaval with the advent of what you might call the "hands on" doctrine of the courts, as opposed to the courts' "hands off" doctrine.

The paradise that insitutional administrators enjoyed of complete deference to their discretion was really gone, and there were many new demands being made on administrators coming from all sorts of directions and demands, some religious, some not religious. The rules of the corrections game, and I mean rules in the broadest sense, were really being completely rewritten and quite properly so; and, in some meas-

ure, those rules still are being rewritten. But administrators and the superintendant here may begin to throttle me before I finish. I hope not, but I think administrators frequently were not intellectually or emotionally or logistically ready for the sorts of changes that were being demanded of them. They were being asked to shift, in a sense, from a collective means of dealing with problems—we will feed this cell block at this time and this cell block at this time—to dealing with problems on a more individual basis. And that was a difficult shift to make and it still remains a difficult shift in a context that urges a collective approach to dealing with people.

Religious demands were probably at the top of the list of those that were suddenly being made. Religion traditionally was recognized as conceptually important and the importance was provided or recognized through the mechanism of the institution chaplain who tended, I think, to lump religious groups together in fairly large categories: Protestants, Catholics, Jews, and you fit into your religious niche or you fit into your religious niche. This was comparatively little room or tolerance for dissidents or for minorities or for people who simply wouldn't fit into one of these large well-rounded slots. And to a certain degree, I expect that was a reflection of society at-large, in terms of tolerance for minority groups and people who didn't conventionally fit in. The new religious groups that were coming before the administrators at that time were groups that tended to have a strong political ideology tied together with their religious beliefs. They might opt to be militant or might be at least perceived as being potentially revolutionary and potentially violent. The religious motivation of some of these groups was greeted with some skepticism by administrators sometimes doubt and sometimes outright disbelief.

The change demands, religious or other wise, were resisted by the administrators on the ground of compromising institutional security, making administration more inconvenient, disrupting the running of the institutions, not wanting to show favoritism to a particular group—sometimes I think saving face—not giving into a demand by a group of Indians and often from a human response. I think that they just didn't want to be told what they had to do, particularly after they had grown up in the system where they were doing the telling.

The result was that everything went to court. Very little negotiation, very little compromise on these issues. Everything was simply an institutional Armageddon. The institutions often simply lacked a mechanism to deal with problem solving of this sort. Another problem, I think, was that the litigation tended to be localized by issue. Muslim litigation was occurring frequently in New York. Orthodox Jewish problems arose in New York. Muslims might arise in California. Those of us in the West could sit there and feel like spectators and say, "Well, we won't have those kind of problems, because there are very few, if any, Muslim or Orthodox Jews in the institutions in Washington," and someone taps you on the shoulder and says, "You've forgotten the Native Americans." "Oh." Then the whole battle starts all over again.

Security needs and other concerns of administrators were probably overasserted and this crying wolf resulted in a loss of credibility on the

administrator's part, but I would ask that you not believe that everything that the administrator says is "wolf." There are very legitimate concerns that run counter—that conflict with religious practices and beliefs, practices, not so much beliefs—in the institutions and these concerns may, at times, be a really life and death magnitude. The State responses to these kinds of demands—how the States adjusted to them really varied frequently on very subjective sorts of factors.

The personalities of the people, the apparent sincerity of the religious belief of the group that was making a demand—and courts have recognized that the sincerity is a legitimate question for inquiry. Overnight, conversions were greeted with some skepticism and an inmate's actions of a religious nature sometimes often spoke more loudly than the religious words he was saying.

The nature of the demands in a particular case had an effect: the politics of the situation, internal institutional politics, external politics, physical plant, and resource questions.

The administrator might say, "I want to do something, but I can't do anything, because I don't, at this time, have the resources." Prison is a very practical world and practicalities often dictate a response, instead of philosophical arguments or ideal positions, but the result was, in any event, frequently in a very bitter fight over an issue in one State, the accommodations of the settlement of the same issue in the State next door, religion. The effect of these demands over time, as with other issues in the correctional reform movement, has held administrators to adopt improved problem solving methods at the institutional levels. We see this in greviance mechanisms; we see this in administrators simply listening to what's being said by inmates and inmate spokesmen. More closely, you see more compromise, more settlement of litigation, more mediation, and a greater willingness to reexamine traditional beliefs and practices.

If 15 years ago Warden Taylor had been presented with the list of demands that he was talking about regarding sweat lodges, I would guess that his response simply would have been, "No, that's just out of the question. We're not going to go through those kinds of contortions."

Instead, he was saying that we examined the question; we did some of our own research; and we've come up with an answer and we think we can accomodate the demand. That's, I think, typical of the change that is occurring across the country, but there are still problems, some of which have been alluded to both by Father Houlahan and Warden Taylor.

It still remains a problem as to what is a religion, what are the tenets and practices of a particular religion. Is a particular belief sincerely held? Can the institution absorb and deal with the demands of a particular religion? The "what is" concern arises particularly with homemade religious groups.

The Church of the New Song, a group that Mr. Cripe mentioned, that was formed originally by its founder's admission, for the purpose of harassing its institutional administrators. The Universal Life Church sends out mail order divinity degrees simply by signing your name on

the dotted line and sending in the money. I once knew of a dog that had a degree from the Universal Life Church, and perhaps even worse, an attorney in my office had one for a while.

Personality cults, tied to a very dominant charasmatic individual, when do they become a religion? Incidentally, Mr. Cripe was talking about the courts evaluating or trying to set up definitions for deciding what is a religion, and he mentioned two cases that recognized or that said that belief in a Supreme Being was at least part of the equation. One of the cases involving a founder of the Church of the New Song apparently has indicated that belief in a Supreme Being is not necessarily a part of what is a religion. So it remains an open question and a very confusing one.

Assuming that the validity of a religion is recognized, what are the tenets and beliefs? In other words, to the administrator, "If we must do something, what must we do." And as the first panel indicated, the demand variations and types of demands is very substantial, and they come from groups that it's not easy to find out what, in fact, the practices and tenets of a particular religion might be. In looking through the District of Columbia's telephone book, I found 75 different—what I guess you could call churches or sects—and I'm not simply counting all of the Methodist Churches—and that was without listing synagogues and lumping Islam under only one general heading. So it becomes a major chore to sort out these varying demands, particularly for a small system, for a jail that does not have the capacity to have a central religious office, such as the Bureau has, such as the State of New York has.

Inquiry into the sincerity of the beliefs will continue to occur. The administrator has been too often burned by the sincere beliefs or expressions of inmates to have anything but a very strict show-me kind of approach.

Now, I think Chairman Flemming, someone asked why—even ask this kind of question. The answer, several answers—inmates will continue—some inmates will abuse religion—first amendment freedoms for their own nonreligious ends. I think the administrator simply assumes that to be a fact, not that all will, but there will be predictable percentage that do. Inmates are not notably tolerant of civil rights of others. Religious or nonreligious groups may develop into a power group in the institution which may or may not be bad, but if one wants to take a negative view, such a group has the potential for dominating weaker inmates in the institution or whole entire segments of the population. Such a group may get into conflicts or competition with other groups for power for perhaps illicit reasons involving drug traffic, gambling in the institution. A white supremacist church, perhaps, you could expect to come into conflict with a militant black religious organization.

Competition may be for turf, as I say; may be for converts; may be for mundane things like meeting space, special privileges, status in the institution; all of these factors, be they ideological or practical or philosophical or whatever, contain a potential for violent conflicts between the groups and other groups, or the groups and staff, and the administrator has to be ready to deal with those sorts of things.

Group demands may create logistical and administrative problems: providing space for meetings, providing supervision for meetings, drawing staff from one duty to supervise someone else. Inmates from segregation who are perceived as dangerous are taken or required to be taken to open church services. There may be substantial custodial supervision that may have to accompany them. Even so, other inmates may simply choose not to come to services because of the fear of what might happen.

The diet problems that have been alluded to create some difficulty in administering a kitchen.

Now, if a religion and a belief are legitimate, then the need to comply with these demands takes on a very high priority and a very strong institutional showing. Strong showing of institutional interest is necessary to avoid meeting the demands that are made.

The issues of administrative convenience which can encompass a considerable amount become really irrelevant as far as the courts are concerned. They are not irrelevant to the administrator, but they are not something he can assert in defense of his position. On the other hand, if the answer to the religion or the belief question is no, if this is not a legitimate religion of—if this is not a legitimate practice of a given religion, then the demands are weighed on a significantly different scale; they are weighed on the same scale that the administrator may consider a visit from a Boy Scout troop, or scheduling guards' days off, or other nonreligious group activities. So it is significant in terms of what factors the administrator can balance against the demand, to decide whether something is or is not a religion.

I've mentioned the security. I would emphasize that the security concerns are not red herrings. We've seen recently the violence on the outside of institution walls that can eminate from cults that seem to go awry—James Jones, Charles Manson, rattlesnakes in mail boxes. We've seen in the District of Columbia a couple of years ago a religious group taking hostages; we've seen a religious group in Philadelphia, as I understand it, at least forsaking among other things personal hygiene.

These kinds of groups on the outside can present a serious danger to society. They present probably a greater danger if allowed to flourish on the inside of prison walls because of the culture inside the walls which is more tolerant of violence and more intolerant of persons perceived as informers or persons who are perceived as against the interest of a given group.

Groups need not be so notorious as the one that I've mentioned to constitute this sort of a danger. It simply has to be recognized that there are some persons in an institutional context that will be dangerous and must be treated as such. The point is that murder is murder whether it is done by the avenging angel of the Lord or simply a mugger, and an after the fact response by the administrator is probably too late. At least, too late obviously for the victim and too late for acceptable professional practice for the administrator.

I doubt that if a religious leader in an institution took his followers into the prison yard and led them in a mass suicide that there would be praise for the administrators' high degree of religious tolerance. So the

administrator, State and Federal, finds himself on a tightrope between prudent control over what goes on in the institution on the one hand, or unconstitutional suppression of religious beliefs and practices on the other hand. And, if he asks the question, "What should I do? Which way am I going?" Too often the answer seems to be, "We will tell you later," and the answer we will give you will depend on whose ox wound up being gored.

So where from here? The American Correctional Association, through its standards for accreditation for correctional facilities, which is a major attempt to upgrade institutional operations and practice in all aspects, includes several religious sections in those standards. I don't have a copy of them with me; I'll send a copy to the staff as soon as I get back to my office today.

VICE CHAIRMAN HORN. Without objection, that will be inserted at this point in the record.

MR. COLLINS. These standards will be fleshed out over the next year or two with explanatory guidelines, which are, just now, in the process of development. The development process really is just beginning, but the standards would require access to religious programs, would require that inmates be provided opportunities for adhering to special diets or other requirements of a particular religion, although the standards would recognize that practices of a religion may be limited, when necessary, in order to maintain security and order.

The tone of the standards and the tone of the guidelines that will be developed, I think, will make it clear that before such limitations can be imposed there has to be a very clear showing of need. As an example, the assertion that a group should not be allowed to wear their hair long, for religious reasons would not satisfy the requirements of the standards and guidelines as I believe they are being interpreted.

In addition to the standards, there remains a need, as some of the speakers have indicated, for community involvement. Community must be seen as a resource, particularly in dealing with comparatively small religious groups where the institution probably simply is never going to be able to provide full time staff to handle the religious needs of perhaps only one or two inmates.

The community must make itself available to the institution as well. There is a need for very careful knowledgeable examination of what, in fact, the religious needs are of a particular group. This is being done at the Federal level as you heard. I think you'll hear some discussion concerning New York. It's easier done with a large system than with a small system, and it will be helpful, as Warden Taylor suggested, if there could be some sort of central clearing house of information where at least an administrator could call and say, "Who should I go talk to to find out about whatever group." The answer may be that they don't know, that the group is too small or too new to have any central body, but on the other hand, it would be helpful, I think, in many cases.

There needs to be a judicial clarification of the ground rules of the game. What is the test? The courts have yet to clearly decide that, and perhaps also, and perhaps more importantly, what scale is to be used in

balancing the religious demands of an individual on one hand and the demands of the institution on the other.

Is it a test of clear and present danger or compelling State interest, as some courts have said, or is it a test that requires a lesser showing of institutional interest as would seem to follow from the Supreme Court's first amendment, prisoner correspondence case of several years ago?

The courts are not yet clear on what approach they are ultimately going to take, and I suppose it would have to wait a Supreme Court decision, again in the religious area, to ultimately answer that question.

As far as the future is concerned, I will expect that there will be greater accommodation, more realistic and a tolerant approach around the States to religious demands but, as Mr. Cripe indicated, I would agree with him that certain conflicts are going to remain inevitable. Conflicts can be reduced by greater knowledge, greater education on the part of the administrator, but some demands are probably going to be impossible for administrators to meet: the use of various kinds of mind altering drugs; having certain areas of the institution declared off limits to staff; these sorts of things simply, at least for the time being, probably are not issues that most administrators are going to be willing to compromise on.

It can be assumed that certain religious rights by certain inmates will be abused from time to time and that sometimes the exercise of one set of rights may infringe on the rights of others.

The fact that there are persons in institutions who are dangerous and violent and willing to settle their differences through violent means simply is inevitable and casts a shadow over the religious question.

It has been said that we live in a society of ordered liberty, and it seems to me that the closer we live together the more order, or the more ordered our liberty becomes.

Prisons are very close living situations; as a result, they have a higher level of order than we have in nonprison society, and I would hope that we can work toward a reasonable balance between the necessary order that must be maintained in these institutions and the religious practices that are significatnt to the various individuals that may be in the institutions.

VICE CHAIRMAN HORN. Thank you very much, Mr. Collins.

That was a very helpful statement and perspective. As you mentioned that some of those new religious groups have a political orientation along with their religion, I thought that through history, and I reflect that many of the established religious groups had a political orientation as well as religion.

Mr. Harold J. Smith, who's superintendent of the Attica Correctional Facility, has attended Champlain College and the State University of New York. He joined the New York State Department of Corrections back in 1952, and he served administratively in various State institutions before coming to the Attica Correctional Facility in 1972 as deputy superintendant at that time.

He's been superintendent since September 1973. We're delighted to have you with us. Please proceed in any manner you'd like.

STATEMENT OF HAROLD J. SMITH, SUPERINTENDENT, NEW YORK STATE ATTICA CORRECTION FACILITY

MR. SMITH. Chairman Flemming, members of the Commission. This morning I would like to give you an overview of the present religious practices that are going on within the Attica Correction Facility. I believe that these are an example of the practices going on throughout the other facilities in the State of New York.

At the Attica Correction Facility, we are presently housing 1,758 inmates under maximum security conditions. In the entire State of New York, we have over 20,000 inmates in our system today. We have 10 different groups practicing the various religious faiths on a regular basis. These include Protestants, sometimes known as the nondenominational; the Catholic, the Jewish, the Sunni or Orthodox Muslim, the World Community of Islam in the West; Jehovah's Witnesses, Christian Science, Seventh-Day Adventist, and the Hispanic Pentecostal.

We have had some of the groups practice, but due to a lack of inmate interest, or lack of volunteer clergy, services were discontinued. One such group was the native North American Indians, who followed the Long House faith. For some 2 years, these people came to our institution and worked with the inmates in holding the various services, and I was very interested in hearing the other superintendent speak about the sweat house, because that never came up.

We had many discussions with the Indians over the period of time; the bringing of the drums, the bringing in of various other accouterments that were needed for the services, but never a sweat house.

Our department, through our director of ministerial services, had worked with a tribal council to establish what the procedures would be within our institution. But some time ago they stopped coming, about 1 year ago. The volunteer stopped coming in. Rumor had it that this group had some kind of funding that came from a Federal program cutoff and, therefore, they stopped coming to the institution.

Out senior chaplain attempted to contact this group. They told him that interest had waned as far as the Indian inmates were concerned; and so, therefore, they could no longer come.

At the present time, we have 14 Native American Indians in our population. We have on our staff a full-time Catholic chaplain, a full-time Protestant chaplain, and a part-time Jewish chaplain. All other services are conducted by volunteer persons or volunteer clergy, with the exception of the Sunni Muslim and the World Community of Islam in the West. Both the Sunni Muslims and the World Community of Islam in the West have had outside imams come to the institution for services; but they came on a very sporadic basis. As a result, our departmental director of ministerial services, the Rev. Earl B. Moore, has directed that each of these groups be allowed to chose an inmate imam from the group.

I'll divert from my remarks for a minute. As it came up in the earlier discussions: who determines what is a religion? That responsibility doesn't fall to me. When those things—when a group indicates that they'd like to hold services, I refer that to our central office in Albany, and the Rev. Earl Moore. He makes the determination based upon

information given to him; research that he does whether this is an accepted religion that will be allowed to hold services inside our correctional facility.

VICE CHAIRMAN HORN. He's head of the chaplaincy group within the New York State prison system?

MR. SMITH. Yes; he works for the department of correctional services. He's the director of ministerial services.

As an inmate, now, Reverend Moore said each of the Muslim group could have an inmate imam from that group.

As an inmate imam, this person is placed in our highest inmate pay grade and is given a pass that allows him to travel about the institution with very few restrictions. The inmate imam position is a full-time job for these men. Within the institution this inmate imam is the spiritual leader for this group.

At Attica we give each religious group the opportunity to hold a religious service and a religious study period of 2 hours each week. When special holy days come along, this group is allowed to celebrate this day in the appropriate manner.

The Protestant or nondenominational group hold regular services on Sunday mornings. The minister has a choir and he also has a group of inmate deacons who help to advise him. The minister holds a Bible study class on Thursday evenings; this class is open to men of all faiths.

The Catholic group has church services on Sunday mornings and on mandated holy days. Our priest has organized a Legion of Mary group who meet every Saturday morning in our auditorium for 2 hours. This group discusses the Catholic faith and on many occasions they have outside speakers come in to their meetings.

The Quakers, Christian Scientists, the Seventh-Day Adventists, and the Hispanic Pentecostals hold their weekly religious services with some services being held during the evening hours and others during the day hours. Volunteers come in from the community to conduct these services.

Our Jewish inmates hold their services on Tuesdays, with the rabbi conducting them. At the present time we have about 25 men attending Jewish services.

During the Passover period, the Jewish inmates are fed a special meal after sundown for eight evenings. These meals are provided by a Jewish community organization from Buffalo. When Jewish inmates have their Seder dinner, they are allowed to have their families attend with them. A special meal is prepared for this occasion, and the rabbi furnishes a holiday food package for those attending. Jewish inmates are allowed to wear their yarmulkes in all areas of the institution.

A few years ago, due to the increasing number of Sunni Muslims, members of the World Community of Islam in the West, plus the number of Jewish inmates already in our population, our department limited us to the use of pork to two meals per week. At meals when pork is served, these men are allowed to take additional amounts of the other foods served so as to supplement their diet.

At this time I would like to speak in some detail about two of the newer religious groups that we have in the Attica Correctional Facility.

These are the Sunni Muslims and the World Community of Islam in the West.

Approximately 20 years ago, perhaps a little longer, we began to see in our institutions men who professed to follow the teachings of Elijah Muhammad. For a long time these men were suppressed from carrying out their religion within the correction facilities of New York State. Having a Koran, Muslim papers, or even holding a gathering that appeared to be discussing the Muslim religion was grounds for disciplinary action.

There were court cases all over the country with regard to the acceptance of the then called "Black Muslim faith." A ruling came forth saying that this teaching would be considered as a religion. The inmates were to receive the same treatment as the Catholics, Protestants, Jews, and other religious groups. Even with this ruling, there was much skepticism among our personnel as to the relative merits of this group of men being a truly religious group. There was so much about this group that we did not know. Over the period of time much of our skepticism has been set aside. This has come about mainly through our observations of these men and how they conduct themselves within our institutions.

At Attica, men from the World Community of Islam of the West and the Sunni Muslims are some of the better men whom we have confined. They are always neat and clean; they are respectful. They work hard on their assignments and take advantage of the educational programs that are available to them. The men of this group do not become involved in homosexual activities, the use of home brew, or drugs while confined. They are also probably the best disciplined group of men that we have in our population.

The World Community of Islam in the West number between 75 and 125 men at any given time. They hold their regular services on Friday in our gymnasium. At one time their service was held in our auditorium where the Protestant and Catholic services are held. However, they felt that the gym was preferable due to the room needed for laying out their prayer rugs and carrying out their other activities. This same group holds a 2-hour study session every Saturday in our school.

The Sunni or Orthodox Muslims see themselves as differing from the World Community in that they follow the doctrines of the Holy Prophet Muhammed. They maintain that they are more rigid in following the Koran than is the World Community group. Both groups use the Holy Koran as their main doctrine.

The Sunni Muslim group holds a service on Friday, with a study session on Sunday. They currently have about 45 men attending their services.

Both of these groups are allowed to have their kufis, prayer rugs, and prayer beads. Kufis may be worn throughout the institution. Prayer rugs, prayer beads, and fezzes may be used in one's cell or at religious services.

During the period of Ramadan, which is a 30-day fasting period before the Feast of Idul Fitur, both Muslim groups are fed a meal after sunset. At this time they are furnished with food that they can eat prior

to the sunrise of the next day. Special menus are made up for these groups. These include foods that these people should eat at this time. After their meal they are allowed a 2-hour period to pray and conduct services.

At the end of the 30 days, the Feast of Idul Fitur is held with a special meal where the Muslim inmates can invite family members to partake with them.

Before coming here, I spoke to each of our inmate imams. I asked them, if they had a free rein to carry out any religious activity they so desired within the confines of Attica, what would they do?

From the Sunni Muslim imam I obtained the following:

Number one, he wished to have their own mosque. Logistically, we don't have the capability of allowing these people to have a room specifically for their own purpose, and this carries through with all other religious groups. There's no room set aside for any one special group.

The second one was the right to worship as a congregation five times daily: At 4:30 a.m., 12:30 p.m., 3:30 p.m., 6:45 p.m., and between 8:30 p.m. and 12 midnight. And logistically, again, this would give us one terrible headache. We just don't have the capability of getting those people together five times daily to pray.

The third thing was to do away with the strip search. No Muslim, they tell me, is to expose his private parts. When we have completed visiting in the visiting room, where an inmate has come in contact with his outside visitors, we strip frisk every inmate before he returns to our inmate population. Sometimes, when frisking in housing units, we do allow the Muslim inmates to strip their clothing off within their cell. They are inspected there. They can dress and then come outside of their cell while we go into the cell to inspect the contents.

Then the other one—he wanted to know—was to have the ability to see inmates confined in our special housing unit, and our special housing unit is a disciplinary section where we have our hard core problem inmates. And outside imams, if they come in, they are allowed to visit that area, but we do not allow inmate Imam to go into that area. In fact, that's the only area of the institution where they cannot go.

The imam of the World Community of Islam in the West asked for the following; again, he would like to have a mosque for his own and for the same reasons. I cannot give him a mosque of his own to be used solely for his own use.

We do furnish an office that is shared by both imams, the one for the Sunni Muslim and the World Community of Islam, and he wished to have the ability to call inmates to his office for interviews. At the present time, his pass allows him to go throughout the institution to all areas, and he can see the various inmates in those areas, whether it be housing unit, recreational areas, or in their work areas.

The other one was he wished to be able to have a phone in that office where he could contact the families of his parishioners at home, and at the present time, if he makes phone calls, they are done through our senior chaplain's office. He comes down; he will explain to him, if

there is a need, the senior chaplain will allow him to make a telephone call.

The other thing was he asked to be able to guarantee that his services and study classes will start on time. It might seem like a small thing, but inside a correction facility they are like slated to start a religous study group at 9 o'clock and it may be 9:10 or 9:15, but I don't believe it's ever more than that. He might be 10 or 15 minutes off before he gets started and he saw this as a problem.

Then, the final thing was he asked for more interaction and interfaith among the various religious groups. At the present time, our senior chaplain is looking into this aspect to see if he cannot have a more ecumenical working among the various religious groups within the Attica Correction Facility.

These are the various activities that are going on within the confines of Attica.

Thank you.

VICE CHAIRMAN HORN. Thank you very much, Superintendent Smith.

Commissioner Freeman, do you have any questions?

COMMISSIONER FREEMAN. None.

VICE CHAIRMAN HORN. Mr. Saltzman.

COMMISSIONER SALTZMAN. No, thank you.

VICE CHAIRMAN HORN. Chairman Flemming.

CHAIRMAN FLEMMING. Mr. Collins, has a study been made which puts into one document a picture of the various policies and practices that are followed by the various States with respect to this issue?

MR. COLLINS. Not that I'm aware of, no.

CHAIRMAN FLEMMING. Wouldn't that be a helpful kind of document to people who are working in the field?

MR. COLLINS. It would be helpful. In fact, as I was listening to Warden Taylor, I made a note to ask him if they have produced anything in writing about the Native American Church so that one State could benefit from the experiences and the lessons learned in another State. It would be beneficial in that respect.

CHAIRMAN FLEMMING. Mr. Smith, what help do you, as superintendent, receive from the central office of ministerial affairs in Albany.

MR. SMITH. I feel I get a great deal of help from them. Actually, without them, I would feel like I was wandering around lost.

There are so many new groups. Like I heard Father Houlahan mention the 5 percenters. Now, the 5 percenters among the Black Muslim people—and the definition has been given to me by inmates is that 85 percent of the black people are nothing but an Uncle Tom, 10 percent are pretty good, but then you have the 5 percent elite, and these people in prison, they see themselves as the elite. And we do not, as a department, recognize this as a religion.

Now, whether they're holding service in the Federal system or not, I'm not sure; but I do get—receive much direction and much help. In fact, at the present time, the World Community of Islam has grown to such an extent, our department is trying to hire either part-time or full-time clergy to assist me in that area.

CHAIRMAN FLEMMING. Do you know whether or not an effort is made to respond to the religious needs of the American Indian community in any of the other institutions in New York?

MR. SMITH. Yes, I do. At Auburn, they are still functioning. They have a reservation just south of Syracuse, the Onondaga Reservation, and yes, they are functioning in that area.

Again, for some 2 years, we functioned at Attica, and for some reason that we are not able to ascertain, we don't have people inside capable of conducting those services. The way we see it at the present time, some of those inmates that were going to the long house services are now attending both our Protestant and Catholic service.

CHAIRMAN FLEMMING. That's all I have.

VICE CHAIRMAN HORN. Has the New York correctional system thought about arranging some of the prisoners, such as the World Community of Islam, on a basis where the members of that group could be in one part of the prison; what are the pluses and minuses as you see them? In other words, if they're so well ordered and well disciplined and less of a problem, what kind of policies would you worry about if prisons were rearranged to reflect that type of arrangement?

MR. SMITH. I think it would cause me all kinds of problems. We usually house inmates within the institution by work assignment or program assignments, so that it's more practical to get them to their assignments with the shortest amount of time, and that is the way that it's done. To house one religious group in one area, I could see would pose me no end to problems. We do have one honor unit within the Attica Correctional Facility. At the present time we have about 130 cells in there, but that's open to men of all religions and they must meet a certain criteria before they're allowed to live in there. They have more privileges, cells open longer, and they travel back and forth to work on strictly their own pass. And all inmates of the World Community of Islam would not fit that criteria, despite their good behavior.

VICE CHAIRMAN HORN. Mr. Nunez, do you have any questions?

MR. NUNEZ. No.

VICE CHAIRMAN HORN. If not, I want to thank both of you gentlemen. Those are very thorough and helpful statements, and that's why the Commissioners have not been pursuing questions with you.

We appreciate the commitment you have in the field and the studies which both of you have undertaken, both as a practical administrator and as an attorney looking at the statewide practices. Thank you.

We'll take about a 4 minute recess before the next panel. If the next panel would like to come forward, that's Mr. Bronstein, Khalil Abdel Alim, Marc Stern, and Felix White, Jr.

[Short recess.]

CHAIRMAN FLEMMING. Mr. Saltzman will introduce the members of the panel and lead the discussion, Mr. Saltzman.

COMMISSIONER SALTZMAN. Members of this panel will provide insights as to problems with religious practice experienced by the incarcerated in Federal and State correctional facilities.

Our first speaker will be Mr. Alvin Bronstein. He is the director of the National Prison Project of the American Civil Liberties Union. He has previously served as chief staff counsel to the Lawyer's Constitutional Defense Committee in Mississippi, consultant to the National Institute of Corrections, and associate director of the Institute of Politics, Kennedy School of Government at Harvard University.

He received his undergraduate degree from City College of New York and his law degree from New York Law School.

Mr. Bronstein.

STATEMENT OF ALVIN BRONSTEIN, DIRECTOR, NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION

MR. BRONSTEIN. Thank you members of the Commission.

I thought it might be useful for those of you who are not familiar with our work to mention just briefly that the National Prison Project is what the title says it is. It's the largest national project of its kind engaged in advocacy of the rights of prisoners.

We're presently engaged in litigation or other activities in more than 25 States and with the Federal Bureau of Prisons, so that our perspective, and I'll try to lay it out for you today, is a national one.

There are two areas of concern about religion which derive from the first amendment, and as I've listened to the other speakers this morning, the focus has been on the second; that is the free exercise clause, and there's been nothing said about the establishment clause.

The first part of that same first amendment—and I think the establishment clause is a much more pervasive problem today and I'll get to that in a few moments.

With respect to the free exercise clause, as we know, the history of the prisoners rights movement derived from the attempts by the Black Muslims in prison to engage in the free exercise of their religious practices.

The early part of the sixties, and through the sixties, it was litigation on behalf of the Black Muslims that generated a new judicial attitude about the rights of prisoners. I think I would agree with—although I didn't hear the Federal officials, I heard the State officials; but what I think they're saying that—is that in the area of free exercise this is a diminishing problem with respect to diets, religious prayer meetings, ornaments and dress, hair, Indian sweat lodges, and I assume Warden Taylor talked about that. Either as a result of litigation or administrative decision or negotiations, these things have slowly been recognized, and the problem is diminishing. There are still some problems in these areas, particularly in State systems, although not exclusively. Last year, for example, at the Federal institution at Petersburg, which is a correctional institution not a penitentiary, we received a number of complaints from Muslims about their treatment there.

There was an incident that was triggered allegedly by the requirement that three Muslims, who were doing construction work, do that construction work at the piggery where the swine were being slaughtered, and that they felt that this was contrary to their religious beliefs, since they would be coming into contact with swine and the innards of swine and so on, and they refused to work and were alledgedly disciplined for this.

There was a great deal of discussion and—in both the outside religious leaders and the institution's—after some time the matter, I think, was cleared up. But clearly, there was a problem there. And if in fact prisoners—I don't know this for a fact—if in fact they were punished for refusing to work there, it seems to me that that was inappropriate.

In addition, there were complaints at the same institution that they were not allowed to observe Ramadan last year. I think that's probably accurate. I think it's in the last year that the Bureau of Prisons has begun to accommodate those special needs of that religious group.

Similarly, just this weekend, you may have seen an item in the newspapers about the warden at Boise, Idaho, at the State prison who ordered a Catholic chaplain to be searched, and they removed from the Catholic chaplain a small amount of sacramental wine which he felt he needed to have to do the sacrament with the wine and wafers. And the warden announced that they would not permit sacramental wine, either for Catholics or for Jewish prisoners at the Passover, even though the wine in both cases is recognized and clearly an instrumental part of the religious services.

The warden went on further to say that there's enough homemade whiskey in the institution; we don't want to allow this other whiskey to be brought in.

It seems to me that the State officials should do something about the homemade whiskey, instead of worrying about the few ounces that the Catholic priesthood was bringing in, but that's the kind of attitude that you still have in some areas.

Similarly, in segregation units, and that was touched on by some of the other speakers, I think there is still a problem about access to religious services and religious materials and, certainly, it is still probably a pervasive problem in the many jails in this country.

As you know, every problem that you have in prisons is exacerbated in the jails. Jails tend to be smaller; they have less resources; they have fewer professional staff; people are there for a shorter time and, therefore, we turn them basically into warehouses. At least in most prisons today, there is some attempt to have them operate as something other than merely a warehouse. So that that problem still exists in those areas, but as I say, I think it is diminishing. I think the Federal system and most State systems are making sincere and honest efforts to accommodate the issues of free exercise of permitting religious prisoners to exercise their religious feelings.

The establishment clause is a much more subtle and, I think, more pervasive issue and much less susceptible to judicial challenge. The courts will intervene; we'll find out in Boise, Idaho, since we just agreed to challenge that practice there. I'm sure, or I have reason to

believe we'll be successful but not on the establishment side of it. I think this issue is more important because it can seriously effect the daily lives of prisoners and even more important their liberty interests.

Let me give you some examples of what I'm talking about. Just a few years ago, we learned that if a District of Columbia prisoner wanted to marry, that the sole administrative procedure set up for that was an interview with the Protestant chaplain, and the Protestant chaplain was given the sole discretion to decide whether or not the prisoner should marry. In a law suit that we filed on that, we took the chaplain's deposition, and he quite flat out—said he makes the decision based on his religious training—whether he thought it would be morally a good thing to do. And the Protestant chaplain was making this decision for Muslim prisoners, for Jewish prisoners, for Catholic prisoners, but was using his own religious tenets to decide whether or not this prisoner should marry.

Again, you have in the area, and this is particularly true in State institutions in classification boards, custody boards, discipline boards, you often have the chaplain, and it's usually a Protestant chaplain. Sometimes in the Southern border States it may be a Baptist minister sitting on that decisionmaking board, deciding what kind of custody a person should have, what kind of job programming, and what kind of disciplinary sanctions should be imposed.

Similarly, you have chaplains and ministers sitting on parole boards, and it is clear to me that the decisions about the lives and prisoners are being made by people who evaluate those decisions based on their own religious feelings.

Up until very recently, many States had as a condition of parole, a formal condition of parole that the prisoner agreed to regularly attend religious services. That has been struck down, but now you still find in many States, for example still today in Mississippi, after all the formal conditions the prisoner signs the conditions. Underneath that is, although it is not required, We strongly urge the prisoner to attend church service regularly.

What happens in this process is that if a prisoner comes up before a disciplinary board or classification board or parole board where one or more members are making their decisions based on their own values, the fact of whether or not a prisoner attends religious services will be weighed by that decisionmaker and, in that manner, the State is engaging really in the establishment of religious criteria for matters that are wholly inappropriate for those kinds of criteria.

Very recently, I wrote to Mr. Cripe, who testified here earlier, about complaints we have received from some Federal prisoners about the fact that their attendance or nonattendance at religious services were being noted on their files and that they were unable to get an explanation about that. Mr. Cripe referred the letter to the superintendent of the particular institution that was involved who has responded they do keep these records. The records are for the purpose of reporting to the central and regional offices the number of inmates involved in religious activities.

They claim that they need these accurate records to accommodate their budget, which is apparently true. In their most recent authorization request, they list by numbers the number of prisoners actually participating in various religious programs, religious furloughs, and so on.

What troubles me a little, although the superintendant assured me it was not happening, is, if these notations are in the files, it is highly conceivable that some decisions may be made that a prisoner's parole or other things based upon their attendance or nonattendance of religious activities. In fact, I plan to request that the Bureau publish a rule or regulation which would make it impossible for those records to be shown to the parole authorities unless the prisoner requested it.

I can understand the need to maintain these records for budget requirements, but they ought not to be kept on a personal basis where the attendance or nonattendance at church can be evaluated by a decisionmaker in deciding whether or not a person should have some interest or benefit or liberty. It is very pervasive in many of the State systems. I don't think it's pervasive in the Federal system. The involvement of the chaplain, involvement of the minister in the day-to-day operations of the prison and the day to day decisions that are made about the lives of prisoners, I think that is a clear violation of the establishment clause, but it is very difficult for me to do something about that.

I think I will stop here so that the other members can speak and I can respond to questions.

COMMISSIONER SALTZMAN. Thank you Mr. Bronstein.

That's a perspective that we really haven't heard much about and I personally appreciate it.

Khalil Abdel Alim is the Imam of the World Community of Al-Islam in the West.

Imam Alim has been affiliated with the Muslim faith since '63, serving as teacher, assistant minister, and minister before becoming Imam for the Washington area and regional Imam for the Southeast region in 1975.

In addition to being one of six Imams leading the World Community of Al-Islam in the West, Imam Alim is vice president of the Washington Metropolitan Interfaith Council and member of the Mayor's Transition Committee serving as chairman of that committee's subcommittee on the Department of Corrections.

STATEMENT OF KHALIL ABDEL ALIM, IMAN, WORLD COMMUNITY OF AL-ISLAM IN THE WEST

MR. ALIM. Thank you.

Members of the Commission we thank you for the opportunity to present to you the perspective of the World Community of Al-Islam in the West.

COMMISSIONER SALTZMAN. Sir, you have submitted a written statement.

MR. ALIM. Yes.

COMMISSIONER SALTZMAN. And I suggest that that be placed in the record of this consultation at this point, prior to your remarks.

MR. ALIM. I would like to also point out that I've been asked by Dr. Muhammad Abdul Rauf, who is the director of the Islamic Center here in Washington, D.C., to also represent him at this presentation. He's a noted Muslim scholar who would be recognized by Muslims who are often designated as Sunni, or Orthodox Muslims. However, this presentation that I'm about to make is for the World Community of Al-Islam in the West.

The World Community of Al-Islam in the West began almost 50 years ago in Detroit, Michigan, in 1930. It was founded by a foreign Muslim who went under many names, but known mostly today as Fard Muhammad.

He taught African Americans something of the history of their African foreparents and the religion of Al-Islam in an unorthodox mythical symbolic manner.

One of his strongest and most faithful converts was an African American named Elijah Poole who was later given the Arabic Muslim name of Muhammad. He became Elijah Muhammad and assumed leadership of the organization in 1934 when Fard Muhammad left. Under his leadership the new movement stressed physical discipline, moral discipline, physical cleanliness, and moral cleanliness. Smoking, drinking alcohol, using drugs, adultery, fornication, eating of pork, lying, stealing, and other such vices were strictly forbidden. Investigators were assigned by the mosque to monitor the behavior of the converts.

Any person who were found to be living in violation of the strict code were punished by banishment from the circle of Islam. He or she would not be allowed to attend the mosque, nor would they be allowed to participate in any mosque activities. While his family was left in the care of some of the faithful members of the group, Mr. Muhammad kept on the move until World War II erupted in 1941. Then he and several of his followers were arrested for failure to register for the draft and imprisoned until the war ended in 1946. The Honorable Elijah Muhammad himself pioneered Al-Islam in American prisons.

With the release of the followers from prison, Elijah Muhammad embarked on new programs from prison, with strong emphasis on establishing businesses and economic development. The hard working converts, who were usually poor and uneducated, pooled their money and began to open small businesses under the complete supervision and management of the leader.

Under his leadership the Nation of Islam established a commendable record in the prisons of the United States with many wardens and prison officials inviting Muslim ministers into their institutions to teach the teachings of Elijah Muhammad.

I might interject here, as it has been previously testified, that this came about mostly after litigation and orders by the court to permit the Muslims to practice their faith.

I, myself, was asked by the warden of Angola Penitentiary in Louisiana in 1971 to come and conduct religious services and counseling for the growing Muslim population. His statement to me was, "I wish you

could convert all of these boys," referring to the hundreds of African American inmates in that institution. I believe that that incident demonstrates the rehabilitative effect many prison officials perceived the Nation of Islam to have on prisoners inside the prisons.

Even when the teachings of the Nation of Islam were racist and nationalistic, many institutions allowed Muslim religious services and accommodations for their diet and observation of Ramadan, the annual month of sunrise to sunset fasting.

In February of 1975 the Honorable Elijah Muhammad passed. The family of Elijah Muhammad and the official staff of the Nation of Islam unanimously agreed that Wallace D. Muhammad, son of Elijah Muhammad, should be the leader of the movement, and he was presented to the 20,000 jubilant followers at the annual convention the next day, after the death of his father.

Immediately Wallace D. Muhammad began a series of planned and continuous steps to move the membership of the Nation of Islam on the straight path of Al-Islam.

With the unyielding support of the followers in the 150 mosques and the national staff, Wallace D. Muhammad began to strip away the bait, nationalistic or race appealing teachings to attract black people, that had been used by Mr. Fard Muhammad and Elijah Muhammad. The temples of Islam across the country were changed to be properly identified as mosques. They had formerly been called mosques in the earlier days of the movement.

Racial restrictions on membership in the organization were removed and persons of all races and nationalities were accepted. West Indians, South Americans, and Caucasians joined to the membership, with a Caucasian Ph. D. being appointed to a high position on the educational administrative staff. In the place of the strict dictatorial policies of the former leader, the ruling power was given by Wallace D. Muhammad to a Council of Imams which has representatives from all the members of the Islamic community. The authority over the Council of Imams is the Holy Qur'an, the Sunnah, and the Representative for the Community and Director of Propagation, Imam Wallace D. Muhammad.

The business enterprises and activities of the Nation of Islam were separated from the mosque activities and turned over to private ownership rather than organizational ownership. The name "Nation of Islam" was officially dropped by Imam Wallace D. Muhammad and the staff and replaced with the more proper named "World Community of Al-Islam in the West."

This name rightly identifies the function and the relationship of the community with the rest of the world of Muslim communities.

Members of the World Community of Al-Islam are now actively engaged in studies of Arabic, Holy Qur'an—the Holy Qur'an English translation by Yusuf Ali—the Hadith, and the Sunnah or traditions of Prophet Muhammad. The response to Jumah prayer, which has been established for over 4 years, has been exceptional. Over 5,000 Muslims leave their homes and places of employment to attend over 50 mosques each week where Jumah prayer has been established. Total attendance

at the Wednesday and Sunday mosque lectures average 225,000 persons per month. These statistics were from 1975.

The World Community of Al-Islam now meets in unity with other Muslims groups and organizations for Jumah prayer, Ramadan observances of Eid prayers, the Hujra year celebration, and other Muslim holidays.

The strict military discipline and social separation enforced by the former leader has now been eliminated; consequently, members of the World Community of Al-Islam in the West are now becoming actively engaged in sharing the community's success in social and human programs with the rest of the society. As an example, the mayor of Atlanta, Georgia, attended a Muslim meeting where he voiced his support for the programs of Imam Wallace D. Muhammad and requested that Muslims assist him in the running of his city government. The mayor of New York City has assigned a city commissioner the specific job of acting as liaison between the Muslim community and the city government. The mayor of Los Angeles, California, attended a Muslim meeting where he also voiced public support for the programs of Imam Wallace D. Muhammad.

Leaders in all segments of the community are now identifying with the mission of the followers of the World Community of Al-Islam in the West. Prison administrators have invited the imam to speak at institutions where they have arranged for his lectures to be heard over specially designed telephone communication lines to all other penal institutions in their State. The Muslim communities established in prisons are engaged in all kinds of productive educational, social, and business rehabilitative programs which are the pride of the prison system. Imam Muhammad met on February 28, 1979, with California prison officials at California Men's Colony East, San Luis Obispo, California, in a video taped interview that we want to have distributed throughout the country. He expressed the position of the World Community of Al-Islam in the West on observance of Al-Islam in the prisons.

We realize that the normal testimony before this body is one of complaints of denial of rights. But as a member of the World Community of Al-Islam in the West and as a Muslim who works in prisons, has eaten in prisons the same food my brother Muslims eat, worshipped with them, counseled them, prayed with them, conducted Jumah prayer with them, partaken of meals to commemorate the end of fasting with them, I can not, with a clear conscience and clear presentation of the objective reality, tell you our rights to religious freedom are being denied in American prisons today as Muslims. Especially, the Federal prisons have sought to accommodate the reasonable demands of legitimate Islamic religious requirements.

I am in frequent correspondence and communication with my brother and colleague, Father Houlahan, who conscientiously seeks to resolve problems arising out of Muslims' attempts to exercise their freedom of worship in Federal prisons. There are now in several prisons and institutions, full time paid Muslim chaplains and many contract chaplains. I know of no institution that denies Muslims access to outside

Imams and teachers. Our problem today is supplying the demand for teachers.

To my knowledge, the dietary requirement of the faith is being fulfilled in most institutions.

The problem that we face is teaching new converts the reality of the faith and its authentic requirements.

As Imam Muhammad said in a statement after an August 1978 meeting with Father Houlahan and General Counsel Clair A. Cripe:

> A lot of questions are raised and sometimes a convert, a misinformed convert, defends a position almost to the death and when he learns that what really he was defending was a fabrication or an innovation from an unreliable or misinformed source, then he's really dealt a terrible blow.

I've known Muslims to take a position that they feel is very serious. They will say, "I have to hold this position" and they hold it and they suffer. They go to the hole, they are punished and penalized, and they suffer a lot for the position they took.

We are thankful for the growing progressive moral trend developing in America, reflected also in prisons. While realizing the millennium has not arrived, we must all remain vigilant against the negative forces that seek to divide us, and we must all fight to keep our country great and strong. With the help of God, we shall all overcome.

Prison ministry is one of our great priorities in the World Community of Al-Islam in the West, and I will conclude with these words from our leader, Imam Wallace D. Muhammad:

> Because once we get out into the free world, many of us have such a heavy responsibility on us to just provide the material means of livelihood for ourselves and our dependents that we hardly have any time for the revitalization of the human form, the moral makeup, the spiritual makeup of the person.
> We feel that if Muslims can become better Muslims during the time they are in prison then perhaps by the time they return to society, there will be less likelihood that they will fall back into the same company and end up in jail.

I would like to add a couple of observations that we made from previous testimony.

Father Houlahan and the other Federal officials commented about the lack—or I believe the question was asked about Muslims in the chaplain service of the Federal—in the Federal chaplain service. We're in the process of now trying to identify Muslims who are qualified and willing to serve in these capacities. We have some Muslims who do have educational qualifications that fit the qualifications of the Federal chaplaincy, but it's a matter of finding those who wish to spend the time and the service in the Federal chaplaincy.

There's often a lot of discussion about the large number of Muslims in the prison populations, Federal and State, which might lead someone to think that perhaps—because Muslims do represent a very small percentage of the total population of the country—that perhaps Mus-

lims commit an inordinate amount of crime. But the fact is that the great majority of the Muslims that are in the prisons of this country are converted inside the institution. I think that we have a very low percentage of Muslims who go in the institution as Muslims.

I would also like to comment about the dietary requirements of Muslims. The only actual dietary requirement that the religion of Al-Islam requires is that a Muslim abstain from the consumption of pork. I believe it has been pointed out earlier that sometimes personal preferences, cultural preferences, and personal and cultural biases are sometimes interpreted as being requirements of a religion. The only legitimate, again, legitimate requirement as far as diet, as far as the religion from the Holy Qur'an is that a Muslim not consume pork, and even under drastic emergency situations he is permitted, even then, to consume enough pork to survive, if he is forced, not being able to eat anything else.

To give an example to Muslims serving as chaplains in the institution, we will use the jurisdiction that we're most familiar with here, the D.C. Department of Corrections. We service nine institutions. We have 12 persons serving those institutions on a voluntary basis: 10 men and 2 women. There is one full time Islamic chaplain who is employed by the D.C. Department of Corrections, and he is employed to serve all of the Muslim communities.

Thank you very much.

COMMISSIONER SALTZMAN. Thank you, sir.

Felix W. White, Jr., is now the executive director of the Nebraska Indian Commission and a member of the traditionalist branch of the Native American Church.

Mr. White, of the Winnebago Indian tribe in Nebraska, has received a bachelors degree in education from Northwestern College in Oklahoma, a masters degree in guidance and counseling from East Central College in Oklahoma, and is currently completing his doctoral studies. Having been a teacher, counselor, and coach, both on and off the reservation, Mr. White's primary interest is in furthering human rights, particularly those rights of the American Indian.

Mr. Felix W. White, Jr.

STATEMENT OF FELIX W. WHITE, JR., EXECUTIVE DIRECTOR, NEBRASKA INDIAN COMMISSION

MR. WHITE. Oh great and good breath giver, oh great and good breath giver, the giver of all life, the maker of the earth, the creator of all mysteries.

You who have made the skies our shelter, you who have made brothers of all the elements, you who have made no promise or a guarantee of your gift, our breath, or that tomorrow we will be the user of that gift.

We stand before you the naked, the weakest of all your great wonders. We seek again today strength, courage: the strength of the grass to be able to stand together; the courage to lift our heads and, with our

spirit cleansed, be open as a blade of grass which can be examined by only you.

Grant us, your naked creation, this that we ask: strength to stand, courage to be as one; wherever we sit, wherever we walk, and whenever we talk; one in our eyes as we are in yours.

I felt it only fitting to give you a sample of the many wonderful prayers that are offered through ceremonies. And I feel that this time I should say, thank you Native Americans for having this original native here.

I'm very pleased that Mr. Saltzman's name could be translated to Indian: Be womp na akaga [phonetic]; Stephen Horn, Stephen Ha [phonetic] Arthur Flemming, would be ska panaga [phonetic]; Freeman, womp shik [phonetic]; the others are out. I can't give them names.

I am pleased that I was moved up on the agenda one speaker. It took a little thunder from my speech, because I've always had the opportunity and planned to say, "last again."

Well, our history seems to have been divided into two parts: BC and AD. BC, before Columbus and AD, all downhill after. And because of that, there have been many things that have been overlooked, misinterpreted.

I have identified it, as we call it, the John Wayne syndrome. The John Wayne syndrome is whenever the Indians come riding over the ridge you immediately circle up your wagons and you wait for those dummies to run around the wagons so you can pick them off. That's far from the truth historically. Historically, the Indian could trap or incase a wagon train at pleasure, cutting off water and any other kind of survival that the wagon train needed.

And as it is today, the Indian is always willing to sit and negotiate, to talk, to communicate our needs, our desires, as well as yours, and we have been laid aside as this country has moved forward. We have been able to survive because of our religious strengths and because of our overall concern for our existence.

You have in front of you, Commissioners, several drawings. There has been a great deal of discussion today. I have actually done three different papers on this, throwing them out the window, and last night I decided, because of the testimony I heard yesterday and the ongoing testimony this morning, I thought that I would lay to rest some of the concerns of the people here.

The first drawing is that of what you call the peyote. The first drawing will show you that the height of the button, as it is called, as it is collected in the peyote field, is the height of the thumb. It is cut back almost 2 inches at a certain angle to leave the root intact.

Page two shows you what you have to work with. The drying process is the piercing of it by thread or a needle to be able to hang them up in the air to dry. When they are dried, they are shriveled up into what you call a button, and from that is where the medicine is derived.

On a personal basis, I would like to reflect historically to the peyote or the Native American Church, as it is now called.

Quanta Parker, a halfbreed Comanche, was being pursued by the Calvary, crossed over into Mexico where he resided for 8 years. In the period of his exile, he had learned of a practice amongst the Natives of Mexico, peyote cult. He studies and brought it back into this country before the turn of the century. He then started passing it amongst the Native people or original Natives. And there seems to be a delightful story as he goes amongst the Pawnee people. He told me he had a new way to fit into the white man's religion and that he could apply it—teach them how to practice this, so he says, "We will go into this lodge here." You all go in and then I will perform this thing for you and as he went into the lodge he noticed wolves, bears here, mountain lion here and buffalo over here, and he said "Wait a minute fellows, it's not like that."

In this religion, because we're going to make it fit into white man's religion, you can't group in these things, you must turn back to people. So, in his endeavors to teach this, it soon spread that it was some kind of a teaching, it moved into the Nebraska area around 1920.

In 1920 it was then called the Peyote Church or Peyote people. In 1922 it took the name of Native American Church, because they included at that time the Bible, in hopes to get away from the persecutions that they were suffering. They were being incarcerated, searched, and—actually, the church in itself was not recognized as a church.

Now, that deals with the Peyote people or the Native American Church.

On your drawing number three, I have what you will call the legal weapon that was used against this church, by this belief, as it incorporated the Bible. This is the extended growth of the peyote button. Where you will find the upper two-thirds highly concentrated in mescaline. Mescaline, being a hallucinogen, was then proper for the narcotic divisions to prosecute them, and it shows an aftergrowth which the Indian did not use.

On page four, drawing four, you have a teepee which is required to practice the religion or the church as it is today. A water drum, which is about 12 inches in diameter; a gourd, which is about 12 inches in length; a staff, which is around 3 feet; a fan, which could be of multicolors, that of any kind of bird feather; and then of course, the fire.

There are a few little incidental things that may fit with each tribe as we go along. I will subdivide that for you in saying that each tribe—now, there are 283 recognized Federal tribes in the United States. Of the 283 tribes, you would say that one church, the Native American Church, is sufficient, but that is not so. For each tribe there is 12 clans. One or two clans may have consolidated into one part of that church; so you, in essence, are looking for six different types of churches in one tribe.

Now, that's not the only religion. There's many more religions, and the essence of the religion evolves from the very beginning of man. We, as an individual, have the obligation, you have the obligation to reverend your body to be the temple of the Lord. And this is the teaching of your Bible. This is also a mandate for the original Native,

to be as he was made to be: pure in mind, pure in body, and always, to revere those things which were granted him.

So we'll step now into the sweat lodge area, which is on page five. Page five, I have a little drawing here of a sweat lodge construction. The willows themselves must be selected by a prayer. A man, who is designated as an assistant to a medicine man, he selects each willow by prayer. The covering is either at one time robes, buffalo robes or heavy robes, deer robes, and today, they use canvas or blankets.

All right. It's in the circular position about 6 feet in diameter at the base. You must have a fire; you must have stones and water. It is ironic that it is recorded in history in very hidden passages that every tribe that ever was encountered by the conquering nation, that every tribe had at least more than one sweat lodge at their location, more than one.

There are ceremonial sweats, there are daily sweats. All right. To conduct any kind of services, it's mandatory to have at least the pipe, any kind of a pipe. There are pipes made similar to a cup which have one or two openings to it. The stem pipe is famous among the Sioux. You got to have your tobacco, a pipe, a bag to carry your tobacco in. A fan, which can be derived from basically the eagle, the eagle feather, the eagle wing, is essential to the religious practice. Then you must have sage, pine, or cedar; these are mandatory for any kind of service.

Now, there is another subdivision of this group. It is—the subdivision could be such that each clan had one. So that would make 12 sweats. Then, again, you have societies within the tribe and those societies can consist to a possible number of 12 more societies. And they may require one—they may not have been located around the villages, but they could have been in their prayer areas, their special areas.

There are so many subdivisions because—if I decided right here that these four gentlemen or these three gentlemen here would join me, we would become one. I could construct one for you, for them. Okay.

I'd like to go on to various other areas, but many of the concerns that we've been discussing have been brought up, are points that I would like to have made; hit me so fast that I couldn't dissect it, I couldn't write fast enough, and I didn't have my glasses yesterday. So I was a little in trouble, but I would like to give to the Commission next to the last little book that I have.

Fifteen years ago I ran across this book and was able to find 50 of them at the purchase price of $1. This thing has become known as the Indian Bible. The title of it is—it's excerpts really—the title of it is, "The Spartan of the West," taken from the book of *Woodcraft* published 1912, done by Ernest Thomas Seaton. I would like to give this to the Commission after I've read you one portion here dealing with the sweat lodge:

> The sweat lodge is usually a low lodge covered with blankets or skins. The patient goes in undressed and sits by a bucket of water. In a fire outside, a number of stones are heated by the attendants. These are rolled in, one or more at a time. The patient pours water on them. This raises a cloud of steam. The lodge becomes very hot. The individual drinks copious draughts of water. After a sufficient sweat, he raises the cover and rushes into the water....

Recall that most of these sweats are located near running water; A lake, stream, creek, or whatever.

> ...besides which, the lodge is always built. After this, he is rubbed down with a buckskin and wrapped in a robe to cool off.
> This was used as a bath, as well as a religious purification. "I've seen scores of them," Clark says. "They were common in all tribes. Every oldtimer knows that they were in daily use by the Indians and scoffed at by the white settlers who, indeed, were little given to bathing of any kind."

Except on Saturdays, I guess.

I would like to give this to the Commission. This is the next to the last of 50.

VICE CHAIRMAN HORN. Could I suggest, Commissioner Saltzman and Mr. Chairman, that that be deposited in our civil rights library, the Rankin Library, and I would like each Commissioner to have a Xerox of that. I, for one, have a particular need for it by the end of the week, if the staff would Xerox it, we'd be most delighted.

MR. WHITE. I would suggest that if you're reading this, read it by index, please. It covers every aspect of the Indian, and it is very, very enlightening to anybody and everybody.

COMMISSIONER SALTZMAN. I see Mr. Wheeless is going to implement your suggestion, Commissioner Horn.

Thank you, Mr. White. We appreciate that, and we'll see to it that it's deposited in the library of the Commission on Civil Rights.

MR. WHITE. Okay. I have just a few more minutes, if you don't mind, gentlemen.

COMMISSIONER SALTZMAN. We don't have much more time.

MR. WHITE. Okay. I'll conclude.

COMMISSIONER SALTZMAN. Okay. The Commissioners are anxious to hear what you would like to conclude with, sir.

MR. WHITE. All right. In all of our needs at the penal complexes, I would like to make one or two recommendations.

Stephen Ha [phonetic], if you don't mind. If your name was Yellow Horn it would be Ha Se [phonetic]; if it was White Horn, it would be Ha Ska [phonetic]. Okay.

There are several recommendations that I would like to make and I can't find them. Oh, here they are.

The problem we're having essentially in our penal complex doesn't deal specifically with the administration because the administration wants to comply with all the Federal regs, State regs. The real problem essentially is in the mannerism of hiring the guards, the lack of sensitivity at the guard level. When they abuse a pipe that's blessed, carried many miles, presented to an organization, it is to be carried in a proper manner and, when a guard wants to search it, he should at least be acknowledgeable to that. But he actually—tears the stem from the bowl, peels down the wrappings on the pipe, and he's just destroyed a sacred object.

Now, as original Native, we're used to that. We're used to seeing our hills torn down, our grass taken away, the stopping of our water. We're

used to that, but here you're knifing people that don't have any other recourse but to explode. So that sensitivity has to get down to the guard level. The hiring practice or something, something's got to be done there. That would resolve essentially the original Native's concerns on the penal complex level.

Mr. Horn brought up something that I was contemplating and would like also to follow up as a recommendation.

We have Muslim, we have all the other faiths with their special requirements, and then I heard a representative up here say that they can't, or no way, subdivide it. Well, I'd like to see this Commission kind of go on record and moving all the original Natives into one total complex, the Muslims into one, really subdividing them. After all, we've already taken away their freedom, why can't we let them express themselves in religious aspects? Let them segragate themselves into their religious aspects, taking over one total complex and just sticking all of those kind of people in there, those that profess the faith, and that's the one that I would like to see. It would certainly, in the dietary area, meet with everybody's requirements. Okay.

I'll resign myself.

COMMISSIONER SALTZMAN. Thank you.

Marc D. Stern presently serves as staff attorney for the American Jewish Congress. He's recently represented two groups of New York prisoners seeking kosher diets.

Prior to his employment with the American Jewish Congress, he was a law clerk to the United States Court of Appeals for the Fourth Circuit. He is a graduate of Yeshiva University and the Columbia University School of Law, where he was managing editor of the *Columbia Journal of Law and Social Problems.*

Mr. Stern.

STATEMENT OF MARC D. STERN, STAFF ATTORNEY, AMERICAN JEWISH CONGRESS

MR. STERN. I find myself in both agreement and disagreement with several of the panelist here.

I think, first, I think it ought to be said that the prisons in this country have made great strides over the last 15 or 20 years. I find myself, perhaps because of my background as a law clerk, unable to agree that prisoners have no recourse when guards abuse them. I think every judge and law clerk in the country can tell you that prisoners have recourse. I think evidence of the viability of our American system is precisely that the courts have responded to those complaints and responded on the whole, fairly well.

Twenty years ago, Muslim inmates were seeking to know what was in their diet. Just to get a menu was their entire request, but they weren't able to get that from prison officials. The courts stepped in and said, "Yes, you would have to give it to them." Today that really wouldn't be a court case. You might have to file papers, but it wouldn't last very long. I think that's evidence of the progress we've made. That's not, of course, to say that more progress ought not to be made.

Commissioner Horn asked several witnesses what they thought of the idea of segregated prisons; segregated essentially on the basis of religion. I know my organization had to deal with that in the context of kosher food in New York State at one maximum security prison, Green Haven. The State officials, at one point, toyed with the idea of opening a separate kitchen to be operated in accordance with the dietary laws. We later agreed on TV dinners. Prison officials broached with us the idea of transferring all Jewish inmates to that prison. Both the American Jewish Congress and the New York Board of Rabbis, which provides chaplains for the New York State prisons, objected very strenuously to that suggestion. For one thing, there are prisoners who don't need maximum security incarceration. There's one inmate in Green Haven right now who's doing time under maximum security conditions when his files contain recommendation that he do medium time. Yet, because he wants kosher food, he's doing maximum time.

I have another client who is in a prison upstate; not Attica, but Auburn. He lives in Syracuse right near Auburn. His family can easily come and visit him. I think every study has shown that family visits are very important to the rehabilitation process. Yet, if you had segregation by religion, he would be transferred 90 miles to Green Haven Prison. I don't know the exact mileage, but it's about 150–200 miles across the State. His family would not be able to come and visit him.

More fundamentally, however, I think the Jewish community—and I suspect there are many other groups in the community who object to the idea that the government ought to be making decisions based on religion, or for that matter race or any other immutable criteria which is irrelevant to the service being provided. The service being provided here—service is perhaps the wrong word—is incarceration, and we would object very strongly to offering that service on a religious basis. Aside from that, I think it's just not workable.

I'd like to go on just briefly to the point that Mr. Bronstein raised, the establishment problem. There is no doubt that that is a very significant problem. It's significant in the context of prisons for a lot of reasons. The idea of the prison in this country is essentially religious—the very name penitentiary is indicative of that. In fact, the American Bar Association has proposed standards for the treatment of prisoners, and the commentary on the proposed guidelines begin with just that observation. So it's not surprising that religion has played an especially important role in the development of the prisoners rights movement. The first cases, really, that recognized the rights of prisoners from the Fourth Circuit and the District of Columbia Circuit involved religious liberty. You'll find language in opinions, one by Judge Winter of the Fourth Circuit in particular to the effect of why not allow people to observe their religion, after all, religion can rehabilitate them. Superintendent Smith, I think, perhaps unintentionally, made the same point. He said, "Well, these Muslim groups are very well behaved," or the Warden in Louisiana who said, "I wish you could convert everybody."

Religion is viewed then as part of the rehabilitative process. There is a lot of common sense appeal to that. There is a common sense notion that religious people tend to be better behaved. Unfortunately, we in

the Jewish community have found that not always to be true. But on the whole, that's a common sense observation that probably could be shown empirically to have a very high validity.

On the other hand, there are the constitutional objections to this sort of thinking that Mr. Bronstein raises and they are hard objections. There is a case out of Louisiana that his project handled involving a warden who allocated good jobs based on attendance of religious services he conducted. The parole problem has been discussed by the courts on several occasions. My problem is I don't think there's an easy answer. Mr. Bronstein suggests not allowing chaplains to play a role in those processes unless the inmate wants them. Well, I suggest that in the context of prisons where parole is so highly desired, it's hardly a solution at all because the noninvocation of the waiver is going to be made in most cases. There's going to be tremendous pressure on inmates to count chapel attendance.

Several last points about the establishment clause I think I ought to raise—I know it's late. One, is that religion in prisons tends to be, to use a Yiddish word, "parve." It's rather neutral and tasteless. Everybody has to get along with everybody else. So we find that despite the fact that the Protestant denominations in the free world frequently can't agree on very many things, we find one service for all Protestants in many prisons.

Within the Jewish religion, we have three very distinct groupings. I sat through a service the other day at Green Haven; to use another Yiddish expression, "Nisht a hain, nisht a hair," its not here and it's not there because it's got to satisfy everybody's needs. That cheapens religion, and by bringing religion into the processes of the prison, the State cheapens religion. By the same token, religion also becomes an inmates's weapon against the administration. That too cheapens religions, because it ceases to be what I, at least personally, view religion as—the way that a man relates to a Supreme Being of one sort or another, and it becomes a weapon. I think that is a real problem. I have clients whose sincerity I doubt very strongly. It's not my job as a lawyer to judge them but, as a human being, I don't believe they're really seriously interested in kosher food. We have found in New York—and I know that others have found in the Federal prison system that we are able to negotiate satisfactory resolutions on the whole to the problem of kosher dietary laws which would satisfy the Sunni Muslims as well. One of the problems we do encounter is inmates whose personal predilections, or interpretations of the dietary laws push prison officials too far. This is a real problem for me as an attorney. I have clients who adopt stricter versions of the dietary laws, which should be perfectly acceptable and have legitimate basis in Jewish law, but are simply beyond the minimum required by Jewish law and are very difficult to comply with in the prison context. This problem creates a lot of tension even within the Jewish inmate population. This is a very difficult problem for me as an attorney representing these groups. I can certainly sympathize with the warden who has got to deal with it, with the threat of a law suit hanging over his or her head.

I would just conclude with something that struck me sitting here this morning and that is one of the interesting ways that American law has grown. The kosher food cases are very easy lawyer steps from the Muslim diet cases which preceeded them, and yet, the prison officials now view the leading case on religious diets as one involving kosher food. Several weeks ago, after I had successfully negotiated a settlement agreement in a kosher food case, I got a letter from a Native American Church group out in Oregon asking for a copy of my brief because they wanted to use the same brief to establish their right to a sweat shop.

COMMISSIONER SALTZMAN. Sweat lodge.

MR. STERN. Sweat lodge; very sorry. That's New York, my forefathers garment industry background.

And I think that is an interesting testimony to the viability of the American constitutional system.

COMMISSIONER SALTZMAN. Thank you, Mr. Stern.

Chairman Flemming, do you have a question or did you waive your questions?

CHAIRMAN FLEMMING. Go ahead.

VICE CHAIRMAN HORN. Let me just ask one question on this point Mr. Stern is pursuing on religious isolation.

Obviously, there's a difference of opinion. I'm sure the discussions would be loud and long within the Commission on Civil Rights in terms of integration, desegregation, segregation, all stages in between; but I think it's a legitimate question to ask and I ask it from the point, not so much of the government making the decision, but whether or not individuals will go to a particular area because they are of a religious faith? It could be that some prisoners don't want to be near home. It could be that some prisoners don't want to be in a particular facility. It just seems to me that if they can be accommodated then they should be. Some of us have known for 20 years, frankly, the advantages of what used to be described as the Black Muslims in the sixties in terms of rehabilitation of that particular clientele. And I don't know from the State's interest if that is not an unreasonable selfish interest to pursue. If you have prisoners of a particular faith who want to get together and it is their decision and facilities can be provided, what is wrong with letting people of that particular faith get together? Must we be so integrative that in a sense it's counterproductive to the individual, the institution, and the State?

MR. STERN. Well, I would have no objections to the State allowing an inmate, say in Auburn, to transfer down to Green Haven because he can more easily get kosher food. But as I understood the proposal, it was more far reaching than that. As you suggested earlier the government would initiate this process and encourage people, or to compel people, and in the world of prisons that is a very narrow line, to transfer to one prison simply because everybody's there so as to minimize the headaches that the various prison officials have in dealing with lots of groups in one prison.

I think there was something else that slipped into your question, you mentioned it in stating your case, and that is some religious groups that

have a proven rehabilitative value and isn't it in the State's interest to encourage those? Well, sure it is. I have no doubt at all that it is. The problem is that you still have to deal with the establishment clause of the Constitution. The establishment clause gets in people's way all over the place, as does the prohibition on illegal searches and seizures. There's no doubt we could do a lot more to control crime if we didn't have the fourth amendment, but it's standing there and you've got to deal with it. Similarly, you've got to deal with the establishment clause. We at the Congress have had to deal informally with the establishment clause in this context. Jewish inmates are sometimes endangered because they are getting kosher TV dinners, which are more desirable than regular prison food. Well, that gives a benefit to somebody on the basis of religion. That's a very serious establishment problem although I believe it is justified by the free exercise clause. It's also a serious problem, because you don't want your client getting stabbed in the back over a TV dinner, and I have no doubt at all that that could happen in the context of a prison.

VICE CHAIRMAN HORN. Well, Mr. Stern, as with any good attorney, you're raising a series of strawmen or strawwomen or strawpersons. It seems to me that you not only have the establishment clause problem, but you also have a first amendment problem against prohibiting the free exercise of religion. While I realize that in prison such a free exercise might appear ironic, but I would think somewhere there's a rule of reason where the State does not establish the religion so much as they permit, even in prison conditions, the right of individuals who profess a particular religion to pursue it. And again, I would leave it up to the individual. I do not say that because you're Jewish or because you're a member of the Native American Church, whichever, that you have to go here, hither, or yon within one facility, between facilities, or whatever; but I think, if the choice were available and it is still within the prison context, what's wrong with that bit of individual freedom?

MR. STERN. Let me just answer that with another question and that is—which is a Jewish trait, as you know—what would you do with the inmate, my inmate in Auburn who doesn't want to transfer to Green Haven; would you still provide him kosher food in Auburn?

VICE CHAIRMAN HORN. Well, I would say number one, the answer is yes, to that, that if he doesn't want to transfer, he doesn't have to transfer. Assuming the classification of the prisons that we're talking about, maximum, medium, minimum, or whatever the classification is; and I would think then, we would follow applicable court decisions in terms of kosher food.

MR. STERN. Well, then, as I understand it, as a practical matter it may be that New York State prisons would not admit to a policy of allowing voluntary transfers. This is sort of a never, never land. So if that's all you're proposing that prison officials accommodate this sort of thing, I have no objection to it.

If you're talking of something more formal, then I have a lot of problems, and I, respectfully, suggest to you that they are not strawmen.

COMMISSIONER SALTZMAN. Mr. Bronstein.

MR. BRONSTEIN. May I also respond from a different point of view, as an advocate of the rights of prisoners.

Superintendent Smith alluded to it, but this is a real problem. Even within the walls of an institution that is maximum security, there are different custody classifications; more restrictive in some cases, less restrictive in others. If 100 Jewish prisoners or Native Americans or Black Muslims elected to live in the same housing accommodations, you would find that prison officials, if they had 4 out of that 100 that they wanted very close custody, they would classify all 100 for very close custody, because they always take the most restrictive alternative in order to protect their control and security interest. So prisoners would have to then choose between giving up some aspect of religious observances and other privileges based on custody. Pragmatically, it's a bad idea.

VICE CHAIRMAN HORN. Well, I don't know that I agree with your assumption; number one, that all prison officials would do that. Obviously, we know the prisons are overcrowded; we also know more prisons are being built. We know there's a change in type of sentencing and parole policies, there's a whole hodge podge here for which, frankly, nobody has a simple solution.

But the fact is—all I'm saying is that within the classification requirements that obviously have to be uppermost in a prison system and the classifications within particular classifications, if possible, it seems to me that the State can encourage the exercise of individual choice as an individual pursues a particular religion. Whether anybody else likes that religion or not is beside the point as far as I'm concerned; be it me, the ACLU, the Federal Government, it seems to me that the individual ought to have that right. In looking at the total institutional picture, it could be that it is in the interest of the prison system to do so in the long run. I doubt that such an interest is sufficient enough to cause the establishment of religion. Such an interest is merely protecting the free exercise of that right by a person who is incarcerated.

MR. BRONSTEIN. You see, if the 100 people in this new unit had previously had different levels of custody, some going out freely on passes, what would happen in order to protect the entire group? And I'm not saying this in a critical way. The institution would have to limit various options for those prisoners in order to accommodate this other interest.

VICE CHAIRMAN HORN. Again, I disagree with the assumption. You gave me an example of four people and you said that because four have to be under maximum security conditions classification, than the State would have to limit the activity of all. I'm saying that is a strawman. I see no reason why the State can not secure four cells somewhere else in that prison and I would stick those four there. And if they want to join in religious services or whatever, under certain conditions, okay. I just don't think that's a reasonable way to approach the problem.

COMMISSIONER SALTZMAN. I think we've explored this question; do you have another?

VICE CHAIRMAN HORN. Not at all.

CHAIRMAN FLEMMING. I would like to ask those who participated on either one of our earlier panels whether or not they have any questions that they would like to address to the members of this panel or whether they have any comments that they would like to make at this particular point, for the record? If you do, to help the reporter, just identify yourself.

COMMISSIONER SALTZMAN. I had a question before we close the session.

CHAIRMAN FLEMMING. Well, I'm not going to close it at this particular point. I indicated earlier that we would provide this opportunity and I would like to provide it at this time, using my time for this particular purpose.

MR. SMITH. Harold Smith from Attica.

I would like to pose a question based upon yesterday's testimony. I was here yesterday morning. I heard the matter of accommodation for employees to get away from inmates; and running an institution, a correctional facility where you run 7 days a week and yes, it may be possible to accommodate that man who attends a Saturday service, but you open up a whole can of worms when all of a sudden the other people that want to go on Sunday say they want to go. If we're going to treat both groups alike—as an administrator, that poses me one large problem.

CHAIRMAN FLEMMING. That's an interesting linkage of some of the administrative problems we were looking at yesterday, in the area of employment, with some of the problems that you confront as an administrator.

MR. SMITH. Like many times, the comment was made, on Sunday most people are off from work. If I locked all those inmates in on Sunday, they wouldn't like it very much.

VICE CHAIRMAN HORN. Your problem might have just posed one of best excuses for affirmative actions for those of the Jewish faith to encourage more to go into the correctional field. We were discussing that yesterday.

CHAIRMAN FLEMMING. Any other question or comment?

If not, Mr. Saltzman, I return it back to you.

MR. NUNEZ. I have no questions.

COMMISSIONER SALTZMAN. Mr. Bronstein, for a moment, I want to explore the issue of establishment—relative to Father Houlahan's indication that the hiring of chaplains on the Federal level is done irrespective of what their particular denomination is. And yet, apparently by coincidence, the majority of them are Protestant and Catholic, or Christian. Do you think the hiring practice related to the denomination represented by the inmate is an expression of the establishment issue?

MR. BRONSTEIN. Well, as a matter of ACLU policy, the existence of State chaplains, if you will, is a problem in the establishment clause. Our druthers, our preference would be that there be no chaplains hired by the State. You have the other problem then of the limited options that a prisoner has. The ideal would be that the State merely make sure that each prisoner or group of prisoners have access to free world

chaplains, ministers, priests, imams, as they desire, but not be in the business of hiring the chaplains.

But the moment the State hires it, you begin to have establishment clause problems. I realize just as in the medical area, the education area, this poses other administrative problems for the administrator. In other words there are so many things that they can do in any given day in accommodating business access to law libraries, or whatever, but it's clearly a problem under the establishment clause.

COMMISSIONER SALTZMAN. Would it be appropriate for the chaplaincy department to seek some proportional representation in accordance with the nature of the prison population?

MR. BRONSTEIN. I suppose so, but of course, the nature of the prison population changes and, if you hired a Catholic priest this year and you didn't have enough Catholics to warrant a priest next year, what kind of a contract would you have with the Catholic priest?

COMMISSIONER SALTZMAN. No further questions.

Mr. Chairman, I ask you to close.

CHAIRMAN FLEMMING. May I express to the members of the panel our appreciation for your coming here, spending this time with us, making these presentations, and responding to questions. It's been very helpful and will mean a great deal to us as we now weigh the issues that have been presented to us during the last 2 days.

This is the last panel in connection with the consultation, and I know that I speak for my colleagues on the Commission and for the staff of the Commission when I say that it's been a very rewarding 2 days in terms of the issues that have been identified and also in the way in which those issues have been discussed.

I don't know just who selected the topic for the consultation, but whoever did, did a good job. It has been a neglected area, and I trust that the Commission will be in a position to give more attention to it in the future than it has in the past and that we will be able to provide some leadership in this area in the form of findings and recommendations as time goes on.

Thank you all very, very much.

Consultation is adjourned.

An Overview of the Religious Discrimination Issue

By W. Melvin Adams

The fundamental convictions of our founding fathers in religious liberty was the spark that ignited the bold experiment in democracy in this nation. The natural or inalienable rights of its citizens constitute the cornerstone of this democracy. President after president has proclaimed that fact. Almost all have regarded George Washington's admonition to preserve "the sacred fire of liberty" as their most serious responsibility.

John F. Kennedy began his inaugural address with the observation that the world was different in 1961 when compared to 1789. Yet "the same revolutionary beliefs for which our forebearers fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God."

President Carter is no exception. He has made it very clear that he and his nation stand for religious freedom. This fact has been shouted from housetops. It has been trumpeted in banner headlines in our newspapers. It has been paraded in dress review before oppressed people of the world.

It is general knowledge that the desire for freedom of religion prodded oppressed people of the old world to brave treacherous sea voyages in rickety ships to the shores of this country. It drove them

to endure untold hardships and dangers of an unfriendly wilderness.

Yet, the thread of religious intolerance has woven its way into every aspect of life since colonial days. It first showed its ugly head when the Puritans demonstrated that they were just as intolerant of the beliefs of others as some of the countries in the old world. This showed up in witch burnings, punishments for desecrating the Lord's day, religious tests for office, discrimination against the Catholics, etc. But the framers of the Constitution envisioned a different nation.

What makes the concept of religious freedom in the United States different from that of other countries? It is the First Amendment to the Constitution. The two great principles enunciated there are the "establishment" clause and the "free exercise" clause. Today, both principles continue to be tested in the courts. Although much is being said in courtrooms concerning the establishment clause, that is not our primary concern this morning. I want to speak specifically concerning the free exercise clause.

At this point, it is proper that we define some of our terminology—the difference between civil liberties and civil rights. For this I draw upon the excellent work of the staff of the Commission on Civil Rights. In one of their briefing papers it is defined as follows:

> "Religious civil liberties issues cluster around the First Amendment right to individual freedom of

> religion, including such issues as the right to hold or not to hold a religious faith, and the prohibition against the establishment of a religion by government.
>
> "Religious civil rights, on the other hand, cluster around the equal protection and due process clauses of the Fourteenth Amendment, which prohibit discrimination against individuals which denies them equal protection of the laws, equality of status under law, equal treatment in the administration of justice, and quality of opportunity and access to employment, education, housing, public services and facilities, and public accommodations because of their exercise of their right to religious freedom."

In nearly every country of the world, there is freedom to believe what you want to believe. Even leading Socialist countries take pride in publicizing the fact that they have "religious freedom." But what makes it only a hollow euphemism? They do not allow freedom to believe to be translated into freedom to act. The difference in our country is the First Amendment.

Unfortunately, the free exercise of religion proclaimed by the Constitution has become an empty promise to many people in the United States. Its absence has been accepted by many to be their

price for marching to the beat of a different drummer. A strange paradox has arisen in our country. It says that you may have your freedoms as long as you are in the majority, or as long as you are in the "mainstream." But if your beliefs are different, you may believe them but you may not practice them unless they do not conflict with the majority, or unless they do not conflict with a contract, or unless they do not conflict with the wishes of an employer, or unless they are not inconvenient. How different, may I ask, is that from the philosophy of governments that give only lip service to religious freedom?

In 1964, when the Civil Rights Act first became law, it was encouraging to note that religion was included in the list of proscribed discriminations. Yet it changed virtually nothing with respect to accommodating religious belief in the working place.

When the Equal Employment Opportunity Commission published its guidelines on July 10, 1967, many individuals saw for the first time that religious discrimination in the market place meant far more than being prejudiced against Catholics, Jews, Jehovah's Witnesses, Muslims, Baptists, Methodists, or Seventh-day Adventists purely because of their religious affiliation. It meant adjusting certain arbitrary work rules in order to accommodate a religious practice of an employee unless such adjustment would work an undue hardship on the conduct of

the employer's business. The burden of proof was placed squarely on the employer, not the employee.

Following the decision of the Sixth Circuit Court of Appeals on August 11, 1970, serious questions were raised as to the intent of Congress concerning religious accommodation when it enacted the Civil Rights Act of 1964. The Court said, "Nowhere in the legislative history of the Act do we find any congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC regulations, which in our judgment are not consistent with the Act." Thanks to the devotion and work of Senator Jennings Randolph and others, the Congress of the United States got the message immediately.

In less than a year (March 24, 1972) the Congress, in Public Law 92-261, adopted virtually the exact language from the EEOC guidelines in Section 701(j). As though in direct reply to the Supreme Court, the Congress seemed to say, "You misread our intentions. The EEOC guidelines accurately stated what we intended in enacting the Civil Rights Act of 1964."

Congress re-emphasized its intent again recently when the Flextime Law of Congressman Solarz became law. A host of litigation

has found its way through the courts relative to religious accommodation under the 1972 amendment to Title VII. The courts generally have embraced the concept of "reasonable accommodation." The Supreme Court enunciated its changed attitude when the TWA v. Hardison said, "In brief, the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship is clear . . . ." In order to underscore their position that the Dewey decision had been overturned, the Court stated in footnote 9, "Clearly, any suggestion in Dewey that an employer may not be required to make reasonable accommodation for the religious needs of its employees was disapproved by S701(j); but Congress did not indicate that 'reasonable accommodation' requires an employer to do more than was done in Dewey, apparently preferring to leave that question open for a future resolution by the EEOC."

That day has come.

Clearly, Section 701(j) has been accepted. The question now being discussed is, "What is a reasonable accommodation?" and "What is an undue hardship?" In the TWA v. Hardison decision, the Court indicated that it was leaving the resolution of these questions up to EEOC.

Most of the problems of discrimination can be lumped into the constant attempts by business management or government administrators to maintain rules or policies which apply uniformly to all concerned. These take all kinds of forms.

All employees must take their vacation during the two weeks that the plant is shut down.

No employees may take leaves of absence for religious reasons for more than one or two days at a time.

All employees must dress uniformly.

All employees must work six days a week.

All employees must work some Sundays on a rotating shift.

All employees must belong to the labor union under the existing contract.

All inmates must eat the food provided by the institution.

All employees must pass a physical examination given by a medical doctor.

All employees are subject to mandatory overtime under certain conditions.

All inmates must use the same worship room.

All must have the same length of hair.

All children must start school at the same age.

Work policies, labor union contracts, prison and army rules are an effort to be fair to all concerned, intended not to discriminate against others, they say. But in some cases it is just plain administrative convenience.

Time after time these policies have proved to be discriminatory because the uniform application of rules can result in placing an uneven burden on some individuals. As one author said, they walk to the beat of a different drummer, and are required to choose between honoring certain precepts of their religion or obeying the policies or goals.

Rules, policies and practices which interfere with religious beliefs and practices, however fair in form and intent they may appear to be, are discriminatory in effect on certain employees with religious convictions.

Before I go on with more specific problems, let me sharpen our concept of religious liberty with a definition by Paul Blanchard.

> "Religious liberty in a nation is as real as the liberty of its least popular religious minority."

Sabbath (Saturday) Observance:

Perhaps the most numerous and most difficult type of accommodation to secure by employees has been experienced by those who observe the seventh-day Sabbath—Jews, Seventh-day Adventists, Worldwide Church of God, Seventh-Day Baptists, Seventh-Day Church of God, and several other groups. The problem is much deeper than what it appears on the surface.

Our country is geared toward a Sunday day of rest. Most industries are closed on that day. The United States Postal Service has a built-in accommodation for Sunday observers. In addition, a contract stipulating seniority procedures is said to take pre-eminence over any type of accommodation for religious convictions. In fact, it is alleged that religious convictions should take their place along with any other personal or secular reason when it comes to the adjustment of work schedules. Religious convictions, thus, could more aptly be termed religious whims or preferences or inclinations. Religious convictions, however, are beliefs so deeply held that people would die before they would violate their obligations to God.

It is convictions such as these that cause people to be willing to lose their employment, their livelihood, their homes, their retirement benefits, their financial security, the education of the children, rather than violate their religious convictions.

Accommodation is often viewed as a threat to the authority of the employer even when it causes nothing more than inconvenience.

John Grayson was an employee at the Speedway Post Office in Indianapolis. He was given a mandatory upgrading in his classification which required that he work a Saturday schedule. He held deep religious convictions regarding the Sabbath. The post office fired him. He was denied unemployment compensation because the post office placed him "on leave without pay" when he appealed his dismissal to the Civil Service Commission. His house payments came due and he was unable to meet them. So, the members of the Seventh-day Adventist Church he attended took up a collection to save his home. He went from one employer to another. Where jobs were available, he was asked the question, "Have you been fired from a job recently?" His answer was "Yes."

"For what reason?"

"Because I could not work on Saturday, the Sabbath."

"Oh, I'm sorry, we can't use you either."

After weeks of searching, after visiting about 40 employers, about half of whom were hiring, he was able to find a part-time temporary job.

It took nearly a year for his appeal to be heard by the Civil

Service Commission. They finally decided in his favor, stating that an accommodation could have been made at the central post office in Indianapolis.

Bob Yarmon, a post office employee in Englewood, California, is currently going through the same problems faced by Mr. Grayson. He is only one of several dozen others who are currently traveling down the road to dismissal by the United States Postal Service. Mr. Yarmon faced imminent dismissal about a year ago. After intervention by the Attorney General of the United States with the Postmaster, an accommodation was found. During the past few days, his tour was arbitrarily changed so that he was required to work on the Sabbath. The reason? Postal officials told him that the TWA v. Hardison decision no longer made it necessary for the post office to accommodate him. He had been notified that his dismissal is imminent again.

Warren Brookshire of Mississippi was terminated in May of 1978. This is a particularly pathetic case because of the human hardship involved. When Mr. Brookshire became a Seventh-day Adventist, he immediately had problems because of the Sabbath. He received a warning letter, then an eight-day layoff, a 30-day layoff, and finally termination. With each of these letters and suspensions he was required to sign documents. The EEO counselor seemed to be on the side of the post office. The EEO counselor tried to resolve the problem by encouraging him to go back to working on Saturdays. Finally she

prepared a document for him to sign, along with other papers, stating that the post office would continue to let him off as long as he used annual leave for it, or took leave without pay, and as long as it did not cause a hardship on the post office. This document was worded to state that he signed it of his own free will without any coercion or urging. He offered to become a part-time clerk. They drew up papers for this but then told him that he would have the same Sabbath problem, so he withdrew the offer. Following his termination, his financial situation became desperate. He was overdue on his house payments and could see no way out of his financial pit. He could not get any of his retirement pay until the case was resolved. Another counselor told him that the papers he had signed has nullified his case. So in a desperate move he signed papers withdrawing his complaint. He received unemployment compensation for a time, but it ran out. He picked up small part-time jobs, but everywhere he went they learned he was a Sabbatarian and they would not give him full-time work. He even tried common labor jobs but could not get on. Food on his table was dwindling. Other necessities of life are about gone. This is his condition today.

How would the Commission on Civil Rights react if it discovered that artificial work rules, evenly applied to all employees, had the effect of barring women, or Blacks or Hispanics from being employed in an entire industry? This is exactly what is happening to Sabbatarians in industry after industry.

Take the auto industry for example. Mr. B applies for work at an assembly plant and is accepted. He is assigned to the second shift because of his lack of seniority. He requests an accommodation because he is assigned to work on Friday night. But he cannot work then because the Sabbath begins at sundown Friday night and goes through sundown Saturday night. He is told that no accommodation is possible under the terms of the contract. The only way he can be accommodated is to work long enough to gain sufficient seniority to advance to the day shift. This will take 15 or 20 years under the "system." If he can put his "convictions" on ice for 15 or 20 years, obviously he has no religious convictions. But because his convictions are deep, he says, "I am sorry, but I cannot do it." And he reluctantly goes on the unemployment rolls until he finds work.

Nearly every industry with this type of system is closed to Sabbatarians. To add injury to insult, unemployment compensation boards across the country are beginning to deny unemployment compensation to individuals who lose their employment because of their religious convictions.

Following the TWA v. Hardison decision by the U. S. Supreme Court, employers all over the country came to Sabbatarian employees warning them that because of the new "law," they no longer had to make an accommodation. Today employers are screening employees carefully to eliminate potential employees who need to be accommodated

by questions such as, "Are you willing to work whenever you are assigned to work?"

Labor Union Membership:

Members of several small religious bodies have experienced religious discrimination because of sincerely held religious beliefs that prevent them from joining or financially supporting labor organizations. They are not free riders because they are willing to pay the equivalent amount of their dues to non-religious, non-union charitable organizations. A number of such cases have been litigated under Title VII of the Civil Rights Act. Despite the favorable decision in Cooper v. General Dynamics, as well as Burns v. Southern Pacific Railroad (both of which were denied cert. by the U. S. Supreme Court) labor unions in various parts of the country still refuse to make accomodations, though the official policy statement of the AFL-CIO says that accommodations should be made.

Religious Discrimination in Housing:

This is a minor issue in the context of the consideration for today, but it should not be overlooked. Any needless religious discrimination is too much in the United States. Some Jewish families, and possibly others, are occasionally barred from buying homes in the country club-type residential areas. In some cases they are barred completely, and in others they are allowed to come in on a percentage basis. Akin to this are the zoning laws that prohibit churches or church facilities to be built in the neighborhood. One is discrimination against individuals, and the other is discrimination against a group of like-minded religious people. It has no place in this land of religious freedom.

The American Indian:

Over a long period of time, the American Indians have suffered discrimination because of their religion. Many have not understood it because of our Judeo-Christian-related society. Hopefully, the new American Indian Religious Freedom Act of August, 1978, will start things in the right direction. This Act provides for access to sacred places such as burial grounds and ceremonial grounds, and also protection in the use and possession of sacred objects. The law provides for various agencies to "evaluate their policies and procedures in order to determine the changes necessary to protect and preserve American Indian religious cultural rights and practices." This report is to come to the President of the United States, and he is required to report to Congress by August of this year.

What this means, in simple terms, is that federal agencies responsible for enforcing laws that interfere with Indian religious practices should see whether they can accommodate these practices by a broader interpretation of existing laws and regulations. If not, they should report back to Congress on what changes in the law would be necessary to accommodate these religious practices. That's how it is supposed to work. We all hope it is successful.

Special Attire:

Some employers have dress regulations for all employees. What happens when dress regulations run contrary to religious practices of certain religious groups? Some employers have dismissed women who would not wear slacks on certain jobs. In other instances, hair styles or head coverings have become an issue in employment. Again, the reasonable accommodation and undue hardship test are called into play. A 1971 case involved a Black Muslim lady employee who was discharged for refusing to refrain from wearing ankle-length dress required by her religion. EEOC investigators found no evidence that the dress policy was necessary to the safe and efficient operation of the business. Other female employees wore attention-getting clothing such as mini-skirts, but no disciplinary action was taken against them. They found that the employee was forced to choose between her mode of dress required by her religious beliefs and her continued employment.

Prison Rights:

Of necessity, incarceration in a penal institution deprives individuals of many rights. Sometimes religious rights are included. Under the Constitution can a prisoner be forced to perform certain duties or functions, or be denied things that would cause him to violate religious convictions?

The American Indian is a good example of religious discrimination in the prisons. Because the native religion of the Indian is not structured and organized as many in our country are, it is not recognized, or if it is recognized it is thought of as heathen worship. This lack of status on the part of the native Indian religion spawns other problems, such as religious advisors. A Catholic priest, Protestant minister, or Jewish rabbi can't minister to this Indian. He needs his own religious advisors, or medicine men as they are called. These native-born Americans also use certain objects in their worship which is often denied them, and the length of their hair can be a part of their religious practices.

Various groups of Muslims also have considerable trouble in the prisons. Because of their religious teaching, these people find it almost impossible to worship in a chapel where a Catholic, Protestant or Jew would have no problem in doing so. They are sometimes denied their own religious literature, and the type of food their religion requires.

Let me give a Christian example. An individual has been brought up as a nominal Christian. He makes a mistake—a serious mistake. He is apprehended and placed behind bars. With time on his hands and counseling by a chaplain, he is truly repentant of his acts and determines then and there to follow what he knows to be right. He is willing to serve his sentence and pay his debt to society for the wrong he has committed. Can he then be forced to perform duties that would conflict with his religious convictions? If he should be a Sabbatarian, could he be required to perform duties that would conflict with his standards of conduct on the Sabbath? An Eighth Circuit Court decision in 1976 stated that a prisoner is not allowed in the name of religion to have special privileges not otherwise provided prisoners, although it did grant him the rights of freedom of worship and freedom to receive religious materials.

Another prison had a rule against the wearing of beards. However, a judge allowed a Hasidic Jew to continue to wear a beard in harmony with his religious requirements. The judge, however, stated that the prisoner could be granted a hearing to determine the sincerity of his beliefs. In 1974, a federal district court judge granted an American Indian prisoner the right to wear long hair for religious reasons despite the prison's hair regulation. Yet in another case in 1972, a federal district court judge disallowed another American Indian the right to maintain long hair, and in 1970, the Fifth Circuit

Court required an inmate in the Florida State Prison to shave twice a week and have periodic haircuts, contrary to his religious beliefs.

Concerning diet, the Fifth Circuit Court of Appeals in 1969 denied a Black Muslim prisoner the right to his dietary requirements, while a federal district court judge in 1975 granted a Jewish rabbi prisoner his right to kosher foods.

Is it a denial of the free exercise of religion for a prisoner to be prohibited from taking a Bible correspondence course? In 1970, the Fifth Circuit Court of Appeals upheld the administrative decision of the penitentiary in denying permission for a prisoner in Florida to take a Bible correspondence course. In 1970 and 1972, the Third Circuit said there was no constitutional right by clergy to have access to prisoners.

During the past few days, word came to us that members of our church in Reedsville, Georgia, who had been conducting weekly prison ministry visits, were denied access to the prison. Only a few selected major church bodies were accorded this privilege. It is obvious that the whole question of religious liberty in penal institutions needs a great deal of study.

Military:

Some young men and women desire to serve their country in the military. They have skills that the armed forces need. But they also have commitments to religious faiths. With an all-volunteer army, these people do not usually enlist. It is another matter when there is a military draft.

The matter of religious observance becomes critical for a Sabbatarian. A conscientious objector has problems as well. Some desire to serve in noncombatant roles because they have religious convictions against training for the taking of human life.

Last winter, an army recruiter who is a Seventh-day Adventist found his re-enlistment papers would have denied all rights to his Sabbath observance and to conscientious objector status—neither of which had been a problem during his army career. He asked for a waiver to these provisions, appealing all the way to the Pentagon, but it was denied. Today he is an insurance salesman.

Education:

In 1972 the Supreme Court of the United States reversed a lower court ruling concerning a Wisconsin law that compelled children to remain in school until age 16. The Court held that the Amish were providing sufficient training to their young people to meet the interests of the state.

Today a new threat is looming. Religious rights are at the very heart of it. Within the past few days a bill was introduced in the South Carolina Legislature that would require compulsory school attendance beginning at age five in kindergarten. A similar bill is about to be introduced in North Carolina. Many states set minimum compulsory attendance at age six. The concept expressed is that the state has greater jurisdiction over children than do parents. Now, compare that philosophy with the fact that numerous parents in this country have such deep religious convictions against compulsory early school attendance that they would risk going to jail rather than to violate their convictions. They do not intend to avoid schooling for their children. They only wish to train them at home until the children have developed physically and emotionally to the place where they can better cope with school. They feel that this is their God-given responsibility as parents, and that it would be a sin for them to do otherwise.

Judy Waddell, a Michigan mother, was one such parent. Two policemen came to her home, placed her under arrest, and took her to the county jail where she was arraigned as a criminal. Her crime? She had not placed her immature son in school even though he had reached the compulsory attendance age. That case is still pending in court.

Should the bills in the Carolinas or similar bills in other states become law, many dedicated Christian parents will become criminals in the eye of the law. Many parents will say, "I must obey God first even if I have to go to jail."

Conclusion:

Today the words "regulations," "conformity," "compliance," and "majority dictates" are compressing free exercise of religion into a smaller and smaller sphere. It is reassuring to note a ray of hope now and then concerning a return to some of the fundamental principles of the free exercise of religion, where there is not only freedom to believe, but freedom to put beliefs into practice without the threat of economic reprisal, or of being made a criminal because you will not conform to an artificial requirement.

It is my hope that the Commission in these two days of discussions will re-dedicate its efforts in the area of expanding freedoms at a time when the trend is for more and more control and conformity. And then I would hope that this Commission would proclaim it so strongly that no legislator, no judge, no employer, no citizen would fail to get the message that our country's strength lies in a free and responsible exercise of religion.

A few weeks ago, I ordered from my Congresswoman a flag that had flown over the capital of the United States. A phone call has informed me that it was to be hoisted over the capital this last Saturday and that I would have it in a few days. I'm looking forward to it coming because I'm proud of my flag. It stands for protection,

not only for the beliefs, practices, and observances of the orthodox and traditional religious groups, but it provides protection for the beliefs, practices and observances of any religion which, however unorthodox, mistaken, or incomprehensible it may be to the average person, is characterized by sincere and meaningful beliefs and respects the rights of others.

In conclusion, may I remind you of the words of the Protestant clergyman of Germany, Martin Niemoller:

> "In Germany, the Nazis came for the Communists, and I didn't speak up because I was not a Communist. Then they came for the Jews, and I did not speak up because I was not a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I was a Protestant so I didn't speak up. Then they came for me . . . by that time there was no one to speak up for anyone."

The Church of Scientology

By Steven R. Heard

Mr. Chairman, I want to thank the commission for requesting that a representative of the Church of Scientology participate in this consultation. I hope that the information which we share with you, other participants and observers proves valuable to the commission in its laudable task to undertake an examination of religious discrimination.

I feel that our situation is somewhat unique in light of the areas on which the commission is focusing and therefore would like to take a few moments to provide some background on the Church of Scientology. The Church was founded in 1954 by L. Ron Hubbard. It is an all denominational religious philosophy in that members of the Church of Scientology can, and frequently are, members of other religious bodies as well. The fundamental beliefs of Scientology are that Man is basically good and that through the application of the religious principles of the Church, an individual is able to discover more about his spiritual nature and thereby gain a greater understanding of God, his fellow man and the world in which we live. There are 247 churches and missions throughout the world.

The Church also believes strongly that it is the duty of religious organizations to become active in human rights issues.

For over a quarter of a century, the Church of Scientology has sponsored various commissions and community groups to work within the system to seek reforms in such areas as patients rights and particularly the rights of mental patients as well as reform efforts in the area of criminal justice.

Over the years, members of the Church have provided information to both the media and congressional committees exposing violations of civil liberties which has resulted in criticism of various agencies and their policies. Consequently, the Church and its members have found themselves the subject of unwarrented government scrutiny and reprisals for nearly three decades, which brings us to the topic at hand this morning.

For many years, members of the Church of Scientology at various times have reported that they have been the subject of discriminatory actions, denial or threat of denial of employment or promotion because of their involvement with the Church. Likewise, the Church itself has encountered many instances where it was being selected out for discriminatory actions or investigations. In each incident the Church was able to trace the problem to erroneous and prejudiced information recorded in a government file which had been broadly circulated even to the private sector.

Because of the frequency of such incidents, the Church viewed the problem as a broad situation and , in 1974, began a

comprehensive campaign to locate such false and misleading files and correct them. The Church of Scientology has filed over 500 Freedom of Information Act (FOIA) requests, has engaged in over 20 FOIA lawsuits and, as a result, has received over 100,000 pages of files which literally dozens of agencies have kept on the Church, its activities and its members. The vast majority of these files range from simply inaccurate to grossly and maliciously false. Let me briefly give just one example:

In 1967, a Labor Department investigator wrote and circulated a memo which had resulted in Scientology ministers from other countries being denied an authorization to work and study in the United States. The memo included such wild falsehoods as "there is evidence that an initiation ceremony is held for all new members at which time an electric shock is administered to them". This is , of course, absurd since for over 25 years the Church has actively sought the ban of electric shock as used on mental patients as we feel it is an inhumane and unworkable treatment.

After this document was uncovered, these falsehoods were brought to the attention of the Labor Department which stated in writing that"the information in that memo was irrelevent, unverified and based upon hearsay". The memo was destroyed and Scientology ministers are now free to work and study in the United States. Had we not used the FOIA to uncover that

document it would still be broadly circulated today.

With this background, I would like to share with you a number of specific cases of religious discrimination in the area of employment which resulted from such false files. I will be referring this morning only to cases where Church members' rights to employment were infringed upon by federal agencies.

The following sampling of cases are supported by affidavits and further details. However, in the interests of protecting the privacy of and possible reprisals against any individual, the names and identifying details will not be mentioned.

* Case #1 involved an individual in a New England state who, while attending a major academic institution, was doing work related to a department of the federal government requiring a security clearance. He had been taking a Communication Course at the Church of Scientology in his locale. This individual told fellow Church members that, upon learning of his interest in Scientology, his superiors told him to have no further contact with the Church. He ceased his participation in the Church. Less than a month later he informed the Church that he had obtained his pay raise and change of security status but only with the stipulation that he no longer be involved with Scientology. This individual stated that "the government wants Scientology crushed". This occurred in 1977.

*Case #2 involves an individual who, in 1978, had been involved with a Church of Scientology in the Southwest part of the country. He had told Church staff members that he was on leave from work with the federal government. This individual had indicated that he was pleased with how Scientology could help an individual and he had even discussed the possibility of doing some work with the Church. However, he later informed the Church that he had been informed by the Internal Revenue Service's Investigative Branch that he could not work at the Church. He said that he further checked with the FBI where he was told that Scientology activities were detrimental to the government. The individual in this case said that he either had to give up any work for the federal government or give up his involvement in the Church of Scientology.

*Case #3 involves an individual from a mid-Atlantic state who became involved with the Church of Scientology in his area. This person has a degree from a major university and had served in the Armed Services where he was introduced to the religion of Scientology by friends. On more than one occassion he stated that he enjoyed his studies and benefited from them.

Sometime later, however, he informed a church counselor that he would not be able to continue with his participation in Scientology because it had been ordered by certain government officials that he would have to discontinue his association with the church.

This individual explained to a legal representative of the

Church that he worked for a private industry that does contract work for the National Security Agency. According to the individual, his supervisor was at NSA headquarters and had mentioned that a person under his charge was involved with the Church of Scientology. The individual's supervisor was told that the NSA could not allow this person to continue his association with Scientology without losing his security rating. The NSA official's reasons were that Scientology had lawsuits against the F.B.I. and I.R.S. and that the NSA frowned upon anyone who is a member of the Church of Scientology and who is employeed by the government. The NSA official reportedly stated that the Church of Scientology was currently on a "blacklist" but that maybe in about a year "Scientology won't have a blackmark against its name" and the individual would be allowed to go back to the Church.

The individual in this case stated that during his involvement with Scientology he had seen nothing to indicate that there was anything about the Church that would jeopardize security. However, he stated that, "he did not want to be out on the street without a job".

*Case #4 involves a person who was enrolled on a basic course in Scientology at one of the Churches in a southern state. In 1977, one of the course administrators at the church received a call from this parishioner who stated that she had decided she would no longer be participating in the Church

because she had been turned down for the position she had requested with a private company, not because she was unqualified, but because the company had run a check on her for security purposes and learned of her involvement in Scientology. This person further stated that she had been told by an agent of the F.B.I. that the Church of Scientology was a "questionable organization" but that if she got off the Church's mailing list and wrote a letter through the Attorney General's Office, that maybe in a month or so she would be allowed to have the position she requested at this company.

*Case #5 involves an individual on the West Coast who was the subject of a U.S. Navy Performance Evaluation Report in which Navy officicials were evaluating this person's qualifications for re-enlistment. The report referred to the person's "keen intelligence",and added that "his physical abilities are exceptional". The report stated that the ratee actively supports the Navy's Equal Opportunity Programs and added that he "has a very high regard for the rights of other people regardless of race, sex or religion. He tries to understand his fellow man in an effort to facilitate more harmonious and productive working conditions".

The report also noted that "the ratee communicates clearly and concisely". However, at the end of the evaluation, it is noted that this individual had become quite active in the Church of Scientology. The report states that "although ratee

is recommended for re-enlistment- if he did re-enlist he would have to subordinate his Scientology beliefs to his military performance in order to be an effective Petty Officer".

Additionally, I received a copy of a letter this past weekend which was recently sent to the Church by a person in the Army, now living in Washington State. In his letter, this person stated that on May 26, 1978 he heard and observed the following: Members of the Personnel Action Center where he was stationed received a directive from headquarters to go through the personnel records of all soldiers and compile a list of names of anyone who listed "Scientology" as their religion. The directive, according to this individual, was assigned a "priority" rating and names were to be sent back up the chain of command.

The individual, stated that he and others in personnel at the time felt that this action violated the "Privacy Act" and was grounds for civil action. Thus, he informed the Church about the incident.

These cases are only a sampling. There are many others similar to these which also cover a broad geographical area. Should the Commission wish to see more specific details, this can be arranged in coordination with the Church's legal representatives since these incidents are currently part of a class action lawsuit brought by the Church.

After many years of research and documentation related to this issue we can say with certainty that the source of such discriminatory patterns lies in the prejudicial views of a handful of government agents who decide to record their biased views in records and dossiers which then become part of the enormous federal record keeping system. Obviously, files themselves do not discriminate. People do. But it is through the use of files that one person can disseminate discriminatory and derogatory information which then becomes "fact" to thousands of others.

Indeed, one governement report which contained false and misleading information on the Church of Scientology and its members was marked for distribution as follows: Five copies to the Air Force, three copies to the Army, 20 copies to the CIA, five copies to the Navy, 10 copies to the U.S. Information Agency, three to the National Security Agency, seven to the Department of Health Education and Welfare with additional copies going to seven other agencies.

However, it is important to point out that many federal agencies, and particularly the Justice Department, have sought to prevent disclosure of erroneous files and have gone to great lengths to evade the provisions of the Freedom of Information Act. This is well documented by us and other groups.

Therefore, we urge the U.S. Commission on Civil Rights to

recommend that the President issue an Executive Order instructing federal agencies to greatly increase their efforts to honestly comply with the Freedom of Information Act and further instruct these agencies to make every effort to accomodate religious groups who want to see their files as well as facilitate efforts by religious groups to make corrections in them.

Until the abuses of the federal record keeping system are brought under control, every religious group which somehow earns the disfavor of a government official is potentially the target of the dossier disease.

Thank you.

STATEMENT

BY ATTORNEY LEE BOOTHBY
BERRIEN SPRINGS, MICHIGAN

As our society has become more complex, industrialized and impersonal, it has become correspondingly more difficult for individuals to find employment where their religious needs are voluntarily accommodated. Many have faced the economic hardships of unemployment as a result of their religious convictions.

It should be recognized that the area of religious discrimination has a somewhat unique position in the legislatively protected areas of Title VII. Discrimination on the basis of race, color, sex or national origin usually affects a substantially large and identifiable class. Most of the Title VII cases covering these areas provide a fertile field for the civil rights attorney. Class actions are prevelant and defendants are subject to large awards in court.

Religious discrimination, on the other hand, generally involves only a one on one situation, the one person in the plant who wants to be excused from work on Sunday or Saturday in order to observe his Sabbath.

The accommodation standard written into law in 1972 requires the courts to weigh the impact of specific employment practices on a specific individual's religious practices and then fashion an individual remedy.

Sabbatarians have long faced the "built-in headwinds" of an employment policy that requires employees, particularly new employees, to work on Friday night or Saturday. This practice operates to exclude Sabbatarians from employment.

Throughout the nation Sabbatarians have been denied the opportunity of employment because of the unwillingness of employers to adjust their policies to the needs of the Sabbath observer.

Section 701(j) by statute requires that an employer accommodate all aspects of the religious needs of its employees unless it can demonstrate that it is unable to reasonable accomodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. The courts have extended this same requirement to unions.

As the case of TWA v. Hardison, _ US _; 975 S Ct: 53 LEd2nd 113 (1977) recently underscored, collective bargaining agreements exacerbate the difficulties of assessing the hardships of accommodation because those contracts often restrict the interchangeability of manpower and facilities. Contract clauses often provide for shift preference by seniority.

Collective bargaining agreements entered into between the employer and the representatives of the employees have failed to take into consideration the special needs of the few within a plant who desire to exercise their religious convictions in a manner that may be different from the majority of those employed.

Sabbatarians working in a plant governed by a collective bargaining agreement often find that although they are generally protected under Title VII, they still face problems because of seniority rules contained in collective bargaining agreements.

In the handling of over one hundred religious discrimination cases, several score of which include the problems of Sabbatarians, I have become convinced that solutions generally can be found if employees, employers and unions will only seek, in good faith, to solve the problems rather than amplify them.

It is important for us all to keep in mind that the problems today faced by Sabbatarians has in large part been created of complicated by government itself as a result of the passing of the National Labor Relations Act of 1935. This legislation permitted a union to represent all employees within a bargaining unit as to the terms and conditions of employment. The union thereupon became the exclusive bargaining agent in the negotiating of a labor agreement with the employer. The individual at the same time lost his right to bargain with the employer on his own and for himself. A company and union by agreement cast conditions of employment which made accommodation for Sabbatarians difficult if not impossible.

These collective bargaining agreements generally provided for such items as mandatory union membership, a prescribed grievance procedure handled through the offices of the union, seniority rights, work schedule and shift preference, promotions, wages and hours, and other items and conditions.

Typical of the collective bargaining agreement was a provision that regardless of other factors such as merit, employees be given shift preference over employees with less seniority. Seniority also generally controlled layoffs and recalls. When layoffs occur, employees having the highest seniority are to be given the available work. Such provisions also provide that in the event of a layoff, if the employee having seniority refuses to change his shift to another shift, he shall be laid off.

It is right and proper for Congress to have given particular attention to the religious needs of employees when Congress itself was responsible for granting to unions the power to be the exclusive representative of all employees within a specified employment unit. When by such legislation Congress made it more difficult for the individual to arrange with his employer for his particular religious needs, it had the effect of inhibiting the accommodation of the free exercise of an individual's religious practices. It is therefore proper for the Congress by remedial legislation to require the union, as well as the employer, to accommodate the individual employee's religious needs.

I have handled scores of cases where initially the employer, the union or both adamantly declared that no accommodation was possible. I will illustrate with only a few cases in point.

R.S. was hired by a telephone company as a lineman. When he was hired he told his employer that he could not work on his Sabbath. Subsequently he was promoted to the job of combinationman and ordered to work on Saturday. The company claimed that it could not accommodate R.S. because of the union contract.

R.S. was notified the union steward and union president of his problem. Nevertheless, he was discharged for refusing to work on Saturdays.

After the commencement of a Title VII action, the company found that it could, in fact, accommodate R.S.'s religious convictions, and the union also decided that it really had no objection to any accommodation that the company might make R.S. with respect to his not working on Saturday as a combinationman. A consent judgment was entered by Federal District Court.

L.F. was employed by the Department of Public Works of a city in Michigan. He was appointed to the position of heavy motor equipment mechanic. Shortly thereafter the city transferred him from the day shift to the evening shift which required him to work from 5 p.m. to midnight.

L.F. told his supervisor that he could not work on Friday evening because of his Sabbath. The city ignored his problem claiming that when he was promoted to his new job his seniority changed under the collective bargaining agreement and therefore it could not make any accommodation. They would not even let him take his old job and daytime schedule back.

L.F. was dismissed. It took a federal lawsuit to get the attention of the employer and union. Just a few days before the scheduled commencement of the trial in federal court, the city and the union agreed to the entry of a consent judgment. This judgment provided that L.F. be restored to his employment with the city with all seniority rights to which he would have been entitled had he remained in the city's employment, together with retirement, pension, and other rights.

The order also provided that the city accommodate L.F.'s religious needs and practices and make reasonable accommodation in working hours for his Sabbath.

W.P. was employed by one of the major auto makers. Company policy provided for rotating shifts. W.P. was, thereafter, changed to the second shift which would have required him to work on his Sabbath. He refused to violate his religious convictions and asked that his employer make an accommodation. Even though another employee in his same classification was willing to trade shifts, the trade was refused by the company. His employment was thereupon terminated in 1969

W.P. filed a discrimination charge with the Michigan Department of Civil Rights. The hearing referee ruled that the auto company had improperly discharged W.P., and had failed to make a reasonable accommodation to his religious needs. The referee ruled that it would not have been an undue hardship for the employer to accommodate W.P.'s religious needs.

Even before the decision became final, the auto company found that it could find a way to accommodate his Sabbatarian's needs. It offered W.P. unconditional reinstatement to the position he had occupied at the time of his separation. No problem developed in the way of employee resentment.

Given the unequal bargaining power of the parties and the economic dependence of the employee, the employer's inflexibility in its employment policies can have a chilling effect on the employee's freedom to complain and negotiate. We should recognize that religious discrimination is a one-on-one situation and the threat of a class action is not a major detterence, particularly to a large incentive employing company.

When there is not only inflexibility upon the part of the employer but an inflexible collective bargaining agreement that precludes any reasonable accommodation, the employee faces almost insurmountable difficulties.

In Steele v. Louisville & N.R.R., 323 U.S. 192 (1942) the Supreme Court refused to let white employee's union bargain to abolish jobs held by black employees. In Steele the Court imposed a dual role on the labor union: besides representing the group, it had a statutory obligation to give "fair representation" to each individual within the bargaining unit. One of the prime forces behind the Court's new doctrine was the principle of exclusive bargaining. By empowering unions to serve as exclusive bargaining agents federal law had deprived individual employees of their right to represent themselves.

In Vaca v. Sipes, 386 U.S. 171 (1967) the Court tested a union's decision not to arbitrate an employee's grievance. Vaca represented the Court's first attempt to defind the duty of fair representation. The Court in Vaca identified three elements of the statutory duty of fair representation:

1. to serve the interests of all members without hostility or discrimination, and
2. to exercise its discretion with complete good faith and honesty, and
3. to avoid arbitrary conduct.

Under Steele and Vaca the duty of fair representation must require more than formality or it cannot secure representation for all employees.

It is submitted that when considering the union's duty of fair representation in the context of Section 703(c)(1) and (3), the union has the legal duty to bargain in good faith concerning the elimination of actual or suspected discrimination. It is further submitted that it has the legal duty to bargain in good faith concerning the inclusion of provisions that will permit the employer to accommodate the religious needs of Sabbatarians.

Employers and unions should be put on notice that a collective bargaining agreement that is so inflexible as to prevent any accommodation for the religious needs of Sabbatarians is per se illegal. At least the employer

and the union should have the burden of establishing why a collective bargaining agreement,in order to satisfy the overriding legitimate business purposes of the employer and/or union,had to be so drafted as to eliminate any acceptable alternative for the religious needs of Sabbatarians.

After reviewing the various court decisions including the pronouncement of the Hardison Court, coupled with several years of dealing almost exclusively in the field of religious discrimination, I offer the following suggestions and recommendations:

1. That the employer shall have the affirmative duty of attempting to make an accommodation to the religious needs of the employee.

2. Where present accommodation does not appear feasible, an attempt should be made on the part of the employer to make a temporary accommodation prior to the discharge of an employee. That further, during the period of time that the employee is being temporarily accommodated, the employer further explore all possibilities present for making a permanent accommodation.

3. That regulations require that the burden shall be on the employer to seek out the cooperation of other employees.

4. That regulations provide that the employer has the duty to formally consult with union representatives and attempt to work out either temporary or permanent accommodation whenever the employer is put on notice as to the religious needs of an employee.

5. That regulations provide that an employer can not sustain its burden of showing undue hardship without first showing that it took affirmative action; that conversely, lack of affirmative action upon the part of the employer to make an accommodation precludes the finding of undue hardship.

6. That as the degree of business hardship decreases, the quantity of conduct which will satisfy the reasonable accommodation requirement increases.

7. That if exemption from a work rule results in significant cost to the employer, the employer then be permitted to impose alternative burdens on the employee as a means of accommodating the employee's religious needs. Alternative burdens can reduce the disadvantage of exemptions by imposing a duty of accommodation on the employee. Alternate burdens also separate conscientious from self-interested objectors by exacting a price for the

accommodation. These alternative burdens may include: adjusting the employee's work schedule to a shorter work week or longer working hours on non-holy days, requiring the employee to treat holy days as vacation leave or leave without pay, permit substitution of shift swapping among employees, or transfer the employee to another position within the company, to permit the employee to pay any overtime costs that result from making the accommodation.

8. That the Commission provide that alternative burdens, however, should not be excessive because the employee should not be penalized for his religious nonconformity. In determining what alternative burdens will be imposed upon the employee, it should however be kept in mind that the least onorous alternative from the employee's standpoint should be tendered to the employee by the employer because of the fact that the employee is in an unequal bargaining position. For example, transfers often result in greater hardship on the employee than other methods of accommodation because transfers often require physical relocation, loss of seniority, reduced pay or a forfeiture of specialized job skills. Because transfers are less drastic than discharge, however, the employer should have the duty to search the organization for an available position before discharging an employee. The duty to seek an available position should not permit the employer to pressure the employee to accept a down-graded position if less drastic alternatives are available. Similarly, an employee should not be required to accept leave without pay or to pay any overtime costs that result from making an accommodation unless no other less drastic alternatives appear to be available.

9. It should be recognized that a union has the duty to fairly represent all employees within the representative unit. This requirement imposed upon the union is, in a sense, fiduciary in nature. The duty arises in part as a result of federal legislation which has vested comprehensive power in the union with respect to the individual. For this reason, in carrying out their Title VII responsibilities of accommodation a union should be required to bargain in good faith concerning the inclusion of accommodation provisions within each collective bargaining agreement. It should be the duty of the union to make certain that all collective bargaining agreements contain sufficient flexibility so that the employer and union can accommodate the religious needs of Sabbatarians. When a collective bargaining agreement does not provide such flexibility, the burden should fall upon the union to demonstrate why such flexibility could not have been so provided in keeping with the business needs of both the employer and the union.

10. Correspondingly, the employer should be required also to bargain in good faith relative to the inclusion of provisions within a collective bargaining agreement that will permit the employer to accommodate the religious needs of its employees.

11. Where a company policy or work rule results in an adverse impact on the religious requirements of an individual, the employer should bear the burden of justifying the policy or work rule.

In this industrialized nation of ours, where the majority dictates more and more the affairs of life, it is vital to protect the interests of those who march to the beat of a different drummer. It is to the benefit of this great nation that we provide a home and haven for all religious thought. It is our nation's greatest heritage.

Religious Discrimination in Employment

By Galen Martin

I am Galen Martin, Executive Director and Attorney, Kentucky Commission on Human Rights. I am First Vice President of the International Association of Official Human Rights Agencies (IAOHRA). I welcome this opportunity to share the Kentucky Commission's experience with you. Tom Ebendorf, Commission Compliance Director and other staff assisted in preparation of this statement.

Kentucky seems to have an unusually high number of religious discrimination cases. Maybe this is because we are in the "Bible belt" or because people take their religion seriously. Whatever the reasons, it has long been a significant part of our caseload at all levels: intake, investigation, conciliation, hearing and appeal.

Since our model enforceable statute was passed in 1966, we have had 25 cases charging religious discrimination. In that year we had a complainant referred to as the "triple threat" who charged discrimination on the basis of religion, sex and race. After our civil rights act was amended in 1974 to define religious accommodation in language identical to Title VII, most complaints of religious discrimination have involved Saturday work.

The Kentucky Court of Appeals has said that the federal statutes on religious accommodations are virtually identical to Kentucky's Revised Statutes 344.030 (5) and 104 Kentucky Administrative Regulations 1.050 (1), religious discrimination guidelines which incorporate by reference the EEOC guidelines requiring employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship."

KRS 344.030 was amended in 1974 to parallel federal statutes by adding this definition:

> (5) "Religion" means all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employe's or prospective employe's religious observance or practice without undue hardship on the conduct of the employer's business.

Unlike EEOC and many state FEPC Acts, the Kentucky Civil Rights Act authorizes us to release the terms of conciliation agreements and, of course, we also have information from public hearings. The facts of these cases can be very interesting. We can't release details on dismissed or pending cases. I will talk about one important pending case in which we can't identify the well-known national company.

I. Lexington Central Baptist Hospital

While most of our cases involve Saturday work, one of the most interesting involved a charge of religious discrimination by a black Baptist minister against the Central Baptist Hospital in Lexington, Kentucky. The Reverend J. C. Beard had been a Pots and Pans Washer for the hospital for 22 years. Mr. Beard said he was called to preach and he had been a Baptist minister for 20 years at a small rural church near Berea, Kentucky. The Baptist Hospital brought in a new food services company to manage its cafeteria, and the company established a new work schedule in which Mr. Beard would be required to work on two Sundays out of every seven Sundays. He was terminated when he said he couldn't do it. We had to schedule the case for public hearing but it was conciliated as the hearing date approached, with the Reverend Beard receiving a back pay award of $4,880, plus $2,250 in compensatory damages and the adoption by the hospital of a policy that would ensure that all of its employees would have their religious preferences accommodated.

Someone suggested that the hospital settled rather than go to public hearing because they didn't want the media reporting the case as Baptist v. Baptist.

Religious Cases Conciliated

Kentucky Commission on Human Rights

1974-1979

Respondent	Complainant	Issue	Denomination	Date	Resolution
Central Baptist Hospital (Lexington)	Rev. J.C. Beard	Sunday work	Baptist	1976-77	Back pay, damages, policy change
Kern's Bakeries (London)	Roger Bryant	Punch("gambling") Board distribution	Church of Christ	1975-76	Back pay, damages policy change
Arby's Roast Beef Restaurant (Louisville)	Jacquelyn Mitchell	uniform (slacks)	Church of God in Christ	1978	Job offer, back pa damages, policy change
A & P (Lvlle Division)	Denise Ray	Saturday work	Seventh Day Adventist	1975-77	Job reinstatement, damages, policy change
Sturgis Clothing (Sturgis)	Carol Hawkins	Saturday work	Seventh Day Adventist	1974-75	Damages, policy change
Duro Bag (Ludlow)	Harold Bohnert	Religious holiday work	World Wide Church of God	1975-76	Damages, policy change
Excepticon Outward Nursing Center (Dawson Springs)	Lawrence Laffoon	Saturday work	Seventh Day Adventist	1976	Back pay, damages policy change
Blue Grass Cooperage Co., (Louisville, Ky.)	Junior Martin	Time off for religious convention	World Wide Church of God	1973	Back pay

Of our 25 religious discrimination cases, we have gone to public hearing on 2, conciliated 8 (see table), and the rest are withdrawn, dismissed or pending. Seven complainants were members of the Worldwide Church of God. Their Kentucky membership is about 1800 people. If we received cases at the same rate from the rest of Kentucky's population, we would have received about 12,000 more cases.

Our most significant Sabbath cases have involved members of the Worldwide Church of God. Two documents from that group may help in understanding their view and why there are so many cases involving their members.

A tract from Ambassador College entitled, "Which Day is the Christian Sabbath" sets out clearly the position of the Worldwide Church of God and Herbert W. Armstrong. It answers the question for the employee who says, "but I can't keep the Sabbath. I'd lose my job." The writer suggests that those who don't have faith on that point don't stand much chance of escaping "the lake of fire."

> Never ask an employer if you can have Saturday off. Use a little wisdom - and PRAY for God's help. Then tell your employer, in a quiet but earnest and positive manner, that you have learned that those hours from Friday sunset to Saturday sunset have been made HOLY by God, and He commands you to keep them holy. You are very sorry if it inconveniences him in any way - but you will not be able to work any more during those hours. Say it in a friendly, but FIRM manner. Tell him you are willing to work Sundays, if that would help.

6

WORLDWIDE CHURCH OF GOD

WORLD HEADQUARTERS
PASADENA, CALIFORNIA 91123

HERBERT W. ARMSTRONG
President and Pastor General

REQUEST FOR EXCUSED ABSENCE

AFFIRMATION

This is to affirm that _____ is/are affiliated with the Worldwide Church of God, and that this Church teaches absolute adherence to the weekly Sabbath which is authorized in The Holy Bible. Article 12 of the Fundamentals of Belief of this Church states:

> "We believe that from Friday sunset to Saturday sunset, the seventh day of the week is the Sabbath of the Lord our God. On this day we must rest from our labors, following the commands and example of the Apostle Paul, the New Testament Church, and Jesus."

It is the duty of each member and his household to observe this day in order to maintain his status as a member in this Church. Thank you for your consideration in this regard.

I hereby affirm, under the penalties of perjury, that the foregoing is true and correct.

WORLDWIDE CHURCH OF GOD

By _____
Minister

II. Parker Seal v. Paul Cummins

Our most unusual religious case is that of Parker Seal v. Paul Cummins, 516 F.2d 544 (1977), judgment vacated and remanded to the Court of Appeals in light of TWA v. Hardison, 97 S.Ct. 2965 (1977), because it went to the U. S. Supreme Court with no fact finding hearing except the one held before the Kentucky Commission on Human Rights. It isn't often that a state commission hearing travels that route, but it happened here because the parties stipulated that the transcript of the Kentucky Commission on Human Rights' hearing should serve as the complete factual record in the District Court.

The complainant had been employed by Parker Seal since 1958, joined the Worldwide Church of God in July 1970 and began refusing to work on Saturdays. Cummins was one of three supervisors. After complaints arose from fellow supervisors, who had substituted for him on Saturdays, the complainant was discharged.

After the commission members held that the company had made a reasonable accommodation and dismissed the complaint, a former staff member, Tom Hogan, filed suit in federal court.

The District Court for Eastern Kentucky said:

> It appears that the plaintiff was afforded a full and fair hearing before the Kentucky Commission on Human Rights and that Commission properly found that the defendant's attempts to accommodate itself to the plaintiff's religious needs was causing the defendant undue hardship.
>
> This Court finds from the entire record herein that the defendant made a reasonable accommodation to the plaintiff's religious needs and that no further accommodation could be made at the time of the defendant's dismissal from employment without creating an undue hardship on the employer's business.

The 6th Circuit Court of Appeals found no substantial evidence to support the District Court's conclusion that accommodation of Cummins' religious practices would have imposed an undue hardship on the conduct of Parker Seal's business. They said the company had shown no dire effect upon its operations:

> To the contrary, the complaints of Appellant's fellow supervisors seem both mild and infrequent. In addition, it appears that Appellee might have alleviated at least some of the dissension if it had pursued a more active course of accommodation.

The Appeals Court further said:

> Undue hardship is something greater than hardship, and Appellee did not demonstrate in the record below how accommodation to Appellant's religious practices would have imposed an unreasonable strain on its business, having lived with the situation for over one year before Appellant's discharge.

The case was argued before the Supreme Court, which remanded it to the Court of Appeals for further consideration in the light of Hardison.

III. Human Resources Department and Hazelwood Hospital

Another Kentucky case that went up and down in relation to U. S. Supreme Court rulings in the Parker Seal case and the Hardison case is that of Linda Nunn Bailey v. Hazelwood Hospital and the Kentucky Department for Human Resources, 564 S.W.2d 38 (1978). It took from 1974 to 1978 for a final determination in this case by the Kentucky Court of Appeals.

Ms. Linda Nunn Bailey, a high school graduate, applied for a job as a nurse's aide trainee at Hazelwood Hospital in Louisville, which had 134 nurses' aides. Ms. Bailey passed a state merit examination for the nurse's aide traine position and was being processed for one of 134 nurse aide positi ns at that hospital when she informed the nursing superintendent supervisor that she could not work from sunset Friday to sunset Saturday because of her membership in the Worldwide Church of God. She did offer to work any other days, including Sundays. She was informed that the hospital could make no accommodation for her religious observances and her application was not further processed. The Department for Human Resources told Miss Bailey that no accommodation could be made because it would be unfair to other employees. Miss Bailey wrote the State Personnel Department saying, "Please keep me in your merit system. I am fighting for that job." But the Department of Personnel ruled that Ms. Bailey had not appealed their determination and that she was not entitled to a job.

After a hearing, the Kentucky Commission on Human Rights found that there had been discrimination because Hazelwood Hospital had made no effort to accommodate her religious beliefs and entered an order providing that the Department must offer her a choice between the first available opening as a nurse's aide trainee or a position different from but comparable in salary to that of nurse's trainee, accommodate her religious holidays, pay all wages she would have earned and adopt a department-wide policy against religious discrimination. The Commission's findings were issued on December 12, 1975, following a hearing on October 24, 1975.

After the Commission issued its findings, the Department for Human Resources appealed to Franklin Circuit Court, which initially upheld the Commission's findings on June 15, 1977, based on the U. S. Supreme Court decision in the Parker Seal case. The U. S. Supreme Court decision in Hardison was ordered June 16, 1977. On August 11, 1977, the Circuit Court vacated its original order, stating the Supreme Court decision in Trans World Airlines v. Hardison, 97 S.Ct. 2264, 14 EPD ¶7620 (1977), required a reversal.

The Kentucky Court of Appeals' decision of March 17, 1978 upheld the Commission's findings that the Department for Human Resources had committed an unlawful practice of discrimination because of religion by failing to make reasonable accommodations for Mrs. Bailey's religious beliefs.

In ruling on the August 1977 Circuit Court decision, the Kentucky Court of Appeals reversed the Circuit Court's judgment, saying that Hardison modified the standard for demonstrating undue hardship.

> There is a clear distinction between the Cummins standard of "chaotic personnel problems" which have a "dire effect" upon an employer's operation and the holding in Hardison that more than a "de minimus cost" in the form of either lost efficiency or wages constitutes undue hardship. However, we also agree with the Commission that Hardison did not remove the duty of the employer under KRS 344.030 (5) and 104 KAR 1:050 (1) to make reasonable accommodations short of undue hardship to the religious needs of its employees.

The Court of Appeals' ruling also stated that

> ... in view of the facts before us, we do not believe that the efforts made by the appellee to accommodate the religious beliefs of Mrs. Bailey were reasonable, and it is clear that additional efforts such as investigating the possibility of other employees "swapping time" with her could have been made without amounting to hardship.

Mrs. Bailey received a comparable state job and $5,055 back pay.

IV. A Case to Test Hardison

Of even greater current interest is a case that our staff is now trying to conciliate or take to public hearing before the Commission, which we believe will test the issue of the extent of the obligation to accommodate a religious Sabbath which remains after Hardison. As you are aware, the Hardison case held:

1. that an employer was under no obligation to override an existing seniority system and deprive workers of their rights under a collective bargaining agreement in order to accommodate Mr. Hardison's need to be off from Saturday work and;

2. that an employer was not obligated to bear more than a de minimis cost in its efforts to accommodate.

Additionally, the court observed that in order for TWA to accommodate Hardison's Sabbath, it would have had to impose on others, who it said:

> "... had strong, but perhaps nonreligious reasons for not working on weekends. There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off. TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath."

Several issues remain:

What is the true weight to be given to the expectations of other co-workers who might be required to assume Saturday work? In Hardison their rights were cemented in contract.

However, what if there is no seniority system or collective bargaining agreement, and what if it could be demonstrated that there is no additional cost to the employer to accommodate an employee's Sabbath observance?

Having eliminated these two factors, will the court require accommodation or will it find any interference with other workers' schedules sufficient to overcome the duty to accommodate?

The case before the Kentucky Commission staff now seems to raise these issues. The complainant, an employee with an excellent work record and no disciplinary problems, was working in a non-union job. He, like his fourteen co-workers in quality control had no right under a contract to shift preferences or overtime hours. The company works very infrequently on Saturdays (less than twelve a year). The company reserves the right to assign its employees to work overtime on Saturday in the manner the company believes will be most beneficial. All overtime is compensated at time and one-half.

The complainant had worked six years for the company before he was baptised into the Worldwide Church of God in April of 1978. He reported that he was no longer able to work the Saturday day shift because of his needs for religious observance. Within six months and after a series of progressive disciplinary actions, he was discharged because he was unwilling to work on assigned Saturdays.

The facts show that it would not have been difficult to identify any one of fourteen individuals who could have worked in his place; that it would not have cost the company any additional money to have assigned someone other than the complainant and, in fact, since the complainant was No. 2 in service seniority, the cost to the company for a replacement employee would have been slightly less than what they would have had to pay the complainant. Complainant was available and did work more than his proportionate share of overtime on days other than Saturday.

The Kentucky plant of this large national manufacturer refused to accommodate the complainant, stating as the basis for their refusal that such an accommodation would have interfered with the shift preferences of other workers and, in support of their position, supplied the Commission with signed statements from some of the employees saying that having to work Saturdays would interfere with their "personal commitments."

In our view, if a company can evade its duty of accommodation by pleading inconvenience to other employees and if this is consistent with Hardison, then we can perceive of only few fact situations that would obligate an employer to accommodate Saturday Sabbatarians and Hardison has, in effect, voided the duty of an accommodation.

V. Religion and Dress

The preceding examples of religious discrimination issues have all addressed the issue of accommodating one's Sabbath, but that is not the only issue in religious discrimination. Our Commission has also handled three cases brought by women who were members of a Pentecostal church and whose religious restrictions required them to refrain from the wearing of shorts or slacks and to wear only dresses of a modest length.

In two of the cases, the women were employees of small manufacturing companies who had enacted uniform dress codes, requiring all of their employees to wear slacks in order to guard against injury to the legs or the possibility of catching loose clothing in moving machinery. When these women refused to wear slacks for religious dress code reasons, they were discharged. The dilemma posed by these two cases is one of balancing dress code requirements designed to increase safety against the religious needs of the employees. The third religious garb case involved a fast food restaurant who had a standard uniform for all of its counter help. The uniform consisted of a smock and pants outfit. Here, the dilemma was not safety, but rather uniformity of appearance.

In each of these cases, the employers were genuinely surprised to learn of the religious issue, and each employer reacted by branding the religious dress requirement as ridiculous and proceeded to ignore the problem until faced with a complaint.

Our experience leads to a few observations:

1. Employers continue to demonstrate an unfortunate lack of sensitivity to the beliefs and practices of minority religions. They don't show elementary tolerance of religious differences they view as obscure or ridiculous, and which they don't recognize as a part of civil rights laws. All too often, the Saturday Sabbath observer is told that, since the employer is willing to work on Saturday, the employee should be willing to work on Saturday.

2. Employers balk at requests for accommodation and frequently assert that, if they accommodate one employee, they will receive so many other requests they will be inundated. They don't understand that members of these groups truly believe, and that it isn't the same as "wanting to fish on Saturday." Of course, this is a totally unrealistic fear. People aren't joining these denominations to avoid Saturday work.

3. Kentucky employers we've dealt with were easily able to accommodate with a minimum of effort and expense, with very rare exceptions.

4. It is unfair to employers, as it is to covered groups for this area of the law, to be Yo-Yo'd. We need statutory amendments or early court decisions to solidify what employees can expect and what employers must provide. As this becomes settled, acceptance and compliance can be much more widespread.

The Michigan Department of Civil Rights

By Thomas J. Peloso, Jr.

Commissioner Flemming and Members of this distinguished Commission:

My name is Thomas J. Peloso, Jr., and I am the Chief Deputy Director of the Michigan Department of Civil Rights. The Department has been in existence since 1955.

I am happy to be here this afternoon to discuss the Michigan Department of Civil Rights' experience in investigating and resolving complaints based upon unlawful religious discrimination.

Michigan's current law, the Elliott-Larsen Civil Rights Act (P.A. 1976, No. 453 as amended) provides that "The opportunity to obtain employment, housing, and other real estate, and the full and equal utilization of public accommodations, public service, and education facilities without discrimination because of RELIGION, race, color, national origin, age, sex, or marital status... is hereby recognized and declared to be a CIVIL RIGHT."

The Department of Civil Rights has authority to:

> Receive, initiate, investigate, conciliate, adjust, dispose of, issues charges, and hold hearings on complaints alleging

violation of the act and (to) approve or disapprove plans to correct past discriminatory practices which have caused or resulted in a denial of equal opportunity with respect to groups or persons protected by the act.

It can require answers to interrogatories, order the submission of books, papers, records, and other materials pertinent to the complaint, and require the attendance of witnesses, administer oaths, take testimony, and compel, through court authorization, compliance with its orders or an order of the Commission.

It can cooperate or contract with other public or private, governmental or non-governmental entities and is authorized to monitor contracts and secure compliance of affirmative action plans.

At any time after a complaint has been filed, the Department can petition the court for temporary relief against a respondent, pending final determination of the proceedings.

Further action can be carried out by our governing Commissioners including:

The hearing of charges issued by the Department, where we have failed to reach settlement through investigation or conciliation, and

The issuance of orders which either dismiss the complaint or order the respondent to cease and desist and to take other appropriate action necessary to secure the equal enjoyment and protection of one's civil rights.

If a PATTERN OR PRACTICE OF DISCRIMINATION prohibited by the act appears in the evidence, the Commission may, upon its own motion or on motion of the claimant, amend the pleadings to conform to the proofs, make findings, and issue orders based on those findings.

The kinds of actions the Commission may order include in part:

-hiring, reinstatement, upgrading - with or without back pay
-admission or restoration of individuals to membership or inclusion in labor organizations, guidance programs, apprenticeship training, on-the-job training, or other occupational training or retraining programs.
-reporting as to the means of compliance with an order or agreement
-requiring the posting of notices in a conspicuous place on how to comply with civil rights law or an explanation of these laws
-paying to the complainant of damages for an injury or loss caused by violation of the act, and for reasonable attorney fees.

-payment to the complainant for all or a part of the costs of maintaining the action before the Commission including reasonable attorney fees and expert witness fees, when the Commission determines the award to be appropriate,

-certify to a licensing agency that the respondent has violated the civil rights act, which may be grounds for revocation of the respondent's license.

-certify to a contracting agency that the respondent has violated the civil rights act, and

-other relief deemed appropriate by the Commission.

A copy of the Elliott-Larsen Civil Rights Act is appended to my testimony. Article 6 provides more detail on how the Commission and the Department operate.

In 1972, the Michigan Department of Civil Rights adopted the U.S. Equal Employment Commission's Religious Discrimination Guidelines of July 10, 1967. We recognize the need for employers to make reasonable accomodations to the religious needs of sabbath and religious holiday observers when it will not create undue hardship on the conduct of an employer's business. The proof of undue hardship lies with the employer. We are currently in the process of revising these guidelines to reflect changes in Michigan and federal law, and significant court decisions.

We have processed sabbath and special religious holiday observer complaints in the employment and educational areas; complaints of Jews excluded from "Executive Suite" jobs; and religious groups excluded from housing, public accommodations or refused public service

We have not handled questions relating to zoning-sanitation raised by Mennonite groups; nor have we formally dealt with the exclusion or stereotyping of religious groups in textbooks.

> The current law allows us to challenge the liquor licenses of private clubs that refuse to admit or serve Catholics, Jews and other religious minorities, but it does not allow us to challenge the licensing of these private clubs when they exclude the same persons from membership.

Certain types of complaints relating to separation of church and state, such as prayers or religious celebration in schools and governmental units have normally been handled as Federal First Amendment questions through the federal courts by other private civil rights and civil liberties organizations.

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CASELOAD STATISTICS

Over the past ten years, over 436 complaints have been filed claiming religious discrimination. Many complaints are not recorded in the above, because someone alleges two or more reasons for the discrimination, such as "race and religion" when filed by a Black Muslim. These complaints are not a very large part of our annual claims load. They usually amount to between 40 and 50 cases and account for 1.6% or less of claims filed per year. Thirty percent of the 102 cases closed in the past two years have resulted in favorable adjustments for the claimants.

There is no clear trend to the complaints of religious discrimination. Discharge of the employee accounts for half of all cases, unfair working conditions for another one-in-five, and refusal to hire results in 9% of claims. Layoff or recall problems, training and upgrading discrimination, and the unions' failure to represent account for between 4 and 7 percent of claims.

CASE EXAMPLES

June 22, 1976

MICHIGAN DEPARTMENT OF CIVIL RIGHTS
ex rel. JOAN MUSKOVITZ, CLAIMANT
v. WHITMORE LAKE PUBLIC SCHOOLS
and EDWARD E. HEATHCOTE, Superintendent, Respondents
Commission File No. 15417-EM

Issue: (1) Disciplinary action because of religion.

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Claimant, an elementary school teacher, is a Conservative Jew. In 1972 and 1975, she requested time off to observe the first day of Passover, a Jewish holiday. Permission in each instance was refused by the Superintendent and she was docked a day's pay and charged with the cost of a substitute teacher.

Respondent argued Claimant's requests were denied because of the union contract and Superintendent's bulletin. Under the contract, teachers were not allowed a day off which came within two (2) days preceding or following a holiday unless there was a "certified emergency." Under the bulletin, not more than two teachers could take personal leave days on the same day except for a "valid and acceptable reason." Claimant in each instance had used her allotted two personal business days to observe other religious days.

While Claimant was not granted permission for religious observance, other teachers were allowed to take a day off, without penalty, due to death in the family or car trouble. Respondent set apart religious observance from other reasons for being absent from school. Hence, Claimant suffered discrimination in being denied the opportunity to observe her religion without penalty. It was further determined that the rules imposed under the contract and bulletin had a disparate effect on any teacher of any religion who wished to observe a particular day as a religious holiday. Finally, it was concluded that Respondent could have accommodated Claimant's religious beliefs without undue hardship in that substitute teachers were normally called when any teacher was ill or took a personal business day.

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Order dated June 22, 1976

The Commission ordered that Claimant be reimbursed monies deducted from her salary and all references to unauthorized absences for Passover in 1972 and 1975 be removed from her personnel file. The Respondent was ordered to modify any contract provision or superintendent directive which prohibits Claimant or any teacher from observing a religious holiday and, in regard to compensation or denial of same for a teacher, treat a request for a personal leave day for religious observance in the same manner as for an additional personal business day.

June 22, 1976

MICHIGAN DEPARTMENT OF CIVIL RIGHTS
ex rel. JUNE BROWN, Claimant
v. MICHIGAN MASONIC HOME, Respondent
Commission File No. 18842-EM

Issues:

(1) Discharge because of religion.

(2) Entitlement to wage increments from date of discharge in computation of back pay award.

Claimant, a Seventh Day Adventist, was hired on March 23, 1970, as a laundry room employee. At the time of her employment, she informed Respondent that her religious beliefs prohibited her from working sundown Friday to sundown Saturday. On May 3, 1973, Claimant was ordered

to work on Saturday, May 5, 1973, by her supervisor, Mr. Sager. She declined and was terminated.

Sager testified that illness and various other reasons were sufficient excuse for not working Saturday. Claimant's Sabbath observance, however, was not considered a justifiable reason for being absent. Hence, Claimant's religious beliefs were singled out for different treatment which resulted in her dismissal.

The evidence submitted at the hearing showed Respondent made no attempt to accommodate Claimant's religious needs. Respondent was aware, well in advance of Saturday, of the increasing work load in the laundry room caused by the breakdown of a large washing machine. It did not require, nor ask, the laundry room employees to work longer hours on any of the work days preceding Saturday nor work the following Sunday. In the past, employees had worked overtime and might have been willing to work overtime hours on days other than the Saturday in question. No attempt was made to determine the availability of volunteers from the nursing staff, as had been done on a previous occasion. Nor was inquiry made into the possibility of using a part-time employee in this situation, since part-time help was employed by the Respondent.

The evidence presented also disclosed that accommodation of the Claimant would not have caused an undue hardship on Respondent in the conduct of its business. Claimant's supervisor substituted for her on Saturday, as he had done on several previous occasions for the other laundry room employees. No overtime before or after May 5 was scheduled or worked. No one was hired to replace the

Claimant and a new washing machine was not installed until May 28. Accommodation, other than on May 5, was not necessary, and, on that day, was made. Respondent was caused no undue hardship by Claimant's absence on the Saturday in question.

Respondent argued that the church doctrine allowed her to perform Sabbath work "directly related" to a patient's health, safety and well-being and that Claimant's laundry room functions fell within the permitted categories. Respondent further questioned the sincerity of Claimant's concerns. Since Claimant's job did not bring her in direct contact with patients, it was determined the laundry room work was outside the scope of permissible Sabbath work. Testimony from the Claimant and her pastor indicated she faithfully attended Sabbath worship service consistently, followed the church doctrines and made Sabbath observance paramount in her decision not to work on Saturday when requested by Respondent. Such evidence demonstrated the sincerity of her religious beliefs.

On the issue of damages, it was determined that Claimant was entitled to any wage increment from the date of discharge in computing the back pay award. The purpose of the back pay remedy was to make the aggrieved party whole and restore to such party his/her "rightful economic status absent the effects of the unlawful discrimination." Bowe v. Colgate-Palmolive Co., 2 FEP Cases 121 (CA 7, 1969); Robinson v. Lorillard Corp. 3 FEP Cases 653 (CA 4, 1971). It was determined the back pay award must reflect any wage increases which Claimant would have received in order to restore her to the economic position in which she would have been, had there been no discrimination.

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Order dated June 22, 1976

The Commission ordered Respondent to immediately reinstate Claimant with full seniority to a position comparable to that from which she was terminated and to pay her back wages, less other interim wages and benefits. Through Gratiot County Circuit the claimant was awarded $4,500. (No. 76-4216)

November 18, 1975

OTTO FEINSTEIN, Claimant -vs- CUTLER-HUBBLE COMPANY, JAMES MURPHY and TERESE MURPHY, Respondents

Commission File No. 14501-H/PA

Issue: Refusal to rent because of religion.

Claimant attempted on two occasions to rent an apartment from respondent. On the second occasion, in January, 1972, he was recommended by a former tenant but was told there were no vacancies. After filing a complaint with the Michigan Civil Rights Commission, claimant was rented an apartment by respondent.

The Referee found that claimant had previously been denied rental because he was Jewish. The Referee recommended that claimant be awarded $7,500 as damages for the embarassment, humiliation and emotional distress he suffered as a consequence of this unlawful discrimination.

Order dated November 18, 1975.

The Commission expanded the Referee's findings of fact. It noted that there had been no Jewish tenants in the building in question between 1966 and 1972, and that respondents had inquired as to claimant's nationality before refusing him a unit. The Commission also found that two apartments were available when claimant applied in January, 1972, and that he incurred $25.00 a month higher rent for four months because of respondent's refusal to rent to him, in addition to $260.00 in moving costs necessitated by the delay. The recommendation of $7,500 in damages was struck down by the Commission since its authority to award damages under the Fair Housing Act is expressly limited to five hundred dollars. The Commission ordered:

1. Respondents to cease and desist from discriminating against claimant and all other tenants or prospective tenants or unlawful considerations of religion, race, color, or national origin.

2. Respondents to pay to claimant the sum of $360.00 in actual damages.

3. Respondents to make quarterly reports for one year to the Commission on the name and race/religion of all new tenants and applicants for tenancy at each apartment building owned and/or managed by respondents.

I presented the last illustration to indicate the important link between housing and employment. In this case, claimant wished to live near his job, and that was why he went to the respondent in the first place.

CONCLUSION

Chairman Flemming and Members of the Commission, I have briefly illustrated what Michigan law covers, what our caseload experience has been, and have given you a few case examples.

Our state legislative mandate is very broad, yet we have not received a large number of religious discrimination complaints. In the area of employment we probably handle over 90 percent of the religious discrimination complaints filed within the state with private and public agencies. What we have done in the course of enforcing the Michigan civil rights laws against discrimination because of one person's religious beliefs, has made a difference; yet there is still much to be done to end this type of unlawful discrimination.

There is very little information available on the extent of this problem because people are reluctant to identify their religion, based upon the strong belief in separation of church and state and/or the right to privacy. We believe that this hearing is a good beginning point. Perhaps the public hearing route is one of the better methods of gathering data about the problem.

We believe that people are unaware that religious discrimination in employment is covered by many local, state and federal civil rights laws. We all have a duty to better advertise this area of protection.

We believe that Title VI of the Civil Rights Act of 1964 should be expanded to cover religious discrimination in federally assisted programs. Federal enforcement, which transcends state boundaries, and a uniform method of regulation would do a lot to further eliminate discrimination based upon one's religious beliefs, or lack of same.

We also feel that the tax laws should be revised to remove the tax exemption privileges from those broad-membership private clubs that exclude Catholics, Jews and other religious groups, as a class, from their membership. There should also not be a business deduction allowed for memberships in those clubs.

If there are any questions, I will be happy to answer them.

The California Fair Employment Practice Commission

By Maurico R. Munoz, Jr.

The California Fair Employment Practice Commission, established by statute in 1959, is the principal official policy-making body for equal opportunity efforts in employment and housing in the state. Its seven members, appointed by the Governor, set standards and issue regulations for the enforcement of California's civil rights legislation, which is administered by the State Division of Fair Employment Practices.

The Commission decides cases of discrimination brought before it in public hearings. Division attorneys prosecute the case, and after hearing testimony from both sides the Commission renders a decision.

The Commission has multiple jurisdiction covering discrimination in employment based on race, color, creed, national origin, ancestry, age, sex, marital status, medical condition and physical handicap; and in housing on the same bases except age, medical condition and physical handicap.

To focus on employment cases--in terms of percentages, for the past several years our employment

complaints have held approximately as follows:

Cases based on race and color----------42%
on sex----------26%
on national origin, ancestry-----15%
on age----------10%
on physical handicap---------- 5%
on religious creed---------- 2%

For religious complaints, this breaks down in actual figures for the past two years as follows (figures for 1978 are not yet available):

In fiscal 1976 there were 58 religious discrimination complaints docketed
21 Jewish
19 Protestant or Catholic
18 "other"

This was out of total of 3,538 cases docketed. (Additionally, there were 4 housing complaints docketed on religious basis.)

In fiscal 1977 there were 66 religious discrimination complaints docketed
18 Jewish
14 Protestant or Catholic
34 Other

This was out of a total of 2,823. (Also, there were 3 housing cases docketed on this basis.)

Additionally, of course, some religious discrimination cases were resolved on an informal basis--as many cases are--and therefore not docketed.

Compared to other types of discrimination cases we receive, religious discrimination cases are relatively few. But I trust we will never reach the point where sheer numbers alone dictate the extent of our concern.

Only recently we conducted a public hearing in one religious accommodation case. The complainant was a bank teller who had taken leave from her job in order to attend a religious convention. She thought she had received prior approval for such a leave. However, when she returned she was terminated. During the course of our investigation, the bank reinstated the teller, but refused to provide back pay. It was the finding of the FEPC panel that back pay should be awarded.

The Commission decision also pointed out that the FEP law "imposes an affirmative obligation on an employer to make reasonable accommodation to an employee's religious needs unless the employer demonstrates that an undue hardship makes accommodation impossible." The

language of that decision raises some questions I'll get back to later.

In another case a rapid transit district refused to hire a man because his religious beliefs prevented his working on Friday evenings or Saturdays. During conciliation a settlement was reached, involving not only monetary compensation but an agreement as to a procedure for handling the religious accommodation needs of other present and prospective employees.

In this case, whether or not the job applicant could have been accommodated in his religious needs was never reached. The Division found in favor of the complainant because the employer had made no effort to determine whether accommodation was possible, and the complainant refused the job offer on the assumption that no accommodation could be made.

Even though our experience in the area of discrimination based on religious accommodation is limited, it has been sufficient to raise a number of questions, some suggested by the two cases cited above. I'd like to briefly pose them here:

1. How do we define "reasonable" accommodation, and at what point does the accommodation "necessary" become "unreasonable" or the hardship on the employer "undue"?

2. To what extent can we expect other employees to bear the burden accommodation may require?

3. How do we resolve the conflict that may arise between a bona fide seniority system established by union contract and the need to accommodate a person's religious beliefs?

4. Is it possible to differentiate between religious conversion based on the convenience of the preferential treatment that results, and religious conversion based on commitment to religious conviction?

5. If an employer finds it possible to accommodate the religious beliefs of some number of employees, how can he avoid charges of differential treatment if business necessity precludes a continuation of such accommodation when others ask for special consideration because of religious beliefs?

6. Does a job applicant have the obligation to inform an employer that he or she can't work certain hours, or does the employer have the obligation to make this inquiry at time of hire?

   If the nature of the business is such that an employer needs people who are available

for over-time or extra hours, wouldn't a pre-employment inquiry as to availability covertly screen out the very persons the law was designed to protect?

These are just a few of the questions that surface as we try to apply laws that are unclear on this issue. After evaluation of wider experience, perhaps a more definitive set of guidelines will emerge. The California FEPC is presently grappling with these problems and is in the process of developing regulations relating to religious discrimination. Conferences such as this one should be helpful to our effort.

LZ/fcc 3/19/79

Religious Discrimination in Employment

By Ira Gissen

The problem of religious discrimination in employment continues to exist, not solely because of the intransigence of employers, but because of the conspicuous and continuing failure of federal civil rights agencies to carry out their mandate and address themselves to this problem. On October 30, 1962, the head of the President's Committee on Equal Employment Opportunity, Hobart Taylor, wrote to George Reedy, at the White House, regarding this subject. In his memo, Mr. Taylor suggested that they do some work on anti-Semitism, and in it agreed with an earlier memorandum from Mr. Reedy that they should hire some Jews and get on with it. Sixteen years later, the Anti-Defamation League was informed by the head of the agency that replaced the President's Committee on Equal Employment Opportunity, the Office of Federal Contract Compliance Programs, that little or no progress had been made. Weldon Rougeau, the agency's director, stated that "we have not done very much about religious and national origin discrimination. Anyone who examines the record of the last four or five years would have to admit that this office has not given this type of discrimination a very high priority and we simply have to do better in the future." We agree.

It is no wonder that the officers of many corporations have an attitude of cavalier indifference to the continuing problem of religious discrimination in employment in the executive suite. The indifference of federal agencies to this problem is so pervasive it is almost beyond belief.

Many corporate executives began their careers with small companies. On August 12, 1976, the Assistant Attorney General for Civil Rights of the United States Department of Justice testified before the Board of Governors of the Federal Reserve System on the subject of regulations to implement the Equal Credit Opportunity Act. In response to the question "Does the Act prohibit religious discrimination?", he replied "I don't know." (The Act does.)

On March 14, 1979, his successor testified before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the U.S. House of Representatives concerning the Civil Rights Division authorization. Nowhere in the 17 pages of his testimony does the word "religion" or the term "religious discrimination" appear. Needless to say, the term "anti-Semitism" is conspicuous by its absence. Do these oversights and omissions indicate an attitude? Do they suggest a "mind set?" They do.

Many corporate leaders began their careers by acquiring experience and training as government employees. Such opportunities are limited for Jews because of the presence of discrimination. The employment section of the Civil Rights Division of the United States Department of Justice has never, in the history of the equal employment opportunity law, represented a Jewish victim of governmental employment discrimination. This goes on, despite the fact that the U.S. Equal Employment Opportunity Commission has investigated these complaints, found probable cause and referred the cases to the Department of Justice. In recent months, the Anti-Defamation League has been involved with such cases in North Dakota, Missouri and New Jersey. But in every case, the Department of Justice has refused to represent the Jewish victims of discrimination. They told us that not enough Jews have been victims of discrimination in any one government employment situation. But we have not been advised of their numerical criterion. (See Appendix A)

Ten years ago, the Social Security Administration made a survey of the employment of Jews and Catholics in the executive suites of the insurance companies serving as Medicare underwriters. That information was collected, filed and forgotten. We had to utilize the Freedom of Information Act to acquire it. One of the companies about which we had received critical information is Nationwide Mutual Insurance of Columbus, Ohio. According to the Social

Security Administration survey, ten years ago this company employed one Jew among its top 70 officials. We determined from other sources that 30 years ago they employed one Jew among their top 70 officials. We have ascertained that today they employ one Jew among their top 70 officials. And in no case is it the same Jewish executive. Clearly, the Social Security Administration study had no effect. How could it? It had been buried.

The situation is not unique. Last year, the Office of Federal Contract Compliance Programs conducted a major investigation of the corporate headquarters of Standard Oil of California. The Office of Federal Contract Compliance and the U.S. Department of Interior had been accused by a Jewish former employee that the federal government had failed to enforce the contract compliance provisions pertaining to nondiscrimination because of religion. The investigatory report was a whitewash of SOCAL. If flagrantly misrepresented or ignored facts and statistics were grossly distorted in order to come up with a relatively clean bill of health for the corporation. Was it to cover up anti-Semitism or was it to protect the Office of Federal Contract Compliance Programs from the charge that it had not been doing its job? (See Appendix B)

The road to the executive suite is lined with pitfalls for the Jewish aspirant. Vast areas of American enterprise are conspicuous by the absence of Jews from among the corporate leaders: investment banking, commercial airlines, automobile manufacturing, the shipping industry, mineral extraction, steel and aluminum manufacturing, and the list goes on.

In those institutions that do not discriminate in their policies, oftentimes inadequate management makes it possible for the effects of a heritage of discrimination to continue unabated. We continue to urge that positive steps be taken to bring a halt to the recurrence of discrimination because of religion.

Employment discrimination against Jews takes several forms:

1. Classic discrimination. Included in this category are recruitment avoidance, promotion levels beyond which Jews cannot go, non-assignment of Jews to certain job areas, and stereotyped employment (i.e., in such departments as legal, accounting and research.

2. Insensitivity to employees' religious observance requirements. This form of discrimination, in direct violation of federal requirements that employers make reasonable allowances for their employees' religious needs, is another method of letting Jewish employees know they are not really welcome in a company.

3. Discrimination continuing as a result of the Arab boycott. Those companies doing business wtih Arab states are not likely to improve their employment practices affecting Jews unless our government enforces its non-discrimination requirements.

4. Maintenance of corporate memberships in restrictive clubs. It is within the confines of private clubs or on private golf courses that a great number of major deals are made and corporate policies set. It is a historical fact, for instance, that U.S. Steel was put together on a golf course. It is reasonable to assume that individuals who are considered undesirable for membership in such clubs (and, in some cases, even barred from merely entering the restricted facilities) are similarly undesirable for positions where such memberships are considered prerequisites. Such memberships also serve as clear indicators to supervisors and to Jewish employees that the companies involved have little or no desire to place Jews in their corporate headquarters.

There is no question that private clubs serve an important function in big business.

Company executives can get together with their counterparts in other companies and industries, conduct informal meetings, close business deals and share

non-proprietary information. It is not unusual, either, for an executive of one company to invite a fellow club member from another to "join the firm."

Private clubs that discriminate on the basis of sex, race, religion and/or national origin, however, are an evil influence on our society and help to perpetuate other evils - including employment discrimination.

As far as federal contractors are concerned, company-paid memberships in such exclusionary facilities should disqualify them under 41 CFR 60 and other applicable federal regulations. They are, in effect, segregated facilities maintained by the company for use by certain employees.

The Internal Revenue Service, for example, has recognized the evils inherent in such exclusionary clubs. It is now part of the tax code that no exclusionary club or other organization can maintain its tax-exempt status and its exclusionary policies at the same time. (See IRS Publication 553, "Highlights of 1976 Changes in Tax Law," 1977 Edition, p. 11.) But it's not being enforced adequately.

Private clubs with exclusionary polices exist primarily to shield their members from certain elements of society with whom they would prefer not to associate. It is a fair assumption that a person who is "not fit" to socialize with is certainly not fit to share desk space in the executive suite. It is also a fair assumption that those people who are ineligible to join (and, in so many cases, even enter) private clubs with exclusionary policies will find it difficult indeed to survive in the higher strata of a corporation which maintains memberships in such clubs. After all, if that is where executives transact much business, then it is only logical that those executives who are unwelcome there are limited in their effectiveness. Such membership, moreover, is a clear signal to certain groups that their services are not really wanted in the upper regions of the corporation - if they are wanted anywhere in the corporation at

all. At the very least, it indicates a lack of sensitivity or concern on the part of a corporation for the problems of minority groups.

The first step in eliminating anti-Jewish employment practices is to let these people know they are wanted in the executive suite by considering them for positions that become available. Traditional, exclusionary employment practices with regard to Jews are a part of a vicious cycle that can only be broken by bringing qualified Jews into executive-level positions with all deliberate speed. This cycle is obvious and self-fulfilling:

-- The executive suite discriminates against Jews;

-- Jews know that;

-- Jews are thus discouraged from seeking executive ladder jobs.

-- Thus, there are few Jewish applicants for executive positions.

-- Many industry executives and federal officials conclude that Jews are not interested in such careers.

Industry, therefore, must move swiftly to bring this cycle to a long-overdue halt. It has proven that swift corrective action is possible and that such action can be effective. We call upon the federal government to monitor the progress of industry in this seriously neglected area.

Every President from Franklin D. Roosevelt on has issued executive orders reaffirming this nation's commitment to equal employment opportunity. A similar executive order is called for at this time. It is 18 years since John F. Kennedy issued an executive order that for the first time called for affirmative action; it is 15 years since Lyndon Johnson issued his historic Executive Order 11246. And yet, discrimination against Jews is still largely ignored by the government, despite laws and orders prohibiting religious bigotry.

We urge that the President, therefore, affirmatively address the issue of equal employment commitment. A cabinet-level committee, headed by the Vice

President, might be set up to monitor the federal government's performance in seeking equal employment compliance from contractor companies. Each federal department and agency should be required to prepare reports summarizing its implementation of Executive Order 11246 as amended and of 41 CFR 60, and outlining the effectiveness of its efforts. The General Accounting Office (an arm of Congress and not the Executive) might prepare similar reports.

The President should demonstrate in as dramatic a fashion as is possible and practical, that what the federal government says is what it means, that it is not enough for agencies to exist but that they must function effectively.

In addition to Presidential action, the Congress should call to hearings the heads of all agencies and departments charged with the administration of equal employment and then legislate ways and means of correcting deficiencies.

The Anti-Defamation League of B'nai B'rith stands ready to assist both industry and government in the effort to eliminate employment practices which discriminate.

The ADL has been in the forefront of the equal rights battle for a very long time - and certainly before it was a popular issue. We have sought rights for all peoples and all minorities. We continue those efforts today.

Our record is known. Our abilities and expertise are known. We can be of real service to both industry and government in the effort to eliminate employment practices which discriminate. We call upon industry and the federal government, therefore, to avail themselves of our abilities and expertise in this regard.

We do not merely want to criticize; we want to help correct the present inequities in employment opportunities.

The Anti-Defamation League of B'nai B'rith welcomes this opportunity to offer its experience and views on religious discrimination in employment in the executive suite.

The B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, representing a national membership of more than 500,000 men, women and their families. The Anti-Defamation League of B'nai B'rith was organized in 1913 for the purpose of combatting discrimination wherever it may appear, helping to expand equal opportunities for all people and advancing good will among all Americans. We have testified in support of legislation against discrimination before committees of the Congress and, operating through 26 regional offices, we have testified before state legislatures and administrative agencies throughout the nation; the Anti-Defamation League has litigated in courts supporting the rights of the broadest variety of groups who were suffering from discriminatory practices.

The Anti-Defamation League was one of the earliest supporters of civil rights legislation. We have pressed vigorously for legislative and administrative action to ban discrimination in employment, education, housing and other areas of American life.

ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH
315 Lexington Avenue
New York, N.Y. 10016

MEMORANDUM

To: Ira Gissen

From: Martin Schiff, Ph.D.

Date: March 22, 1979

Subject: Federal Investigation of Anti-Jewish Discrimination in Standard Oil of California

What follows is a review and analysis of a report based on an investigation in 1977 and 1978 of Standard Oil of California (SOCAL) conducted by the Office of Federal Contract Compliance Programs (OFCCP) and the Department of the Interior. The investigation was the result of a complaint of anti-Jewish employment discrimination bought against SOCAL by a former employee, Sidney Deitch, who also filed suit in United States District Court against the Federal agencies for failure to enforce the prohibition against religious discrimination.

Summary

Their investigation served a dual purpose: by attempting to whitewash SOCAL, OFCCP and the Department of Interior hoped to minimize the apparent consequences of their nonfeasance. The investigative report of employment discrimination by SOCAL has 3 basic defects that reveal the whitewash effort and the discrimination it is intended to conceal: (I) failure to investigate adequately the basic allegation of hiring discrimination against Jews; (II) gross manipulation and distortion of statistics; (III) failure to draw conclusions of discrimination from obviously discriminatory SOCAL activities.

I. FAILURE TO INVESTIGATE ADEQUATELY THE BASIC ALLEGATION OF HIRING DISCRIMINATION AGAINST JEWS

The report never analyzes why Jews comprise less than 1% of the total work force at the three divisions of SOCAL (the Principal Office, the Chevron Research Laboratory and the Richmond Refinery) investigated. In fact, the report does not address itself to the central question in a complaint of anti-Jewish hiring discrimination, namely, whether job offers were in fact made to Jewish college students or to what extent job applications from Jewish college students were acted upon affirmatively. Nor does the report investigate the hiring standards used by SOCAL, the qualifications of Jewish and non-Jewish employees of SOCAL holding similar positions and whether differential standards are used for Jews and non-Jews which result in less than 1% Jewish employment in the three SOCAL divisions investigated.

A. Investigators Ignore Their Own Guidelines

The report states, "The investigation yielded no evidence of discrimination in hiring; however, because of technical problems this area of the investigation was very limited. Since the investigative team was unable to develop a practical method

of identifying the religion or ethnic background of unsuccessful applicants for employment with SOCAL, no analysis of rejected applicants in comparison with those hired was undertaken." Such a disclaimer by government officials charged with the responsibility of enforcing their own guidelines against religion and national origin discrimination is hardly adequate. 41 CFR 60-50.2 of these guidelines sets forth obligations of government contractors "to insure that applicants are employed, and that employees are treated during employment without regard to their religion or national origin" and to "undertake appropriate outreach and positive recruitment activities...(to) remedy existing deficiencies." These same guidelines describe eight positive recruitment activities which may be undertaken by a government contractor to be considered in compliance and, therefore, eligible to do business with the Federal government.

The report indicates that the government investigators completely ignored these specific compliance indicia. Instead they made a superficial search for other Jewish victims of hiring discrimination. Such a search, undertaken without the systematic approach suggested to investigators by the Anti-Defamation League, could not be expected to produce any reliable results. In view of the existing evidence of extremely low Jewish employment and lack of positive recruitment activities at SOCAL, OFCCP had an obligation: (1) to conduct a search as thorough as that conducted in enforcing other guidelines against discrimination; and (2) to enforce compliance based on the evidence already at hand.

B. Vicious Cycle Effect of Discrimination Ignored

Not only do the governmental investigators fail to enforce their own guidelines, but they ignore the fundamental vicious cycle effect of anti-Jewish hiring discrimination in discouraging applications by Jews for employment at the offending company. As long as Jews know or suspect that the oil industry in general discriminates against them, they will avoid seeking or accepting oil industry jobs. Thus, there will be very few Jews among oil industry employees and applicants for executive positions. Therefore, the oil industry will claim that it is not discrimination against Jews but lack of interest by Jews in oil industry careers that results in their low percentages of employment.

The U.S. Supreme Court in International Brotherhood of Teamsters v. US, 97 S.Ct. 1843 at 1870 (1977), referred to this vicious cycle effect, stating that "when a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination as is he who goes through the motions of submitting an application." The Court found that the message of an employer's discriminatory policy can be communicated to potential applicants "by an employer's actual practices-by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries and even by the racial or ethnic composition of that part of his workforce from which he has discriminatorily excluded members of minority groups." Thus, with SOCAL in violation of OFCCP's guidelines as expressed in 41 CFR 60-50.2 which are identical to some of the requirements of a non-discriminatory policy as indicated by the Supreme Court, government investigators had sufficient facts available for OFCCP to cite SOCAL for discrimination.

In Teamsters, the Court found that with adequate proof of discrimination, "the government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discrimination policy." Ibid at 1867. In short, the government investigators had enough evidence of discrimination by SOCAL without obtaining the names of additional Jews who would have to prove that they unsuccessfully applied for positions from which Jews as a class have been largely and disproportionately excluded.

C. Investigators Ignore SOCAL's Avoidance of Jewish Recruitment

There is no evidence that the investigators actually interviewed any Jewish college graduates and young executives in the physical, chemical or engineering sciences (who could have been expected to work for the oil industry) as to whether they felt or had been discriminated against by SOCAL. Nor did they interview qualified and available Jewish college students in the San Francisco-Richmond S.M.S.A. or nationwide -- the relevant labor market -- to see if they had been or felt discriminated against.

There is no evidence that the investigators contacted any of the Hillel foundations or Jewish fraternities or sororities on college and university campuses to see if SOCAL had attempted to recruit Jewish employees there. Instead, the report points out that recruitment of new employees is done mostly at colleges and universities which have active Hillel foundations. The report concludes that there is "no pattern of avoiding schools with Jewish enrollments" (p.21) as if this fact in some way negates a finding of religious discrimination against Jews. The report thereby tries to create the impression of recruitment of Jewish employees when in fact SOCAL had never made any effort or shown any intent to contact campus Hillel foundations who could be expected to refer interested and qualified Jewish college students.

The report totally avoids the question of how, statistically, given the high percentage of Jews at colleges and universities with Hillel foundations, so few Jews could have been recruited by SOCAL in the absence of religious discrimination.

Finally, the investigators do not consider discriminatory the fact that SOCAL, despite few Jewish employees, admittedly did not recruit employees from among religious or ethnic organizations or advertise in any religious or ethnic media (pp. 31-32). The investigators accept uncritically SOCAL's justification for such a lack of Jewish recruitment "that they generally have a sufficient number of applicants to fill their needs through their regular recruitment efforts." (p.31) Such justification is never accepted by OFCCP as a proper defense to a charge of discrimination and misses the point of the charge.

D. Investigation Deals With Internal Promotion Policy Rather Than Hiring Discrimination Which Was the Subject of the Complaint

The government investigators purport to determine whether or not SOCAL has discriminated against Jews in hiring from interviews with most of the relatively miniscule number of Jews who had been employed by SOCAL at the three divisions surveyed -- 60(of 69) out of the total of 7,195 employees at the three divisions -- and with a sample of non-Jewish employees. Such an interview approach is obviously inappropriate for the results bear no rational relationship to the question of hiring discrimination. Moreover, the credibility of the

responses to the interview by Jewish employees who wished to remain employed is very doubtful if the company in fact discriminates so that a lack of significant criticism of the company is virtually assured.

II. GROSS MANIPULATION AND DISTORTION OF STATISTICS

In reporting their interviews regarding SOCAL's internal promotion policies at the three divisions investigated, the investigators constantly shift the statistical frame of reference from the three divisions as an entity to the entire corporation and then back to the sample of 268 interviews (60 Jews and 208 non-Jews). The shift serves to distort the statistically miniscule number of Jews employed by the three divisions; obviously, for example, if all Jews in the three divisions are measured against a sample of 268 rather than against all non-Jews in the three divisions, the Jewish percentages will be inflated.

A. Distortion of Number of Jews in Management and Supervisory Positions

The investigators report, as if it were statistically noteworthy, that the total of 18 Jews in management or supervisory positions at the three divisions is 16% of the total number of managers -- 113 -- among the 268 employees. The shift in the statistical frame of reference leaps from the total number of employees in the three divisions -- 7,195 -- to an arbitrary sample of 268. Thus, instead of comparing the number of Jewish managers and supervisors in the three divisions with the total number of managers and supervisors, which would be a relevant statistic, the report shifts to the number of managers or supervisors among the arbitrary sample of 268, a frame of reference that makes the comparison deceptive and statistically meaningless. Nowhere does the report even reveal the total number of managers and supervisors in the three divisions. An inference may be drawn that the percentage of Jewish managers and supervisors is under 1% of their total just as the percentage of Jewish employees is under 1% of the total number in the three divisions.

The report also makes no effort to determine how many, if any, and in what capacity Jews were employed by the Principal Office of SOCAL in San Francisco as opposed to the other two divisions surveyed. There is no reference to facts in an Anti-Defamation League report supplied to OFCCP concerning the lack of Jewish managers and supervisors at the Principal Office of SOCAL. Nor is there any analysis of how many, if any, of the less than 1% of Jewish employees at the three divisions actually had top level management positions at the headquarter Chevron, U.S.A. or any of the other units within the Principal Office. Clearly a top-level manager employed at the Principal Office of SOCAL or Chevron, USA cannot be equated with a supervisor in charge of a research laboratory or refinery who lacks corporate decision-making authority. The investigators lump together the Jews employed at the three divisions without any effort to identify the Jews employed at each individual unit. This technique is utilized without any explanation by investigators as to why these three units were chosen and why it is valid to lump these numbers together. Since the Principal Office, the Richmond refinery and the Research Laboratory are clearly not equivalent units, the effect of lumping these numbers together is to distort the statistics employed.

Moreover, the report strangely shifts to SOCAL as a worldwide entity in noting that of the top 250 positions corporate-wide, four were held by identified

Jews. (There is no effort to identify the Jews and to see if they hold managerial positions as opposed to positions stereotypically assigned to Jews in accounting, law, research, etc.) Their figure is still only 1.6% of the total number of positions. Also reported, as if it were significant (p.40) is that the three divisions had nine more Jews than the investigative team was able to identify; in fact, even with the nine more, Jews are still less than 1% of the total work force at the three divisions.

B. Distortion of Jewish Opportunities for Advancement

The statistical frame of reference shifts back, in analyzing opportunities for advancement, from the arbitrary sample of 268 to the total number of employees at the three divisions identified as having potential for managerial jobs, which was 1,373. Here the report's statistics indicate that "identified Jews" listed as having managerial potential number only 19 or 1.4% of the total. However, the text of the report deals not at all with this statistic but compares the percentage of Jewish employees on this list with the percentage of non-Jewish employees. In view of the fact that the number of Jews employed by the three divisions is statistically deficient in comparison to their numbers in the relevant labor market and in the absence of information, empirical or otherwise, on qualifications required of all employees and of managerial candidates and on the qualifications of the 60 Jews hired and of the 19 Jews among them listed as having managerial potential, such a comparison of a Jewish percentage with a non-Jewish percentage for potential managers is deceptive and misleading.

C. Ignoring Continuing Anti-Jewish Discrimination in Promotions

The report does not undertake to show statistically the continuing denial of promotions to Jews. The report finds that in recent vacancies for 47 mid-level positions, none were filled by Jews. (p.21) There were 222 employees among the candidates considered for 19 of the 47 which were competitive positions. Of the 222, two were employees identified as Jewish, neither of whom received a position. The report finds that some of the 19 identified Jewish employees on the high management potential list could have been considered for these positions but were not. (pp.21-22) Amazingly, the report claimed such evidence to be "inconclusive" on the question of discrimination "because of lack of knowledge of the variables that went into each selection" (p.22). There is no explanation, however, as to why the investigators could not acquire knowledge on the variables of selection. Moreover, two paragraphs later, the report states unequivocally that "there was no evidence of discrimination in the selection" (p.22).

D. Ignoring Conclusions From Its Own Data on Available and Qualified Jewish Applicants

All three divisions of SOCAL reviewed operate in the San Francisco and Richmond regions of California which, the report suggests, have a Jewish population of 4.9% (p.39), as compared to the national Jewish population of 2.7%.

Jewish students are statistically prominent -- approximately 8% of the nation's college students. If the relevant labor market for potential employees was considered to be the San Francisco and Richmond regions where the Jewish population was more than 80% higher than the Jewish population nationwide, it may

be presumed that the percentage of Jewish students in these regions considerably exceeded 8%. Yet the investigation report made no effort to ascertain the relevant labor market of Jewish college students.

By any statistical standard, Jews are scarce in the three divisions reviewed. In International Brotherhood of Teamsters v. US, 97 S.Ct. 1843 (1977), the Court held that, while statistics may not be used to require that an employer's work force be racially balanced, they are relevant in showing that racial or ethnic imbalance is not a mere accident but a result of purposeful employment discrimination. (Footnote 20, pp. 1856-57.) Similarly, in Hazelwood School District v. US, 97 S.Ct. 2736 at 2741 (1977), the Court noted that statistics can be an important source of proof in discrimination cases whereby a comparison could be made between the number of members of a given class employed by a given organization and the relevant labor market of potential employees.

The Federal investigators had an obligation, at the very least, to enforce their own guidelines.

III. FAILURE TO DRAW CONCLUSIONS OF DISCRIMINATION FROM OBVIOUSLY DISCRIMINATORY SOCAL ACTIVITIES

A. The Investigative Report Completely Omits Information Supplied to the Federal Agencies Regarding Employment Discrimination by SOCAL

For example, there was no reference to or contact with the Jewish Career Counseling Center in San Francisco which acts as a job referral service. Yet the Federal agencies had seen A Study of Jewish Employment Problems in the Big Six Oil Company Headquarters, published by the Anti-Defamation League, in which the Jewish Career Counseling Center reported that "the center had received no formal job requests from SOCAL. No information on middle - and upper - management positions that had opened up had ever been forwarded to the center."

The investigative report lists the Jewish Bulletin as one of the Anglo-Jewish community newspapers contacted, but no reference is made to what was learned. Completely omitted is the fact reported in the aforementioned ADL study that SOCAL had never placed any employment recruitment advertising in the Jewish Bulletin despite the newspaper's San Francisco readership.

B. The Investigative Report Fails to Recognize the Discriminatory Influence of SOCAL Memberships in Discriminatory Private Clubs

The report notes, but without finding discrimination, that SOCAL finances 761 memberships in private clubs of which only one member is Jewish (p.26). The company finances nine memberships for seven of its top executives in five of these clubs which exclude totally or have a quota of Jews (Pacific Union Club, Bohemian Club, Burning Tree Club, Metropolitan Club, Olympic Club). SOCAL was sued by one of its former employees, a Jew who was dismissed after being assigned to a position which required transacting business in private clubs which deny membership and admittance to Jews. SOCAL eventually reached an out-of-court settlement with the former employee. Despite these facts, the investigation failed to address the hiring discrimination against Jews implicit in business practices by SOCAL that

make use of discriminatory private clubs. In fact, the report failed to draw the logical conclusions of anti-Jewish discrimination even from its own statistics on these private clubs, stating merely that "the record shows that SOCAL pays for employees' memberships in clubs which Jewish organizations identified as restricting Jews from membership." (p.42) (emphasis added)

C. The Report Fails to Acknowledge the Significance of Employment Discrimination by ARAMCO

SOCAL is also a partner in ARAMCO. 150 SOCAL employees were found to be working for ARAMCO on tours of duty that range from two to five years. No statistics are provided on how many, if any, are or have ever been Jews.

Mention is made of one Jewish employee sent on a temporary assignment to Saudi Arabia who was refused a visa by Saudi Arabia because he was Jewish and divulged his religion on various forms which had to be submitted to the Saudi Arabian government. The report implies that the matter was resolved satisfactorily when it states that the employee indicated that "6 months later the Saudi Arabian government issued a proclamation indicating Jewish employees could enter the country, provided they had specific business in the country and provided further that they were not Zionists." (p.30.)

D. The Report Accepts at Face Value SOCAL's Disclaimer of Knowledge About the Religion of Jewish Applicants and Employees

The report ignores the significance of corporate awareness of SOCAL's Jewish employees and accepts at face value SOCAL's explanation that it had not made an effort to recruit Jews because "such employees cannot be identified and the emphasis has been toward protected groups under 41 CFR 60-2." (p.30.) Company supervisors claim that they "do not know the availability of Jews or ethnic minorities in the labor force nor can they identify their employees as such."(p.16) The company also claimed that it feared possible violation of privacy rights if it inquired about a prospective employee's religion.

However, the report describes SOCAL's awareness of Jewish employees and applicants. Significantly, although SOCAL executives claimed that they did not know which of SOCAL's employees were Jewish because SOCAL did not practice religious discrimination, the bulk of the Jews identified by the investigators were from the names of Jews supplied by company representatives. The report merely noted, "the investigation indicated that some supervisors and other company officials did know the religion and/or ethnic background of some employees, including some Jewish employees." (p.43.) In fact, it was more than some Jewish employees because the report noted elsewhere (p.8) that "the company representatives gave the team the names of 55 additional employees whom they believed to be Jewish. Forty of the fifty-five persons were interviewed; the remaining 15 were not available. Of the 40 interviewed, all but four confirmed they were Jewish."

Nowhere do the investigators question how SOCAL managed, on the basis of its allegedly non-discriminatory policy toward Jews and its difficulty in identifying Jews, to keep Jewish employment in the three branches consistently below 1%. Instead the investigators echo the argument of SOCAL that it cannot identify Jewish applicants to justify their own failure to identify Jewish victims of discrimination.

CONCLUSIONS:

While pointing out that "SOCAL has not undertaken a review of its employment practices in accordance with 41 CFR 60-50.2 (b) to determine whether deficiencies exist in the employment opportunities of certain religious or ethnic groups," (p.43) the report remarkably concludes that "there is insufficient evidence to conclude that SOCAL has engaged in a pattern of discrimination against Jews." The report thereupon directs SOCAL to implement 41 CFR 60-50 within 25 days from the date of the report to encourage "the utilization of recruitment sources to maximize employment opportunities without regard to religion or national origin." (p.43) No corrective measures beyond this are mandated, however, and SOCAL is directed to police itself with respect to providing equal opportunity in religion to its current employees.

Our analysis of the Federal agencies' investigative report leads to the following conclusions:

1. The Federal agencies had enough facts available to establish a prima facie case of failure to comply with contract compliance requirements, and of discriminatory failure to hire Jews.

2. There was no serious effort to investigate the basic allegation of hiring discrimination against Jews.

3. There was gross manipulation and distortion of statistics to portray SOCAL in a favorable light.

4. There was a failure to draw conclusions of discrimination even when the facts reported showed SOCAL activities to be obviously discriminatory:

(a) Vacancies for positions were not publicized in media where they were likely to be seen by Jews.

(b) Appropriate outreach and positive recruitment activities to hire Jews were not undertaken as suggested by OFCCP compliance guidelines.

(c) Corporate recruitment techniques had a disproportionately negative impact on the employment of Jews in the company.

(d) There was anti-Jewish discrimination in corporate promotions.

(e) There was anti-Jewish discrimination in private club memberships financed by SOCAL.

(f) There was anti-Jewish discrimination by ARAMCO in which SOCAL is a partner.

RECOMMENDATIONS

A show-cause hearing should be held by the Office of Federal Contract Compliance (OFCCP) to determine whether or not SOCAL wishes to comply with requirements pertaining to non-discrimination because of religion. Such compliance should include: (1) the establishment of empirical standards and qualifications for positions for which the company recruits; (2) recruitment of qualified Jews for top level management positions; (3) recruitment of qualified Jews through contacts with college and university Hillel chapters, Jewish community groups and employment referral services and through advertising in the Anglo-Jewish media; and (4) publicizing of the company's commitment to equal employment for Jews throughout the company. In the event OFCCP fails to promulgate such a program, consideration should be given to petition for a writ of mandamus to compel enforcement of Executive Orders 11246 and 11375 and its implementing regulations, 41 CFR 60-50.

MS:am

Executive Suite and Social Discrimination

By Seymour Samet

I. EXECUTIVE SUITE AND SOCIAL DISCRIMINATION

A. UNEQUAL TREATMENT OF EQUALS

ENCYCLOPAEDIA OF SOCIAL SCIENCES DEFINITION a) "THE ALTERATION IN COMPETITIVE STATUS."

B. FACTS-- AJC STUDIES OF EXECUTIVE SUITE DISCRIMINATION

1) LAST MONTH A SAMPLING OF 35 PRESIDENTS OF FORTUNE 500 CORPORATIONS FELT THAT IT WAS IMPORTANT TO EXPAND OPPORTUNITIES FOR JEWISH EMPLOYMENT OPPORTUNITIES.

2) AMONG 1,200 OF THE LARGEST INDUSTRIAL AND FINANCIAL CORPORATIONS ONLY A FEW HAVE MORE THAN 1 OR 2 TOP EXECUTIVES WHO ARE JEWISH.

3) EIGHT YEARS AGO: 10% OF ALL COLLEGE GRADUATES WERE JEWISH BUT LESS THAN 1% OF CORPORATION EXECUTIVES WERE JEWISH.

4) 1978 - 1979 STUDY FIGURES REMAIN SAME.

CORPORATION RECRUITMENT, A PRIME SOURCE OF EXECUTIVE TALENT CONTINUES TO BE PRIMARILY ON CAMPUSES WITH SMALL STUDENT BODY.

5) THAT SURVEY NOTES, "IT IS HIGHLY IRONIC THAT IN THE AGE OF AFFIRMATIVE ACTION, JEWS WHO HAVE LONG BEEN VICTIMS OF DISCRIMINATION, ARE NOW COUNTED IN THE WHITE MAJORITY."

6) STUDIES SHOW THAT JEWISH AND OTHER MINORITY YOUTH BELIEVE CORRECTLY THAT BIG BUSINESSES DISCRIMINATE AGAINST THEM.

7. SOME OF THE MOST BLATANT ANTI-JEWISH DISCRIMINATION EXISTS IN LARGE NEW YORK CITY BANKS.

a) A RECENT STUDY SHOWED THE FOLLOWING:

1) THERE WAS NOT ONE JEW AMONG THE 22 OFFICERS WHO ARE ALSO DIRECTORS OF THE LARGEST N.Y. BANKS.

2) ONLY THREE OF THE TOP 86 OFFICERS (EXECUTIVE VICE PRESIDENTS AND ABOVE) ARE JEWISH - 3½%

3) OF 345 SENIOR OFFICERS (INCLUDING SENIOR VICE PRESIDENTS) THERE WERE A TOTAL OF ONLY 15 JEWS (4.3%).

4) THIS IS SO DESPITE THE FACT THAT 50% OF THE COLLEGE GRADUATES IN NEW YORK CITY ARE JEWISH.

5) LITTLE CHANGE SINCE AJC'S 1967 STUDY TITLED, "PATTERNS OF EXCLUSION FROM THE EXECUTIVE SUITE: COMMERCIAL BANKING."

AT THAT TIME JEWS WERE 1% OF THE EXECUTIVES OF THE NATION'S LEADING COMMERCIAL BANKS.

6) AJC SPONSORED STUDY AT HARVARD UNIVERSITY SCHOOL OF BUSINESS ADMINISTRATION AMONG BUSINESS EXECUTIVES WHOWED THAT 76.3% FELT THAT JEWISH RELIGIOUS BACKGROUND WAS A HINDRANCE TO PROMOTION.

C. FACTS- SOCIAL DISCRIMINATION

1. AJC SPONSORED STUDIES INDICATE THAT BUSINESS CLUBS, SOCIAL CLUBS UNIVERSITY CLUBS, COUNTRY CLUBS AND ATHLETIC CLUBS ARE USED AS EXTENSIONS OF THE CORPORATION.

2. ACCEPTANCE BY THE BEST CLUBS IS CORRELATED TO PROMOTABILITY WITHIN A FIRM.

3. THE EXCLUSION OF ENTIRE GROUPS FROM CLUB MEMBERSHIP WITHOUT REGARD TO INDIVIDUAL MERIT IS TO IMPUTE GROUP INFERIORITY - A CONCEPT REPUGNANT TO A DEMOCRATIC SOCIETY, AND ONE WHICH IS WELL CALCULATED TO KEEP JEWS, AMONG OTHERS "IN THEIR PLACE." THAT PLACE IS <u>OUTSIDE</u> OF THE EXECUTIVE SUITE.

II. RECOMMENDATIONS FOR ACTIONS BY THE U.S. COMMISSION ON CIVIL RIGHTS.

A. RESEARCH

1. UPDATE THE PREVIOUS STUDIES DONE BY THE PRIVATE SECTOR ORGANIZATIONS SUCH AS AJC TO DETERMINE CORPORATE PRACTICES REGARDING THE RECRUITMENT,

Testimony

TRAINING, EMPLOYMENT AND EMPLOYMENT OF JEWS IN THE EXECUTIVE SUITE OF MAJOR INDUSTRIES WITHIN THE U.S.

2. STUDY OF THE MOST PRESTIGIOUS SOCIAL CLUBS OF AMERICA TO ASCERTAIN THE DEGREE RACIAL, RELIGIOUS AND SEX DISCRIMINATION CURRENTLY BEING PRACTICED (PRAISE PROXMIRE AND FEDERAL HOME LOAN BANK BOARD RE BANKING STUDY)

3. ANALYZE THE PRACTICES OF GOVERNMENT ANTI-DISCRIMINATION AGENCIES TO DETERMINE IF ANY ARE ENFORCING REQUIREMENTS OF NON-DISCRIMINATION ON RELIGIOUS GROUNDS.

B. REGULATION AND LEGISLATION

1. RECOMMENDATIONS SHOULD BE MADE TO OFCCP AND EEOC THAT THEY PROHIBIT GOVERNMENT CONTRACTORS FROM PAYING FOR MEMBERSHIPS OF ITS EXECUTIVE STAFF IN CLUBS WHICH DISCRIMINATE BY REASON OF RACE, CREED OR COLOR.

2. REQUIRE GOVERNMENT CONTRACTORS TO MAINTAIN STATISTICS SHOWING THE NUMBER OF JEWS EMPLOYED IN EXECUTIVES CAPACITIES. A GUIDE FOR HOW THIS CAN BE DONE IN A CONSTITUTIONALLY LEGITIMATE FASHION IS CONTAINED IN THIS AJC GUIDEBOOK. (IT SHOULD ALSO BE NOTED HERE THAT UNDER NO CIRCUMSTANCES WHATSOEVER DO WE RECOMMEND THAT QUOTAS BE ESTABLISHED TO BRING JEWS INTO THE EXECUTIVE SUITE E.G. PROVIDENT MUTUAL INSURANCE COMPANY).

3. FEDERAL GOVERNMENT PERSONNEL ARE CURRENTLY NOT PERMITTED TO CONDUCT ANY OFFICIAL BUSINESS IN CLUBS WHICH PROHIBIT ATTENDANCE AT SUCH MEETINGS BECAUSE OF RACE, CREED, COLOR OR SEX. THIS PROHIBITION SHOULD BE BROADENED SO THAT FEDERAL OFFICIALS MAY NOT MEET AT SUCH CLUBS EVEN IF THEY PERMIT GUESTS TO ATTEND SPECIAL MEETINGS BUT PREVENT THEM FROM BECOMING MEMBERS BECAUSE OF RACE, CREED, COLOR OR SEX.

4. STATE ADVISORY COMMITTEES OF THE U.S. SHOULD HOLD SIMILAR HEARINGS TO THIS ONE.

5. GOVERNMENT COMPLIANCE OFFICERS SHOULD BE GIVEN INSTRUCTIONS AND TRAINING ON ON HOW TO DEAL WITH THESE ISSUES AND THEN BE REQUIRED TO ELICIT THE INFORMATION

NECESSARY TO DETERMINE IF RELIGIOUS DISCRIMINATION IS BEING PRACTICED.

6. LAWS HAVE BEEN PASSED,IN SOME STATES, WHICH DEPRIVE DISCRIMINATORY CLUBS FROM THE RIGHT TO SUCH PRIVILEGES AS OBTAINING LIQUOR LICENCES. A COMPILATION OF SUCH LAWS SHOULD BE MADE BY THE COMMISSION AND STUDIED WITH A VIEW TOWARD DETERMINING IF FEDERAL LAWS AND REGULATIONS OF A SIMILAR NATURE ARE FEASIBLE, e.g. SHOULD A DISCRIMINATING CLUB CONTINUE TO BE ENTITLED TO TAX EXEMPTION AS A NON-PROFIT ORGANIZATION?

7. IN 1965 WE RECOMMENDED TO THE THEM SECRETARY OF LABOR, WILLARD WIRTZ, A FOUR POINT PROGRAM FOR GOVERNMENT ACTION;

   a) TO MAKE CLEAR THAT THE GOVERNMENT'S EQUAL EMPLOYMENT PROGRAMS WERE CONCERNED WITH RELIGION AS WELL AS RACE;

   b) CONTRACTORS SHOULD BE REQUIRED TO REPORT ON WHERE THEY STOOD;

   c) STAFF SHOULD BE ASSIGNED TO DEVELOP NEEDED PROGRAMS;

   D) PROCEDURES FOR COMPLIANCE REPORTS SHOULD BE REVISED.

A SUCCESSFUL APPLICATION OF THESE RECOMMENDATIONS WAS MADE BY THE SOCIAL SECURITY ADMINISTRATION IN ITS NEW MEDICARE PROGRAM AS THEY MONITORED INSURANCE COMPANIES. BECAUSE OF THAT SUCCESS SECRETARY WIRTZ REMINDE ALL GOVERNMENT CONTRACTORS OF THEIR RESPONSIBILITIES TO DO LIKEWISE USING THE RESOURCES OF THE OFCC IF THEY NEEDED ASSISTANCE. THERE IS LITTLE EVIDENCE AVAILABLE TO US THAT THIS WAS DONE.

STATEMENT OF WALTER ECHO-HAWK

I. INTRODUCTION

I want to thank the Commission for its invitation to me to participate in this consultation regarding religious discrimination. I hope my remarks concerning Native Religious discrimination will be useful.

At the outset, I will state that this consultation is extremely timely from the standpoint of Native Americans, because of the recently enacted "American Indian Religious Freedom Act" PL-95-341 (Signed August 11, 1978).

As a result of the passage of the "American Indian Religious Freedom Act," the federal government is presently in the midst of an agency-wide review of statutes, policies, and procedures of federal agencies, in consultation with Native traditional religious leaders, to determine appropriate changes necessary to protect and preserve Native American religious freedom and practices.

This agency-wide review is being coordinated by an Executive Task Force chaired by the Secretary of the Interior. Ms. Susan Harjo will be able to tell you about the status and activities of the task force.

My intent is to tell you about various areas of religious discrimination against Natives.

First, I should tell you something about traditional or tribal religion as native religion is vastly different from the Judeo-Christian religions most of us are familiar with. Because native religions are so different, the religion of the redman has never been understood by the non-Indian soldiers, missionaries, or government officials. 1) It is important to note that there are probably as many native religions as there are Indian tribes in this country. 2) None of these religions or religious tenets have been reduced to writing in a holy document such as the Bible or Koran.[1] 3) None of these religions have man-made churches in the Judeo-Christian sense, rather the native religions are practiced in nature, at sacred sites, or in temporary religious structures--such as tipis or sweat lodges. 4) The religious beliefs are tied to nature, the spiritual forces of nature, the natural elements, and the plants and creatures which make up the environment.... Natives are dependent upon all these things in order to practice their many religious ceremonies, rituals and religious observances.

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[1] To understand the nature of Indian religion, one must necessarily look to the native practitioners themselves for information.

One final point about the unique nature of native religions is that native religion and culture are virtually inseparable. Like the Amish people, the religion of native people pervades their daily lives...the manner of dress, personal appearance, ways of speaking, eating, etc.

Because of the ignorance of the whiteman of these unique native religious qualities, native religions, up until the present, have always been either banned, suppressed or discriminated against in this country. After the military conquest, natives were placed onto reservations which were administered, in many instances, by missionaries. Natives were forbidden to speak their languages, practice their rituals, or even leave the reservations to obtain things necessary to practice the religions. Children were forced to cut off their hair and to dress and look like the whiteman. The sun dance ceremony, the ghost dance, the peyote religion and other religious practices were actively suppressed by statute, military force or the withholding of rations. This active suppression was practiced up until the early part of this century.[2]

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[2] There is historical evidence that this suppression and other factors led to the extinction of some Indian tribes and cultures in this country.

During the period of active suppression, native religions went underground...where many remain today. For example, practitioners of the peyote religion are today subject to arrest at any time for a variety of offenses: use of peyote, possession of bird feathers, illegal cutting of tipi poles from federal land, or even violating fire permits or noise ordinances.

Because the discrimination against native religions is so pervasive in this country, Congress found that remedial legislation was necessary to effectuate first amendment protections for natives. The "American Indian Religious Freedom Act" states:

> "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."

My law firm, the Native American Rights Fund, is presently coordinating a project designed to identify native religious problems and to explore possible remedial solutions. I want to share with you various problems.

II. AREAS OF RELIGIOUS DISCRIMINATION AGAINST NATIVES

The Discrimination faced by natives is primarily directed against fundamental religious practice itself, rather than mere collateral or secondary observances.

A. CRIMINAL JUSTICE DISCRIMINATION

1. PRISONS. The Federal Bureau of Prisons and LEAA-funded state prisons are perhaps the most obvious and widespread discriminators against native religions. Today I am presently aware of live controversies regarding native religious freedom in 14 federal and state prisons. The issues include: a) denial of right to receive fundamental religious items necessary to the practice of native religion (such as feathers, gourds, fans, medicine pouches, sacred pipes, cedar, sage, sweet grass, and drum; b) denial of right to practice fundamental religious ceremonies, such as the sweat lodge ceremony and the Ywippi ceremony; c) denial of the right to wear long, traditional hair for religious purposes; d) denial of access to medicine men and spiritual leaders; and e) denial of the right to sing native ceremonial songs on a regular basis.

2. CRIMINAL COURTS. In criminal proceedings I am aware of two examples where the question of whether or not to recognize Indian traditional marriage ceremonies for purposes of invoking the Husband-Wife privilege was at issue.

3. LAW ENFORCEMENT. In the area of state arrests, I am aware of three criminal arrests and prosecutions of Native American Church members for possession of the sacrament, peyote, since last fall.

4. PAROLE. The federal and most state parole boards maintain a parole condition which prohibits the parolee from using drugs. This provision discriminates against the Native American Church member who is entitled by federal law to use peyote for religious purposes.

B. EMPLOYMENT

In the areas of employment, traditional natives have the same problems as other minority religions in obtaining religious leaves or holidays to the same extent as is granted by employers for major Judeo-Christian observances. Hopefully, the "Federal Employees Flexible and Compressed Work Schedules Act of 1978," 5 U.S.C. §533A, will remedy this problem with respect to federal employees.

Other possible employment problems arise where the religious observance of wearing traditional hair style may cause job discrimination or disciplinary action. This is clearly the case in the Armed Services, where I am also aware of a recent instance where the Marines denied enlistment of a Native American Church member for use of peyote.

C. EDUCATION. The primary discrimination against Indian religion in education centers upon school grooming codes where native children must cut their hair. I am aware of four lawsuits involving this religious issue. In some instances, compulsory education laws infringe upon native religion where children of traditional and holy families are forced to attend public schools in environments which interfere with cultural and spiritual upbringing.

D. DENIAL OF ACCESS TO NATIVE RELIGIOUS PLACES. As I stated earlier, natives have no churches in the Judeo-Christian sense. Rather, native places of worship are outdoors in nature. Because of this fact, the country is dotted with many Holy Areas and Sacred Sites. These areas consist of ceremonial areas, burial grounds, herb gathering sites, vision questing sites, and other Holy Areas. Many of these areas are located on federal, state and private lands now.

Problems arise in terms of native access to their areas for worship purposes, protection of these areas from desecration and commercial development, and access for ceremonial harvesting of certain natural products for religious purposes.

E. ACCESS TO SACRED OBJECTS. Natives are utterly dependent upon products from nature in the practice of their religion. These products are essential and generally consist

of certain bird and animal parts, herbs, wood, etc. Many of these religious items are difficult to obtain or illegal to possess as a result of federal and state conservation laws. These laws have risen because of the slaughter or indiscriminate taking of certain wildlife and plants; and while these laws are necessary to protect the endangered species, there are no religious exemptions for natives, except for bald eagles. Thus, the native experiences additional religious suppression.

III. CONCLUSION

The above remarks generally survey the nature of native religious discrimination. I am available for questions.

Thank you.

sonian Institution usually have absolute and complete evidence to offer. Here is J. O. Dorsey's paragraph on Omaha cleanliness:

"The Omahas generally bathe (hica) every day in warm weather, early in the morning and at night. Some who wish to do so, bathe also at noon. Jackson, a member of the Elkgens, bathes every day, even in winter. He breaks a hole in the ice on the Missouri River, and bathes, or else he rubs snow over his body. In winter the Omahas heat water in a kettle and wash themselves (kigcija). . . . The Ponkas used to bathe in the Missouri every day." (Dorsey, 3th Ann. Dep. Eth.; p. 269.)

Every Indian village in the old days had a Turkish bath, as we call it; a "Sweat Lodge," as they say, used as a cure for inflammatory rheumatism, etc. Catlin describes this in great detail, and says:

"I allude to their vapor baths, or *sudatories*, of which each village has several, and which seem to be a kind of public property — accessible to all, and resorted to by all, male and female, old and young, sick and well." (Vol. I., p. 97.)

The "Sweat Lodge" is usually a low lodge covered with blankets or skins. The patient goes in undressed and sits by a bucket of water. In a fire outside, a number of stones are heated by the attendants. These are rolled in, one or more at a time. The patient pours water on them. This raises a cloud of steam. The lodge becomes very hot. The individual drinks copious draughts of water. After a sufficient sweat, he raises the cover and rushes into the water, beside which, the lodge is always built. After this, he is rubbed down with buckskin, and wrapped in a robe to cool off.

This was used as a bath, as well as a religious purification

I have seen scores of them. Clark says they were "common to all tribes," (p. 365). Every old-timer knows that they were in daily use by the Indians and scoffed at by the white settlers who, indeed, were little given to bathing of any kind.

CHASTITY

About one hundred years ago the notorious whiskey-trader, Alexander Henry, already mentioned, went into the Missouri region. He was a man of strange character, of heroic frame and mind, but unscrupulous and sordid. His only interest and business among the Indians was beating them out of their furs with potations of cheap alcohol. This fearless ruffian penetrated the far Northwest, was the first trader to meet certain Western tribes, and strange to tell he wrote a full, straightforward and shocking account of his wanderings and methods among the red folk he despised for not being white. In spite of arrogance and assumed superiority, his narrative contains much like the following:

"The Flatheads on the Buffalo Plains, generally encounter the Piegans and fight desperately when attacked. They never attempt war themselves, and have the character of a brave and virtuous people, not in the least addicted to those vices so common among savages who have had long intercourse with Europeans. Chastity is particularly esteemed, and no woman will barter her favors, even with the whites, upon any mercenary consideration. She may be easily prevailed upon to reside with a white man as his wife, according to the custom of the country, but prostitution is out of the question —she will listen to no proposals of that nature. Their morals have not yet been sufficiently debauched and corrupted by an intercourse with people who call themselves Christians, but whose licentious and lecherous manners are far worse than those of savages. A striking example is to be seen throughout the N. W. country, of the depravity and wretchedness of the natives; but as one

- 11 -

REDMAN'S DREAM

By Jay Silverheels

Last nite I dreamed I went to Indian heaven.
The Redman's happy hunting ground.
No gate to pass thru, no barrier.
No challenge there.
All Redmen as free as our "God's" pure air.
I heard the drums beat low, and I saw the campfires glow.
As I mounted the golden stair.
I heard the muffled beat of the moccasined feet.
As they danced and welcomed me there.

Last nite I dreamed I went to Indian heaven.
The Redman's happy hunting ground.

There on the threshold of that golden stair.
As if in heavenly trance.
I stood and I watched to the end
That beautiful welcome dance.
Then gently from above, a brighter glow.
Seemed to beckon me, come! come yet on high.
To this great council fire, here in the sky.

Last nite I dreamed I went to Indian heaven.
The Redman's happy hunting ground.

There by that greatest council fire.
Silent and in reverent meditation.
Sit the brave and noble chiefs
Who so long ago ruled o'er all this mighty nation.
Their names are famous, their deeds are too.
Crazy Horse, Sitting Bull, they of the mighty Sioux.
Tecumseh Shawnee, Cochise Chirachua, Sequoya Cherokee.

Last nite I dreamed I went to Indian heaven.
The Redman's happy hunting ground.

They're all here now, these Indian heroes of long ago.
Geronimo Apache, Joseph Nez Perce, Brant Mohawk and Osceola Seminole.
They walked narrow trails and talked straight tongue.
They lost their fight, but here their glory is won.
For dauntless heroes all, from the white, the black, the red and yellow,
Mingle here in that heavenly love, the love of brothers.
Thank "God"! how beautifully blend these colors.

Last nite I dreamed I went to Indian heaven.
The Redman's happy hunting ground.

My fleeting vision fades, dim and dimmer glows the light.
Must I journey home to that dark of nite?
Clinging desperately to that last ray of hope and light.
I linger, for I fancy I hear them say,
"Oh great spirit, wilt thou guide our visitor safely on his way.
Tenderly prepare him for a longer stay,
When he comes again on some future day.

Last nite I dreamed I went to Indian heaven.
The Redman's happy hunting ground.

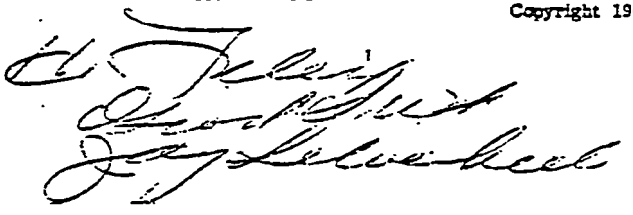
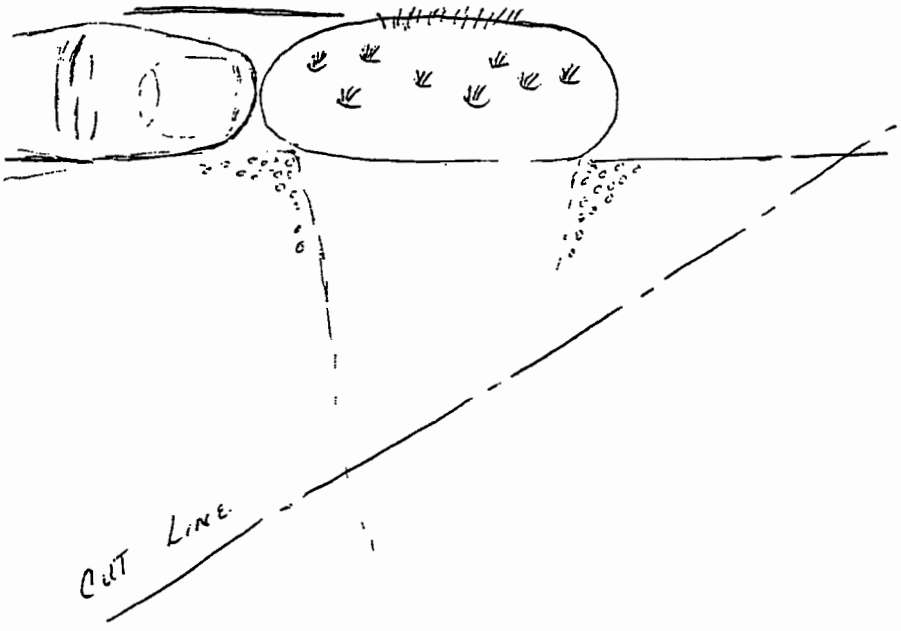


Figure 1



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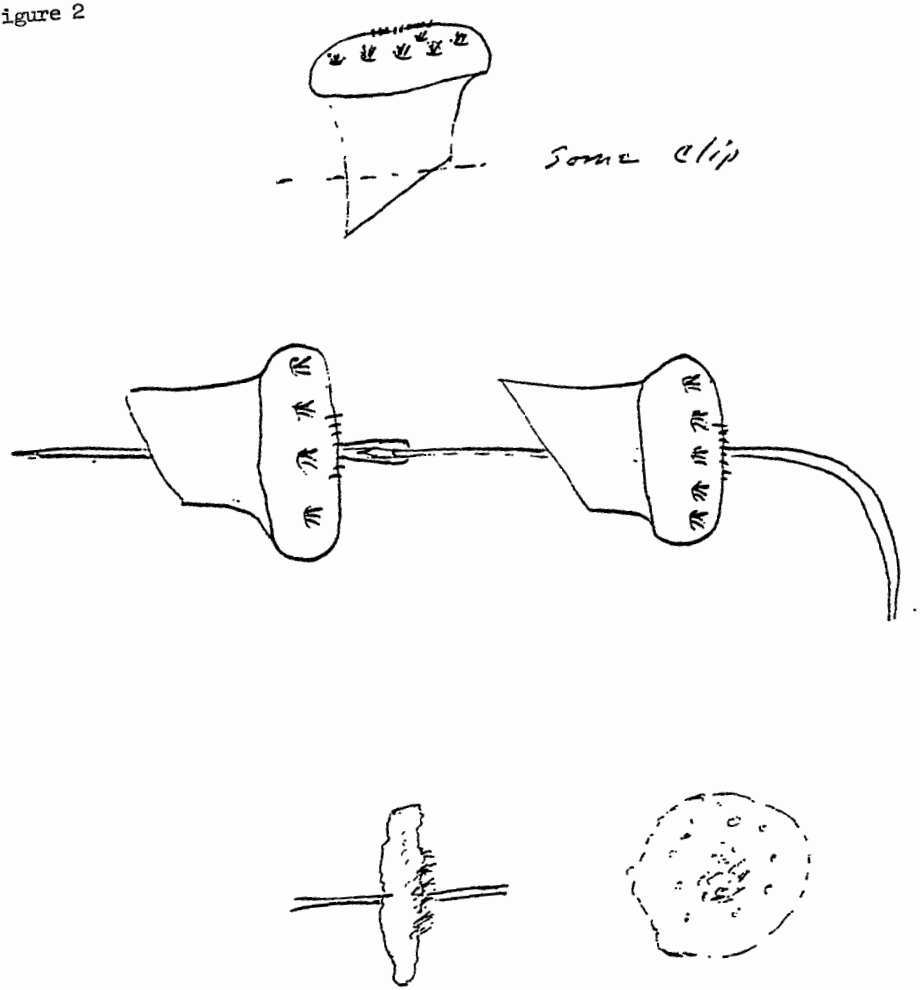

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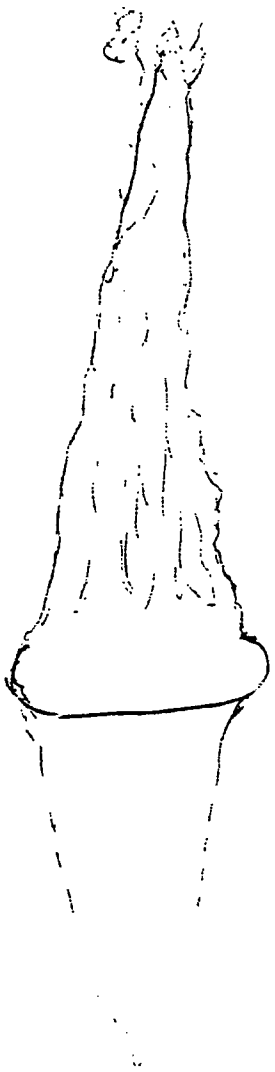

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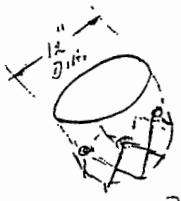
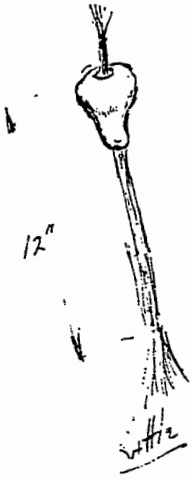
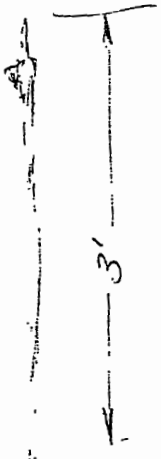
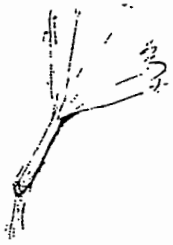


Tent

Water Drum







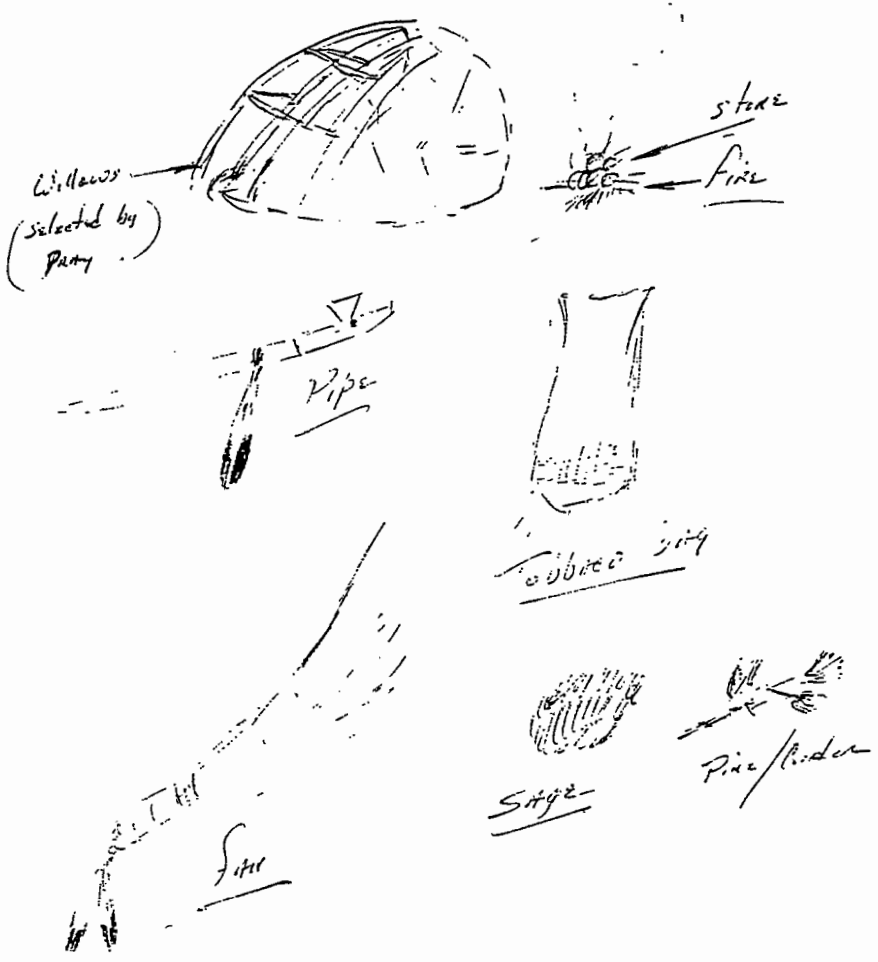
staff

fish

fire

Figure 5

Still Mark



Adjustment of Work Schedules for Religious Observances

By Seymour Gettman

Mr. Chairman, Members of the Commission:

I am pleased to appear before you today to discuss title IV, of Public Law 95-390. Title IV is entitled "Adjustment of Work Schedules for Religious Observances."

PURPOSE OF THIS LEGISLATION

The purpose of title IV, as its title indicates, is to allow Federal employees to adjust their work schedules so that they may comply with the religious requirements of their faith without having to use personal leave. More specifically, it provides that a Federal employee may elect to engage in "overtime work" for the purpose of taking compensatory time off from his or her scheduled tour of duty when the employee's "personal religious beliefs" require the abstention from work during certain periods of time. It also suspends premium pay entitlements for such overtime work.

Congressman Stephen J. Solarz, of New York, was the sponsor of a series of legislative initiatives on this subject. Mr. Solarz finally proposed an amendment to H.R. 7814, which became title IV of the "Federal Employees

Flexible and Compressed Work Schedules Act of 1978." The Act was signed into law by the President on September 29, 1978. As a technical point, it should be noted that title IV of the Act is permanent legislation and bears no relation to the 3-year experimental program of flexible and compressed work schedules otherwise authorized by the Act.

CONGRESSIONAL INTENT

It is relevant to note certain statements of legislative intent at this point. The intent of Congress was clearly enunciated in Senate Report No. 95-1143 submitted jointly by the Committee on Human Resources and the Committee on Government Affairs. To quote:

> The Committees find that the provisions of title IV are necessary because of problems faced by the religiously observant in the Federal service in accounting for time taken out from work as a requirement of their faith. The committees find that existing Federal work schedules unnecessarily discriminate against Federal employees who are members of religious minorities and whose personal religious beliefs require the abstention from work during certain periods of time which conflict with their normal tours of duty. Although the Federal Government in most instances grants leave to employees to meet their religious requirements, religious minorities

> are penalized for adhering to the tenets of their faith because the time they must take off for religious reasons is either deducted from their salary or their annual leave. As a result, members of religious minorities must occasionally choose between meeting the requirements of their faith and suffering a reduction of income or a loss of vacation time. The committees believe it is unnecessary, in most cases, to force any Federal employee to make such a choice.

The report noted that ample precedent existed for allowing an accommodation of the time off needed for religious observance. For example, title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on religion. More specifically, section 701(j) of that title, added in 1972, requires an employer to make reasonable accommodations to the demands of an employee's "religious observance and practice as well as belief."

Certain relevant conceptual bases for title IV provisions should also be discussed. For example, as Congressman Solarz pointed out on the floor of the House, although the provisions authorize the use of overtime to obtain compensatory time off for religious purposes, it was not intended that this would be the only way an employee could make up for such lost time. The authority would only become operative, he emphasized, if the employee elects to ask for the overtime work. Moreover, any overtime work required by the agency would be subject to the normal compensation rules.

Congressman Solarz also noted that title IV does not compel any Federal manager to automatically accept an employee request for compensatory overtime work to meet religious needs. He said: "If the provision of overtime compensatory work provides an undue hardship on the agency or interferes with its efficiency, the agency need not grant such work." In this connection, the report of the Senate committees offered the following additional clarifying guidance:

> The Committees anticipate that circumstances requiring an employee to forego such time off for religious observances will be quite rare. Mere inconvenience to an employee's agency will not justify refusal of an accommodation.

It also should be noted that Congress expected that the overtime worked for religious observances would be useful and productive work. The overtime is to be worked either in anticipation of time which will be needed on account of religious observance, that is prospectively, or after the fact to make up for time already taken for that purpose. The Senate report emphasized that the amount of accummulated time to be made up must be limited to a "reasonable number of hours." OPM has so far left the determination as to what is reasonable to the agencies.

OPM REGULATIONS

The Office of Personnel Management (then, the Civil Service Commission) issued "interim regulations" to implement title IV of the Act for Executive agencies on October 2, 1978. These regulations were published in the Federal Register on October 6, 1978, with a retroactive effective date of October 2, 1978. They were also promulgated in Federal Personnel Manual Letter 550-71.

These regulations were issued very quickly for two reasons: (1) because of the immediacy of certain days of religious observance for some Federal employees in early October and (2) the specific requirement in title IV of the Act that the Office of Personnel Management prescribe regulations within 30 days of enactment.

The Office of Personnel Management regulations apply to Executive agencies. Agencies of the legislative and judicial branches and the Government of the District of Columbia are required to issue their own regulations for the implementation of title IV.

There are four significant elements of the Office of Personnel Management regulations which I should describe for you, as follows:

- An employee who elects to work compensatory overtime for the purpose of religious observance shall be granted (in lieu of

overtime pay) an equal amount of compensatory time off (hour for hour) from his or her scheduled tour of duty.

- The overtime pay entitlements provided by title 5, United States Code, and the Fair Labor Standards Act of 1938, as amended, do not apply to the compensatory overtime worked for this purpose.

- An employee may work the compensatory overtime before or after the grant of compensatory time off. It is significant to note that this is the first such authority where an employee may take advanced compensatory time before the overtime is actually worked. Agencies were advised that a grant of advanced compensatory time should be repaid by the appropriate amount of compensatory overtime work within a "reasonable amount of time."

- The Office of Personnel Management interim regulations include the exception provided in title IV of the Act that an employee's election to work compensatory overtime or to take compensatory time off to meet his or her religious obligations may be disapproved by an agency if such modifications in work schedules interfere with efficient accomplishment of an agency's mission. In this regard, however, agencies are expected to accommodate

to an employee's request to work compensatory overtime or to take compensatory time off for this purpose. Agencies are advised that if no productive overtime is available to be worked by the employee at such time as he or she may initially request, alternative times should be arranged for the performance of the compensatory overtime work.

MAJOR ISSUE

It is of interest to note that during the consideration and development of the interim regulations one major issue needed to be addressed. Specifically: Is it necessary or feasible to define what is a "personal religious belief", and should it be done in terms of established or well recognized religious practices?

Early bills on the subject contained such language as "an employee who is a member . . . of a bona fide religion". The Civil Service Commission, in reporting on these earlier bills, indicated that the reference to "bona fide religion" violated the prohibition of the First Amendment of the Constitution against passage of laws "respecting an establishment of religion." As a result, this language was later modified by the bill's sponsor to read "an employee whose personal religious belief requires the abstention from work during certain periods of time."

Thus, the application of this provision, as it is presently worded in title IV of the Act, is not based on the employee being a member of a "bona fide religion." Its focus is placed on the employee's personal beliefs rather than upon the dictates of any specific theistic body. It is our position that the Office of Personnel Management should not attempt to distinguish between a formal religion and something which might be viewed as less than an established religion or religious practice.

Furthermore, in our view, it is not up to the Office of Personnel Management to define what constitutes a personal religious belief nor is it for an agency to question whether an employee's personal religious belief is in any sense a legitimate or accepted religious belief. The only requirements are (1) that the employee's personal belief be of a religious nature, and (2) that the employee's personal religious belief requires the abstention from work during the period the employee is requesting time off.

In conclusion, I would like to quote Congressman Solarz again regarding the high-minded purpose of title IV. He emphasized that this provision of law is designed "to guarantee that all Federal employees are treated equally, regardless of their religion, and to make sure that no Federal employee is discriminatorily or unnecessarily penalized because of their devotion to their faith."

Thank you for this opportunity to discuss this new employee benefit and the Office of Personnel Management's implementing regulations.

I would be pleased to answer any questions you may have.

Testimony

By Michael Schwartz

My name is Michael Schwartz. I am the associate executive director of the Catholic League for Religious and Civil Rights. The Catholic League is a private, non-profit organization founded six years ago to respond to defamation of Catholics and their beliefs and to defend the religious and civil rights of Catholics and others.

I joined the staff of the Catholic League two years ago, and while I was already aware of the problem of anti-Catholic sentiment and its negative impact on the rights and interests of the Catholic community, I must confess that I was surprised to learn that, even at this late date, some people are still denied jobs and promotions commensurate with their abilities simply on the basis of their religious or ethnic background. It is common knowledge that in past generations Catholics suffered an open discrimination in employment. But over the past 30 years, Catholics have made great strides in socio-economic terms, so that today they are generally above the national average in educational attainment and income.

Yet there is sufficient evidence to indicate that Catholics are still seriously underrepresented in certain high-paying and prestigious occupations, and in general terms, it seems that the more prestigious the position, the more difficult it is for a Catholic to attain it. Considering the relatively high socio-economic status of Catholics, the only reasonable explanation for this is a continuing bias against Catholics in the upper reaches of the business, professional and academic communities.

The evidence at hand is far from exhaustive, and it is not uniform: in some cases it deals with members of the Catholic Church; in others with graduates of Catholic schools; and in still others with members of ethnic groups that are overwhelmingly Catholic. But the paucity of evidence is in itself indicative of the extent of the problem. Sociologists and government agencies have tended to

overlook this issue, and their not-so-benign neglect has made it more difficult to identify religious discrimination in employment and to initiate efforts to overcome it.

Nevertheless, there have been enough studies to make a prima facie case that Catholics — particularly those from identifiably Catholic ethnic groups — have not been getting high-prestige jobs in numbers anywhere near their expected proportions. In 1973 the 106 largest corporations in the Chicago area were surveyed to find out how many persons of Black, Hispanic, Italian and Polish heritage were among their officers and directors. It is widely recognized that Black and Hispanic people have been subject to discrimination, and even though much remains to be done to eliminate such discrimination, the government has made a serious effort to address this problem. But people of Italian and Polish descent, who are overwhelmingly Catholic, have been given no support at all by government agencies in fighting discrimination, and in this respect the law has been enforced unequally.

The survey found that people of Italian ancestry accounted for only 1.9% of the aggregate 1341 directors of those Chicago-area corporations, and one man of Italian heritage sat on the boards of nine of those corporations. If he had been counted only once in that study, the Italian-American representation among those directors would have been only 1.3%. Italian-Americans accounted for 2.9% of the officers of those same corporations, yet they make up approximately 8% of the metropolitan Chicago population.

This underrepresentation of Italian-Americans pales in comparison with the problems Polish-Americans face in gaining leading positions in those Chicago corporations. Among the 106 corporations surveyed, there were only four Polish-American directors (0.3%) and ten officers (0.7%), even though the Chicago area has the largest concentration of Polish-Americans in the nation, an estimated 16% of the metropolitan population.

In the following year, 1974, the Ethnic Heritage Studies Center of the

University of Michigan conducted a similar survey among the 100 largest corporations in the Detroit area, and found a similar pattern. Italian-Americans accounted for 3.0% of the directors and 2.5% of the officers of the corporations in the study, while Polish-Americans represented 1.9% of the directors and 1.4% of the officers. One reason for the relatively better showing of these ethnic groups in the Detroit study as compared with the Chicago results is that the Detroit corporations were not as large as those surveyed in Chicago. Among those Detroit corporations with annual sales over $500 million, Polish-Americans held only four of 554 positions (0.7%), ranking behind both Blacks and Hispanics. The Polish-American community represents an estimated 14% of the population of metropolitan Detroit.

A Harvard Business Review study published in December, 1976 indicates that this situation is not confined to those two Great Lakes cities. More than 80% of the top executives surveyed said they were white Protestants.

The major commercial banks seem to be a stronghold of discrimination against members of minority groups. The most striking evidence for this appears in a survey of the senior executives of commercial banks with 50 or more employees conducted by the Massachusetts Banking Commissioner. Slightly more than half the population of Massachusetts is Catholic, and in the outstate areas Catholics held 28% of the senior banking positions, a reasonably respectable showing. But in the Boston banks, in addition to a virtual absence of women, Blacks and Jews, the report found that only 6% of the senior executives were Catholics in a city whose population is nearly 75% Catholic. The relatively higher representation of Catholics in the outstate banks is sufficient to belie any claim that the scarcity of Catholic executives in the Boston banks is due either to lack of interest or lack of talent.

The legal profession is another area where Catholics have trouble rising to the top. The Catholic League has been supporting a lawsuit by attorney John Lucido

against the prestigious New York law firm of Cravath, Swaine and Moore, for whom he worked from 1965 to 1972. Lucido alleges that his religious and ethnic background was the sole reason why the firm denied him a partnership and, in effect, his job. In its entire history, the firm had never had an Italian-American partner. In preparation of an amicus curiae brief filed in support of Lucido, the Catholic League surveyed the twenty largest law firms in seven major cities and found that only 2.3% of the partners and 3.6% of the associates in those firms had Italian surnames, and 0.7% of the partners and 1.5% of the associates had Polish surnames. Moreover, graduates of law schools affiliated with Catholic universities were rarely found in these leading firms. For instance, in the twenty New York firms surveyed, nearly two-thirds of all the partners and associates were from either Harvard, Yale or Columbia. But while the University of Virginia alone had 59 graduates in those twenty firms, all the Catholic law schools in the country, including two in New York City, had a total of just 62 in those firms.

Catholics also meet resistance in the academic community, as illustrated by the Ladd-Lipset Report on the American Professoriate in 1975. Catholics are by far the largest single denomination among college graduates, representing 26% of the college-educated population. Yet in the prestigious major universities that receive most of the research grants, Catholics represent only 12% of the faculty members, ranking behind Presbyterians, Methodists and Jews. In the smaller colleges, the proportion of Catholic faculty members is much closer to their representation in the population, so that they make up 18% of the total American professoriate.

All of the foregoing studies reveal the same pattern: the larger and more prestigious the institution, whether it be a university, a law firm or a corporation, the more difficult it appears to be for a Catholic to succeed.

This pattern points inexorably to one of two conclusions: either recruitment policies are inadvertently discriminatory against Catholics, or prejudice places a barrier to the advancement of Catholics. In either case, corrective action is called for.

Two other recent studies confirm the anti-Catholic bias in academic hiring. Last year Dr. Richard Aliano was denied tenure in the political science department of Queens College in the City University of New York system, and he alleged that it was a case of religio-ethnic discrimination. The Italian-American legislators of New York City commissioned a study of the City University system and found that while approximately 25% of the students in the system were of Italian heritage, only 5% of the faculty and staff positions were held by Italian-Americans.

Currently, the American Catholic Philosophical Association is completing a study of the job prospects for recipients of Ph. D.'s in philosophy from Catholic universities. Catholic graduate schools grant approximately 15% of the doctoral degrees in philosophy each year. Graduates of Catholic universities represent 59.8% of the philosophy faculties in Catholic colleges and universities in this country. Among the faculties of public colleges, they represent only 5.3%, and in private non-Catholic colleges, they account for only 2.3% of the teachers of philosophy. The conclusion, of course, is that graduates of Catholic universities are at a disadvantage in the job market.

A Harris Poll examining the public perception of various minority groups was recently commissioned by the National Conference on Christians and Jews, and it helps to explain the dynamics of anti-Catholicism. The poll revealed that only 4% of non-Catholic Americans believe that there is any discrimination against Catholics. Yet when these same people were asked their opinion of Catholics on specific questions, an alarming number of them held negative stereotypes of Catholics. For instance, 35% considered Catholics to be narrow-minded and

under the influence of church dogma, and only 50% rejected this view. When it comes to professional advancement, a stereotype like this can be crippling, especially when the person who holds it does not recognize it as an anti-Catholic attitude. The implication is that anyone who believes the teachings of Catholicism is incapable of independent thought, and such an incapacity would obviously render him unsuited to a position of responsibility.

When we add to this the negative stereotypes that burden so many predominantly Catholic ethnic groups, the situation is even worse. Polish-Americans are typed as stupid and crude; Italians as devious and dishonest; Hispanics as violent; Irish as irresponsible and alcoholic. Obviously, stereotypes and prejudices are not cognizable by the law, but their effects, in the form of jobs and promotions denied, are. And there is sufficient reason to believe that anti-Catholic and anti-ethnic attitudes are depriving some Americans of the advancement they deserve.

The Civil Rights Act guarantees citizens protection against discrimination because of religion or national origin, and the presence of these categories in the legislation means that regulatory agencies, including this Commission, have an obligation to attempt to eliminate such discrimination. Yet so far the responsible agencies have not even studied the matter, much less taken any concrete action on it, so no one can even say with certainty how widespread religious discrimination is.

So far I have focused my discussion on the statistical underrepresentation of Catholics in certain positions. This is discrimination based on "who we are," simply as members of the Catholic Church or of a predominantly Catholic ethnic group or as graduates of Catholic schools. But there is another type of discrimination, operating in individual instances, based on "what we believe."

A Catholic employee of the Internal Revenue Service has brought a discrimination suit against the IRS because he has been repeatedly passed over for promotion for his alleged "lack of objectivity." This man's job is to decide whether or not

to grant tax-exempt status to organizations applying for that privilege, and in this capacity, he is required to exercise his discretion in applying the tax laws as written. His alleged "lack of objectivity" arises from the fact that he has recommended against granting tax-exempt status to abortion clinics and certain organizations promoting liberalized abortion laws and rights for homosexuals. According to his superiors, it is "objective" to rule in favor of these oeganizations, but "unobjective" to find against them. Precisely because this man is known, as a Catholic, to have religiously-based convictions regarding the particular issues those organizations were concerned with, he has been deemed incapable of exercising a fair and reasonable judgment. This man has been held back, not for holding opinions, but for holding the wrong opinions.

In California, a religious brother who holds a doctoral degree in psychology has taken a state examination three times seeking certification as a high school guidance counselor. All three times, he has been asked what he would do if a student came to him with a problem pregnancy, and all three times he has replied that he would call in her parents for consultation. All three times his examiner has given him a failing grade for an alleged lack of familiarity with the law on this point. But the law is, at best, unclear on this point and still in the process of being formulated. Regardless of the examiner's personal preferences for what the law ought to say, the answer that this candidate gave was at variance with neither sound legal or psychological practice. The examiner has taken a matter of opinion and elevated it to the position of a standard of measurement which he uses to exclude from his profession those who disagree with him.

In New York State a nurse, a member of the Christian Reformed Church, has refused to participate in abortions, as is her right under the law. The hospital administration has transferred her out of the maternity ward. This discriminatory form of retaliation is so common in some places that it is regarded as a standard

operating procedure.

The University of California at San Diego has operated a residency program in obstetrics and gynecology in such a manner as to deny positions to applicants who were unwilling to perform abortions, in favor of less-qualified applicants who would perform abortions.

Last year the Superintendent of Schools in Miami let it be known that if any public school employees sent their children to non-public schools, their jobs would be in jeopardy.

It is obviously unjust to require a person to give up his or her rights of conscience or any other constitutionally protected rights as a condition for attaining or keeping a job or receiving a promotion. Yet this is a position in which many Catholics and others find themselves in today. In addition to addressing statistical imbalances and other broad problems of discrimination, I urge the responsible government agencies to give the highest priority to protecting the religious freedom rights of employees who find their livelihoods unnecessarily and arbitrarily threatened simply because they choose not to abandon their religious or moral values.

My organization and many others concerned with religious freedom have been disappointed in the past with the lack of interest on the part of this Commission and other government agencies in overcoming religious discrimination. There has been a tendency in the past not to take this issue seriously. I was very much heartened last year when Eleanor Holmes Norton of the Equal Employment Opportunity Commission took such resolute action on the matter of religious accomodation in employment. I am even more heartened that this Commission has taken an interest in the matter of religious discrimination.

It has been my purpose today to persuade you that religious discrimination in employment is a serious issue that warrants attention. I make no pretense that it is the most serious or most widespread form of discrimination. Catholics,

at least, are not on the unemployment lines in disproportionate numbers. But some people are being denied jobs or promotions because of their religious beliefs, and if that happens to just one person, it is to the shame of our nation's tradition of tolerance and freedom of conscience.

I am convinced that this problem can be substantially alleviated if only the responsible agencies will let employers know that they expect the law to be followed in this regard. So far, I know of no case in which a government agency, including this Commission, has even inquired into possible discrimination on the basis of religion, much less initiated any positive action to eliminate such discrimination. Because of this, employers have had no incentive to examine, and where necessary to correct, their hiring and promotion policies. I suspect that a good portion of the religious imbalance in some areas of employment may be inadvertent, and can be corrected merely by a serious showing of governmental interest in the subject.

It is my hope that this consultation will be the beginning of such a serious showing of interest. But if this is a matter that will merely be talked about and not acted upon, then today's proceedings will have been nothing more than window dressing, an opportunity for the witnesses to vent their frustrations and for the Commission to allay some of its critics. And if that is permitted to happen, it would be even more disappointing than the previous policy of neglect.

RELIGIOUS FREEDOM IN INSTITUTIONS

ACA CONGRESS OF CORRECTIONS
August 23, 1976

Clair A. Cripe
General Counsel
Federal Bureau of Prisons

Religious Freedom in Prison

By Clair A. Cripe

Black Muslims - A Foot in the Door

It is a matter of some interest to correctional administrators and to lawyers that the "correctional law revolution" can be traced to religious cases -- specifically, to cases brought by Black Muslim prisoners in the early 1960's.

By the correctional law revolution, we mean of course the evolving concern of the courts (and to a lesser degree, I suppose, of the legislatures and of the practicing bar) in correctional matters. Application of Constitutional guarantees to those behind prison walls was the first step. This mushroomed, into broader reviews of all prison programs and activities, of the effectiveness of confinement in the criminal justice scheme of things, and of prison as a component of sentencing.

Not all would agree, but I think there is considerable validity to the proposition that Black Muslim litigation was the fuse to this legal explosion. There are prisoners rights cases on the books before 1961 -- but they are sporadic, and lead to no consistent, nationwide body of case law in any area of correctional concern.

With the Black Muslims making demands for recognition and for religious activities in prisons, prison administrators, and then courts, from one end of the country to the other, had to face the practical and the First Amendment issues. In New York, in the District of Columbia, in California[1], within a year's time, trials and decisions started dealing with the Black Muslim claims. Some states decided to litigate the issue of whether the Nation of Islam was a religion at all -- hoping of course to show that it was not, thereby depriving it of First Amendment protections completely. One court tackled the tough question of what a religion is[2], and concluded that the Muslim faith is a religion. District of Columbia corrections officials conceded in court that the Nation of Islam was a religion, and was entitled to many of the activities its followers had been asking for.[3] It is my personal recollection that that concession, however, did not result in an end to the legal challenges -- to the contrary, hundreds

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1/ Pierce v. LaVallee, 212 F. Supp. 865, 293 F. 2d 233 (N.Y. - 1962, 1963); Fulwood v. Clemmer, 206 F. Supp. 370 (D.C. - 1962); Ex parte Ferguson, 361 P. 2d 417 (Cal. - 1961).

2/ Fulwood v. Clemmer, supra, at p. 373: "... a belief in the existence of a supreme being controlling the destiny of man."

3/ Sewell v. Pegelow, 304 F. 2d 670 (1962).

of complaints and demands were filed by Muslims out of that corrections system alone. With that, the flood was loosed. Every correctional administrator and every court administrator knows -- and could give us his own (usually pained) version of what has happened in the way of prisoner suits from 1963 to today.

The purpose of this paper is not to trace the complete history of the Black Muslim litigation or the historical development of religious correctional law. Having described how the Black Muslim prisoners got their foot in the judicial door, and then flung it wide open if you will, I think it may be of most benefit to survey recent decisions in various religious areas -- to describe the furnishing of this First Amendment room where we now find ourselves.

The First Amendment -- The Double-Edged Sword

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

In practice, this grand precept (contained in what is sometimes called a preferred amendment to the Constitution) would seem at first blush to call for the most complete individual religious liberty. Upon closer

look, however, and as the tougher factual cases surface, a tension between the two phrases emerges.

In prison, the tension between the establishment clause and the free exercise clause is tighter and perhaps more sharply outlined.

Recent Cases - Establishment of Religion

The most common issue surfacing here is the use of government money to build chapels and pay for chaplaincy programs.

There has been considerable attention given in the last few months to a ruling by a state judge in Iowa[4/] concerning religious activities at the state penitentiary. Taxpayers brought suit to prohibit the use of state monies for paying for chaplains' salaries and for maintenance of prison chapels. The court found this was not a violation of the establishment clause of the U. S. Constitution. However, the Iowa State Constitution contains the language:

> "nor shall any person be compelled to ... pay tithes, taxes, or other rates for building or repairing places

4/ Rudd v. Ray, Civil No. 16843, 8th Jud. Dist. of Iowa, January 8, 1976.

> of worship, or the maintenance of any minister, or ministry."

The court found that prison chaplains are such ministers, and that the state would have to be enjoined from using tax revenues for paying chaplains and for maintenance of places of worship at the penitentiary.[5/]

The U. S. Supreme Court had before it allegations of improper establishment by the State of Texas of Catholic, Jewish, and Protestant programs in its prisons, but failed to deal squarely with this issue.[6/] Justice Rehnquist, in a dissenting discussion in that case, would find no establishment problems in the state providing religious facilities in prisons for different denominations.

There is language in another Supreme Court opinion, not dealing directly with prisons, which I think provides sound guidance for prison administrators, in the First Amendment area:

> "The state must be steadfastly neutral in all matters of faith,

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5/ The court did note that the State of Washington, in its constitution, while having similar prohibitive language about use of tax money for religious activities, specifically exempted and allowed for state chaplaincy services in its correctional and mental institutions.

6/ Cruz v. Beto, 405 U.S. 319 (1972).

> and neither favor nor inhibi-
> religion ... (H)ostility, not
> neutrality, would characterize
> the refusal to provide chaplains
> and places of worship for prisoners
> and soldiers cut off by the state
> from all civilian opportunities for
> public communion."[7/]

This language obviously does not answer all problems which may come up. On the tough issues, it becomes more evident how the two parts of the First Amendment come into taut tension.

In Pennsylvania, the U. S. Court of Appeals found that (under the establishment clause) two priests had no right to come into the penitentiary to visit inmates or conduct services (which the prison administration had terminated as being revolutionary and inciting the inmates).[8/] The court found that, on the free exercise clause, the inmates would have the right (like other sects) to have visits and services, unless the state has sound justification for denial.

Two cases involving the Church of the New Song (the cases primarily known and cited for free exercise

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7/ Abington School District v. Schempp, 374 U.S. 203, 296.

8/ O'Malley v. Brierley, 477 F. 2d 785 (C.A. 3, 1973).

decisions) dealt with attacks on the submission of reports by prison staff commenting on religious activities. One court held that there was not sufficient showing that any particular religion was being favored in the parole process which included oral or written reports by chaplains.[9/] As an aside, the court did note that this was a very sensitive area. Another court, dealing with an attack upon use of taxpayers' money for support of a chaplaincy program, ruled that the payment of chaplains by the Federal Bureau of Prisons was not unconstitutional.[10/] Reports by chaplains on inmates' religious activities, which are then culled into more general reports which are considered in the parole process, were held to be unconstitutional. The court enjoined the submission of any such chaplains' reports. The court found that, in allowing such reports, the government was abandoning the neutrality required by the Constitution; that it was in effect promoting or even compelling participation in religious activities.

I submit that this last analysis in itself does violence to the neutrality doctrine. In forbidding religous reports, the state is discriminating against those who choose to be actively engaged in such programs. Where is the neutrality in allowing prison staff to comment on

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9/ Remmers v. Brewer, 494 F. 2d 1277 (C.A. 8, 1974).

10/ Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga., 1972).

the inmate's involvement in work, in baseball, football, handball, in drug counselling, chess club, and debating -- but when it comes to his singing in the chapel choir, engaging in religious study courses, or attending religious services, the state must completely avoid any hint of his involvement in its written records? I further submit that such a position in fact undercuts sound correctional management: it allows reports to be written for parole consideration, or for any other correctional decision-making (such as classification, institution programming, release planning) with comment on the inmate's history and current activities -- but with a void as to what he has done in the religious area. Again, this is discriminatory against the person who chooses to engage in religious activities, and it deprives the decision-maker of information he needs to know as fully as possible about the individual inmate. In my view, this court, ostensibly trying to protect neutrality, has abandoned it to the detriment of those who pursue religious activities.

There does seem to be at least Supreme Court dictum that compulsory attendance at chapel services would be an unconstitutional establishment action by the government.[11/] Despite this, one court held that Indiana could

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11/ See Abington, above, for example. Also, see Anderson v. Laird, 466 F. 2d 283 (C.A. D.C., 1972), cert. denied 409 U.S. 1076; military academies may not continue compulsory chapel.

require attendance of juveniles at non-denominational religious services.[12] This ruling is suspect.

Recent Cases - Free Exercise

The language of the First Amendment sounds absolute:

> "Congress shall make no law ... prohibiting the free exercise (of religion)."

A preferred Constitutional liberty it is; an absolute individual freedom it is not.

From a long line of cases, the premise is that the individual in our society has an absolute guarantee of freedom of religious belief. Actions, taken upon those beliefs, do not have absolute protection, but may be regulated to the extent necessary to protect the health, welfare, and good order of society.[13]

That same standard has been applied in prison religious cases, particularly in the Black Muslim cases referred to earlier. Prison officials cannot take actions solely on the basis of an inmate's religious beliefs.[14]

12/ Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind., 1972).

13/ For example, Cantwell v. Connecticut, 310 U.S. 296 (1940).

14/ For example, Pierce v. LaVallee, 293 F. 2d 233 (C.A. 2, 1961); Banks v. Havener, 234 F. Supp. 27 (E.D. Va., 1964).

Restrictions may be placed on religious activities, to the extent the restrictions can be shown to be necessary in order to protect the security, health, or orderly running of the institution. In the Black Muslim area, for example, the organization's newspaper and publications may be excluded by prison authorities if they are shown to be inflammatory, posing a threat to the internal order and security of the institution.[15] But, a court will not hesitate to look at issues of the paper; finding them non-hazardous, it will order them to be allowed in.[16] Black Muslim requests for special diet and for special meals after sunset during the month of Ramadan were answered by denials. These denials were affirmed by the courts so long as the authorities could show that the inmates were receiving adequate sustenance in selecting non-pork items on the menu (the pork items being specially marked so they could be avoided)[17] and the special hours of feeding being shown to present serious security and administrative problems.[18]

15/ Sewell v. Pegelow, 304 F. 2d 670 (C.A. 4, 1962); Abernathy v. Cunningham, 393 F. 2d 775 (C.A. 4, 1968).

16/ Walker v. Blackwell, 411 F. 2d 23 (C.A. 5, 1969).

17/ Barnett v. Rogers, 410 F. 2d 995 (C.A. D.C., 1969); Abernathy v. Cunningham, note 15 above.

18/ Walker, note 16 above.

The Supreme Court, in a case where a Buddhist inmate claimed he was discriminated against because of his religious beliefs, said that if that inmate was prevented from pursuing his faith in ways comparable to those afforded followers of other religions, there was obvious religious discrimination and a First Amendment violation.[19] The court chose the phrase, "reasonable opportunities," in defining what must be given to each religious group. It did note that not exactly the same chapel or place of meeting, or chaplain service need be provided, suggesting that this may well vary depending on the size of the inmate group.

Three areas of dispute have been of significant concern in recent years: the Church of the New Song, the Metropolitan Community Church, and Kosher diet for Jewish inmates.

The Church of the New Song (CONS) was organized and its teachings were written primarily by a federal inmate. Its adherents were other prisoners. Despite the founder's admission that it was started as a game, the District Court found the tenets of CONS sufficient to qualify it for First Amendment protection.[20] Once the

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19/ Cruz v. Beto, note 6 above.

20/ Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga., 1972).

Court found religious status, it concluded (largely on the Black Muslim precedents) that the inmates in the group are entitled to free exercise of their religion, and the state must show a compelling public interest in order to subjugate those free exercise rights. The Court of Appeals reversed, finding the teachings of this organization and the history of its founder sufficiently suspect to raise a question as to its integrity.[21/] It remanded the case, with directions to inquire into the validity of the religion and whether the beliefs of its followers were sincerely held, recognizing that the testing of the bona fides of a religion and its followers by a court is extremely difficult. Upon remand, a different court found that the CONS was not a religion, with First Amendment protections.[22/]

The Metropolitan Community Church is I think inevitably referred to as the homosexual or "gay" church, although its ministers point out that its services and

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21/ Theriault v. Carlson, 495 F. 2d 390 (C.A. 5, 1974).

22/ Theriault v. Silber, 391 F. Supp. 578 (W.D. Tex., 1975). Inmates in Iowa obtained recognition by federal courts that they were entitled to First Amendment protection as a religious group. Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa, 1973); affirmed 494 F. 2d 1277 (C.A. 8, 1974).

programs are open to all. Inmates in California requested the ministry and congregated services of the MCC. The state authorities banned all activities of the group. The state defended its actions, contending that the MCC is not a bona fide religion and that the ban on the MCC's congregated services and group activities was justified by concern for the security of the institutions and welfare and safety of the inmates. A 3-judge court rejected the first contention. It found that the MCC has the "cardinal characteristics" of a religion, "in that it teaches and preaches a belief in a Supreme Being, a religious discipline and tenets to guide one's daily existence."[23/] As such, the inmates are given the standing to contest the state's total ban on their group activities. To retain the ban, the court held that a compelling state interest in orderly prison administration would have to be shown, to the extent that, were it not for the ban, a clear and present danger of breach of prison security or inmate safety would be present. Following this decision, California prison authorities allowed MCC representatives to enter the institutions and conduct services and other ministry to inmates.[24/]

23/ Lipp v. Procunier, 395 F. Supp. 871 (N.D. Cal., 1975).

24/ Information supplied by California authorities, who agreed to a consent order in the Lipp case to resolve the complaint.

Relying on court rulings that special religious diets or meals need not be prepared for Black Muslims in prisons so long as the inmates could adequately sustain themselves with what was regularly cooked and served, federal officials declined to make special Kosher foods available to Jewish inmates. District courts in New York disagreed as to whether the Federal Bureau of Prisons was obliged to make special Kosher provisions.[25/] The question was resolved on appeal by a holding that the laws of Kashruth are of "deep religious significance" to a practicing Jew. Prison authorities, the Second Circuit held, must allow the Jewish inmate to observe dietary obligations, and must provide foods "sufficient to sustain the prisoner in good health without violating the Jewish dietary law."[26/] This does not mean, as the Court of Appeals and later District Courts interpreting the ruling made clear, that inmates must be provided specific kinds of Kosher food which are preferable to them.

Many other interesting issues have been raised in prison free exercise cases. For example, a holding

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25/ U. S. v. Kahane, 396 F. Supp. 687 (E.D. N.Y., 1975 -- special Kosher provision must be made); U. S. v. Huss, 394 F. Supp. 752 (S.D. N.Y., 1975) and U. S. v. Shlian, 396 F. Supp. 1204 (E.D. N.Y., 1975) (no special provision needed).

26/ Kahane v. Carlson, 527 F. 2d 492 (C.A. 2, 1975).

that a satanic religion need not be given special publicity opportunities in the prison (with an assumption that other groups were treated the same).[27] The ruling that persons in segregation do not have a right to attend religious services with the regular population, especially when the inmate has a violent or disruptive background.[28] Approval of prison requirements to cut hair, despite inmate claims that this violated their religious beliefs or vows.[29] A state, however, which argued that an inmate's long hair was worn as individual preference and not as related to his spiritual beliefs lost when the court found that the hair length (for an American Indian) is indeed related to his religious beliefs and therefore must be protected.[30]

27/ Kennedy v. Meacham, 382 F. Supp. 996 (D. Wyo., 1974).

28/ For example, LaReau v. MacDougall, 473 F. 2d 974 (C.A 2, 1972); Pinkston v. Bensinger, 359 F. Supp. 95 (N.D. Ill., 1973); Konigsberg v. Ciccone, 285 F. Supp. 585 (S.D. Mo. 1968).

29/ Proffitt v. Ciccone, 506 F. 2d 1020 (C.A. 8, 1974); Theriault v. Carlson, N.D. Ga., note 20 above.

30/ Teterud v. Gilliam, 385 F. Supp. 153 (S.D. Iowa, 1974). A Bureau of Prisons policy which permitted beards only to those inmates who had them for religious reasons at time of commitment to prison was held to be an impermissible, unconstitutional discrimination against those inmates who acquired sincere religious beliefs proscribing shaving after commitment. Maguire v. Wilkinson, 405 F. Supp. 637 (D. Conn., 1975).

Conjugal visitation has been denied, despite a claim of free religious exercise protection.[31] Requests for a special Mormon home evening program were denied, with need for security and uniform visiting rules as the justification.[32]

As stated earlier, this paper does not attempt to be a full survey of prison religious law. It is hoped that this discussion has put into some focus the considerable, and ongoing, contentions over the interpretations of the two aspects of the First Amendment -- the establishment clause and the free exercise clause.

To predict in the correctional law area is foolhardy: speculation is the wiser term, for where the law may yet go. In one respect, I think prediction is warranted. A quick glance through the cases discussed above and their citations makes it obvious that the issues are tough constitutional ones, but they have largely been dealt with in the lower courts. It is quite certain, and I think predictable, that the Supreme Court must, in the next few years, grapple with some of these questions and give us clearer guidance in a most sensitive and important area of correctional administration.

31/ Polakoff v. Henderson, 370 F. Supp. 690 (N.D. Ga., 1973).

32/ Fallis v. U. S., 476 F. 2d 619 (C.A. 5, 1973).

The Perspective of the World Community of Al-Islam in the West

By Imam Khalil Abdel

The World Community of Al-Islam in the West began almost 50 years ago in Detroit, Michigan in 1930. It was founded by a foreign Muslim who went under many names, but known mostly today as Fard Muhammad.

He taught African-Americans something of the history of their African foreparents and the religion of Al-Islam in an unorthodox mythical symbolic manner.

One of his strongest and most faithful converts was an African-American named Elijah Poole who was later given the Arabic-Muslim name of Muhammad. He became Elijah Muhammad and assumed leadership of the organization in 1934 when Fard Muhammad left. Under his leadership the new movement stressed physical discipline, moral discipline, physical cleanliness, and moral cleanliness. Smoking, drinking alcohol, using drugs, adultery, fornication, eating of pork, lying, stealing and other such vices were strictly forbidden. Investigators were assigned by the mosque to monitor the behavior of the converts. Any persons who were found to be living in violation of the strict code (law) were punished by banishment from the circle of Islam. He or she would not be allowed to attend the mosque, nor would they be allowed to participate in any mosque activities. While his family was left in the care of some of the faithful members of the group, Mr. Muhammad kept on the move until World War II erupted in 1941. Then he and several of his followers were arrested for failure to register for the draft and imprisoned until the war ended in 1946. The Honorable Elijah Muhammad himself pioneered Al-Islam in American prisons. With the release of the followers from prison, Elijah Muhammad embarked on new programs with a strong emphasis on establishing businesses and economic development. The hard working converts, who were usually poor and uneducated, pooled their money and began to open small businesses under the complete supervision and management of the leader. Under his leadership the Nation of Islam established a commendable record in the prisons of the United States with many wardens and prison officials inviting Muslim ministers into their institutions to teach the teachings of Elijah Muhammad.

I, myself, was asked by the warden of Angola Penitentiary in Louisiana, in 1971, to come and conduct religious services and counseling for the growing Muslim population. His statement to me was, "I wish you could convert all these boys," referring to the hundreds of African-American inmates in that institution.

I believe that incident demonstrates the rehabilitative effect many prison officials preceived the Nation of Islam had on prisoners inside the prisons.

Even when the teaching of the Nation of Islam was racist and nationalistic, many institutions allowed Muslim religious services and accommodations for their diet and observation of Ramadan, the annual month of sunrise to sunset fasting.

In February of 1975, the Honorable Elijah Muhammad passed. The family of Elijah Muhammad and the official staff of the Nation of Islam unanimously agreed that W. D. Muhammad (son of Elijah Muhammad) should be the leader of the movement, and he was presented to the 20,000 jubilant followers at the annual convention the next day after the death of his father. Immediately W. D. Muhammad began a series of planned and continuous steps to move the membership of the Nation of Islam on the straight path of Islam.

With the unyielding support of the followers in the 150 mosques and the national staff, W. D. Muhammad began to strip away the "Bait" (nationalistic or race appealing teachings to attract black people) that had been used by Mr. Fard Muhammad and Elijah Muhammad. The "temples of Islam" across the country were changed to be properly identified as "mosques." They had formerly been called "mosques" in the early days of the movement.

Racial restrictions on membership in the organization were removed and persons of all races and nationalities were accepted. West Indians, South Americans and Caucasians joined on to the membership, with a Caucasian Ph.D. being appointed to a high position on the educational administrative staff. In the place of the strict dictatorial policies of the former leader, the ruling power was given by W. D. Muhammad to a Council of Imams, which has representatives from all the members of the Islamic community. The authority over the Council of Imams is the Holy Qur'an, the Sunnah, and the Representative for the Community and Director of Propagation, Imam W. D. Muhammad.

The business enterprises and activities of the Nation of Islam were separated from the mosque (Islamic propagation) activities and turned over to private ownership rather than organizational ownership. The name "Nation of Islam" was officially dropped by Imam W. D. Muhammad and the staff and replaced with the more proper name "World Community of Al-Islam In the West." This name rightly identifies the function and the relationship of the community with the rest of the world of Muslim communities.

Members of the World Community of Islam are now actively engaged in studies of Arabic, Holy Qur'an, Holy Qur'an English translation by Yusuf Ali, Hadith and Sunnah Muhammad (may the peace and blessings of Allah be upon him). The response to Jumah Prayers, which have been established for four years, has been exceptional. Approximately 5,000 Muslims leave their homes and places of employment to attend the 50 mosques each week where Jumah Prayers have been established. Total attendance at the Wednesday and Sunday mosque lectures average 225,000 persons per month in 1975.

The World Community of Al-Islam now meets in unity with other Muslim groups and organizations for Jumah Prayer, Ramadan observances, Eid Prayers, Hijra year celebration, and other Muslim holidays.

The strict, military discipline and social separation enforced by the former leader has now been eliminated; consequently, members of the World Community of Al-Islam in the West are now becoming actively engaged in sharing the community's success in social and human programs with the rest of the society. As an example, the mayor of Atlanta, Georgia, attended a Muslim meeting where he voiced his support of the programs of Imam W. D. Muhammad and requested the Muslims assist him in the running of his city government. The mayor of New York City has assigned a city commissioner the specific job of acting as liaison between the Muslim community and the city government. The mayor of Los Angeles, California, attended a Muslim meeting where he also voiced public support for the programs of Imam W. D. Muhammad.

Leaders in all segments of the community are now identifying with the mission of the Bilalian people of the World Community of Al-Islam. Prison administrators have invited the Imam to speak at institutions where they have arranged for his lecture to be heard over specially designed telephone communication lines to all the other penal institutions in their state. The Muslim communities established in prisons are engaged in all kinds of productive educational, social, and business rehabilitative programs which are the pride of the prison system. Imam Muhammad met February 28, 1979, with California prison officials at California Mens Colony East - San Luis Obispo, California, in a video taped interview that we want to have distributed throughout the country. He expressed the position of the World Community of Al-Islam in the West on observance of Al-Islam in prison.

I know that the normal testimony before this body is one of complaints of denial of rights. But as a member of the World Community of Al-Islam in the West and a Muslim who works in prisons, has eaten in prisons; the same food my brother Muslims eat; worshipped with them, counseled them, prayed with them, conducted Jumah Prayer with them, partaken of meals to commemorate the end of fasting with them; I can not, with a clear conscious, and clear presentation of the objective reality, tell you our rights to religious freedom are being denied in

American prisons today as Muslims. Especially, the federal prisons have sought to accommodate all reasonable demands of legitimate Islamic religious requirements.

I am in frequent correspondence and communication with my brother and colleague, Father Houlahan, who conscientiously seeks to resolve any problems arising out of Muslims' attempts to exercise their freedom of worship in federal prisons. There are now in several prisons and institutions, full-time, paid Muslim Chaplains and many contract Chaplains. I know of no institution that denie Muslims access to outside Imams and teachers. Our problem today is supplying the demand for teachers.

To my knowledge, the dietary requirement of the faith is being amply fulfilled in most institutions.

The problem is teaching new converts the reality of the faith and its authentic requirements.

As Imam Muhammad said in a statement after an August 1978 meeting with Father Houlahan and General Counsel Clair A. Crepe, "A lot of questions are raised and sometimes a convert, a misinformed convert, defends a position almost to the death and when he learns that what really he was defending was a fabrication or an innovation from an unreliable or misinformed source then he's really dealt a terrible blow.

I've known Muslims to take a position that they feel is very serious--'I have to hold this position' and they hold it and they suffer. They go to the hole, they are punished and penalized, and they suffer a lot for the position they took."

We are thankful for the growing progressive moral trend developing in America; reflected also in prisons. While realizing the millennium has not arrived, we must all remain vigilant against the negative forces that seek to divide us and we must all fight to keep our great country great and strong; with the help of God we shall all overcome.

Prison ministry is one of our great priorities. I conclude with these words from our leader, Imam Wallace Deen Muhammad, "Because once we get out into the free world, many of us have such a heavy responsibility on us to just provide the material means of livelihood for ourselves and our dependents that we hardly have any time for the revitalization of the human form, the moral makeup, the spiritual makeup of the person.

We feel that if Muslims can become better Muslims during the time they are in prison then perhaps by the time they return to society, there will be less likelihood that they will fall back into the same company and end up in jail again."

Appendix A

Act No. 453
Public Acts of 1976
Approved by Governor
January 13, 1977
As Amended by
Act 162, Public Acts of 1977,
and Act 153, Public Acts of 1978

ELLIOTT - LARSEN CIVIL RIGHTS ACT

AN ACT to define civil rights; to prohibit discriminatory practices, policies, and customs in the exercise of those rights based upon religion, race, color, national origin, age, sex, height, weight, or marital status; to preserve the confidentiality of records regarding arrest, detention, or other disposition in which a conviction does not result; to prescribe the powers and duties of the civil rights commission and the department of civil rights; to provide remedies and penalties; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

ARTICLE 1

Sec. 101. This act shall be known and may be cited as the "Elliott-Larsen Civil Rights Act."

Sec. 102. The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, or marital status as prohibited by this act is hereby recognized and declared to be a civil right.

Sec. 103. As used in this act:

(a) "Age" means chronological age except as otherwise provided by law.

(b) "Commission" means the civil rights commission established by section 29 of article 5 of the state constitution of 1963.

(c) "Commissioner" means a member of the commission.

(d) "Department" means the department of civil rights or its employees.

(e) "National origin" includes the national origin of an ancestor.

(f) "Person" means an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency thereof, or any other legal or commercial entity.

(g) "Political subdivision" means a county, city, village, township, school district, or special district or authority of the state.

ARTICLE 2

Sec. 201. As used in this article:

(a) "Employer" means a person who has 4 or more employees, and includes an agent of that person.

(b) "Employment agency" means a person regularly undertaking with or without compensation to procure, refer, recruit, or place an employee for an employer or to procure, refer, recruit, or place for an employer or person the opportunity to work for an employer and includes an agent of that person.

(c) "Labor organization" includes:

(i) An organization of any kind, an agency or employee representation committee, group, association, or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

(ii) A conference, general committee, joint or system board, or joint council which is subordinate to a national or international labor organization.

(iii) An agent of a labor organization.

(d) "Sex" includes, but is not limited to, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth that does not include nontherapeutic abortion not intended to save the life of the mother.

Sec. 202. (1) An employer shall not:

(a) Fail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including a benefit plan or system.

(2) This section shall not be construed to prohibit the establishment or implementation of a bona fide retirement policy or system which is not a subterfuge to evade the purposes of this section.

(3) This section shall not apply to the employment of an individual by his or her parent, spouse, or child.

Sec. 203. An employment agency shall not fail or refuse to procure, refer, recruit, or place for employment, or otherwise discriminate against, an individual because of religion, race, color, national origin, age, sex, height, weight, or marital status; or classify or refer for employment an individual on the basis of religion, race, color, national origin, age, sex, height, weight, or marital status.

Sec. 204. A labor organization shall not:

(a) Exclude or expel from membership, or otherwise discriminate against, a member or applicant for membership because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify membership or applicants for membership, or classify or fail or refuse to refer for employment an individual in a way which would deprive or tend to deprive that individual of an employment opportunity, or which would limit an employment opportunity, or which would adversely affect wages, hours, or employment conditions, or otherwise adversely affect the status of an employee or an applicant for employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(c) Cause or attempt to cause an employer to violate this article.

(d) Fail to fairly and adequately represent a member in a grievance process because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Sec. 205. An employer, labor organization, or joint labor-management committee controlling an apprenticeship, on the job, or other training or retraining program, shall not discriminate against an individual because of religion, race, color, national origin, age, sex, height, weight, or marital status, in admission to, or employment or continuation in, a program established to provide apprenticeship on the job, or other training or retraining.

Sec. 205a. An employer, employment agency, or labor organization, other than a law enforcement agency of the state or a political subdivision of the state shall not in connection with an application for

employment, personnel, or membership, or in connection with the terms, conditions, or privileges of employment, personnel, or membership request, make, or maintain a record of information regarding an arrest, detention, or disposition of a violation of law in which a conviction did not result. A person shall not be held guilty of perjury or otherwise giving a false statement by failing to recite or acknowledge information the person has a civil right to withhold by this section. This section shall not apply to information relative to a felony charge prior to conviction or dismissal.

Sec. 206. (1) An employer, labor organization, or employment agency shall not print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign relating to employment by the employer, or relating to membership in or a classification or referral for employment by the labor organization, or relating to a classification or referral for employment by the employment agency, which indicates a preference, limitation, specification, or discrimination, based on religion, race, color, national origin, age, sex, height, weight, or marital status.

(2) Except as permitted by rules promulgated by the commission or by applicable federal law, an employer or employment agency shall not:

(a) Make or use a written or oral inquiry or form of application that elicits or attempts to elicit information concerning the religion, race, color, national origin, age, sex, height, weight, or marital status of a prospective employee.

(b) Make or keep a record of information described in subdivision (a) or to disclose that information.

(c) Make or use a written or oral inquiry or form of application that expresses a preference, limitation, specification, or discrimination based on religion, race, color, national origin, age, sex, height, weight, or marital status of a prospective employee.

Sec. 207. An individual seeking employment shall not publish or cause to be published a notice or advertisement that specifies or indicates the individual's religion, race, color, national origin, age, sex, height, weight, or marital status, or expresses a preference, specification, limitation, or discrimination as to the religion, race, color, national origin, age, height, weight, sex, or marital status of a prospective employer.

Sec. 208. A person subject to this article may apply to the commission for an exemption on the basis that religion, national origin, age, height, weight, or sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise. Upon sufficient showing, the commission may grant an exemption to the appropriate section of this article. An employer may have a bona fide occupational qualification on the basis of religion, national origin, sex, age, or marital status, height and weight without obtaining prior exemption from the commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business.

Sec. 209. A contract to which the state, a political subdivision, or an agency thereof is a party shall contain a covenant by the contractor and his subcontractors not to discriminate against an employee or applicant for employment with respect to hire, tenure, terms, conditions, or privileges of employment, or a matter directly or indirectly related to employment, because of race, color, religion, national origin, age, sex, height, weight, or marital status. Breach of this covenant may be regarded as a material breach of the contract.

Sec. 210. A person subject to this article may adopt and carry out a plan to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin, or sex if the plan is filed with the commission under rules of the commission and the commission approves the plan.

Sec. 211. Notwithstanding any other provision of this article, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system.

ARTICLE 3

Sec. 301. As used in this article:

(a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

(b) "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof, or a tax exempt private agency established to provide service to the public.

Sec. 302. Except where permitted by law, a person shall not:

(a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

(b) Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service will be refused, withheld from, or denied an individual because of religion, race, color, national origin, age, sex, or marital status, or that an individual's patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable, or undesirable because of religion, race, color, national origin, age, sex, or marital status.

Sec. 303. This article shall not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the private club or establishment are made available to the customers or patrons of another establishment that is a place of public accommodation or is licensed by the state under Act No. 8 of the Public Acts of 1933, being sections 436.1 through 436.58 of the Michigan Compiled Laws.

ARTICLE 4

Sec. 401. As used in this article, "educational institution" means a public or private institution, or a separate school or department thereof, and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, local school system, university, or a business, nursing, professional, secretarial, technical, or vocational school; and includes an agent of an educational institution.

Sec. 402. An educational institution shall not:

(a) Discriminate against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, or sex.

(b) Exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, or privileges of the institution, because of religion, race, color, national origin, or sex.

(c) For purposes of admission only, make or use a written or oral inquiry or form of application that elicits or attempts to elicit information concerning the religion, race, color, national origin, age, sex, or marital status of a person, except as permitted by rule of the commission or as required by federal law, rule, or regulation, or pursuant to an affirmative action program.

(d) Print or publish or cause to be printed or published a catalog, notice, or advertisement indicating a preference, limitation, specification, or discrimination based on the religion, race, color, national origin, or sex of an applicant for admission to the educational institution.

(e) Announce or follow a policy of denial or limitation through a quota or otherwise of educational opportunities of a group or its members because of religion, race, color, national origin, or sex.

Sec. 403. The provisions of section 402 related to religion shall not apply to a religious educational institution or an educational institution operated, supervised, or controlled by a religious institution or organization which limits admission or gives preference to an applicant of the same religion.

Sec. 404. The provisions of section 402 relating to sex shall not apply to a private educational institution not exempt under section 403, which now or hereafter provides an education to persons of 1 sex.

ARTICLE 5

Sec. 501. As used in this article:

(a) "Real property" includes a building, structure, mobile home, real estate, land, mobile home park, trailer park, tenement, leasehold, or an interest in a real estate cooperative or condominium.

(b) "Real estate transaction" means the sale, exchange, rental, or lease of real property, or an interest therein.

(c) "Housing accommodation" includes improved or unimproved real property, or a part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of 1 or more persons.

(d) "Real estate broker or salesman" means a person, whether licensed or not, who, for or with the expectation of receiving a consideration, lists, sells, purchases, exchanges, rents, or leases real property; who negotiates or attempts to negotiate any of those activities; who holds himself out as engaged in those activities; who negotiates or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon real property; who is engaged in the business of listing real property in a publication; or a person employed by or acting on behalf of a real estate broker or salesman.

Sec. 502. (1) A person engaging in a real estate transaction, or a real estate broker or salesman, shall not on the basis of religion, race, color, national origin, age, sex, or marital status of a person or a person residing with that person:

(a) Refuse to engage in a real estate transaction with a person.

(b) Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith.

(c) Refuse to receive from a person or transmit to a person a bona fide offer to engage in a real estate transaction.

(d) Refuse to negotiate for a real estate transaction with a person.

(e) Represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or knowingly fail to bring a property listing to a person's attention, or refuse to permit a person to inspect real property.

(f) Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign, or use a form of application for a real estate transaction, or make a record of inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a preference, limitation, specification, or discrimination with respect thereto.

(g) Offer, solicit, accept, use, or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith.

(2) This section is subject to section 503.

Sec. 503. (1) Section 502 shall not apply: (a) to the rental of a housing accommodation in a building which contains housing accommodations for not more than 2 families living independently of each other if the owner or a member of the owner's immediate family resides in 1 of the housing accommodations, or to the rental of a room or rooms in a single family dwelling by a person if the lessor or a member of the lessor's immediate family resides therein.

(b) To the rental of a housing accommodation for not more than 12 months by the owner or lessor where it was occupied by him and maintained as his home for at least 3 months immediately preceding occupancy by the tenant and is temporarily vacated while maintaining legal residence.

(c) With respect to the age provision only, to the sale, rental, or lease of housing accommodations meeting the requirements of federal, state, or local housing programs for senior citizens, or accommodations otherwise intended, advertised, designed or operated, bona fide, for the purpose of providing housing accommodations for persons 50 years of age or older.

(2) As used in subsection (1), "immediate family" means a spouse, parent, child, or sibling.

(3) Information relative to the marital status of an individual may be obtained when necessary for the preparation of a deed or other instrument of conveyance.

Sec. 504. (1) A person to whom application is made for financial assistance or financing in connection with a real estate transaction or in connection with the construction, rehabilitation, repair, maintenance, or improvement of real property, or a representative of that person, shall not:

(a) Discriminate against the applicant because of the religion, race, color, national origin, age, sex, or marital status of the applicant or a person residing with the applicant.

(b) Use a form of application for financial assistance or financing or make or keep a record or inquiry in connection with an application for financial assistance or financing which indicates, directly or indirectly, a preference, limitation, specification, or discrimination as to the religion, race, color, national origin, age, sex, or marital status of the applicant or a person residing with the applicant.

(2) Subsection (1)(b) shall not apply to a form of application for financial assistance prescribed for the use of a lender regulated as a mortgagee under the national housing act, as amended, being 12 U.S.C. sections 1701 to 1750g (Supp. 1973) or by a regulatory board or officer acting under the statutory authority of this state or the United States.

Sec. 505. (1) A condition, restriction, or prohibition, including a right of entry or possibility of reverter, which directly or indirectly limits the use or occupancy of real property on the basis of religion, race, color, national origin, age, sex, or marital status is void, except a limitation of use on the basis of religion relating to real property held by a religious institution or organization. or by a religious or charitable organization operated, supervised, or controlled by a religious institution or organization, and used for religious or charitable purposes.

(2) A person shall not insert in a written instrument relating to real property a provision that is void under this section or honor such a provision in the chain of title.

Sec. 506. A person shall not represent, for the purpose of inducing a real estate transaction from which the person may benefit financially, that a change has occurred or will or may occur in the composition with respect to religion, race, color, national origin, age, sex, or marital status of the owners or occupants in the block, neighborhood, or area in which the real property is located, or represent that this change will or may result in the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools in the block, neighborhood, or area in which the real property is located.

Sec. 507. A person subject to this article may adopt and carry out a plan to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin, or sex if the plan is filed with the commission under rules of the commission and the commission approves the plan.

ARTICLE 6

Sec. 601. (1) The commission shall:

(a) Maintain a principal office in the city of Lansing and other offices within the state as it deems necessary.

(b) Meet and exercise its powers at any place within the state.

(c) Appoint an executive director who shall be the chief executive officer of the department and exempt from civil service, and appoint necessary hearing examiners.

(d) Accept public grants, private gifts, bequests, or other amounts or payments.

(e) Prepare annually a comprehensive written report to the governor. The report may contain recommendations adopted by the commission for legislative or other action necessary to effectuate the purposes and policies of this act.

(f) Promulgate, amend, or repeal rules to carry out this act pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws.

(g) Request the services of a department or agency of the state or a political subdivision.

(h) Promote and cooperate with a public or governmental agency as in its judgment will aid in effectuating the purposes of this act and the state constitution of 1963.

(i) Establish and promulgate rules governing its relationship with local commissions, and establish criteria for certifying local commissions for the deferring of complaints.

(2) The commission may hold hearings, administer oaths, issue preliminary notices to witnesses to appear, compel through court authorization the attendance of witnesses and the production for examination of books, papers, or other records relating to matters before the commission, take the testimony of any person under oath, and issue appropriate orders. The commission may promulgate rules as to the issuance of preliminary notices to appear.

(3) A majority of the members of the commission constitutes a quorum. A majority of the members is required to take action on all matters not of a ministerial nature. but a majority of a quorum may deal with ministerial matters. A vacancy in the commission shall not impair the right of the remaining members to exercise the powers of the commission. The members of the commission shall receive a per diem compensation and shall be reimbursed for the actual and necessary expenses incurred in the performance of their duties. The per diem compensation of the commission and the schedule for reimbursement of expenses shall be established annually by the legislature.

Sec. 602. The department shall:

(a) Be responsible to the executive director, who shall be the principal executive officer of the department and shall be responsible for executing the policies of the commission.

(b) Appoint necessary employees and agents and fix their compensation in accordance with civil service rules. The attorney general shall appear for and represent the department or the commission in a court having jurisdiction of a matter under this act.

(c) Receive, initiate, investigate, conciliate, adjust, dispose of, issue charges, and hold hearings on complaints alleging a violation of this act, and approve or disapprove plans to correct past discriminatory practices which have caused or resulted in a denial of equal opportunity with respect to groups or persons protected by this act.

(d) Require answers to interrogatories, order the submission of books, papers, records, and other materials pertinent to a complaint, and require the attendance of witnesses, administer oaths, take testimony, and compel, through court authorization, compliance with its orders or an order of the commission.

(e) Cooperate or contract with persons and state, local, and other agencies, both public and private, including agencies of the federal government and of other states.

(f) Monitor contracts to insure compliance by a contractor or a subcontractor with a covenant entered into pursuant to section 210.

Sec. 603. At any time after a complaint is filed, the department may file a petition in the circuit court for the county in which the subject of the complaint occurs, or for the county in which a respondent resides or transacts business, seeking appropriate temporary relief against the respondent, pending final determination of proceedings under this section, including an order or decree restraining the respondent from doing or procuring an act tending to render ineffectual an order the commission may enter with respect to the complaint. If the complaint alleges a violation of article 5, upon the filing of the petition the department shall file for the record a notice of pendency of the action. The court may grant temporary relief or a restraining order as it deems just and proper, but the relief or order shall not extend beyond 5 days except by consent of the respondent, or after hearing upon notice to the respondent and a finding by the court that there is reasonable cause to believe that the respondent has engaged in a discriminatory practice.

Sec. 604. If the commission, after a hearing on a charge issued by the department, determines that the respondent has not engaged in a discriminatory practice prohibited by this act, the commission shall state its findings of fact and conclusions of law and shall issue a final order dismissing the complaint. The commission shall furnish a copy of the order to the claimant, the respondent, the attorney general, and other public officers and persons as the commission deems proper.

Sec. 605. (1) If the commission, after a hearing on a charge issued by the department, determines that the respondent has violated this act, the commission shall state its findings of fact and conclusions of law and shall issue a final order requiring the respondent to cease and desist from the discriminatory practice and to take such other action as it deems necessary to secure equal enjoyment and protection of civil rights. If at a hearing on a charge, a pattern or practice of discrimination prohibited by this act appears in the evidence, the commission may, upon its own motion or on motion of the claimant, amend the pleadings to conform to the proofs, make findings, and issue an order based on those findings. A copy of the order shall be delivered to the respondent, the claimant, the attorney general, and to other public officers and persons as the commission deems proper.

(2) Action ordered under this section may include, but is not limited to:

(a) Hiring, reinstatement, or upgrading of employees with or without back pay.

(b) Admission or restoration of individuals to labor organization membership, admission to or participation in a guidance program, apprenticeship training program, on the job training program, or other occupational training or retraining program, with the utilization of objective criteria in the admission of persons to those programs.

(c) Admission of persons to a public accommodation or an educational institution.

(d) Sale, exchange, lease, rental, assignment, or sublease of real property to a person.

(e) Extension to all persons of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the respondent.

(f) Reporting as to the manner of compliance.

(g) Requiring the posting of notices in a conspicuous place which the commission may publish or cause to be published setting forth requirements for compliance with civil rights law or other relevant information which the commission determines necessary to explain those laws.

(h) Payment to an injured party of profits obtained by the respondent through a violation of section 506.

(i) Payment to the complainant of damages for an injury or loss caused by a violation of this act, including a reasonable attorney's fee.

(j) Payment to the complainant of all or a portion of the costs of maintaining the action before the commission, including reasonable attorney fees and expert witness fees, when the commission determines that award to be appropriate.

(k) Other relief the commission deems appropriate.

(3) In the case of a respondent operating by virtue of a license issued by the state, a political subdivision, or an agency thereof, if the commission, upon notice and hearing, determines that the respondent has violated this act and that the violation was authorized, requested, commanded, performed, or knowingly permitted by the board of directors of the respondent or by an officer or executive agent acting within the scope of his employment, the commission shall so certify to the licensing agency. Unless the commission's finding is reversed in the course of judicial review, the finding of the commission may be grounds for revocation of the respondent's license.

(4) In the case of a respondent who violates this act in the course of performing under a contract or subcontract with the state, a political subdivision, or an agency thereof, where the violation was authorized, requested, commanded, performed, or knowingly permitted by the board of directors of the respondent or by an officer or executive agent acting within the scope of his employment, the commission shall so certify to the contracting agency. Unless the commission's finding is reversed in the course of judicial review, the finding is binding on the contracting agency.

Sec. 606. (1) A complainant and a respondent shall have a right of appeal from a final order of the commission, including cease and desist orders and refusals to issue charges, before the circuit court for the county of Ingham, or the circuit court for the county wherein the alleged violation occurred or where the person against whom the complaint is filed, resides or has his principal place of business. An appeal before the circuit court shall be reviewed de novo. If an appeal is not taken within 30 days after the service of an appealable order of the commission, the commission may obtain a decree for the enforcement of the order from the circuit court which has jurisdiction of the appeal.

(2) A proceeding for review or enforcement of an appealable order is initiated by filing a petition in the circuit court. Copies of the petition shall be served upon the parties of record. Within 30 days after the service of the petition upon the commission or its filing by the commission, or within further time as the court may allow, the commission shall transmit to the court the original or a certified copy of the entire record upon which the order is based, including a transcript of the testimony, which need not be printed. By stipulation of the parties to the review proceeding, the record may be shortened. The court may grant temporary relief as it deems just, or enter an order enforcing, modifying and enforcing as modified, or setting aside in whole or in part the order of the commission, or may remand the case to the commission for further proceedings. The commission's copy of the testimony shall be available at reasonable times to all parties for examination without cost.

(3) The final judgment or decree of the circuit court shall be subject to review by appeal in the same manner and form as other appeals from that court.

(4) A proceeding under this section shall be initiated not more than 30 days after a copy of the order of the commission is received, unless the commission is the petitioner or the petition is filed under subsection (3). If a proceeding is not so initiated, the commission may obtain a court order for enforcement of its order upon showing that a copy of the petition for enforcement was served on the respondent, that the respondent is subject to the jurisdiction of the court and that the order sought to be enforced is an order of the commission, regularly entered, and the commission has jurisdiction over the subject matter and the respondent.

ARTICLE 7

Sec. 701. Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

(b) Aid, abet, incite, compel, or coerce a person to engage in a violation of this act.

(c) Attempt directly or indirectly to commit an act prohibited by this act.

(d) Wilfully interfere with the performance of a duty or the exercise of a power by the commission or 1 of its members or authorized representatives.

(e) Wilfully obstruct or prevent a person from complying with this act or an order issued or rule promulgated under this act.

Sec. 702. A person shall not violate the terms of an order or an adjustment order made under this act.

Sec. 703. If a certification is made pursuant to section 605(3), the licensing agency may take appropriate action to revoke or suspend the license of the respondent.

Sec. 704. Upon receiving a certification made under section 605(4), a contracting agency shall take appropriate action to terminate a contract or portion thereof previously entered into with the respondent, either absolutely or on condition that the respondent carry out a program of compliance with this act, and shall advise the state and all political subdivisions and agencies thereof to refrain from entering into further contracts or extensions or other modifications of existing contracts with the respondent until the commission is satisfied that the respondent carries out policies in compliance with this act.

Sec. 705. (1) This act shall not be construed as preventing the commission from securing civil rights guaranteed by law other than the civil rights set forth in this act.

(2) This act shall not be interpreted as restricting the implementation of approved plans, programs, or services to eliminate discrimination and the effects thereof when appropriate.

(3) This act shall not be interpreted as invalidating any other act that provides programs or services for persons covered by this act.

ARTICLE 8

Sec. 801. (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both.

(2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business.

(3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees.

Sec. 802. A court, in rendering a judgment in an action brought pursuant to this article, may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate.

Sec. 803. This act shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of this state.

Sec. 804. Act No. 251 of the Public Acts of 1955, as amended, being sections 423.301 to 423.311 of the Compiled Laws of 1970, Act No. 45 of the Public Acts of the Second Extra Session of 1963, as amended, being sections 37.1 to 37.9 of the Compiled Laws of 1970, and Act No. 112 of the Public Acts of 1968, as amended, being sections 564.101 to 564.704 of the Compiled Laws of 1970, are repealed.

T. Thos. Thatcher

Clerk of the House of Representatives.

Wilbur S. Farnum

Secretary of the Senate.

Approved_____

_____

Governor.

Appendix B

ALTON R. WALDON JR.
DEPUTY COMMISSIONER

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS
2 WORLD TRADE CENTER, NEW YORK, N. Y. 10047
(212) 488-7626

April 24, 1979

Mr. Herbert Wheeless
U.S. Civil Rights Commission
1121 Vermont Avenue N.W.
Washington, D.C. 20425

Dear Mr. Wheeless:

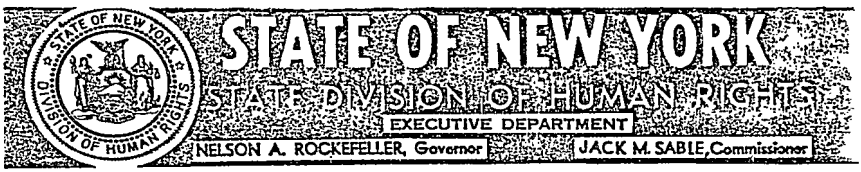
Upon my return to New York, a perusal of our records was conducted to determine if we have any data regarding the religious persuasion of employees, either in the private sector or in the public sector. We have no such data, per se. However, enclosed find the results of a survey conducted in 1972 by the Division.

I have also enclosed for your information and edification copies of Governor Carey's Executive Orders which permit monitoring of a nature related to your concerns, vis-a-vis the private and governmental work force sectors.

I hope this information proves helpful.

Yours truly,

Alton R. Waldon, Jr.



SUMMARY REPORT

Survey of Private Colleges in New York State to Ascertain the Especial Needs of Devout Students

STATE DIVISION OF HUMAN RIGHTS

Administrative Office

270 Broadway

New York, New York 10007

THIS REPORT ENTITLED "SURVEY OF PRIVATE COLLEGES IN NEW YORK STATE TO ASCERTAIN THE ESPECIAL NEEDS OF DEVOUT STUDENTS" WAS COMPILED BY THE RESEARCH UNIT, BUREAU OF PROGRAM PLANNING AND AFFIRMATIVE ACTION WHICH ASSEMBLED THE INFORMATION AND PREPARED THE SUMMARY ANALYSIS.

STAFF CREDITS:

D. Robert Ricciardi, Director, Bureau of Program Planning and Affirmative Action
Milton Rosenberg, Associate Director, Bureau of Program Planning and Affirmative Action
Preston Israel, Sr. Research Analyst

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DOROTHY ORR
ASSISTANT COMMISSIONER
PROGRAM PLANNING AND AFFIRMATIVE ACTION

SUMMARY REPORT

Survey of Private Colleges in New York State to Ascertain the Especial Needs of Devout Students

In the summer of 1971, the Division of Human Rights began investigating the extent to which devout students at institutions of higher education in New York State are subject to especial hardships as a result of classwork, examinations or other school activities (including registration) missed on days of religious observance. To supplement the information received by religious spokesmen of various faiths, the Research Unit of the Bureau of Program Planning and Affirmative Action canvassed the chief executives of the State's private, non-sectarian universities and colleges with undergraduate student bodies in November of that year.

Questionnaires were sent to the administrative centers of 52 such institutions, several of which comprehend a number of subsidiary colleges. Replies were received from 38 colleges[1/], which include a total undergraduate student body of approximately 98,400. Of these institutions, 29 responded with a definite answer or estimate as to the number of students missing one or more class or other work days annually for reasons relating to religious observance. The total number of such "devout" students reported was nearly 10,600 or 16.4 percent of the 64,600 undergraduate students included in the institutions responding to this particular question. Details for individual colleges are reported in Table 1, below.

1/ Includes separate replies from the four subsidiary colleges of Long Island University.

Table 1

Estimated Number of Undergraduate Students in Reporting Colleges Absent One or More Days Annually for Religious Observance

College or university	Total undergraduate student body	Students absent	
		Number	Pct. of total
Academy of Aeronautics	1,200	65	5.4%
Adelphi University	3,000	100	3.3
Alfred University	2,100	100	4.8
Bennett College	345	4	1.2
Cazenovia College	480	15	3.1
Clarkson College of Technology	2,600	20	0.8
Colgate University	2,170	250	11.5
Cooper Union	915	650	71.0
Cornell University	11,004	4,000	36.4
Elmira College	1,264	250	19.8
Hamilton College	937	20	2.1
Hobart and William Smith Colleges	1,658	250	15.1
Julliard School of Music	662	25	3.8
The Kings College	746	0	0.0
Kirkland College	600	125	20.8
M.J. Lewi College of Podiatry	202	10	5.0
Long Island University - B'klyn Campus	5,289	0 1/	0.0
LIU - C.W. Post College	4,700	2,000	42.6
LIU - B'klyn College of Pharmacy	407	10	2.5
LIU - Southhampton College	1,487	100	6.7
New School for Social Research	106	32	30.2
New York Institute of Technology	4,810	25	0.5
Pace College	8,668	1,500	17.3
Polytechnic Institute of Brooklyn	2,061	150	7.3
Rensselaer Polytechnic Institute	3,439	500	14.5
Skidmore College	1,875	250	13.3
Touro College	36	0 1/	0.0
Union College	1,780	125	7.0
Webb Institute of Naval Architecture	82	0	0.0
Total	64,623	10,576	16.4

1/ School closed or not in session during major religious holidays.

The following additional colleges responded to the survey, but did not or were unable to estimate the total number of their students ever absent for religious reasons:

Briarcliff College
Columbia University
New York University
Pratt Institute
Russell Sage College
Sarah Lawrence College
Syracuse University
Vassar College
Wells College

Religious holidays during which a substantial number of students were reported to abstain from class attendance and participation in school activities by a number of colleges are Rosh Hashanah, Yom Kippur, Succoth, Passover and Shavuoth for the Jewish faith and Good Friday for Christians. For colleges which provided specific estimates as to the number of students absent for religious observance on these and other holy days, a total of more than 46,000 class or work days were reported lost annually by Jewish students nearly 1,900 days by Christian students, and 75 days by observers of the Chinese New Year.

A summary of relevant characteristics for all days of religious observance reported appears in Table 2.

Table 2

Estimated Undergraduate Student Observance of Religious Holidays on Days of Regularly Scheduled School Activity

Religious holiday	Creed observing	Date or approx. time of year	No. colleges reporting students observing1/	No. class or work days reported involved	Est. no. students absent for observance1/	Approx. no. student-class or-work days lost2/
Rosh Hashanah	Jewish	September	20	1-2	7,034	11,256
Yom Kippur	Jewish	Late Sept.-Oct.	20	1	7,166	7,166
Succoth, Smini Atzereth, & Simchath Torah3/	Jewish	Late Sept.-Oct.	10	1-4	2,516	3,883
Chanukah	Jewish	December	2	1	2,250	2,250
Passover	Jewish	April	14	1-4	7,262	18,367
Shavuoth	Jewish	May-early June	8	1-2	2,416	2,757
Fast of Av	Jewish	Late July-early Aug.	1	1	75	75
			Total for Jewish holidays reported			46,054
All Saint's Day	Catholic	Nov. 1	2	1	79	79
Feast of Immaculate Conception	Catholic	Dec. 8	2	1	79	79
Holy Thursday	Catholic	April	1	1	200	200
Good Friday	Christian	April	9	1	1,400	1,400
Ascension Thurs.	Catholic	May	2	1	79	79
Feast of Assumption	Catholic	Aug. 15	1	1	40	40
Easter	Eastern Orthodox	Spring	1	1	5	5
			Total for Christian holidays reported			1,882
Chinese New Year -	Chinese cultural/ religious	Late Jan-Feb.	1	1	75	75
				Grand total - all faiths		48,011

1/ Colleges were requested to specify only those religious holidays during which regular school activities were scheduled. The response indicated in this column must not be interpreted as a measure of the relative religious significance of the holidays listed.

2/ May not be computed as the exact product of the numbers in the two previous columns, since the number of holy days which coincides with actual class days varies with the school calendar of the institution.

3/ Holidays named include the first two days, the eighth day, and the ninth day, respectively, of a consecutive nine-day period, sometimes referred to collectively as Succoth.

Most of the responding colleges reported that their programs were sufficiently flexible to allow for devout students to make up missed work through individual consultations with faculty members, although the responsibility for this rested solely with the student. In addition, a number of colleges reported that no examinations were ever scheduled on religious holidays, nor were students ever penalized for absence on such days.

Although the questionnaire attempted to elicit estimates of the costs incurred in such make-up work, none of the administrators responding were able to separate out such costs from current operating expenses. Nor were administrators of the few schools where no allowances for devout students were specified able to speculate as to what additional costs would be incurred if substantially equivalent make-up opportunities were offered.1/

Administrators offering comments as to the need for special or formal make-up programs generally indicated that no such need existed for colleges where the student body was sufficiently small to allow for continued program flexibility. However, the response from Cornell University (current undergraduate student body: 11,000) did indicate that the possibility of discrimination against students observing religious holidays has been brought up as a matter of student concern as recently as this Fall and that the matter of implementing a University Senate non-discriminatory proviso was currently pending.

1/ The response from Union College, where partial provisions for devout students are currently made, did indicate that a comprehensive program of substantially equivalent make-up opportunities would add approximately $5,000 to its annual operating expenses.

Transcribed below are several of the more relevant comments received.

G.J. Grout, Assistant to President, Hamilton College:
"A small liberal arts college, with a flexibility of program and scheduling, should not consider the missing of a few classes or exams to be a problem. Hamilton does not, but understands that a large university might not be able to cope without a specific program."

Charles DeCarle, President, Sarah Lawrence College:
"We do expect a student whenever possible to make up work missed by an absence. Because our educational structure provides our students with frequent individual conferences as well as classroom sessions, it is quite feasible for a student to make up missed work and examinations."

Mrs. Castner W. Rapalee, Assistant to the Vice President, Hobart and William Smith Colleges:
"March 1971 Memo. to the Faculty from the Provost:
'....., as in the cases of other major religious days, the faculty is expected to use discretion with regard to any assignment/test etc. which would make class attendance at these times more important than usual.
'Faculty members who themselves desire to observe holy days may, at their own discretion, cancel classes falling at this time.'
"Our flexible arrangement works quite well; students make up work individually with faculty members. We have no need for a comprehensive program."

Herbert Liebeskind, Director of Admissions and Registrar, Cooper Union:
"Cooper Union has traditionally excused absences of devout students for religious observances. Students are not penalized in any manner for such absences.
"For many years special attention has been given to class programs of devout Jewish students who are required to arrive at their homes before sundown on Fridays."

Bessie C. Graber, Registrar, M.J. Levi College of Podiatry:
"The problem is not an acute one - faculty does not schedule examinations on Holidays, if possible -- classes missed (labs) can be made up and fellow classmen made notes for those absent, routinely."

George Cohen, Vice President, Touro College:
"Touro College recognizes and respects the religious commitments of its students and has arranged its calendar so that classes are not conducted on days when religious observance precludes attendance."

William J. Lowe, Dean of Students, Clarkson College of Technology:
"Student may make up work at a mutually convenient date with his instructor.
"I do not believe a special program is necessary for our college. It has worked on an informal person-to-person basis and has been successful."

Judith Warren, Administrative Assistant, Wells College:
"Because of Wells' small and rural nature, the number of students observing religious holidays is minimal and unavailable to administrative offices. All academic arrangements, if any, would be made with individual faculty members. There are no hardships imposed upon either the individual student or the College.
"While the College provides no special program, nor does the Village of Aurora serve any but those of the Roman Catholic, Episcopalian and Presbyterian faiths, information is provided for those few students who wish to observe holidays and attend services in nearby cities or on nearby campuses. Very often it is faculty members of the various faiths who take the responsibility for providing information, facilities, and transportation for such events."

Harold N. Gainer, University Counselor, Coordinator, Religious Center, Adelphi University:
"The University Faculty and Division of Student Affairs cooperate with all devout students on academic matters in the event they must absent themselves from class or examinations for religious observances."

Judson Ehrbar, Registrar, The Julliard School:
"Most classes have alternate sections that the student can attend. Missed private lessons are made up by the faculty involved. Special help is always available.
"Although there are an appreciable number of Jewish students and staff, the problem has been negligible in this professional school. The cases are few and are handled on an individual basis. No need for a comprehensive make-up program is evident now or in the near future."

Elizabeth A. Littlejohn, Assistant to the Vice Chancellor, Syracuse University:
"Our academic calendar does not cause a conflict between religious holy days and either registration or examinations. Those holy days which frequently conflict with scheduled classes are: Rosh Hashana, Yom Kippur, Ash Wednesday, and Passover.
"There is no penalty imposed upon students for missing classes other than the loss of educational experience. We have no formal program for make-up of this class time, but faculty members, upon request will allow students to sit in on a comparable class or will meet privately with the students if a comparable class is not available. (Continued on next page)

Elizabeth A. Littlejohn, Assistant to the Vice Chancellor, Syracuse University (Continued):

"Because of the informality of this program, there is currently no extra cost to Syracuse University. If an increasing number of students requested make-up time such that additional classes were formally scheduled, an increase in faculty compensation could result."

Thomas Davis Jr., Chaplain & Asst. Prof. of Religion, Skidmore College:

"Should problems arise in this area, the college has a Religious Life Committee comprised of one student representative from each student religious group on campus, one faculty member from each of the three major religious groups in America, the Dean of Students, and the Chaplain. Complaints of hardships incurred by devout students may be brought to any member of this body and the Committee would then act upon them immediately.

"It seems fair to say that Skidmore is as yet a small enough college that no special programs, even small in cost, are needed."

Edward J. Malloy, Dean of Students, Union College:

"In a small college, the instructors are generally aware of individual absences for religious observance. We are scrupulous in not penalizing students in any way. The proposed legislation would probably increase absences not necessarily for religious observance although that would be claimed. It is a real financial threat in a time of crisis."

Robert Hoffstein, Director, Institutional Research, Pace College:

"There is never a penalty for religious observance. If perchance an exam was scheduled on that day the student is entitled to a make-up. The school is closed on "major" religious holidays (e.g. The Jewish New Year).

"We have regular make-up exams for any student who has been out - part of our routine academic set-up."

Richard Lettis, Executive Dean, C.W. Post College:

"To the best of my knowledge there simply is no problem. Any student may make-up any work missed because of religion, illness, accident, faulty alarm clock, or snow in Vermont."

James M. Hester, President, New York University:

"If every student were to be authorized, by declaring himself devout, to demand special class sessions or special make-up examinations, etc., the potential costs, and the potentials for abuse, seem high. The good intentions expressed in the vetoed bill do not, it seems to us, eliminate these possibilities, or adequately guard against them.

"It may be of interest that a University Senate combined committee is currently investigating the subject of the Jewish high holy days, and is holding University-wide open hearings, to determine if it might be advisable for us not to schedule academic activities upon certain of these days. As the investigation is still in progress, we have no indication of what they will find or recommend."

STATE OF NEW YORK
EXECUTIVE CHAMBER
HUGH L. CAREY, GOVERNOR

James S. Vlasto, Press Secretary
518-474-8418
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FOR RELEASE:
IMMEDIATE, WEDNESDAY
SEPTEMBER 15, 1976

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY

No. 40

E X E C U T I V E O R D E R

In pursuit of New York State's policy against discrimination as expressed in the State Constitution and the State Human Rights Law, it is the responsibility of the New York State Division of Human Rights to enforce the State's policy of ensuring full and equal employment opportunity for minorities, women and the disabled at all levels of State government.

Therefore, by virtue of the authority vested in me by the Constitution and laws of the State of New York, I, Hugh L. Carey, Governor of the State of New York, do hereby establish the following:

I. Responsibilities of State Agencies and the State Division of Human Rights.

1. Each State agency or department shall develop a written affirmative action program, including the development of specific goals and timetables for the prompt achievement of full and equal employment opportunity for minorities, women and the disabled. This plan shall be submitted to the Division of Human Rights by every State agency or department no later than December 1, 1976. The Division of Human Rights shall review and evaluate these plans on an agency-by-agency basis and, where necessary, assist the agencies in improving and implementing their programs.

2. In furtherance of the foregoing, the State Department of Civil Service shall provide technical assistance to the Division of Human Rights and to the agencies, where appropriate. The State Department of Civil Service shall submit regularly to the Division of Human Rights, upon the request of the Division, reports of the composition of the work force of each State agency and department by sex and ethnic identity, for all job categories, salary grades, and civil service classifications. Each State agency or department shall cooperate with the Division of Human Rights by duly complying with all requests for such further data as the Division of Human Rights deems necessary to effectuate the purposes of this Order. The Division of Human Rights shall review and evaluate these reports on an agency-by-agency basis.

3. In accordance with Executive Order No. 8, dated April 11, 1975, the Women's Division in the Executive Chamber shall assist the Division of Human Rights and the agencies by providing its expertise and guidance in areas of special sensitivity and concern to women. However, the requirement in Executive Order No. 8 for biannual reports to the Governor is hereby revoked and superseded by the reporting provisions of this Executive Order. Agency heads shall continue to supply to the governor any information which the Governor or the Director of the Women's Division requests to demonstrate implementation of Executive Order No. 8.

4. The Division of Human Rights will monitor affirmative action efforts in all State agencies and provide quarterly reports of those efforts to the Governor.

II. Establishment of the Governor's Executive Committee for Affirmative Action.

1. A committee shall be established within the Executive Department to be known as the Governor's Executive Committee for Affirmative Action. It shall consist of the President of the Civil Service Commission, who shall serve as Chairperson, the Commissioner of Human Rights, the Appointments Officer to the Governor, the Secretary of State, the Director of the Budget, the Director of the Women's Division, the Industrial Commissioner, the Director of the Office of Employee Relations, and the Special Assistant to the Governor for Urban Affairs. The Committee shall designate a Vice-Chairperson, who shall serve at the pleasure of the Committee and who shall perform the duties of Chairperson in the Chairperson's absence and at such other times as the Chairperson may direct.

2. The Committee shall advise the Governor and assist the Commissioner of Human Rights in the formulation and coordination of plans, policies and programs relating to affirmative action in all State departments and agencies and in assuring effective implementation of such policies, plans and programs by such agencies. The Committee shall submit to the Governor each year a written report of the Committee's activities and recommendations.

III. Revocation of Prior Executive Order and Effective Date.

Executive Order No. 27, dated May 7, 1968, and continued by Executive Order No. 1, dated January 1, 1975, is hereby revoked and superseded by this Executive Order.

G I V E N under my hand and the Privy Seal of the State at the Capitol in the City of Albany this fifteenth day of September in the year of our Lord one thousand nine hundred seventy-six.

(L.S.)

(Signed) Hugh L. Carey

BY THE GOVERNOR

Secretary to the Governor

(Signed) David W. Burke

SECOND QUARTERLY REPORT TO THE GOVERNOR ON THE
IMPLEMENTATION OF EXECUTIVE ORDER 40
MARCH 15, 1977

Pursuant to Executive Order 40, the State Division of Human Rights is pleased to present its second quarterly report on affirmative action in state government to the Governor covering the period December 16, 1976 to March 15, 1977.

The second quarter of operations in implementing Executive Order 40 represented a period of both solid achievement and severe frustration. A significant portion of implementation tasks were completed as scheduled, while a series of efforts that should have been performed during the period remained undone due to a serious shortage of staff.

Fifty affirmative action plans submitted by State agencies were on hand at the end of the second quarter, of which ten had been reviewed, evaluated and returned for changes and additions. Only one plan, from the Department of Correctional Services, received tentative approval, subject to several modifications and additions. Ten other affirmative action plans were under active review at the time of this report.

Pursuant to directives received at the January 25, 1977 meeting of the Executive Committee, the DHR gave first priority consideration to the affirmative action plans of four large agencies that were expected to do extensive hiring during the 1977-78

fiscal year: the Departments of Mental Hygiene, Taxation and Finance, Transportation, and Correctional Services. The plans of these agencies were analyzed, and three of the four were found to deviate seriously from the Affirmative Action Guidelines issued by the DHR last year. The three agencies were provided with a detailed critique of their plans and were requested to rewrite them accordingly within four weeks.

Seven additional affirmative action plans were found to be deficient in their totality as well as in their individual component parts. Again, the agencies submitting them were advised to review the DHR guidelines carefully and requested to submit revised and complete plans within a four-week period.

Throughout the initial review process the DHR offered and provided technical assistance to all agencies in need of it. A number of technical assistance conferences were held, dozens of telephoned inquiries from State agencies were answered, and general liaison was maintained. Letters of acknowledgement were sent to all agencies to certify receipt of their plans and request the immediate implementation of affirmative action policy until such time as their plans can be evaluated, revised as necessary, and approved.

In order to facilitate revision of plans, where necessary, and to provide technical assistance to agencies in the most efficient manner, a DHR-sponsored Affirmative Action Workshop has been

scheduled for late April. All State agencies subject to Executive Order 40 have been advised to attend the all-day seminar. Members of DHR staff, representatives of the Department of Civil Service, and others with proven affirmative action expertise will assist State agency staff in overcoming difficulties encountered in their plan development. While many such problems are likely to be resolved through the Workshop approach, individual technical assistance conferences will continue as the needs of individual agencies dictate.

Unfortunately, much of the work the DHR had previously scheduled for the second quarter remains incomplete. Lack of staff necessitated the postponement of a number of important assignments that should have been undertaken during this period.

Intermittent assistance from other Division employees cannot possibly make up for the absence of permanent, full-time personnel; there is documented need for a minimum of five additional staff members to assure prompt implementation of the Executive Order. It is particularly important to note that staff requirements will increase with time, as monitoring the activities of those agencies with approved affirmative action plans will have to commence shortly and continue as a standard operating procedure.

Moreover, shortage of qualified personnel has prevented the DHR from dealing with affirmative action programs for the numerous campuses of SUNY. Affirmative action in academe presents many

unique and complex problems, as the Federal experience has already demonstrated. Without adequate staff resources it is impossible even to take the initial step of the implementing process, namely the review and evaluation of SUNY's affirmative action plans. Yet, as the second largest employer among State agencies, SUNY can hardly be neglected in our state-wide affirmative action activities. A similar problem exists in regard to implementation of Executive Order 40 with respect to public authorities.

An extensive promotional and informational program on Executive Order 40 was continued by the DHR throughout the quarter. Five conferences on implementation requirements were held with various advisory and/or citizens groups and nearly 200 telephoned inquiries from sources outside of State government were answered.

Liaison and cooperation with the N.Y. State Department of Civil Service continued on a very active basis. Department staff has continued to provide valuable assistance to the DHR, particularly with respect to the accumulation and tabulation of essential statistical data.

The pilot project for a visual census of disabled state employees was successfully completed in the scheduled two agencies. At this time, all agencies subject to Executive Order 40 have been asked to conduct a census of their disabled workers. Numerous completed questionnaires have already been returned to the DHR; it is anticipated that tabulated results of the entire census will be available from our Research Unit by the end of June.

PRELIMINARY GUIDELINES FOR THE FORMULATION OF AFFIRMATIVE ACTION PROGRAMS BY NEW YORK STATE GOVERNMENT AGENCIES

State of New York
Executive Department
Division of Human Rights

Werner H. Kramarsky, Commissioner

October 1976

INTRODUCTION

The following guidelines have been drafted to assist agencies of the State Government of New York in complying with the mandate of Executive Order No. 40, issued by Governor Hugh L. Carey September 15, 1976. The Order requires that "Each State agency or department shall develop a written affirmative action program, including the development of specific goals and timetables for the prompt achievement of full and equal employment opportunity for minorities, women and the disabled." Such programs will be reviewed and evaluated by the State Division of Human Rights which, where necessary, will assist the various agencies in improving and implementing their programs.

The Guidelines are especially intended for use by the agencies where patterns of employment at various job levels do not reflect the percentage ranges of minority group persons, women and disabled persons in the relevant labor force. In all areas where the pattern of employment of an individual State agency demonstrates a discernible disparity, the agency must identify and change any practice which could account for disparity, such as methods of recruiting, hiring, discharge, grievance procedures, etc.

The implementation of a result oriented affirmative action program can be achieved within the framework of a job-validated merit system, from initial employment to advancement through a training-based career ladder program. A recent statement of Federal policy is of particular relevance:

"... there is no conflict between a true merit selection system and equal employment opportunities laws -- because each requires nondiscrimination in selection, hiring, promotion, transfer and layoff, and each requires that such decisions be based upon the person's ability and merit, not on the basis of race, color, national origin, religion or sex."*

LEGAL BASIS OF SDHR AFFIRMATIVE ACTION GUIDELINES

The New York State Human Rights Law (Executive Law, Article 15) provides that the Division of Human Rights shall have the function, power and duty to "develop human rights laws and policies for the state and assist in their execution...." (§295.9). Governor Carey's Executive Order No. 40 (Sept. 15, 1976) states that "it is the responsibility of the New York State Division of Human Rights to enforce the State's policy of ensuring full and equal employment opportunity for minorities, women and the disabled at all levels of State government."

The policy of ensuring full and equal employment opportunity is an affirmative policy. In 1968, the Legislature went beyond a mere non-discrimination policy and declared affirmatively "that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life..." (Human Rights Law §290.3).

The Division of Human Rights was "created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of

*Executive Order No. 40 also requires nondiscrimination based on disability and mandates affirmative action for the disabled.

the state...." (ibid). Under Executive Order No. 40, the Division was mandated to review and evaluate state agency affirmative action plans and to assist the agencies in improving and implementing their programs. In accordance with this mandate, the Division has prepared these Guidelines.

The Division will issue more detailed guidelines in the future on the basis of its experience working with state agencies and will also issue periodic updates to reflect new developments. Specifically, the Division will issue additional guidelines related to affirmative action for the disabled since statistical data on employment of the disabled in state agencies have not been systematically collected. In the interim, agencies should include the disabled as a target group in their affirmative action programs.

DEVELOPING AN AFFIRMATIVE ACTION PROGRAM

The Division of Human Rights will critically assess State agencies' efforts and will evaluate the success or failure of an agency primarily by the measurable results achieved by its efforts to implement the affirmative action program. In making this evaluation, the Division will also consider the aggressiveness with which the agency pursues all available affirmative measures including, but not necessarily limited, to those listed below. Therefore, any affirmative action program developed by an agency of New York State must contain the following elements:

1. A Statement of Policy

   Each State agency is expected to issue a firm policy statement, bearing the signature of the agency's Commissioner, Chief Executive, or Chairperson. It should underscore the agency's commitment to equal employment opportunity and its intent to undertake affirmative action

to correct exclusionary employment practices that may be found to exist within any of the agency's departments, divisions or facilities. The statement must not focus upon what has been accomplished in the way of affirmative action gains in the past, but rather upon what remains to be accomplished in the future.

The policy statement should be included within the text of the plan, and should be circulated to every member of the agency's staff. Although the statement should appear as the very first component of the plan, it should not be drafted until the remaining sections of the plan are completed. The statement must apprise all staff of the rationale underlying the need for affirmative action, and this cannot be done successfully until inequities in the agency's employment pattern are made evident as a result of the studies made in conjunction with the design of the plan.

2. Responsibility for Implementation

The agency head shall designate a member of the executive staff as Director of Affirmative Action (DAA) who shall report directly to the agency head. The DAA will assume day to day responsibility for development and implementation of the program. Deputies should be appointed as needed in the various departments and facilities to implement such rules and regulations as shall be enacted to enforce the program. In addition, the DAA shall act as liaison with the Division of Human Rights in connection with the implementation of the Division's obligations pursuant to Executive Order No. 40.

3. Dissemination and Participation

The equal employment policy of the agency must be disseminated both within and without the agency.

Within the agency the affirmative action policy statement must be distributed to advise personnel in every department, bureau and section of the existence of anti-discrimination laws and Executive Order No. 40, and the agency's policies with regard thereto, as well as of the agency's plans and methods of affirmative action implementation. A copy of the text of the final affirmative action plan in its entirety, after approval by the Division of Human Rights, must be made available to every member of the agency's staff and to the public upon request.

For external dissemination, the agency should develop a public information effort to include newspaper, radio, television, speeches by officials, contact with community agencies, notice to recruitment sources, schools, public and private employment agencies, civil service publications, etc.

The agency shall develop a mechanism for obtaining input on a continuing basis from its employees, from advocacy groups and from its client population, where applicable. Participation in providing this input should be especially sought from minorities, women and the disabled. The mechanism established for this purpose should be included in the affirmative action plan.

4. Self-Evaluation

Each agency shall conduct a utilization survey of the agency's workforce to determine where there exists underutilization of

minority group persons, women and the disabled in particular salary grade levels, occupational categories, departments and subdivisions of the organization, or at specific work sites and facilities of the agency throughout the State, in comparison to the composition of the relevant labor force with requisite skills in the geographic labor market area. Generally, with respect to employment at or above salary grade GS 14, the entire State of New York should be deemed the relevant labor market for recruitment. However, there are certain positions below that level where use of a statewide labor pool may also be appropriate for achieving adequate representation and these should be specified in the plan.

Ethnic and sex classifications of the agency's workforce by salary and occupational category should be consistent with the United States Equal Employment Opportunity Commission's EEO-4 form reporting requirements. In addition to the federal classifications, the Executive Order also mandates affirmative action for the disabled. Therefore, affirmative action target groups shall be deemed to include Blacks, Hispanic Americans, Asian-Americans (including Pacific Islanders), American Indians (including Alaskan Natives), women, and the disabled.

5. Formulation of the Affirmative Action Program

Based upon the utilization survey the agency shall prepare a projected five-year affirmative action program, which will set target percentage ranges for improved employment participation

of minority group persons, women and the disabled at each salary level, occupational category, department and facility where such improvement is warranted.

These goals shall be set for each year of the program and shall reflect an awareness of the need to increase the employment of minority group persons, women and the disabled in the middle and upper level job categories. The annual goals shall be reviewed every year and shall be subject to revision, to reflect significant changes in agency work force or relevant labor force composition.

6. Affirmative Recruitment

A thorough review of the agency's present recruitment policies must be undertaken to determine whether practices exist that continue to proliferate patterns of disproportionate underutilization of minority group persons, women, and the disabled in specific occupational categories and job titles.

The affirmative action program must underscore the individual agency's responsibility for a recruitment system that will bring knowledge of job openings to the minority community and organizations representing women and the disabled, in order to facilitate applications by members of the groups they represent.

This should include advertising in a wide variety of media, the use of employment agencies with substantial minority, female and disabled clientele, and publicizing job opportunities through a continuing program of personal contacts by agency staff with organizations

representing groups for which affirmative action is necessary. Such avenues would include schools, religious organizations and civic groups. Special recruitment efforts should be directed toward jobs in the professional and administrative categories. In this respect, the resources of persons with experience in the military, non-paid persons, and professionals that provide transferable skills should be carefully explored.

State agencies, particularly those which have installations in communities where few minority group persons reside, should focus direct attention on the social problems that have often in the past prevented minority persons, women and disabled persons from taking full advantage of available job opportunities. Wherever possible, agency plans should take into consideration and be flexible in accommodating to the particular needs of minorities, women and the disabled. Providing alternative work schedules, flexible working hours, and part-time job opportunities can be particularly helpful in meeting the needs of parents, persons with home and family responsibilities, persons with physical and mental disabilities, etc.

A comprehensive program should also utilize strategies to enlarge the recruitment from minority population centers within commuting distance, such as assistance in providing practical transportation facilities, action to foster the availability of housing accommodations in the immediate area, child care, etc.

7. Hiring Practices

The agency affirmative action program shall describe and evaluate its current hiring practices and procedures. Such evaluations shall

detail for each department, salary grade and job title, the number and proportion of minority persons, women and the disabled hired for the past three years. Said hiring practice statement shall be broken down as to those appointed provisionally, by examination, and/or on an exempt basis.

The agency shall review the education and experience criteria currently in effect, as well as the examinations given for various job titles, in order to determine their validity in reflecting actual job requirements. Where, pursuant to a program designed to effectuate goals and timetables for increased employment of minorities, women and the disabled, provisional appointments to selected job titles have been made, then the education, experience and demonstrated ability to perform the job of said provisional appointees can be used as validating criteria in the development and design of specifications for any examination thereafter required in connection with the particular job.

The agency's validation process shall be undertaken in conjunction with the State Department of Civil Service to secure such modification of criteria and examination content as is warranted.

8. Career Development

The agency shall maintain a well publicized career ladder structure for its employees and, where possible, shall establish and implement advancement programs to prepare its employees for promotion and lateral transfer to positions where greater promotional opportunities exist. Special attention shall be given to the progress of minority persons, women and the disabled in connection with

such programs, particularly monitoring and encouraging their enrollment and progress, and promoting the cooperation of current supervisory employees in program implementation. Goals and timetables should be established for the upward mobility of affirmative action target groups.

The plan shall include provisions for extensive, sustained and varied programs of pre-service and in-service training to provide persons in affirmative action target groups with skills, opportunities for promotion, and the supervisory support necessary to enable them to advance in state service while utilizing their fullest potential. A uniform selection process should be used to screen all candidates for upward mobility, and target positions should be designated for employees in positions for which career ladders do not now exist. The agency shall make maximum efforts to secure grant funds that may be available to finance such training.

9. Separations

The agency's plan shall provide for re-evaluation of separation policy. Separation policies and practices that have a disparate impact on minority persons, women or the disabled shall be examined closely to determine whether or not they reflect past discriminatory hiring patterns. The agency shall develop plans to avoid a discriminatory impact of separation policies and shall expect such patterns of separation to be the subject of critical review by the Division of Human Rights

10. Staff Orientation

Each agency shall give special attention to training in affirmative action for supervisors, managers and administrators, to ensure understanding, support and implementation of the affirmative action program at all levels. Specific and practical training plans shall be developed, including orientation to the affirmative action plan, awareness training in potential work situation conflicts, and human relations training where necessary.

11. Feedback and Evaluation

Pursuant to item 2. of these Guidelines, responsibility for development and implementation of the agency's affirmative action plan is primarily vested in a designated member of the executive staff and appointed deputies. It is, however, also imperative that the agency develop a feedback system to ensure communication between staff at all levels and the officials chiefly responsible for the successful implementation of the plan. Procedures for continuous internal monitoring and evaluation are necessary to ensure that all program elements are being adhered to; a free flow of communication between staff and the responsible officials is absolutely essential toward this end.

All managerial and supervisory staff should be made well aware that successful affirmative action program results will be given considerable weight in their performance evaluations. It is extremely unlikely that affirmative action programming efforts will achieve their full degree of potential success if total responsibility for their execution is limited to executive management operating in a vacuum. All supervisory personnel must bear a high degree of

responsibility in working toward the achievement of meaningful program results.

12. Reports

The agency shall furnish the Division with such reports as the Division shall deem necessary in accordance with the Division's obligation to monitor the agency's affirmative action efforts and to provide quarterly reports thereon to the Governor. The Division, on its part, will make every effort to avoid the necessity of duplication of reporting by agencies that have already provided to the State Department of Civil Service extensive information concerning the ethnic and sex composition of its work force. The agency may expect, however, to be called upon to provide the Division with supplementary and/or more current or detailed statistical information that is not available in reports submitted to the Department of Civil Service.

CONCLUSION

The purpose of the above guidelines is to provide direction to state agencies in their efforts to develop and implement successful affirmative action programs. The obligation of the State as an employer to be in the forefront of the drive for equal opportunity has been enunciated by the Governor. The principal objective is clear: each state agency is expected to assume decisive responsibility for taking all measures necessary to achieve functional equal opportunity -- with the evaluation of the effort related to the nature of the results.

To that end the Division of Human Rights is prepared to meet its responsibilities: to provide consultation and technical assistance, and to review periodically the agencies' programs, giving principal attention to the adequacy of the affirmative action plan and to the specific end results obtained.

State of New York

Executive Chamber

NO. 45

EXECUTIVE ORDER

WHEREAS, it is the established policy of the State of New York to provide equal opportunity in employment and training for all persons without discrimination on account of race, creed, color, national origin, sex, age, disability or marital status, and to promote the full realization of such equal opportunity through affirmative, continuing programs by contractors and their subcontractors in the performance of contracts with or for the State of New York, and

WHEREAS, discrimination in employment by public contractors tends to decrease the pool of available labor and leads to labor strife, thereby adversely affecting the cost and progress of public contracts, and

WHEREAS, in order to insure that the State of New York continue its leadership role in maximizing equal opportunity in employment for all its citizens, and

WHEREAS, it is necessary and desirable that the State of New York provide an affirmative action program to implement and enforce such policies through contractual provisions of State contracts,

NOW, THEREFORE, I, Hugh L. Carey, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and Laws of the State of New York, do hereby order as follows:

Article I - Administration

1.1 There is hereby established in the Executive Department, Division of Human Rights, an Office of State Contract Compliance (OSCC) which, under the overall direction of the Commissioner of Human Rights, shall administer these provisions and coordinate implementation and enforcement of this Executive Order.

1.2 The Commissioner of Human Rights shall adopt such rules, regulations, guidelines, procedures, directives and affirmative action programs, and shall issue such orders, as he or she deems necessary and appropriate to effectuate the purposes hereof.

1.3 The OSCC shall have primary responsibility for enforcing the provisions of this Order.

(a) The OSCC may delegate to State agencies any portion of its enforcement duties or functions whenever such delegation is deemed appropriate for proper administration of this Executive Order.

(b) The OSCC may promulgate contract provisions consistent with the purposes and intent of this Order, for inclusion in every contract and agreement subject hereto.

(c) The OSCC will prepare standardized forms to be utilized by contractors and by State agencies for notices and compliance reports relating to the operation and implementation of the Order.

(d) The OSCC shall examine the employment practices of any State contractor or subcontractor, or direct such examination by the appropriate State agency, to assure the effectuation of the policies and purposes of this Executive Order. Where such examination is initiated by a State agency, it shall be conducted in accordance with procedures established by the OSCC and the agency shall report to the OSCC any action taken or recommended.

(e) The OSCC shall use its best efforts, directly and through contracting agencies, other governmental agencies, contractors and all other available instrumentalities, to cause any labor union whose members are engaged in work under State contracts, or any agency or body referring such workers or providing apprenticeship or training for or in the course of such work, to cooperate in the implementation of this Executive Order.

(f) The OSCC shall, in appropriate cases, notify the concerned State agencies, the Equal Employment Opportunity Commission, the United States Secretary of Labor, the State Attorney General, the United States Department of Justice, or other appropriate Federal, State or local agency whenever it has reason to believe the practices of any such labor organization or agency or body violate the State Human Rights Law, Title VI or Title VII of the Civil Rights Act of 1964, or other provisions of related Federal, State or local laws.

(g) The OSCC may hold such public hearings for informational or educational purposes as the Commissioner of Human Rights may direct, related to the purposes of this Executive Order.

(h) The OSCC shall hold or cause to be held hearings, in accordance with rules, regulations or orders to be adopted by the Commissioner of Human Rights, prior to the Commissioner imposing, ordering, or directing the imposition of the sanctions authorized under Section 7.1 of this Executive Order.

(i) The OSCC shall periodically review the practices and procedures of State agencies with respect to compliance by them with the provisions of this Executive Order, and shall require them to file performance reports.

(j) The OSCC may direct withdrawal of approval or funding granted by any State agency to any affirmative action or training program which interferes with or impedes the implementation of this Order, or which fails to comply with this Order or with the rules and regulations hereunder.

Article II - Definitions

2.1 Contract - any written agreement, purchase order, lease or other instrument by which the State or a state agency is either committed to expend its funds in return for property, equipment, supplies, merchandise, goods, materials, work, labor or services, or to provide State assistance through which such a contract may be aided in whole or in part. The term "contract" shall not include (a) employment by the State or a State agency of officers and employees, and (b) contracts, resolutions, indentures, declarations of trust, or other instruments authorizing or relating to the authorization, issuance, award and sale of bonds, certificates of indebtedness, notes or other fiscal obligations of the State or a State agency, or consisting thereof.

2.2 Construction contract - any contract as defined in Section 2.1 of this Article for the erection, construction, reconstruction, rehabilitation, alteration, conversion, extension, repair, landscaping, improvement, demolition of buildings, highways, or other real property.

2.3 Subcontract - any agreement between a contractor and any person under which any portion of the contractor's obligation is performed, undertaken or assumed.

2.4 State-assistance - includes but is not limited to the following forms of assistance accorded to contractors or applicants directly or indirectly by the State of New York or any State agency: loans; financial guarantees; subsidies; grants; insurance; tax abatements; tax exemptions; air rights; and the sale, lease, disposition or lease-back of property.

2.5 State agency - all agencies of the State, and all public benefit corporations, authorities, bureaus, departments, boards, commissions or other bodies authorized or created by the State which operate wholly within the State.

2.6 Contracting agency - any State agency which awards or administers a State or State-assisted contract.

2.7 Contractor - any bidder for or awardee of a contract, as defined above, obtained through competitive bidding procedures or otherwise.

2.8 Applicant - any entity which applies for State assistance, and includes such applicant after it becomes a recipient of such State assistance.

2.9 Affirmative action programs - programs approved or adopted by the Commissioner of Human Rights to assure equal employment opportunity for minority group persons and women by State and State-assisted contractors. Such programs shall include, at a minimum, provisions requiring contractors to achieve goals and time tables designed to reflect adequate utilization of minority group persons and women.

Article III - Contract Provisions: State Contracts

3.1 Except for contracts exempted in accordance with Article V hereof, all State contracting agencies shall include in every contract hereafter entered into, and the bid documents therefor, the following provisions:

(a) The contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status and will undertake programs of affirmative action to insure that they are afforded equal employment opportunities without discrimination. Such action shall be taken with reference, but not be limited to: recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination, rates of pay or other forms of compensation, and selection for training or retraining, including apprenticeship and on-the-job training.

(b) If the contractor is directed to do so by the contracting agency or the Office of State Contract Compliance (hereafter OSCC), the contractor shall request each employment agency, labor union, or authorized representative of workers with which he has a collective bargaining or other agreement or understanding, to furnish him with a written statement that such employment agency, labor union or representative will not discriminate because of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the contractor's obligations hereunder and the purposes of Executive Order 45(1977).

(c) The contractor will state, in all solicitations or advertisements for employees placed by or on behalf of the contractor, that all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

(d) The contractor will comply with all the provisions of Executive Order 45 (1977) and of rules, regulations and orders issued pursuant thereto and will furnish all information and reports required by said Executive Order or such rules, regulations and orders, and will permit access to its books, records and accounts and to its premises by the contracting agency or the OSCC for the purposes of ascertaining compliance with said Executive Order and such rules, regulations and orders.

(e) If the contractor does not comply with the equal opportunity provisions of this contract, with Executive Order 45 (1977), or with such rules, regulations or orders, this contract or any portion thereof, may be cancelled, terminated, or suspended or payments thereon withheld, or the contractor may be declared ineligible for future State or State-assisted contracts, in accordance with procedures authorized in Executive Order 45 (1977), and such other sanctions may be imposed and remedies invoked as are provided in said Executive Order or by rule, regulation or order issued pursuant thereto, or as otherwise provided by law.

(f) The contractor will include the provisions of clauses (a) through (e) above and all contract provisions promulgated by OSCC pursuant to Section 1.3(b) of Executive Order 45 (1977), in every non-exempt subcontract or purchase order in such a manner that such provisions will be binding upon each subcontractor or vendor as to its workforce within the State of New York. The contractor will take such action in enforcing such provisions of such subcontract or purchase order as the contracting agency or the OSCC may direct, including sanctions or remedies for non-compliance. If the contractor becomes involved in or is threatened with litigation with a subcontractor or vendor as a result of such direction, the contractor shall promptly so notify the Attorney General, requesting him to intervene and protect the interests of the State of New York.

3.2 Every State contract hereafter entered into, and the bidding documents therefor, unless exempted from the provisions of this Executive Order pursuant to Article V hereof, shall provide that prospective contractors must submit to the contracting agency, prior to the award of such contract, and prospective subcontractors prior to their approval by the agency, a program of affirmative action to provide for equal employment opportunity in accordance with the intent and purpose of this Executive Order, in such form and substance as may be required by rule, regulation or order of the Commissioner of Human Rights.

3.3 No contracting agency shall enter into any contract with or award any contract to any bidder or prospective contractor subject to the foregoing requirement unless the program of affirmative action submitted pursuant to Section 3.2 is acceptable to the OSCC, or if the Commissioner of Human Rights so authorizes by rule, regulation or order, to the contracting agency.

3.4 The affirmative action programs referred to in this Article shall apply to the entire workforce of the contractor within the State of New York during the performance of the State or State-assisted contract.

3.5 The provisions referred to in Sections 1.3(b) and 3.1 shall be deemed supplementary to, and not in lieu of the non-discrimination provisions required by the New York State Labor Law or other applicable Federal, State or local law to be included in State or State-assisted contracts.

Article IV - Contract Provisions : State Assisted Contracts

4.1 Each State agency which administers a program involving State assistance as defined in Section 2.4, shall include in any contract entered into with an applicant for State Assistance provisions that said applicant undertake and agree to incorporate or cause to be incorporated in all contracts entered into by the applicant pursuant to the purposes for which the assistance is granted, the provisions prescribed in Section 3.1 together with the provisions prescribed in Section 3.2 for prospective contractors.

4.2 Each such contract shall also require the applicant to undertake and agree: (1) to assist and cooperate actively with the contracting agency and the OSCC in obtaining the compliance of contractors and subcontractors with such provisions; (2) to obtain and to furnish to the contracting agency and to OSCC such information as they may require for the supervision of such compliance; (3) to carry out sanctions for violation of such obligations, imposed upon contractors and subcontractors by the Commissioner of Human Rights or the contracting agency pursuant to Article VII of this Executive Order; and (4) to refrain from entering into any contract subject to this Executive Order with a contractor debarred from State contracts under Article VII of this Executive Order.

4.3 In the event that an applicant fails or refuses to comply with such undertakings, the agency, after consultation with the OSCC, and after giving notice and opportunity for hearing before the agency or the OSCC, may take any or all of the following actions:

(1) subject to approval of the State Attorney General, cancel, terminate or suspend in whole or in part the contract with such applicant with respect to which the failure or refusal occured;

(2) refrain from extending further assistance under the program or condition further assistance upon satisfactory assurances of future compliance; and

(3) refer the matter to the State Attorney General for appropriate legal proceedings.

Article V - Exemptions

5.1 The OSCC may, when it deems that special circumstances in the public interest so require, exempt a contracting agency from including any or all of the provisions required pursuant to Articles III and IV hereof in any specific contract and may also exempt those facilities of a contractor which are separate and distinct in all respects from activities of the contractor related to the subject of the contract.

5.2(a) The Commissioner of Human Rights, by rule or regulation, may exempt designated classes of contracts, including contracts (1) for standard commercial supplies or raw materials; (2) involving less than specified amounts of money or numbers of workers; or (3) to the extent that they involve subcontracts below a specified tier.

5.2(b) Such rule or regulation may also provide for the exemption of construction contractors who are participating in an area-wide negotiated plan of affirmative action which has been approved by the Commissioner.

Article VI - Duties of State Contracting Agencies

6.1 Each State contracting agency shall be primarily responsible for monitoring its contracts, including State-assisted contracts, and obtaining compliance with this Executive Order, the rules, regulations, and orders of the Commissioner of Human Rights issued hereunder and the contractual provisions required pursuant to Articles III and IV hereof. All State agencies shall comply with the rules and regulations of the OSCC and are directed to cooperate with the OSCC and to furnish to that office such information and assistance as it may require in the performance of its functions under this Executive Order. Each State contracting agency is further directed to appoint or designate, from among the agency's executive personnel, a compliance officer who shall report to the OSCC in matters pertaining to the implementation of this Executive Order.

6.2 All State agencies shall require every contractor working on a State or State-assisted contract to file, and to cause each of its subcontractors to file, such periodic compliance reports as the Commissioner of Human Rights may prescribe by rule or regulation. State agencies shall require each such contractor to keep and maintain such records pertaining to its employment practices as the Commissioner of Human Rights may prescribe by rule or regulation, and shall cause its subcontractors to keep and maintain such records.

6.3 Under rules and regulations prescribed by the Commissioner of Human Rights, each agency compliance officer shall make every effort to secure compliance with the contract provisions required pursuant to Articles III and IV of this Executive Order within a reasonable time by methods of conference, conciliation, mediation, and persuasion before proceedings shall be commenced under Section 7.1 of this Executive Order.

6.4(a) Whenever a State agency has reasonable grounds to believe that a proceeding under Article VII should be commenced, it shall promptly notify the OSCC of its recommendation and the reasons therefor.

6.4(b) Whenever the OSCC makes a determination provided for in this Executive Order which may affect the award or performance of an agency's contracts, the OSCC shall promptly notify the agency of that determination and its recommendation or direction for action, if any, to be taken by such agency. The agency shall take the prescribed action and shall report the results thereof to the OSCC within such time as that office shall specify.

Article VII - Sanctions and Other Remedies

7.1 In accordance with the hearing provisions of Section 1.3(h) hereof and with such rules, regulations, procedures or orders as the Commissioner of Human Rights may issue or adopt hereunder, the Commissioner may:

(a) Direct the State contracting agency concerned to withhold payments, cancel, terminate, suspend, or cause to be cancelled, terminated, suspended, or have payments withheld on any contract, or any portion thereof, for failure of the contractor or its subcontractor to comply with the equal employment opportunity provisions of the contract or the affirmative action program. Such contracts may be cancelled, terminated or suspended absolutely, or continuance thereof may be conditioned upon a program for future compliance approved by the Commissioner of Human Rights.

(b) Declare a contractor or subcontractor ineligible for future contracts for a period not to exceed two years and direct that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any such contractor or subcontractor for said period.

(c) Publish or cause to be published the names of contractors who have been found to be in non-compliance with the contract provisions or affirmative action requirements of this Executive Order or rules, regulations or orders issued hereunder.

(d) Rescind any sanctions or remedies set forth in paragraphs (a), (b) and (c) of this article.

(e) Whenever a State contracting agency cancels or terminates a contract or whenever the award of further State or State-assisted contracts has been withheld, or such sanctions have been rescinded, the OSCC or the contracting agency involved shall promptly notify the Comptroller of the State of New York and the agency's fiscal officer.

7.2 The Commissioner of Human Rights in addition to or in place of the foregoing and without a hearing, may:

(a) Publish or cause to be published the names of unions or other bodies and organizations which the Commissioner has concluded have interfered with or impeded compliance with the contract provisions or affirmative action requirements of this Executive Order or rules, regulations or orders issued hereunder.

(b) Recommend to the State Attorney General, local human rights agencies, the Equal Employment Opportunity Commission, the U. S. Secretary of Labor, State Labor Department, or the U. S. Department of Justice that appropriate legal proceedings be instituted.

(c) Recommend that criminal proceedings be brought against any individual or organization furnishing false information to any contracting agency or to the OSCC.

(d) Recommend to the State Attorney General that, in any case of willful interference or the threat of willful interference with a contractor's ability to comply with the contractual provisions entered into pursuant to this Executive Order or with other obligations assumed pursuant hereto, appropriate proceedings be brought to obtain injunctive or other necessary relief against organizations, individuals, or groups who prevent or seek to prevent, directly or indirectly, compliance with such provisions and obligations.

(e) Recommend to the State Industrial Commissioner that deregistration proceedings be initiated against any apprenticeship or training program registered under Article 23 of the Labor Law whenever the failure of said programs to comply with affirmative action requirements under said law interferes with or impedes the effectuation of this Executive Order.

Article VIII - Functions of State Department of Labor

8.1 The State Department of Labor shall cooperate with the OSCC and with each State contracting agency by providing assistance to contractors seeking referrals of, or training programs for, minority group employees.

8.2 The State Department of Labor shall provide the OSCC with information and reports relating to equal opportunity in apprenticeship and other training programs, as requested by the OSCC.

8.3 Upon receipt of a recommendation made pursuant to Section 7.2(e) the State Industrial Commissioner shall immediately investigate and take action either to obtain compliance or to initiate deregistration proceedings, as the circumstances warrant.

Article IX - Municipalities and Public Agencies

Any local government, and any board, authority, commission, district or other public agency, not part of the State government, whose field of operations and jurisdiction lies wholly or in part within the State of New York, may, by agreement with the Commissioner of Human Rights, elect to comply with the program established by this Executive Order and with the rules, regulations and orders promulgated hereunder, as to its contract activities within the State of New York.

Article X - Separability Clause

If any part of this Order or the application thereof to any person or circumstances be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this Executive Order or the application thereof to other persons or circumstances.

Article XI - Revocation of Prior Executive Order and Effective Date

Executive Order No. 43, dated January 21, 1971, and continued by Executive Order No. 1, dated January 1, 1975, is hereby revoked and superseded by this Executive Order, which shall become effective thirty (30) days after its date.

GIVEN under my hand and the Privy Seal of the State in the City of New York, this fourth day of January, in the year of our Lord, one thousand nine hundred seventy-seven.

(L.S.)

(signed) Hugh L. Carey

BY THE GOVERNOR:

(signed) David W. Burke

Secretary to the Governor

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A GUIDE
TO FEDERAL REQUIREMENTS
ON
RELIGIOUS DISCRIMINATION

Center for
Human Relations
Concerns of Business
165 East 56 Street, New York, N. Y. 10022

A PROGRAM OF THE INSTITUTE OF HUMAN RELATIONS OF THE AMERICAN JEWISH COMMITTEE

INTRODUCTORY NOTE

New guidelines, issued by the Office of Federal Contract Compliance in 1973,* state that:

> *An employer must accommodate to the religious observances and practices of an employee or prospective employee unless the employer demonstrates that it is unable reasonably to accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.*
>
> --OFCC Guidelines on Discrimination Because of Religion or National Origin, 1973

Government contractors are required to:

1. Be cognizant of the religious minorities in their work force.

2. Identify employment problems based on religion.

3. Institute appropriate affirmative actions to obtain solutions.

This memorandum is designed to help you carry out the letter, spirit and goals of these requirements, as they apply to Jews and other religious minorities. Many of the suggestions, of course, apply to other minority groups as well, and can help your company avoid the public embarrassment and costs of litigation resulting from inadvertent violations of the law.

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*Amendment to the Code of Federal Regulations applying to Executive Order 11246.

THE DYNAMICS OF EXECUTIVE SUITE DISCRIMINATION

Religious discrimination can affect the entire development of a business career, from recruitment through every step on the corporate ladder. But exclusionary business practices do not hurt only the excluded. Business itself is deprived of many talented, highly trained and motivated executives; and the economic development that depends on the effective use of available talent is also adversely affected.

Studies at the Harvard Graduate School of Business Administration* and the University of Michigan's Institute of Social Research** have revealed some startling facts about the dynamics of executive suite discrimination. Harvard's researchers found, for example, that the number of Jews in the Advanced Management Program of the Graduate School, where industry sends its brightest, most rapidly advancing junior executives, was many times lower than their representation among the School's master's degree graduates.

The Michigan Study demonstrated that "discrimination in executive promotions rarely stems from prejudice alone." It is largely the product of ignorance, and/or a fear among many executives that others they do business with -- clients or employees -- may be prejudiced against minority groups. And, the study showed, the inconsistency between what corporations say and what they do about fair hiring and promotion plays a large role in perpetuating discrimination: Executives who thought their companies gave only lip service to equal job opportunities were almost three times as likely to discriminate as officials who believed their companies took the matter seriously.

Often, but far from always, religious discrimination violates explicit company policy, and corporate officials are genuinely surprised to discover that their companies discriminate in executive hiring and promotion.

Such practices, whether they occur by default or by design, are often fed by myths accepted by both discriminators and the discriminated against, the researchers found. Many executives are convinced, for example, that Jewish aptitudes are confined largely to mathematics, research, pure science and the creative

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*"The Ethnics of Executive Selection," by Lewis B. Ward, reprinted from Harvard Business Review, The American Jewish Committee, 1965; Student Expectations of Corporate Life: Implications for Management Recruitment, by Lewis B. Ward and Anthony G. Athos, Harvard University School of Business Administration, Division of Research, 1972.

**Discrimination Without Prejudice, University of Michigan, Survey Research Center, 1964; The Chosen Few, by Robert F. Quinn et al, University of Michigan Institute of Social Research, 1968.

arts, and that Jews are not really interested in careers in corporate management. On the other hand, many Jews are so convinced that certain jobs and companies are closed to them, that they fail to seek out or train for available opportunities.

In addition to the myths that feed discrimination, there are the evasions: "I really want to move him into top management but the 'other fellows' wouldn't go for it." Maintaining things "the way they've always been" is seen by many corporate officers and personnel managers as a way to keep the peace and avoid rocking the boat.

In sum, all available research on religious discrimination in the executive suite suggests that implementation of the new OFCC guidelines requires not only a corporate commitment to merit hiring, but a deliberate plan by high company officials to search out and deal with the practices and attitudes that stand in its way.*

STEPS TOWARD ELIMINATING RELIGIOUS DISCRIMINATION FROM THE EXECUTIVE SUITE

Experience and the public record demonstrate that several affirmative measures can significantly reduce executive-suite discrimination against minority groups.

1. The first step is a clear declaration by the highest executives in the corporation -- and its communication to personnel directors, department heads, managers, and all other personnel, however far removed from the top, who have authority and/or responsibility for hiring, firing, transfers or promotions -- that discrimination and the conditions which may have caused it in the past will no longer be tolerated. Among the points that should be made are:

Company hiring and promotion at all levels -- including management and management entry -- will be based solely on ability; race, religion, sex, national origin or social position are not valid criteria in the selection process.

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* For an extended review of the Harvard and Michigan studies and related issues as well as suggestions for corporate remedial action, see The Case of the Missing Executive, How Religious Bias Wastes Management Talent....and What Is Being Done About It, by Edwin Kiester, Jr., American Jewish Committee, New York, 1968, 1972; pp. 27.

. The correction of practices which place minority applicants at a disadvantage is not only a matter of legal compliance, but in the company's best business interest.

. If an employee has not been hired or upgraded because of his religion, management must investigate whether he was also excluded from company training programs, and if so, furnish the training.

. The principle of merit in hiring and promotion will be as vigorously executed as are company policies on budget, production, quality control, sales and so on.

. Managers and corporate officials will be judged on their success in promoting equality in employment in their departments, and those judgments will be just as important a factor in their overall evaluations as judgments about performance in operating or other departments.

. The chief executive officer and his top aides will require regular progress reports and undertake ongoing responsibility for checking company compliance with OFCC guidelines.

2. A careful review of present entry-level and middle management staff will help answer several crucial questions about company hiring and promotion practices.

In most cases, an anonymous census -- asking all executives to check their religion on a form card that requires no personal identification -- is an efficient way to gather such information. Calculating only division or department totals further reduces the danger of invasion of personal privacy. (A sample census form appears at the top of page 6.) Division heads can also get some notion of the numbers of Jewish staff by tallying absences on important Jewish holy days, like Yom Kippur.

The company should also be in a position to know if any of its departments have absolutely no Jewish executive staff; if all Jewish managers and executives are in "back room" positions invisible to the public eye, or only on the lower rungs of the corporate ladder; if they are conspicuously absent from "line" positions.

If these investigations indicate that the executive staff are completely homogeneous, the question must arise whether personnel managers "naturally" hire people who belong to the "right" church, and whether other factors may block the hiring or promotion of minorities.

SAMPLE RELIGIOUS CENSUS FORM

Religious Census Request

To: All Executive Personnel

From: (Chief Executive Officer)

Our hiring and promotion procedures may not be reaching the entire pool of applicants qualified for management positions in this company. To make certain that we have not inadvertently been using religious affiliation as a criterion of selection, we would like to do an anonymous religious census of our current personnel. *We are interested only in overall statistics, not in any individual's religious background.*

Your cooperation will help us meet the letter and spirit of government requirements to eliminate religious discrimination in employment. Please indicate your religious affiliation or background in the space below. *Do not sign this card or identify yourself in any way.*

Religious affiliation or background: _____

If religious minorities consistently fail to find a welcome in your company, they will stop applying for such jobs. Correcting this situation begins with fair recruitment.

3. The attitudes of interviewers, recruiters and talent scouts can make or break the best fair employment program. They need careful training, close supervision.

. High school and college guidance counselors, as well as executive-talent agencies and similar commercial services, should all be advised of the company's interest in hiring minorities.

Recruiters should be assigned to colleges and universities with high proportions of Jewish students and/or those

of other minority groups, to assure them that management jobs are open to qualified people, regardless of extraction. (A caution: Never conduct a recruitment meeting in a facility that does not welcome members of minority groups. When headquarters of sectarian campus organizations are used for recruiting, the meetings should be repeated in several different settings.)

4. A company's fair employment policy can work only if the minority communities know about it.

Spreading the word about equal opportunity management jobs requires steady communication with major Jewish and other minority organizations.

. Local chapters of large Jewish organizations like the Jewish Vocational Service, the Jewish Federation or Council; Hillel and The American Jewish Committee can help enhance company credibility and image, and vouch for its good faith.

. Articles or ads about company personnel policies and recruitment campaigns in the local press, including Anglo-Jewish weeklies and other minority-group periodicals, will help reach prospective applicants.

. Make consultation opportunities with knowledgeable people and organizations in the Jewish community available to management personnel to resolve any misunderstandings or misconceptions and to advise on implementation. The National and Area Offices of The American Jewish Committee stand ready to offer assistance.

5. Education and career guidance programs for trainees and lower-echelon managers should include the following built-in safeguards:

. Periodic personnel reports identifying promotable minority-group employees, and their inclusion in visible positions of authority.

. Periodic reports by all managers on programs of affirmative action.

. Publicity for equal employment measures, including the hiring or promotion of minority personnel.

. Vigorous support by chief executive officers of personnel managers whose affirmative action creates discomfort or arouses controversy.

. Familiarity with the major religious observances and practices of Jews and other religious minorities. (Religious

observances of some, but not all, Jews include not working or traveling from sundown Friday to sundown Saturday and on certain holy days; wearing a beard; symbolic covering of the head. These practices create little or no dislocation, but some do require minor changes in dress rules and adjustment of work schedules.)

6. Social relationships affect executive-suite discrimination.

Prestige social clubs are close adjuncts of the corporate world when high-level business is transacted in that setting. Individuals excluded from such clubs solely because of religion are often cut off from executive-suite careers.

Individual and corporate influence can be used to help break down discriminatory barriers in the social clubs in communities where the company has facilities. Many companies now refuse to reimburse managers for membership dues paid to clubs which discriminate. Some companies go further and issue orders that say simply: "Take the leadership to integrate such organizations or cancel your membership."* Such a step underlines the fact that top management means what it says and will act upon its convictions.

A CONCERN OF ALL AMERICANS

The Center for Human Relations Concerns of Business does not believe executive-suite discrimination can be solved by a quota system of hiring, promoting or upgrading Jews or other minority group members in numbers proportionate to their share in the population, or in any other fixed ratio. It does believe, however, that a reappraisal of many companies' practices and a change of attitudes toward the hiring of minorities in management posts is called for in much of U.S. business.

* * *

The Center for Human Relations Concerns of Business invites requests from corporate executives for information, consultation and other assistance in complying with the guidelines on religious discrimination and national origin.

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*"The New Chamber Marketplace: Challenges and Opportunities," Owen Kugel, Urban Strategy Center, Chamber of Commerce of the United States, 1973.

Appendix D

ANNOUNCEMENTS

Native American Rights Fund Winter 1979

"We Also Have A Religion"
The American Indian Religious Freedom Act and the Religious Freedom Project of the Native American Rights Fund

On August 11, 1978, President Carter signed into law the "American Indian Religious Freedom Act." Introduced as Senate Joint Resolution 102 and now Public Law 95-341, the Act is intended to guarantee to native peoples—American Indians, Native Alaskans and Native Hawaiians—the right to believe, to express, and to practice their native traditional religions. This is to be achieved by establishing a comprehensive and consistent Federal policy directed toward protecting and preserving the native religious practices in this country.

Among other things, the Act guarantees to Native Americans access to religious sites, use and possession of sacred objects, and the freedom to worship through traditional ceremonial rites. Furthermore, it calls for the President to direct Federal agencies, whose activities affect Native American religious practices, to evaluate their policies and make changes where possible to insure that Native American religious and cultural rights are protected. It also directs the President to report back to Congress one year after the signing of the Act with the results of his evaluation, including any changes that were made in administrative policies.

Like all other religions, the religious beliefs and practices of Native Americans fall under the protection of the First Amendment of the Constitution. However, historically—and especially during the past decades—infringement of Native religions has been increasing. Because Native American religions are so culturally removed and different than their own, non-Indians do not see them as having the same status as "real" religions. This attitude has led to the enactment and enforcement of a multitude of Federal laws without any consideration of their possible affect on Native religions, and which have severely restricted the religious practices of Native Americans. Though these laws often concern such worthy objectives as the preservation of wildlife and the protection of wilderness areas, they were not written with an awareness of their potential adverse affect on Native religions.

It is the belief of the Native peoples, of the congressional sponsors and supporters of the Resolution, and many others that this country need not violate the religious freedom of her Native peoples; that Federal laws and programs can be made compatible with Native religious practices; and that this Act will serve as a clear policy statement from Congress that this country intends to respect and protect the religious freedom of Native Americans.

Part I: Federal Suppression of Native Religious Practices

The Indian Religion has no name because it's part of all Indian life. Before the coming of the New People, this was our paradise, right here in America. Everything natural comes from God and is made by Him. God is in you and part of you. The Bible and our own religion are closely related. The only difference is that we practice and live ours every day.

Ernie Peters, Dakota

The nature and varieties of Native American religions is set down in thousands of books, articles, studies and dissertations. In fact, no aspect of Native American life has been subject to greater examination by historians and others. So it is neither necessary—nor possible in this space—to attempt even a limited review. However, one aspect of Native religion must be discussed because of its importance to an understanding of the need for the "Native American Religious Freedom Act," and why this Act should be applied to protect certain customs, traditions and practices which some may question as not being truly "religious" in nature, and, therefore not entitled to protection under the Act.

This aspect is the *unity* of traditional Native cultures in which the religious beliefs permeate all parts of individual and community life. Whether it was the now historical buffalo hunt, planting and harvesting of food, relations with neighboring tribes, or even how one was to be named, sacred ceremonies and beliefs came into play. "Ceremonies, great and small, were the very fabric of life. They furnished the chief opportunities for learning, for feasting, for lovemaking. They gave courage to a lone hunter. They fused a group together in heartening ritual. They combined the functions not only of a church but of a school, clinic, theater, and law court."

Where most Western cultures have divided life into distinctly separate political, social and religious aspects of existence, Indian traditional life is still unified in many ways. In 1961, the Fund For the Republic conducted a private study, which summarized this social unity:

. . . In their society and in their religion, Indians believe they have values worth preserving. These are sometimes stated in

Continued on page three

NATIVE AMERICAN RIGHTS FUND

The Native American Rights Fund is a national law firm specializing in the protection of Indian rights and resources. NARF's priorities identified by the Steering Committee are the preservation of tribal existence; the protection of Indian resources; the promotion of human rights; the development of a body of law relating to Indian people; the accountability of the dominant society to American Indians and the advancement of self-determination.

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mystical terms and, if related to the Supreme Being, are sometimes kept secret. Nonetheless they exist. Two examples out of many involve their idea of unity and their reverence for Mother Earth. Unity is evidenced by the individual's voluntarily working with the community of which he is a part. He gives his strength and help to perpetuate the traditional culture. Cohesion is also furthered in many tribes by a veneration for elders and reliance on their wisdom. Status as well as personal security is often gained by service.

The following is a brief examination of some of the historical and current issues to illustrate both the nature of Indian religious beliefs and the course Federal suppression has taken.

The Taking and Restoration of Blue Lake

To the Taos Pueblo Indians of northern New Mexico, the Blue Lake area is holy land. As the principal source of the Rio Pueblo de Taos, Blue Lake is actually and symbolically the source of all life; it is the retreat of souls after death; and the home of the ancestors who gave life to the Taos people of today. The August ceremonies at Blue Lake serve to bind the youths of the Pueblo to the community as it exists and has existed for centuries. Blue Lake, therefore, symbolizes unity and continuity of the Pueblo people. Because the religious significance of Blue Lake extends to the entire watershed, the whole area is considered sacred.

The Taos Indians have resided in their present location at least since 1300 A.D., and probably long before. Although specific land areas were set out for the pueblos during the Spanish colonization period, it appears that the Taos traditional life style was not seriously interfered with. In 1848, the United States assumed control of the area under the Treaty of Guadalupe Hidalgo, and existing Spanish land laws were recognized. But all other land was considered public domain as far as the United States was concerned, and the Blue Lake area was within the public domain. But until the turn of this century, the Taos did not become overly alarmed by the land status of the Blue Lake area or the ever-growing presence of the White man, since the Blue Lake area was high in the Sangre de Cristo Mountains, secluded from most outsiders.

But in 1906, President Theodore Roosevelt proclaimed Blue Lake and the surrounding area as part of what is now the Carson National Forest. It is doubtful if the Taos fully understood the implications of this action, but they came to realize that Blue Lake was no longer exclusively theirs. Thereafter, they could not go into the area for religious ceremonies undisturbed from outside interference as before. Realizing this, they began what was to be a 64-year struggle to regain the sacred area for their exclusive use. During this time, various compromises were offered by the Federal government, but were either rejected or failed to work out as promised.

When the Indian Claims Commission was established in 1946, the Taos Pueblo reluctantly filed their land claim to the Blue Lake area, but made it clear that they wanted the land returned and not monetary compensation. But since the ICC Act did not provide for return of lands, the Taos petitioned Congress, recognizing that only by special congressional act could they regain the Blue Lake area. Repeatedly, they had bills introduced providing for outright return of the land, and repeatedly they died in Congress. But by the 1960's they began to plead their cause on the basis of religious rights. Congress' main concern was that granting the Taos claim would establish an undesirable precedent for other Indian land claims calling for return of areas for religious purposes—a situation they thought they had forever precluded with the establishment of the Indian Claims Commission, which was authorized to award only monetary compensation if an Indian land claim was upheld.

Therefore, what the Taos Pueblo had to do was convince Congress of the uniqueness of their claim; that even within the area of Native religious practices, their situation and claim was such that no other tribe could reasonably assert an identical consideration. Testifying on behalf of the Taos, Stewart Udall, then Secretary of the Interior, characterized the Taos claim as unique in that it was based solely on religious grounds. But Congress was persistent in requiring the Taos to prove that the nature of their religious use of the land and of the meaning of the area for them was so critical that nothing else, neither money nor sharing of the area with others nor having special areas or days set aside for them, would be adequate. Finally, the testimony of anthropologist John Bodine and others apparently convinced wavering congressmen of just this *uniqueness*. (Besides Bodine, the Taos had received support from neighboring Whites, especially long-time resident artists around the town of Taos.) Bodine emphasized that control of the entire area, not just Blue Lake, was essential to the practice of the Taos religion for Blue Lake was but one of many "shrines" in the area and all were necessary; that the total ecology must be undisturbed because of the use made of local plants and other natural features; and that the very presence of non-Indians constituted defilement of the ceremonies. Perhaps more importantly, he pointed out that the delicate interrelationship of the social institutions which make up the Taos culture was threatened. That danger to one—religion—would eventually lead to the weakening of others, such as the political system and family life; that the disappearance of the Taos religion could easily lead to the dissolution of the Taos culture; and that no other tribe's entire religion depended to the same degree on shrines in such a restricted area.

In 1970, Congress finally passed the bill, and on December 15, President Nixon signed it into law, returning over 48,000 acres to the Pueblo. This marked the first time in the history of the United States that an Indian claim for land, based on the practice of a Native traditional religion, ended successfully in return of the land to the Indian tribe.

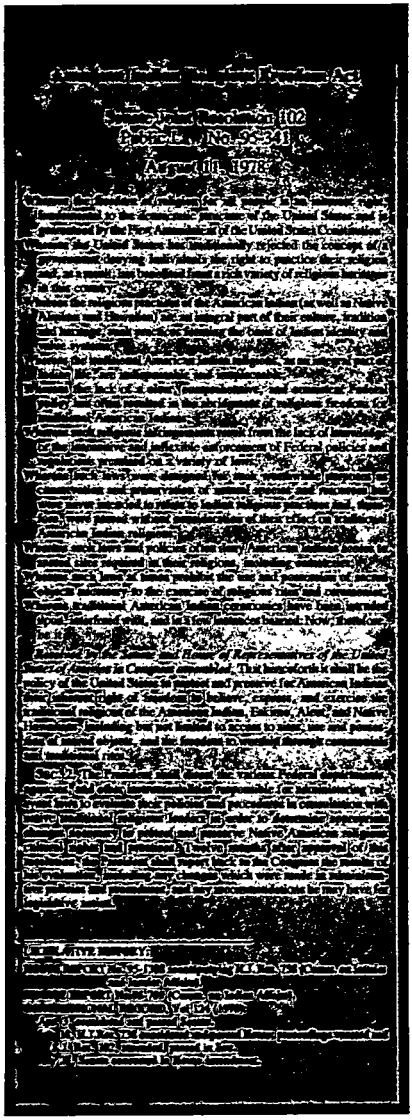
Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiian.

American Indian Religious Freedom Act of 1978

The Ghost Dance Movement

The Ghost Dance movement is often characterized as the last, desperate attempt of the Indians to oppose the white seizure of the land. It began around 1888, when a Paiute Indian from Nevada, known as Wovoka, appeared and told how he had experienced a prophetic vision. That a better world would be coming for the Indians; that this new world would come in a whirlwind out of the West and would crush out everything in this land which was old and dying; that the white man would disappear; that Indians long dead would return; and that the nearly extinct buffalo would come back as numerous as before.

"There was much that was beautiful about this movement, Wovoka counseled Indians to remain nonviolent, to be faithful to family life, and pray and hope, and above all, to dance. They were to dance that ecstatic circular dance about the center of life, singing those songs of supplication that now remain to posterity in some contemporary peyote rites. Even more impressive was the exhortation for all Indians to come together, to cease fighting among themselves—a message of truly prophetic ethical value, for Indian tribes too had a long record of strife and



warfare over hunting grounds and other, less significant causes. Maybe here, for the first time in active memory, Indians would truly be one people.

"The Ghost Dance spread like a grass fire *eastward, southward, and northward; more elaborate myths sprang up along with it, such as the idea that the Ghost Dance shirt would ward off the white man's bullets and that a great flood would engulf the white men as it engulfed all creation in the dawn celebrated by Indian mythology."*

(C. Starkloff, The People of the Center.)

But the Ghost Dance was not looked upon as the nonviolent, religious movement that it was. It was considered a threat to be crushed before the tribes could really unite. And so the vision of Wovoka came to a" . . . crushing halt under the Hotchkiss guns of a panicky and no doubt vengeance-bound army detachment at Wounded Knee Creek in South Dakota, in late December of 1890" (Starkloff). At Wounded Knee, nearly 300 of the 350 men, women and children were killed by a well-armed force of 500 soldiers. Lakota Medicine Man, Black Elk, who witnessed the massacre related many years later:

"And so it was all over. I did not know then how much was ended. When I look back now from this high hill of my old age, I can still see the butchered women and children lying heaped and scattered all along the crooked gulch as plain as when I saw them with eyes still young. And I can see that something else died there in the bloody mud, and was buried in the blizzard. A people's dream died there. It was a beautiful dream. And I, to whom so great a vision was given in my youth,—you see me now a pitiful old man who has done nothing, for the nation's hoop is broken and scattered. There is no center any longer, and the sacred tree is dead."

Peyote and the Native American Church

Peyote has been used for religious purposes since pre-Columbian times. The current issue involving peyote concerns its use by members of the Native American Church in their religious ceremonies. It is considered and used as a "sacrament," and for this reason both Congress and the courts have treated this use as a *bona fide* religious practice entitled to protection.

Federal narcotic laws regarding the use of peyote provides for a special exemption for religious use by members of the Native American Church. The exempting language states that "the listing of peyote as a controlled substance . . . does not apply to the non-drug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law."

However, Indians, like other citizens, are subject to state law as well

"The right to free religious expression embodies a precious heritage of our history. In a mass society which presses at every point toward conformity, the protection of self-expression, however unique, of the individual and group becomes even more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan."

California v. Woody (1964)

as Federal. Although nine states have adopted legislation similar to the Federal law, even where the state involved has an exemption for religious use by Indians, members of the Native American Church are still being arrested for possession and use of peyote. And unlike consideration given other religions, they are often under the burden of having to prove to state authorities their legitimate membership in the Native American Church. So despite some protective laws, discriminatory harassment against Native Americans still persists in this area.

Religious Ceremonial Use of Feathers

The use of feathers has been a part of American Indian culture long before the European discovery of this country. Used for both decorative and ceremonial purposes, they are essential to many religious ceremonies still practiced today. But the continued availability of such feathers to Indians is threatened by laws restricting their procurement and use, and by the tenuous existence of many species of birds, caused—not by the Indians— but by powerlines, insecticides, and outright extermination.

It is difficult for non-Indians to understand and accept the fact that Indians do attach religious importance to the use of feathers in certain rites; indeed, they are essential if the rite is to have any religious meaning for the Indian. The religious needs of other, more orthodox faiths is readily accepted by most, but these same people reject as primitive the same needs of the Indians. The use of wine in the Catholic and Jewish faiths is not questioned as being used for bona fide religious purposes. In fact, during the prohibition era, a special exemption was created to allow for the procurement and use of wine for sacramental purposes. It is in this respect that Native Americans are asking for equal consideration of their own beliefs. For thousands of years, the natural wildlife of this country have lived with no danger of extinction that could be blamed on the Indians. Yet, ironically, it is the Indian who is often accused of being insensitive to wildlife conservation, when all he is asking is simply that provisions be made so that he can continue to practice certain rites of his religion.

The Sun Dance

The sun dance is one of the oldest and most solemn ceremonies of the plains Indian culture. For some tribes, it was a relatively recent adoption; for others, its origin is unknown. The sun dance is one of the most misunderstood of all Indian religious rites. Many think of it as an initiation into manhood, or as a way of proving one's courage. It is neither. Rather, it is both a prayer and a sacrifice; and it is not something an Indian did voluntarily, but only after he had a vision or a dream of such a nature that he knew he was being called to participate in the dance. One account describes the sun dance very vividly:

> *Staring open-eyed at the blazing sun, the blinding rays burning deep into your skull, filling it with unbearable brightness . . . blowing on an eagle-bone whistle clenched between your teeth until its shrill sound becomes the only sound in the world . . . dancing, dancing, dancing from morning to night without food or water until you are close to dropping in a dead faint . . . pulling, pulling away at the rawhide thong which is fastened to a skewer embedded deeply in your flesh, until your skin stretches and rips apart as you finally break free . . .*
>
> *Many people do not understand why we do this. They call the sun dance barbarous, savage, a bloody superstition. The way I look at it, our body is the only thing which truly belongs to us. When we Indians give of our flesh, of our bodies, we are giving of the only thing which is ours alone. If we offer Wakan Tanka (God) a horse, bags of tobacco, food for the poor, we'd be making him a present of something he already owns. Everything in nature has been created by the Great Spirit, is part of Him. It is only our flesh which is a real sacrifice–a real giving of ourselves. How can we give anything less?*

To the Whites, especially the missionaries, their first encounter with the sun dance was a mixture of bewilderment and horror. But their suppression of it, as they came to see its religious significance to the Indians, was quick and complete. For over half a century, they banned it whenever and wherever possible. In 1921, for instance, the Office of Indian Affairs issued a policy statement to its agents which stated:

> *The Sun dance, and all other similar dances and so-called religious ceremonies are considered "Indian offenses" under existing regulations, and corrective penalties are provided. I regard such restrictions as applicable to any (religious) dance which involves . . . the reckless giving away of property . . . frequent or prolonged periods of celebration . . . in fact any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.*

The idea of personal, physical sacrifice is not restricted to the Native Americans. Many accounts of the conversion of Indians to Christianity relate how surprised many missionaries were at the ease with which many Indians adopted the new faith. But it was the striking similarities to their own beliefs which enabled Indians to identify with Christianity. To the tribes which practiced the sun dance, the account of Christ's crucifiction as a sacrifice to God, was seen as very similar to their own idea behind the sun dance. So when the sun dance ceremony was denounced instead of accepted, even more confusion set in—as far as the Indians were concerned—regarding Christianity. John Lame Deer, Dakota medicine man, has said: "The difference between the White man and us is this: You believe in the redeeming powers of suffering, if this suffering was done by somebody else, far away, two thousand years ago. We believe that it is up to every one of us to help each other, even through the pain of our bodies."

So the sun dance still continues. No longer banned, many of the younger generation see it as the one essential ceremony that must be preserved if their religion is to have any of its real meaning.

The Native Hawaiians

In testifying before the Senate Committee in favor of the Act, Senator Inouye of Hawaii related how the coming of the missionaries to Hawaii resulted in the conversion of a majority of the Native Hawaiians to Christianity; how the old gods were forgotten; and their worship chastised and forbidden by the new religious leaders. Yet, despite the demise of much of the Hawaiian culture, including its religion, certain traditions and beliefs remain. To those individuals who still revere these traditions and beliefs, the right to freely express and practice them is of utmost importance to their identity as Native Hawaiians and to their spiritual well-being.

Essential to Hawaiian religious expression is the right of free access to sacred sites; to the many ancient ko'as (altars) and heiaus (temples) whose remains dot the Islands. To these places, the ancient Hawaiians came to worship. Today, many Native Hawaiians still feel called by spiritual tradition to worship at these ancient sites. But too often they are prevented from doing so. The continued use of Kahoolawe Island for bombardment and ship-to-shore target training by the Navy is one example. Protest has come from a number of Native Hawaiians who

believe the Navy's actions to be an abhorrent abrogation of the traditional religious principle of Aloha Anina (love and respect for the land). Because of the Navy's use of the area, public access to many of Kahoolawe's religious sites is prevented. The Navy is beginning to cooperate in efforts to assure that neither national defense interests nor religious freedom rights will be sacrificed. Target areas have been moved away from religious sites, sites are being catalogued, and restoration is beginning on some. Steps are also being taken to provide for safe public access to the religious sites.

Although the problem of Kahoolawe is far from resolved, progress is encouraging, especially when compared with conditions on other Islands where severe restrictions to free exercise of traditional religious practices continue to exist. On almost every Island, Native Hawaiians are prevented from taking pilgrimages to sacred sites because they are on restricted lands—lands owned by the military, the state or by private companies and individuals. Many religious sites within Volcano National Park are off limits to the public, and Park officials have prevented Natives from taking herbs and volcanic sulphur used for medicinal purposes from the Park. Of particular concern is that many of the sites in restricted areas are being either destroyed by land development or are deteriorating through neglect.

Senator Inouye stated that many Native Hawaiians, young and old, "feel the mystery or sacredness that is there, feel a connection with the past and undergo perhaps a transcendental experience. This too is a form of worship, as spiritual for some as the recitation of the mass. This is an experience that the Native Hawaiian today believes he must share to secure his well-being. It is an experience that, as Americans commited to the belief that each individual may choose his form of spiritual fulfillment, we must allow him."

PART II: The Failure of the First Amendment

We support this measure because we want the right to worship and the right to an Indian way of life without any suppression, without any inhibition, and with the full support and protection of the U.S. Government. We support this measure because it will finally begin the process of sensitizing the Government, its agents, and its employees to the unique situations of the American Indian, the Alaskan Natives and the Native Hawaiians. It is these people whose way of life has consistently been infringed upon and violated by the laws of this country and the way in which they were enforced."

Barney Old Coyote, Crow

The First Amendment of the U.S. Constitution clearly encompasses the religious freedom rights of Native Americans. Nevertheless, Congress saw fit to pass this remedial law pertaining expressly to the rights of a minority despite the fact that such rights are already protected. The legislative history of Senate Joint Resolution 102 justifies the necessity for the Act as being the only way to make clear to Federal Government agencies and others that Native religious practices are equally entitled to respect and proper protection by the Government in the enactment of laws, policies, and practices.

Some may maintain that from its inception, the First Amendment was meant to, and did in fact, apply to Native religious beliefs and was not intended to be restricted to Judeo-Christian religions. It may be impossible to document whether the "Founding Fathers" did or did not also have Native beliefs in mind in their concern for establishing religious freedom in this country. But despite what may have been the intention in their minds, the history of this country is consistent in the area of Native religions.

It is a bleak history of disrespect, ignorance, suppression and attempted eradication of Native beliefs and practices. Such treatment by the White society could not have been so much the result of a conviction of the righteousness of their own faith—for they respected or at least tolerated other faiths in both the Old and New World. It must surely have rested in the belief that the "barbarism" and "savagery" of the Natives rendered their religious beliefs unworthy of any respect or consideration. The White people have given tolerant respect to other religions, cults, and creeds existing in this country and the world over. But the religious beliefs of the Native American have been subjected to suppression and persecution from the very first and continues to this day.

It is, therefore, an attitude that needs changing. An attitude that will turn suspicion and suppression of Native religious practices into respect and protection. It was essentially this attitude that made the First Amendment a meaningless promise to Native Americans during much of this country's history. So whether *in theory* the First Amendment legally applied to Native Americans, *in fact* it did not in that it afforded them no protection.

Because of this attitude toward Native religions, it was necessary for Congress to pass remedial legislation in the form of the "American Indian Religious Freedom Act of 1978." The primary congressional sponsor of the Act, Senator Abourezk stated:

Representatives of traditional Indian religious societies have sought to protect their rights, to have access to sacred religious sites, to make use of a variety of natural substances and wildlife in the practice of their religion and to secure privacy for sacred ceremonials. Infringement of these rights have consistently occurred due to enforcement of conservation laws which simply failed to take into account their impact on such Indian religious and cultural practices. While our resolution does not attempt to specifically amend existing legislation, it does call for examination of relevant Federal laws and procedures for the purpose of making appropriate changes in their administration. This fundamental question of Federal policy represents an issue all Americans can readily understand and support. I hope that expeditious action on the resolution will lead to securing the exercise of those rights and establishing permanent awareness on the port of all federal officials.

According to Kurt Blue Dog, NARF Attorney and Co-Director of NARF's American Indian Religious Project:

The purpose of P.L. 95-341 is to insure to the Native American the right to believe, express, and practice his religion in his traditional way by clearly establishing a comprehensive and consistent Federal policy directed toward protecting and preserving Native American religious freedom. Historically, the lack of knowledge, unawareness, insensitivity, and neglect have often been the keynotes of the Federal government's interaction with traditional Indian culture and religion. Among other things, it is the insensitive enforcement procedures and administrative policy directives which have interfered with the culture and religious practices of Native Americans.

So, there are basically two points of view as to why Native religious rights have historically been infringed upon. One view stating that the basic cause was an ethnocentric attitude which allowed, or rather fostered, suppression. And the official view holding that though Native religious rights may have been suppressed, that existing problems are a result of mere inadvertence.

Whatever the view, the new Act is intended to solve these conflicts between Federal laws and Native religious rights. To fulfill the mandates of P.L. 95-341, President Carter has directed the various Federal agencies to reevaluate their policies and procedures to identify any changes needed to correct this situation. Therefore, Federal agencies responsible for administering laws which presently interfere with Native religions must examine them to see if they can be made to accomodate them to the religious rights being sought. They must also report on what changes in the law or regulations may be necessary for such an accomodation.

Additionally, the President has appointed a Federal task force in the Executive Branch to investigate these problems and to recommend solutions, through consultations with traditional Indian religious leaders. Following a one-year review, the task force is to report back to the President, who will then submit a final report to Congress. In conjunction with the Federal agency efforts, the Native American Rights Fund and the American Indian Law Center will research and formulate the necessary changes in an effort to modify existing Federal laws and practices which unnecessarily infringe upon Native American religious rights.

It is important to note that the Religious Freedom Act has limits as to what protection can be secured under it. Native religious rights are infringed upon not only by the Federal government, but also by state and local governments, private companies and organizations, and individuals. This Act, however, applies *only* to Federal or Federally-related activities. However, although there must be a Federal connection, it does not have to be direct Federal action itself for the Act to apply. Federal funds which support organizations or colleges whose activities are violating a Native group's religious rights may be sufficient Federal connection to invoke the Act.

PART III: The American Indian Religious Freedom Project

The Act presents a number of challenges in its mandate that American Indians and other Native American religions be protected and preserved. It is a great opportunity, however, for Indians and Natives to further secure their existence in America. Given the tenuous nature of this existence up to this point, Indians and Natives cannot afford to let this opportunity pass to secure their right to religious freedom. It is submitted that this Project can be of great assistance in achieving this goal.

Excerpt from NARF's Proposal

As stated above, the Act does more than proclaim that it shall henceforth be the policy of the Federal government to protect the religious freedom of Native Americans; it also calls for specific action by the Executive Department.

The provision in the Act calling for consultation with Native traditional religious leaders was absolutely essential in order for the Act to bring about the desired changes in Federal law and policy.

In order to facilitate Native American consultation and achieve the desired beneficial changes for Native Americans called for by the Act, NARF submitted a proposal in June of 1978, in conjunction with the American Indian Law Center of the University of New Mexico and others involved with the legislation, proposing that NARF begin an "Implementation Project" to begin the following month. The project was subsequently funded with joint funding from the Bureau of Indian Affairs (BIA), the Administration for Native Americans (ANA), and the Community Services Administration (CSA), with ANA being the granting agency. The project is to operate for approximately one year, the same time frame set by the Act for the Administration to prepare its report to Congress on this matter.

In cooperation with the Federal task force effort, NARF is conducting a parallel review of Federal agencies' policies and procedures, making certain that the Federal task force does not overlook any area of concern to the Native American. There will, therefore, be two separate reports on Native religious freedom when the project is completed. NARF anticipates that the work of its Project will be completed by July 30, 1979.

Project Staff

John Echohawk, Executive Director of the Native American Rights Fund, has assigned two staff attorneys to act as Co-Directors for the Project—Kurt Blue Dog, a Sisseton-Wahpeton Sioux from South Dakota, and Walter Echo-Hawk, a Pawnee from Oklahoma. Both attorneys have had extensive experience in dealing with Indian religious rights in Federal and state prison matters. Also working on the Project as a consultant is Henry Old Coyote (Crow), formerly of the Senate Select Committee on Indian Affairs; and Burgess Primeaux (Osage-Ponca) and George Tah-Bone (Kiowa) as paralegals. Assisting as a part-time consultant is Dale Old Horn (Crow), Director of Indian Studies at Eastern Montana College.

The American Indian Law Center in Albuquerque, under the direction of Philip "Sam" Deloria, has been engaged to do a substantial portion of the legal research required. Working with Mr. Deloria is Vicky Santana, Parker Sando and Jeff Taylor. The Center's work is vital to the Project, and the experience of its staff in dealing with the Federal system through its past and existing projects is especially useful to this Project. The Center's work will concentrate on Federal statutes, regulations, and policies which impact adversely on the religious rights of Native Americans.

Native American Religion Advisory Board

For the Project to be successful, it is essential that the *broadest possible* input be obtained from American Indian and other Native American groups and individuals affected by Federal practices and regulations. To achieve this input, a 15-member "Native American Religion Advisory Board" has been formed as an integral part of the Project. The Project is now able to draw—on a continuing basis—from the Advisory Board's knowledge and experience with the issues, as well as make additional contacts from referrals made by Board members. The Advisory Board is representative, but is not meant to be exclusive or exhaustive (see page 13 for complete Board membership). All Board meetings in connection with the Project are open to any Native American who has an interest and a contribution to make.[1]

Project Design

Research into any area of American Indian life, whether for contemporary or historical insight, is difficult at best due to the conditions and locations of the primary resource materials. Though thousands of historical volumes exist, the original records are scattered throughout the country in Federal, state and private archives, and with few guides to indicate what and where some written information may exist.

The study of Native American religion has its additional unique problems. First, there is not one "Native American Religion," but as many as there are tribes and even variations within a tribe. Second, native religions are not "public" types of religions where the tenets and practices for each are reduced to a printed form as the Koran and Bible. And this leads to the third problem. Much needed information must be gathered from present-day practioners, who are difficult to identify, to

[1]One more Board meeting remains as this issue goes to press.

Indian Religious Freedom Project personnel, pictured here from left to right: Dale Old Horn (Crow), Project consultant; Henry Old Coyote (Crow), Project consultant; Parker Sando (Jemez Pueblo) and Vicky Santana (Blackfeet), staff attorneys for the American Indian Law Center, Albuquerque, New Mexico.

locate, and obtain information from. But these problems are slowly being overcome—especially with the help of the Advisory Board.

The Project is divided into two major components. The first is consultation with American Indian, Hawaiian and Alaskan groups. This component is being conducted throughout the Project period, primarily by the paralegal and the consultant staff under the supervision of the Project Co-Directors. The base of traditional Indian and Native groups participating in the consultation process is gradually expanding; additional specific data on the incidence of problems is being gathered; and the Advisory Board is being consulted in the development and implementation of specific remedial proposals.

The second Project component involves organization and classification of data; legal research; drafting proposals for remedial action; liaison with the Federal task force; and implementation of specific remedies in conjunction with the Federal task force. This component is being conducted primarily by NARF and the American Indian Law Center's legal staff.

The Project is being conducted in three phases:

Phase I (three months). Gathering additional information on the problems and expanding the base of tribes and individuals involved in the consultation process; organization of data on the problem into manageable form; analysis of Federal statutes, regulations, guidelines.

Phase II (three months). Drafting of remedial proposals and consulting with the Advisory Board on remedial action; liaison with Federal inter-agency task force; assuring the adequacy of their information, putting them in contact with Indians, securing their involvement in and support for remedial proposals.

Phase III (six months). Further consultation with the Advisory Board and assistance to Indian and Native groups in establishment of implementation mechanisms; working with Federal task force and Federal agencies on implementation of remedial actions including regulatory amendments, inclusion of statutory amendments as needed as part of legislative program of agency and executive branch.

There are several special problems which have to be dealt with as the Project evolves, but hopefully, workable solutions can be found. Some of these special problems are:

Definitions. It is important that Federal officials and the general public understand the basic religious considerations surrounding the substances and practices in question so that the necessary support for remedial actions is forthcoming. It is difficult to communicate these considerations without forcing Native religions into a conceptual framework that the English language has developed to express its *own* religious concepts, but which is inadequate to express non-Western religious thought and practice. For example, the English language varies between derisive terms—witch doctor, medicine man—and pseudo-scientific terms—shaman, animism—to express Indian religious concepts.

Confidentiality. Generally, Native people have been reluctant to reveal the details of religious beliefs and practices, partly because of the inherent sanctity of these beliefs and partly to avoid the exploitation of the religion for commercial purposes. It is ironic that at this stage of the process the burden is being placed upon the Indian people to justify their "exemption" from Federal law and regulation, and that in order to do so, they may have to reveal details of religious beliefs and practices.

Bureaucraticization. The basic problem here is to find a workable basis for recognition of Native religious freedom, which is not open to abuse by non-Indians and Indians who might misuse their rights for illicit purposes. Obviously, the goal is to have the least possible discretion placed on Federal officials to determine "authenticity" of Indian religious practices. By removing this discretion from the Federal officials, the burden of distinguishing the "authentic" from the "bogus" will fall on the Native people, which raises the unpleasant but perhaps unavoidable prospect of bureaucratic procedures—i.e., issuing of identity cards, and the like.

Religious Infringement Issues

Most of the incidents of religious infringement identified by the Advisory Board for consideration by the Project staff fall into one or more of the following areas.

Preservation of and Access to Sacred Areas. Like religions everywhere, many Native groups consider certain physical locations such as cemeteries, ceremonial sites, mountains and other areas to be sacred. But oftentimes, they are denied access to such sites or allowed only restricted use. In some instances, the areas are even being destroyed by excavation, flooding or mining. The issue here is not necessarily ownership of the areas in questions, but the right to have the areas protected from desecration and to have access to them. Many of these areas are on Federal land controlled by such Federal agencies as the Forest Service, Park Service, Bureau of Land Management and other Federal agencies. The American people are capable of understanding and respecting holy areas such as Mecca, Jerusalem and St. Peters, but apparently not yet the holy sites of the Natives.

The Right to Religious Use of Peyote. Although Federal drug laws and several Western states permit use of peyote for *bona fide* religious purposes, members of the Native American Church are still being arrested for possession and use of peyote. Issues that are being researched include the right to grow and harvest peyote; the right to transport peyote free from arrest; and the right to *bona fide* religious use in *every* state where the Native American Church exists.

The Right to Recover Religious Objects. For many tribes, the free exercise of their religion has been further complicated by the fact that many religious artifacts have been lost to museums, private collectors, or foreign countries. Native religious leaders complain that they are unable to perform religious ceremonies and rites without the artifacts. The NARF implementation staff is consulting with affected tribes to determine what actions can be taken to recover their religious objects. It is hoped that these museums will cooperate with the tribes.

NARF is currently negotiating with the Denver Art Museum in an attempt to recover a Zuni tribal war god sculpture. War god sculptures are placed by Zuni Bow Priests in remote open shrines every year to protect the New Mexico Pueblo. Tribal leaders have informed the museum that the statue is a sacred religious object; that it is communal property and, thus, could not have been acquired legally by the museum; and have asked for its immediate return. The Denver Art Museum has about 15,000 Indian Artifacts.

The Right to Cross Borders Freely for Religious Purposes. Many tribes bordering Canada and Mexico have been split by international boundaries, and historically been involved in border disputes with the Immigration and Customs Departments. Natives cross to attend ceremonies and visit ancient tribal sites. Medicine bundles and other religious materials prepared and sealed by medicine men and worn for health, protection, and purity reasons have sometimes been searched and confiscated by Customs officials. This renders them useless and unclean to their owners according to their religious beliefs. It is hoped that special exemptions can be made to protect religious materials.

The Rights of Incarcerated Indians. The religious rights of Indians confined in prisons and reformatories are constantly being infringed. They are denied access to their spiritual leaders; refused religious items needed for ceremonies; and prevented from wearing their hair in traditional fashion. Although some progress has been made recently, especially through NARF's Prison Project which dealt mainly with religious freedom rights, much remains to be done. Despite statements that religious involvement is one of the most successful rehabilitative forces, prison officials continue to deny to Indian inmates their First Amendment rights.

Right to Religious Privacy. This right refers not only to preserving the sanctity of ceremonies, but also to the right to freedom from illegal search and seizures of religious items. When the Taos Pueblo Indians were attempting to recover the sacred Blue Lake area, they found it difficult to explain to Congress the religious significance of the area to them without revealing details of ceremonies; to them such public revelations would have desecrated the ceremonies themselves. This right to privacy also covers the right to travel around the country and across borders without having religious artifacts searched and confiscated. Ministers of Western religions are properly respected but not the Indian medicine man.

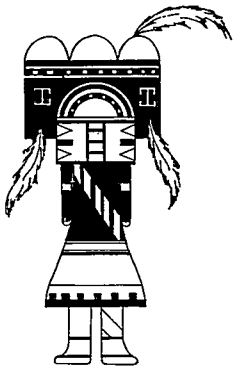
Milton M. Marks, Yurok, a member of NARF's Religious Freedom Advisory Board, is presently serving his second term as Chairman of the California Native American Heritage Commission. In 1970, Marks founded the Northwest Indian Cemetery Protective Association, Inc., in Eureka and has served as its Chairman for the past eight years.

The Rights of Indian Students. Probably in no other area have the religious rights of Indians been violated more than in Federal, public and denominational schools. Historically, it was in the schools, under the guise of "education," that the Indian was stripped of his culture, language and religion. There are still instances today where Indian students' rights are violated. For example, although Christian holy days are duly honored on the school holiday calendar, Indian students are not permitted days off for their religious ceremonial days. They are also prevented by school dress codes from wearing their hair in traditional fashion, which for them has religious meaning. And some Native parents believe that compulsory attendance for Indian youth infringes on their religious rights to raise their children in a manner that would ensure cultural identity and religious preservation.

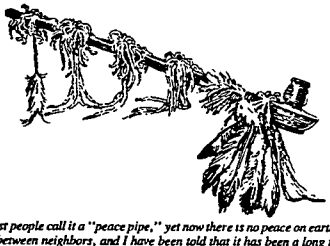
The Right to Traditional Hair Styles. In any confined environment where the Indian may find himself—schools, prisons, reformatories, military service—he is seldom allowed to wear his hair in Native fashion. It is difficult for the non-Indian to see this as a religious issue, and this is principally because he does not understand the unity of culture and religion for most Natives. The traditional Indian has not yet divided his personal life into separate areas. For him, religion, art, language, and family are all united.

There are other issues and areas that are being investigated by the Project staff and will be included in NARF's report to Congress.

Continued on page twelve



We have been told by the white men, or at least by those who are Christian, that God sent to men His son, who would restore order and peace upon the earth; and we have been told that Jesus the Christ was crucified, but that he shall come again at the Last Judgment, the end of this world or cycle. This I understand and know that it is true; but the white men should know that for the red people too, it was the will of Wakan-Tanka, the Great Spirit, that an animal turn itself into a two-legged person in order to bring the most holy pipe to His people; and we too were taught that this White Buffalo Cow Woman who brought our sacred pipe will appear again at the end of this "world," a coming which we Indians know is now not very far off.



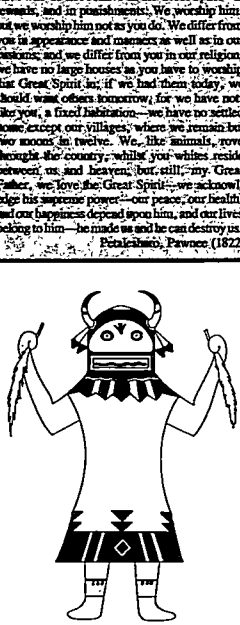
Most people call it a "peace pipe," yet now there is no peace on earth or even between neighbors, and I have been told that it has been a long time since there has been peace in the world. There is much talk of peace among the Christians, yet this is just talk. Perhaps it may be, and this is my prayer that, though our sacred pipe, and through this book in which I shall explain what our pipe really is, peace may come to those peoples who can understand, an understanding which must be of the heart and not of the head alone. Then they will realize that we Indians know the One true God, and that we pray to Him continually.

Black Elk, The Sacred Pipe

Our departed braves,
happy-hearted maidens,
dren who lived here and
season, will love these s
even-tide they greet sha
And when the last Red M
and the memory of my tri
myth among the White
swarm with the invisible
when your children's chi
alone in the field, the st
highway, or in the silence
they will not be alone. In
place dedicated to solitu
streets of your cities and
you think them deserted,
returning hosts that once
this beautiful land. The V
alone. Let him be just a
people, for the dead are n
I say? There is no death, o
Se

"I believe there are no people of any color on this earth who do not believe in the Great Spirit—in rewards, and in punishments. We worship him, but we worship him not as you do. We differ from you in appearance and manners as well as in our customs; and we differ from you in our religion; we have no large houses as you have to worship that Great Spirit in; if we had them today, we should want others tomorrow, for we have not, like you, a fixed habitation—we have no settled home except our villages, where we remain but two moons in twelve. We, like animals, rove through the country, whilst you whites reside between us and heaven, but, still, my Great Father, we love the Great Spirit—we acknowledge his supreme power—our peace, our health, and our happiness depend upon him, and our lives belong to him—he made us and he can destroy us."

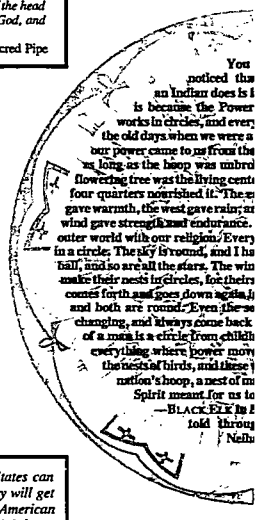
Petalesharo, Pawnee (1822)



BLUE LAKE

There it lies
Nestled in the high mountains
The Little Blue Eye of Faith
The Deep Turquoise Lake of Life
Blue Lake, my church
Guarded by Mother Earth
Surrounded by Life
Rippled by the Wind
It's life giving water flows
Yet, within its depths, mysteries lie
Those which man will never know

©James F. Cordova, Taos Pueblo



You
noticed tha
an Indian does is
is because the Power
works in circles, and every
the old days when we were a
our power came to us from the
as long as the hoop was unbro
flowering tree was the living cent
four quarters nourished it. The e
gave warmth, the west gave rain; a
wind gave strength and endurance.
outer world with our religion. Every
in a circle. The sky is round, and I ha
ball, and so are all the stars. The win
make their nests in circles, for their
comes forth and goes down again, h
and both are round. Even the se
changing, and always come back
of a man is a circle from childh
everything where power mov
the nests of birds, and these
nation's hoop, a nest of st
Spirit meant for us to
—Black Elk in
told throug
Neih

Members of any other ethnic group within the United States can return to their native country, their place of origin and they will get reacquainted with their traditional culture. But not the American Indians. The native land, the place of origin—for the Indian it is here. Once the culture is wiped out, that is the end. There is no place for us to go back to.

Lloyd Old Coyote, Crow

mothers, glad,
a our little chil-
here for a brief
solitudes and at
eturning spirits.
have perished,
have become a
ese shores will
f my tribe, and
ink themselves
shop, upon the
pathless woods,
earth there is no
night when the
es are silent and
throng with the
em and still love
an will never be
kindly with my
rless. Dead, did
nnge of worlds.
uquamish Chief

Brother! Continue to listen. You say that you are sent to instruct us how to worship the Great Spirit agreeably to his mind; and if we do not take hold of the religion which you white people teach we shall be unhappy hereafter. You say that you are right, and we are lost. How do you know this to be true? We understand that your religion is written in a book. If it was intended for us as well as for you, why has not the Great Spirit given it to us; and not only to us, but why did he not give to our forefathers the knowledge of that book, with the means of understanding it rightly? We only know what you tell us about it. How shall we know when to believe, being so often deceived by the white people?

Brother! You say there is but one way to worship and serve the Great Spirit. If there is but one religion, why do you white people differ so much about it? Why not all agree, as you can all read the book?

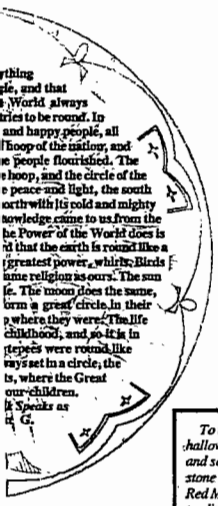
Brother! We do not understand these things. We are told that your religion was given to your forefathers and has been handed down, father to son. We also have a religion which was given to our forefathers, and has been handed down to us, their children. We worship that way. It teaches us to be thankful for all the favors we received, to love each other, and to be united. We never quarrel about religion.

Brother! The Great Spirit has made us all. But he has made a great difference between his white and red children. He has given us a different complexion and different customs. To you he has given the arts; to these he has not opened our eyes. We know these things to be true. Since he has made so great a difference between us in other things, why may not we conclude that he has given us a different religion, according to our understanding? The Great Spirit does right. He knows what is best for his children. We are satisfied.

Red Jacket, Seneca

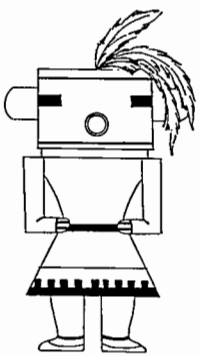
The other puzzle was as between Catholic, Methodist, Baptist, Episcopal, Mormon, Quaker, etc. To the Indian's mind there was nothing strange in having so many denominations, because there were many cults among his people, but he could see no sense in the fanatical notion that a person could belong to but one of them at a time and be required to denounce the other at sight. Why these sects should hate each other so, was quite beyond his understanding.

C. Wissler, Red Man Reservations



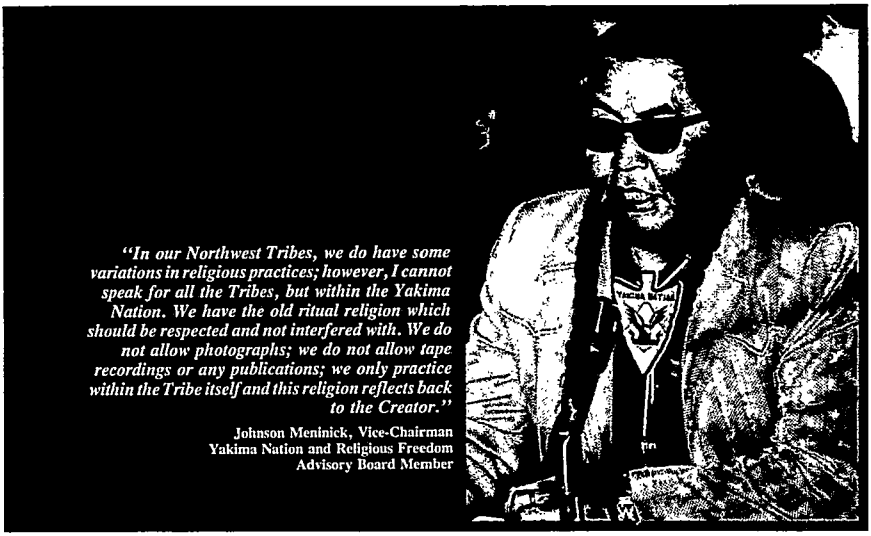
In the house of long life,
there I wander.
In the house of happiness,
there I wander.
Beauty before me,
with it I wander.
Beauty behind me,
with it I wander.
Beauty below me,
with it I wander.
Beauty above me,
with it I wander.
Beauty all around me,
with it I wander.
In old age traveling,
with it I wander.
On the beautiful trail I am,
with it I wander.

Navajo



To us the ashes of our ancestors are sacred and their resting place is hallowed ground. You wander far from the graves of your ancestors and seemingly without regret. Your religion was written upon tables of stone by the iron finger of your God so that you could not forget. The Red Man could never comprehend nor remember it. Our religion is the traditions of our ancestors—the dreams of our old men, given them in the solemn hours of night by the Great Spirit; and the visions of our sachems, and is written in the hearts of our people.

Seattle, Suquamish Chief



"In our Northwest Tribes, we do have some variations in religious practices; however, I cannot speak for all the Tribes, but within the Yakima Nation. We have the old ritual religion which should be respected and not interfered with. We do not allow photographs; we do not allow tape recordings or any publications; we only practice within the Tribe itself and this religion reflects back to the Creator."

Johnson Meninick, Vice-Chairman
Yakima Nation and Religious Freedom
Advisory Board Member

CONCLUSION

Three years ago, this country celebrated its 200th anniversary as an independent nation. Generally absent from this celebration were the Native Americans. Few tribes or other Native groups joined enthusiastically in the Bicentennial; and those who did participate probably were not celebrating what was for them only a reminder of over 200 years of subjugation. For even if all the treaties had been honored, all the promises kept, and all the government officials been wise and honest, the Native peoples would still have been dispirited over a celebration which commemorated—at least for them—a history which witnessed the taking of their lands, the annihilation of numerous tribes, and the loss of much of their traditional ways of life.

And yet after two centuries of oppressive policies aimed at their complete assimilation and even genocide, the Native Americans still remain. Most retain many aspects of their traditional ways and beliefs, and many tribes are even larger than before. This resurgence is not only in the form of population growth, but also cultural revival, protection of the remaining land and resources, and control over all aspects of life. It is nothing less than a determination for tribal survival.

And it is for this reason that the Native American Rights Fund became involved in the efforts aimed at the implementation of the "American Indian Religious Freedom Act." From its establishment in 1971, NARF's first priority has been the preservation and promotion of tribal existence. For Native Americans, existence is defined by more than mere physical survival. It encompasses the native language; family and group solidarity; social relationships; and, above all, traditional religious beliefs. Recognition and protection of Native religious beliefs and practices is, therefore, necessary for cultural survival. NARF's aim is to work toward full implementation of the word and the spirit of the Act.

When this country celebrated its Centennial in 1876, it was the height of the so-called "Indian Wars." Ironically, Little Big Horn was the beginning of the end for real freedom for most tribes who were still resisting the White advance across the country. It was the end of the free, nomadic life and the beginnings of the reservation system. The next century was to see a fluctuating Federal Indian policy from one of assimilation to tribal survival—and back again. The 1976 Bicentennial year saw the Federal government once again seemingly favoring cultural survival and self-determination for Native Americans. But how long this will continue to be the policy is uncertain in light of the history of previous Government reversals.

What will be the condition of the Native Americans in the year 2076 when the country celebrates its tricentennial? Will any Indian tribes, Native Alaskans or Native Hawaiians still exist; and if so, will they be culturally distinguishable from the rest of the people? This will be the real test of the democratic philosophy of this country—at least so far as the Native Americans are concerned.

For further information on the American Indian Religious Freedom Act, NARF's Project, and especially those who may have knowledge of existing or potential infringements of Native American religious rights by either Federal, state or local governments, please contact:

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Emerson Jackson
(Navajo)

Joe Little Coyote
(Crow)

Jane Penn
(Wintu)

Marie Saltclah
(Navajo)

Bernard Second
(Mescalero Apache)

Pete Stump
(Cree)

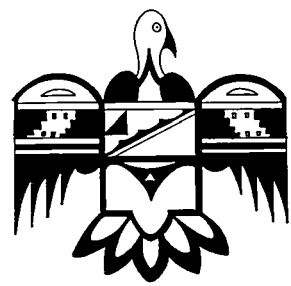
NARF Receives Special Grant For Tribal Energy Project

In October, 1978 NARF was awarded a special grant from the Administration for Native Americans (ANA) and the Community Services Administration (CSA) to develop Tribal Energy and Social Development Offices on three Indian reservations. NARF is subcontracting part of its grant to the Council of Energy Resource Tribes (CERT) for the implementation of this Project. The overall objective of the Project is to assist tribes to begin regulating and controlling the development of energy resources on their reservations.

NARF has sub-contracted the socio-economic aspect of the Project to CERT. The three tribes selected to participate in the Project are all members of CERT, they are the Laguna Pueblo and Jicarilla Apache of New Mexico and the Ute Tribe of the Uintah and Ouray Reservation in Utah. CERT has a total membership of some 26 tribes.

The Project has been segregated into a number of major tasks. Both NARF and CERT staff will undertake a survey of socio-economic and legal impacts of energy development on Indian reservations. Both organizations will develop and administer training sessions on energy development and related legal and socio-economic issues for the three Tribal councils and the Tribal energy office staffs.

CERT will develop an information system to facilitate the dissemination, retrieval and utilization of relevant information on energy development and its implications. Both NARF and CERT will be responsible for providing on-going legal and technical assistance to the energy offices during the one-year Project period. It is anticipated that the energy office personnel for the local Tribal offices will be selected by the end of March, 1979 and training sessions will begin by mid-April. The offices should be in operation shortly thereafter. Ms. Thelma Stiffarm, a member of the Cree and Gros Ventre Tribes is serving as NARF's Energy Project Director. Ms. Stiffarm is former Deputy Director of the American Indian Law Center in Albuquerque, New Mexico. The present project is scheduled to last through September, 1979. Ms. Stiffarm reports that CERT is working with the three tribes to secure funding for the on-going operation of the local energy offices. More information on this Project will be provided in the next issue of this publication.



Major Developments

HUNTING AND FISHING RIGHTS

For many tribes, the right to hunt, to fish and to harvest certain plants on or near reservation land continues to be important to tribal subsistence and livelihood. Under treaties, which removed these tribes from their aboriginal hunting and fishing lands and placed them on reservations only a fraction of the size of their aboriginal areas, such rights were generally retained.

Today's issues regarding the hunting and fishing rights of Indians fall into two basic categories. First, what rights do tribes have to continue to hunt and fish on lands outside reservation boundaries but which are on aboriginal lands ceded under various treaties? Second, what rights do tribes have to control hunting and fishing within their reservations boundaries free from state control? Since its inception, NARF has considered these rights to be of paramount importance to tribal survival and identity. The following four cases illustrate both the diversity of tribal claims and the continued importance of hunting and fishing rights to Indian tribes.

UTE MOUNTAIN TRIBE SECURES HUNTING RIGHTS WITH STATE OF COLORADO

Judge Hatfield Chilson of the United States District Court for the District of Colorado issued a Consent Decree on September 21, 1978, whereby members of the Ute Mountain Ute Tribe may hunt in the four million-acre Brunot Agreement Area in southwestern Colorado under the supervision of a Tribal Hunting Commission. Much of the area is national forest land in the San Juan Mountains. Signing of the Decree ended two years of negotiations among members of the State of Colorado Wildlife Commission; Bill James of the Attorney General's Office; the Business Committee of the Ute Mountain Ute Tribe; Scott Jacket, Tribal Chairman and Native American Rights Fund attorneys.

When the threat to the Ute Mountain Ute Tribe's hunting rights came to NARF's attention, NARF was prepared to litigate those rights in federal court for the Tribe. But in light of the expenditure of time and money involved in litigation, NARF first asked the State of Colorado whether an out of court settlement could be reached before initiating court action. State officials responded positively, given the fact that Indian law precedents would assure to the Tribe all of their rights secured by the Act of 1874 (18 Stat. 36) and the Tribe's right to regulate their members' hunting and fishing rights off the reservation.

Last March Tribal officials and officials of the State's Wildlife Commission were prepared to sign an agreement recognizing the Tribe's historic rights to the Brunot Cession Area when local citizens obtained an injunction in Montezuma County Court, temporarily preventing the historic agreement from being signed. On the same day, the Ute Mountain Tribe filed Civil Action No. 78-C-0220 in federal district court against wildlife officials of the State of Colorado seeking declaratory and injunctive relief against impairment of federal Indian hunting rights and privileges secured for the Utes in 1874. Both parties later agreed to enter into the consent decree which embodied the proposed agreement rather than continuing the litigation.

Historical Background

The consent decree honors a century old agreement called the Brunot Cession of April 19, 1874 (18 Stat. 36) in which the United States assured the Ute Tribe that its members could hunt in the San Juan Mountains "so long as the game lasted and the Indians were at peace with the white man." In exchange, the Ute relinquished their title to the San Juan Mountain area. The right to hunt in the San Juan Mountains has never been extinguished by the federal government. This right and the Tribe's reservation is all that remains of the Ute Indian's aboriginal domain which extended to large parts of Colorado, Utah and New Mexico.

The Ute Indians lost their historic lands through a series of treaties and agreements with the United States in the Nineteenth Century. One of the most significant treaties was that of March 2, 1868, in which the Utes managed to reserve their title only to the western third of the State of Colorado and relinquished all claim and title to their other lands.

Shortly after 1868, gold and silver was discovered in the San Juan range, which was located within the Ute's Reservation, bringing a barrage of miners to the area. The United States did nothing to honor the Treaty of 1868 and in fact began further negotiations with the Ute Indians for the cession of that area as well. The Ute Indians fiercely resisted any further cession, but after extended negotiations laced with threats of the possibility of enforced military removal, they signed the Brunot Cession Agreement in 1874.

General Provisions of the Consent Decree

The Consent decree provides for the establishment of a Ute Mountain Ute Brunot Area Agreement Hunting Commission which will issue a "Ute Mountain Ute Tribal Hunting Code for the Brunot Agreement Area." This Code will be Tribal law and the Tribe will use it to regulate and control all hunting by authorized members which is specified in the decree when the hunting is done for subsistence, religious or ceremonial purposes.

All Tribal members wishing to hunt in the Brunot Agreement Area must first obtain Tribal regulations and hunting permits and carry proper and complete identification at all times.

Monies received from fines and fees paid by Ute Mountain Ute Tribal hunters are to be used by the Brunot Agreement Area Wildlife Commission for the maintenance of the Commission.

Violators of Tribal hunting regulations are to be prosecuted in the Ute Mountain Ute Tribal Court and the penalties and fines are to be comparable to those provided for under State law. However, Tribal hunters in the Brunot Agreement Area who violate federal law will be prosecuted in federal court.

Tribal hunters will be subject to State law when they hunt in the Brunot Cession Area for other than subsistence, religious or ceremonial purposes and when they hunt on private property without the owner's consent.

In the agreement the State of Colorado reserves the right to exercise general police power in the Brunot Agreement Area and to impose special conservation restrictions on the Indian hunting privileges described in the agreement when necessary to preserve a species of game animal.

The agreement further provides for cooperation of the Tribe and the State in training Tribal game wardens and in development of a Cooperative Game Management Plan.

Year-round hunting for deer and elk by authorized tribal members without state licenses is to be permitted subject to a number of conditions.

Authorized Tribal hunters may hunt deer and elk for subsistence, religious or ceremonial purposes during the state seasons subject to Tribal regulations. Recognized Tribal hunters are not subject to state license requirements or to state bag limits, except when the State and the Tribe mutually agree on special conservation restrictions when necessary to preserve a species of game animal, or when necessary to implement a game management plan.

Commercial hunting will not be allowed. Hunters may not barter,

Ute Mountain Ute Tribal Chairman Scott Jacket signs historic hunting agreement with Tom Farley, former Chairman, Colorado State Fish and Wildlife Commission.

trade or sell wildlife which they have killed, but they may barter, trade or sell raw or tanned hides. There will be no hunting on private land without the owner's consent.

This agreement resolves a six-year dispute between the Ute Mountain Ute Tribe and the State of Colorado. It began in 1972 when a Tribal member, Clifford Whyte, was arrested the first day of the hunting season after killing a deer in Montezuma County in the San Juan National Forest. He had no valid Colorado hunting license and was charged with the unlicensed killing of a deer.

A hearing was held on his motion to dismiss on stipulated facts and on June 4, 1973 the case was dismissed by Judge George R. Armstrong of the County Court for the County of Montezuma on the grounds that the 1874 Brunot Agreement precludes any authority of the State of Colorado to subject Whyte to its hunting laws. The County Court's decision was appealed to the District Court for the County of Montezuma. It issued an order dated June 10, 1974 reversing the County Court's judgement and remanding the case for proceedings consistent with its opinion. As of September, 1976 there had been no trial and on October 4, 1976 the judge of the County Court for the County of Montezuma signed an order granting Whyte's motion to dismiss with prejudice on the grounds that Whyte's speedy trial rights had been violated. [*Ute Tribe of Indians v. State of Colorado, et al., Civil Action No. 78-C-0220.*]

GREAT LAKES TRIBES ASSERT ABORIGINAL FISHING RIGHTS

NARF attorneys, in conjunction with local legal services attorneys, are representing the Bay Mills Indian Community in a suit brought by the United States on behalf of Bay Mills and the Sault Ste. Marie Tribe of Chippewa Indians against the State of Michigan. Both Tribes were parties to two treaties under which large parts of the present State of Michigan and adjoining areas of the Great Lakes were relinquished by the Tribes. The Great Lakes area encompassed the aboriginal fishing sites for these Tribes as well as many other neighboring tribes in the area. The Tribes depend to a great extent for their subsistence and livelihood on the fishing economy of the region.

The Tribes are contending that they retained the right to fish free of state regulation in the areas of Lake Superior and Lake Michigan which were ceded in the treaties. The Tribes and the Federal government are asking the Court to declare that the affected Tribes, as descendants to signatories of the 1836 treaty have reserved rights to fish in substantial portions of the Great Lakes.

The matter finally came to trial in Federal District Court in March, 1978 and lasted nearly a month. Trial concluded on December 18, 1978, following a recess due to the Judge's ill health. At trial, over 300 exhibits were introduced by all parties and extensive expert testimony was received from historians, ethnohistorians, archeologists and anthropologists. In addition, several Tribal witnesses testified regarding oral tradition in their communities as it pertained to the meaning of the treaties of 1836 and 1855. The trial transcript is contained in ten volumes and totals nearly 3,000 pages.

Closing argument and post-trial briefs were submitted February 2, 1979 and the District Court's decision is now pending. (*United States v. Michigan*, U.S. District Court, Western District of Michigan, Civ. No. M26-73).

FOURTH CIRCUIT UPHOLDS EASTERN CHEROKEE FISHING REGULATIONS

On November 30, 1978, the United States Court of Appeals for the Fourth Circuit entered a decision upholding the lower court judgment. In the Fourth Circuit opinion, the Court unanimously held that North Carolina could not impose its fishing licenses and fishing regulations on tourists fishing in the Pot and Take Program of the Eastern Band. The case is significant because it is the first Court of Appeals case which has held that the Tribe, together with the United States Department of the Interior, can pre-empt overlapping state fishing and game laws as they apply to non-Indians.

Currently, the State of North Carolina is preparing a petition for a writ of certiorari to the United States Supreme Court. [*Eastern Band of Cherokee Indians v. North Carolina, U.S. Court of Appeals for the Fourth Circuit, No. 76-2161.*]

QUECHAN TRIBE ASSERTS EXCLUSIVE HUNTING AND FISHING AUTHORITY WITHIN RESERVATION BOUNDARIES

On January 11, 1979, oral argument was presented before the U.S. Court of Appeals for the Ninth Circuit in San Francisco. Argument was presented on the issues of whether California game laws applied to non-Indians within the Fort Yuma Reservation and if so whether state game wardens had the authority to enter the Reservation to enforce them. Earlier, the lower Federal District Court had ruled that although state game laws did apply to non-Indians within the Reservation, state game wardens had no authority to enter the Reservation without Tribal consent.

Both the Tribe and the State are appealing the District Court's decision. The State is arguing that Tribal sovereign immunity does not bar the State's action; the State game laws apply to non-Indians; and that State game wardens do have the authority to enter and enforce State game laws on non-Indians within the Reservation. Besides arguing that the Tribe's sovereign immunity bars the State's action against it and that State game laws do not apply within the Quechan Reservation, the Tribe is also asking that the case be transferred back to the District Court for consideration of whether the Tribe's comprehensive hunting and fishing code now pre-empts the appliction of overlapping state laws.

Subsequent to the oral argument, the Ninth Circuit Court issued an order postponing any decision until it renders a decision in a related case—*Confederated Tribes of the Colville Reservation v. State of Washington*. A decision in this case is expected in the coming months. [*California v. Quechan Tribe*, U.S.Court of Appeals for the Ninth Circuit, No. 77-1500, 77-2172]

EASTERN LAND CLAIMS

There are presently about 20 Indian land claims which have been filed seeking return of more than 20 million acres of aboriginal land areas from Maine to Louisiana. All of the suits charge violations of the Indian Nonintercourse Act of 1790, which prohibited state and local governments and other non-Indians from acquiring Indian lands without congressional ratification and involvement. NARF is currently assisting in at least twelve of these land claims cases. What makes each complicated is the unique nature of each land transaction; that is, under what conditions they occurred and whether the Indians who sold the land were acting as members of an active tribe or as individuals. Summarized here are status reports on five of the NARF land claims cases. Future issues of *Announcements* will report on the progress of these very important land claims actions.

NEGOTIATIONS CONTINUE IN MAINE LAND CLAIMS CASE

Negotiations aimed at settlement of the Maine Indian land claim continued through 1978 with at least two new settlement proposals being offered by members of the State's congressional delegation. The latest proposal was introduced in October, 1978 by former U.S. Senator William D. Hathaway (D—Maine) which would provide the Penobscot and Passamaquoddy Tribes with $37 million. Of this sum, $10 million would be used toward the purchase of 100,000 acres of land now held by 14 large landholders. The actual Tribal claim seeks 12.5 million acres, roughly two-thirds of the State of Maine and $25 billion in trespass damages.

In a statement, which was not made public, the large landholders indicated their willingness to sell 200,000 acres of land to be held in trust for the benefit of the Tribes. This proposal was endorsed by President Jimmy Carter, Maine's Governor James Longley, Attorney General Joseph Brennan, who is now Governor, Congressman David Emery, Senator William Cohen and Senator Edmund Muskie. The leaders of the two Tribes termed the offer a "constructive proposal", but did not actually endorse it.

Since the Hathaway proposal was made public, the Tribes have been involved in negotiations with the large landholders concerning the price, location and method of acquisition of lands which those companies are willing to convey. The Tribes have also been involved in discussion with the Department of Interior concerning various benefits which will be available to the Tribes if the settlement is accomplished. Discussions with the State of Maine concerning jurisdictional matters had not begun as of the end of the year, although a preliminary meeting had been held with Governor-elect Brennan.

On March 9, 1979, U.S. District Court Judge Edward T. Gignoux announced a six-month extension of the time in the claims litigation so that negotiations could continue among the parties in the Maine case. This was the fifth such extension that Judge Gignoux has made since January, 1977.

Last June, the Maine congressional delegation also introduced legislation drafted by Congressman William Cohen, who is now Senator. This legislation provided for the outright extinguishment of the Passamaquoddy and Penobscot claims. In place of the claim, the Cohen legislation provided for an action in the U.S. Court of Claims in which recovery would be limited to the difference between the value of the land when taken and the amount paid, plus simple interest. The Tribes objected vigorously to this course of action and President Carter indicated that he did not support the measure. President Carter had earlier indicated in a public appearance in Bangor, Maine that he would veto legislation extinguishing the Tribal claims on terms other than those which had been negotiated by the Special Task Force which he had appointed in October, 1977, and the Tribal negotiating committee. Matters remained at a stalemate until October when former Senator Hathaway proposed a totally-Federally funded settlement.

Indian Township Passamaquoddy Tribal Governor Harold Lewy recently announced that he had replaced the Township representation to the Tribal negotiating committee. Lewy named Allen J. Sockabasin and Albert Dana to succeed Wayne A. Newell and Jeanette Neptune. George Stevens has been appointed as an alternate. Currently representing Pleasant Point Passamaquoddy Reservation on the Committee are Tribal Lt. Gov. Cliv Dore and Albert Sockbeson. Representing Indian Island Penobscot Reservation are Tribal Governor Wilfred Pehrson, Andrew Akins, James Sappier and Timothy Love. Stanley Neptune of Indian Island is an alternate. Representing off-reservation Penobscots is Reuben (Butch) Phillips of Dover—Foxcroft.

Mount Katahdin, spiritual home of the Maine Indians.

(Photo courtesy of The Wabanaki Alliance)

FIRST CIRCUIT COURT OF APPEALS UPHOLDS RULING OF DISTRICT COURT ON QUESTION OF MASHPEE TRIBAL EXISTENCE

On February 13, 1979, the First Circuit Court of Appeals in Boston, Massachusetts, upheld the decision of the Massachusetts District Court on the question of Mashpee Wamponoag Tribal existence. In the original complaint, filed August, 1976, the Mashpee Tribe sought a declaration of ownership to approximately 13,000 acres of undeveloped land in the Town of Mashpee, Massachusetts. All individual homeowners were exempted from the claim within the claim area. The defendants in the suit included the Town of Mashpee, the State of Massachusetts, several real estate developers, a utility company and several title insurance companies.

The suit is based on the Indian Nonintercourse Act of 1790, which requires federal approval of tribal land transactions. No federal approval was obtained for the transactions by which the Mashpees lost their land. The defendants asserted that the Mashpees were not a tribe and therefore not entitled to the protection of the Act. This question of tribal existence was severed out for a separate trial by District Court Judge Walter J. Skinner.

Trial was completed in January, 1978, after 40 days of testimony and presentation of evidence. The issue of tribal existence then went to the jury and the jury was instructed to decide whether there was a Mashpee Wamponoag Tribe in existence on six key dates. The jury found that there was a Tribe in existence in 1834 and 1843 when the Tribe lost its land, but not in 1790, 1869, 1870 and 1976. Judge Skinner then took the case under advisement because of the inconclusive nature of the jury's findings. On March 24, 1978, the *Mashpee* case was dismissed by the Court on the grounds that no Tribe existed to assert the claim.

The Plaintiff tribe raised a number of issues on appeal to the First Circuit Court of Appeals. First, the Mashpee Tribe argued that the District Court erred by refusing to grant a continuance pending the Department of Interior's action on the Mashpee application for federal

recognition as a tribe. The Court of Appeals ruled, however, that the lower court acted correctly in denying the continuance.

The Tribe also challenged the District Court's instructions to the jury on the definition of a "tribe." The Tribe was required to prove that it met the definition of a "tribe of Indians," as the phrase was used in the 1790 Indian Nonintercourse Act. The Court of Appeals concluded that ". . . there were a few isolated sentences of the Judges' charge that may have been unclear or overstated, but the instructions taken as a whole were largely consistent with the position that the plaintiffs argued. . . . " and refused to reverse on that ground.

In addition, the Mashpee Tribe asserted that the District Court was wrong in placing the burden of proof of tribal existence on the Tribe. They contended that the burden of proof should have been placed on the defendants by virtue of a federal statute placing the burden on non-Indian claimants in Indian land cases. The Court of Appeals held the statute inapplicable, however, in this case.

The Mashpees further argued that the special verdicts returned by the jury were irreconcilably inconsistent and totally ambiguous. As a consequence the Tribe argued that the only solution was to order a new trial. In response to this issue, the Court of Appeals held that the jury's answers could support the judgment and that a new trial was not required on the basis of the special verdicts.

Finally, the Tribe maintained that the District Court failed to investigate sufficiently the impact on the jury verdict of an anonymous threatening phone call made to one of the jurors, and that a new trial therefore, was mandatory. The Court of Appeals ruled that a satisfactory investigation had taken place and a new trial was not needed.

NARF attorneys representing the Mashpees are now preparing an appeal to be submitted to the Supreme Court of the United States. [*Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (S.D. Mass. 1978)].

PRESIDENT CARTER SIGNS NARRAGANSETT LAND CLAIMS SETTLEMENT LEGISLATION

On October 2, 1978, President Carter signed into law the "Rhode Island Indian Claims Settlement Act." This negotiated settlement marks the first Indian land claims to be settled on the East Coast. The Tribe's original claim, filed in Federal District Court in Rhode Island in 1975, called for the return of approximately 3,200 acres to tribal ownership, which included 600 acres of surface lakes.

Under the terms of the Settlement Act the Tribe is to receive 1,800 acres, half of it State land and half to be purchased from private landowners who are willing to sell at fair market value. The land will be purchased with a $3.5 million appropriation from Congress. These lands are to be held by a state-chartered, Indian controlled corporation and subject to a permanent, Federally-imposed restriction against alienation. The lands will be put in Federal trust for the Tribe if the Tribe gains Federal recognition. (As this issue was going to press, it was learned that the Governor of Rhode Island has filed a bill in the Rhode Island Legislature to create the permanent public corporation to hold the land in trust). The Tribe has the option to establish its own hunting and fishing rights on the settlement lands. The land will be pre-zoned but otherwise exempt from local zoning restrictions. Settlement lands will be free of property taxation; however, any profit-making activities would be subject to taxation. State civil and criminal law will generally apply, such as health, building and other codes.

The Narragansett Settlement will undoubtedly have an impact on the other Eastern Indian land claims cases still pending. The existence of the Indian claims not only subjects the parties to lengthy and expensive court battles, but also imposes a cloud over land titles which has disrupted real estate and municipal bond sales in the disputed areas. But despite the economic hardships the suit may have caused some, the Narragansetts " . . . are equally bitter about the loss of their last remaining chunks of reservation lands in 1880 when the Rhode Island Assembly paid them $5,000 and declared their Tribe defunct."

NEGOTIATIONS CONTINUE IN CATAWBA LAND CLAIMS ACTION

Since 1974, NARF has been assisting the Catawba Tribe in its Tribal land claim arising out of treaties between the British Crown and the Tribe in 1760 and 1763. By these treaties, the Tribe ceded a much larger tract of land to the colonies in return for the establishment of a 15-mile square, 144,000 acre reservation situated on what is now the border between North and South Carolina. In 1840, the State of South Carolina, without federal consent or participation, negotiated a treaty with the Tribe purporting to extinguish the Tribe's title to their 1763 reservation. In return, the State promised to secure for the Tribe a suitable reservation in North Carolina. The State failed to do this and in 1842, purchased a 630 acre tract of land for the Tribe within the original boundaries of the 1763 reservation as a new reservation for the Tribe.

In 1976, after more than a year of historical and legal research, NARF submitted a litigation request to the Secretary of the Interior, on the Tribe's behalf. The request asked the Secretary to request the Justice Department to initiate legal action on behalf of the Tribe to regain possession of the 1763 Reservation. After reviewing the Tribe's request for more than a year, the Interior Department asked the Justice Department in 1977 to bring suit on the Tribe's behalf to regain possession of the Reservation.

The Tribe and the federal government adopted the position that a negotiated settlement was preferable to protracted litigation. To that end, the Tribe in 1977 undertook lengthy negotiations with South Carolina State officials which culminated in a November, 1977 agreement between the Tribe and the State's Attorney General. The agreed upon settlement would provide that in return for the extinguishment of the Tribe's claim, legislation would be enacted by Congress which would establish a federal reservation on unoccupied lands, a Tribal development fund and status as a federally-recognized Indian tribe. In the months that followed, however, opposition among Tribal members to the proposed settlement plan emerged, centering around failure to the Tribe's proposal to allow those members who might elect to receive their share of the settlement benefits in cash. In July, 1978, the Tribe voted to revise its settlement proposal to allow those members who desired to receive their portion of the settlement on an individual rather then a Tribal basis to elect to do so. The Tribe is currently in the process of drafting legislation and is negotiating with representatives of the Administration and Congress in an effort to develop settlement legislation which can be enacted during the current session of Congress.

SEMINOLE TRIBE FILES SUIT AGAINST STATE IN LAND DISPUTE

The Seminole Tribe of Florida has filed a suit against the State which challenges the legality of a 1950 dedication of 16,000 acres of the Seminole State Reservation for use as a flood control district. The 16,000 acres had been part of the East Big Cypress Reservation, first set aside by the State as a reservation for the Seminoles' exclusive and perpetual use in 1936. In this suit, the Tribe claims that the 1950 dedication was void by virtue of non-complaince with the 1790 Indian Nonintercourse Act, and therefore constitutes a breach of the State's trustee responsibilities toward the Seminole Tribe.

The suit was filed initially by the Seminole Tribal attorney. The Tribe asked NARF to serve as co-counsel and NARF drafted and filed an amended complaint. Shortly after the amended complaint was filed, the Florida Attorney General's office indicated its interest in settling the case. NARF and the Tribal Attorney met twice with the State's attorneys. On December 10, 1978, the Assistant Attorney General assigned to the case recommended that the State settle the case. NARF has agreed on an appropriate measure of damages for purposes of settlement and expects to meet with Florida attorneys soon in order to work out a preliminary settlement. [*Seminole Tribe v. Florida*, U.S.D.C. for the So. District of Florida, Civ. No. 78-6116-DIV-NCR]

OTHER MAJOR CASES

FLANDREAU INDIAN STUDENT REINSTATED

In January, 1978, NARF was contacted by the representative of an Indian student who had been wrongfully expelled from an Indian boarding school in violation of the student's due process rights. The school had stated that it would not reinstate the student pending the administrative appeal through the Bureau of Indian Affairs. Since those appeals could take months, and since the student had already been out of school for one semester, NARF immediately began work on the legal proceedings necessary to reinstate the student. The next week in Federal court in South Dakota, NARF's attorneys argued to Federal Judge Nichols that the student was denied due process of law and that he was entitled to a preliminary injunction reinstating him in school. Judge Nichols agreed and the student was back in school several days later. Later that month, the United States agreed to drop all administrative appeals in light of Judge Nichols' findings.

The *Cornelius* case was the first known case which interpreted the Indian student rights regulations under 25 CFR Part 35. These regulations were approved in 1974; however, they have been seldom used to insure student rights despite many purported violations by BIA school administrators. After the opinion was rendered in the *Cornelius* case, the Office of the Associate Solicitor for Indian Affairs agreed to contact Indian boarding school administrators and inform them that they must abide by these regulations. [*Cornelius v. U.S., District Court, So. Dakota, So. Division, C.A. No. 78-4002, filed January, 1978.*]

U.S. SUPREME COURT ISSUES FAVORABLE RULING IN COLORADO RIVER WATER REVIEW

In this case, NARF is representing the Cocopah Tribe, one of five lower Colorado River Tribes, in trying to determine the water rights of the Tribe to the Colorado River. This case was originally decided by the Supreme Court in 1963. During the intervening years, the five Colorado River Tribes have filed motions to intervene for the purpose of securing additional water rights.

In October of last year, NARF participated in the argument of the case before the U.S. Supreme Court. On January 9, 1979, the Supreme Court issued its opinion which proved favorable to the Cocopahs. The Court approved and ordered the entry of a supplemental decree which included a subordination provision which provided that in times of shortage the five tribes would come first in allocation of water.

The Court deferred other issues, including whether or not the Tribes be allowed to intervene in the case to a special master of the Supreme Court. A retired Senior Judge of the Fifth Circuit Court of Appeals will serve as this Special Master. The Master has scheduled a March 29 1979, pre-trial conference in Phoenix, Arizona. After hearing Tribal witnesses, the Special Master will make recommendations to the U.S. Supreme Court. [*Arizona v. California*, 373 U.S. 546 (1963).]

UTE TRIBE RESCINDS WATER AGREEMENTS WITH STATE OF UTAH

On March 5, 1979, the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah announced it was cancelling any participation in the Central Utah Project (CUP) and repealing all water agreements with non-Indians in the Uintah Basin.

Tribal council members based their repeal on the reported refusal of the Utah Legislature to consider a settlement agreement on Tribal claims in the basin. Included among the Tribe's current agreements with non-Indians is one which supplies water to Roosevelt City by the large Uriah Heap Spring, located on Indian trust lands. This spring has been a major source of water to the City.

A significant aspect of the Central Utah Project is to divert water from the Uintah Basin over the Wasatch Mountains to Salt Lake City for agricultural, municipal and industrial purposes. In 1965, the Ute Tribe agreed to defer the irrigation of some of its lands so that approximately 60,000 acre-feet of water could be diverted to the Wasatch Basin. In recent years, it has become apparent that the Tribe, which was promised certain water storage and irrigation projects in return for its deferral of water, was not receiving those benefits expeditiously. As a result, the Tribe has taken a more vigorous posture in asserting these water rights and out of this has emerged the effort between the Tribe and the State to bring about a comprehensive water entitlement settlement.

During the past six years, NARF has assisted the Ute Tribe in trying to secure and quantify its water rights and other reservation rights. Tied to the water settlement is the settlement of certain hunting and fishing and taxation issues. At one time, the Ute "compact" was to include civil and criminal jurisdiction but that now appears to have been lost for the present time. During the past two years, NARF has assisted the Tribe's attorney in negotiating a comprehensive settlement covering water, hunting and fishing, taxation and civil and criminal jurisdiction for the State of Utah. The key to the settlement is the significant "Winters Doctrine" water rights of the Ute Tribe. Tribal Council Chairperson Ruby Black has indicated that the Tribe is still open to negotiations in this dispute with the State.

U.S. SUPREME COURT RECOGNIZES MISSISSIPPI CHOCTAW RESERVATION AS "INDIAN COUNTRY"

On June 23, 1978, the Supreme Court of the United States reversed two lower court rulings and held that the Mississippi Choctaw Indian Reservation constitutes "Indian Country" within federal jurisdictional statutes. The Court held that Federal courts and not state courts had jurisdiction over a prosecution of an assault allegedly committed by an Indian on the Reservation.

The opinion in the *Smith John* case was favorable to Indian interests since it recognizes the existence of an Indian reservation in face of a challenge by the State that no reservation existed.

NARF assisted the Indian's private attorney during the briefing of the Federal case to the U.S. Court of Appeals. NARF prepared the appeal of the State case to the Supreme Court and briefed and argued both cases in that Court on behalf of the Indian defendants. [*Smith John v. Mississippi*, 437 U.S. ___(1978)].

DECISION IS EXPECTED IN FLORIDA TAX CASE

The question as to whether the State of Florida can collect state sales tax from the Seminole Tribe for tribal business activities on the reservation is still pending. In October, 1976 the State of Florida filed suit against the Tribe asking the court to order the Tribe to collect state tax on admissions the Tribe charges to the Seminole Village and on arts and crafts items it sells on the Seminole Reservations. The State claimed in its original complaint that the Tribe owed it more than $8,000 in taxes. In May, 1978, a hearing was held on the Tribe's motion to dismiss the case. To date, the Judge has not ruled on the Tribe's motion. [*Askew v. Seminole Tribe of Florida, Inc.* Civ. No. 76-17413, Seventh Judicial Circuit Court, Broward County, Florida.]

News Notes

PROFESSIONAL STAFF CHANGES

During the past year a number of transitions occurred in NARF's professional staff. Following completion of the *Mashpee* trial in January, Staff Attorney Barry Margolin left NARF's employ and re-joined the staff of Massachusetts Fair Share. Maine Staff Attorney Dennis Montgomery left NARF in June and now is employed by the Colorado Attorney General's Office in Denver.

NARF's former Legislative liaison Suzan Shown Harjo joined the Interior Department's staff in March and now serves as a Special Legislative Assistant to Asst. Secretary of Indian Affairs Forrest Gerard. NARF's Legislative Liaison position has not yet been filled.

In May, NARF's Head Bookkeeper Susan R. Hart was promoted to the position of Treasurer/Controller. In early September, Staff Attorney John Wabaunsee joined the Legal Services Corporation Office in Denver as Coordinator of Indian Programs.

There were two additions to the staff in October when Ms. Thelma Stiffarm, a Cree-Gros Ventre Indian, joined the staff as Director of NARF's special energy project. Ms. Stiffarm is former Deputy Director of the American Indian Law Center in Albuquerque and has also served as a legal consultant to the U.S. Commission on Civil Rights. Ms. Grace Gillette, an Arikara Indian from North Dakota, joined the staff as Business Manager during this same month. Ms. Gillette was hired to replace Mr. James A. Laurie, who is now employed by Management Task Force in Denver.

STEERING COMMITTEE ELECTS TWO NEW MEMBERS

During the past year two new people were elected to the NARF Steering Committee replacing Mrs. Janet McCloud of the Tulalip Tribe, who chose not to run for another term and Ms. LaNada Boyer, a Shoshone-Bannock Tribal member, who resigned in September.

Replacing Mrs. McCloud is Mr. Herman Williams, also a Tulalip Tribal member who works for the Department of Housing and Urban Development in Seattle, Washington. Mr. Williams serves as a Special Assistant to the Regional Administrator for Indian housing programs in Region X. Mr. Roger Jim, a member of the Yakima Tribal Business Committee, was elected in October to fill the unexpired term of Ms. Boyer. Mr. Jim has served on his council for the past eight years. He also is immediate past Area Vice-President for the National Congress of American Indians and served three times as President of the Affiliated Tribes of Northwest Indians. NARF's staff and Steering Committee members welcome these two new members.

We would also like to extend special thanks to Mrs. McCloud and Ms. Boyer for their years of service to the organization. LaNada Boyer was one of the original Steering Committee members and incorporators for the Native American Rights Fund. She served continuously on the Committee since 1970 and has served several terms as a member of the Executive Committee as well.

National Indian Law Library (NILL)

NILL began in 1972 with the assistance of a grant from the Carnegie Corporation, and is now funded through a grant from the Administration for Native Americans in the Department of Health, Education and Welfare.

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Appendix E

SPARTANS OF THE WEST

(*From the Book of Woodcraft, 1912*)

BY

ERNEST THOMPSON SETON

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INDEX

* * *

INTRODUCTION

Except for the above Index, this Introduction, and the Notes appearing on the inside of the back cover, this booklet is an exact reprint from Ernest Thompson Seton's THE BOOK OF WOODCRAFT, first copyrighted in 1912. In the 1921 edition, The Chief, as Mr. Seton was respectfully known, wrote:

"For over thirty years I have been giving the talks and demonstrations that are gathered together in this book...

"By Woodcraft I mean outdoor life in its broadest sense...

"Woodcraft is the first of all the sciences. It was Woodcraft that made man out of brutish material, and Woodcraft in its highest form may save him from decay...

"As the model for outdoor life...I took the Indian, and have thus been obliged to defend him against the calumnies of those who coveted his possessions. In giving these few historical extracts to show the Indian character, it must be remembered that I could give hundreds, and that practically all the travelers who saw with their own eyes are of one mind in the matter..."

(continued on inside of back cover)

(continued from inside of front cover)

The "talks and demonstrations" which The Chief began presenting in 1880 grew into the world-wide youth movements of today. His "Seton Indians" served as the model when he and Dan Beard and another man created the "Boy Scouts of America." When this organization later began leaning towards militarism and reaction The Chief re-activated his own original group, calling it the "Woodcraft Indians." Because of the extreme American prejuduice against the word Indian, The Chief's pioneer organization is now known as the "Woodcraft Rangers."

The Indian Rebirth which is now firmly established might never ve been if The Chief had not taught and trained the exceptional outh of three American generations in the superior physical, mental and spiritual values of the Indian Way of Life. These trained reinforcements have come to the assistance of the ancient, authentic Tribal Chiefs and helped turn a possible trend to extinction into a probable tide to victory.

Craig

* * *

NOTE REGARDING PAGE 50

Oraibi Hopis ran 45 miles to tend their Moencopi gardens and returned the same day - 90 miles round trip and a day's work besides.

Charlie Talawepe of Moencopi Village ran a message for Indian Agent Ronke the 79 miles to Flagstaff in one morning, and the return trip to Tuba City in the afternoon - 158 miles in about 17 hours. This is the world's record long distance feat as near as I can determine. (I have just learned that Talawepe ran to Flagstaff over the OLD road and not the new one. This means that he ran nearly 200 miles in one day instead of the 158 previously mentioned.)

NOTE REGARDING PAGE 55

Following ample documentation and a convincing historical account, Thomas R. Henry concludes (in his book WILDERNESS MESSIAH, William Sloane Associates, N.Y., 1955), "...the thinking of one small but vital group (the Iroquois) can possibly affect the world-wide affairs of mankind." "...their influence upon history was profound. For their remarkable confederation...affected the thinking not only of the men who framed the Constitution of the United States of America but also of the men who were responsible for the Russian Communist concept of political organization." The two major world powers of today trace their roots to the practical idealism of the Indian Way of Life.

(over please)

NOTE REGARDING PAGE 14

In his 1939 classic THE GOSPEL OF THE RED MAN, Ernest Thompson Seton, the foremost authority on Indian cultural values, points out:

"A massacre is the ruthless, wholesale murder of helpless men, women and children, or captive warriors who have surrendered. It assumes a considerable number of victims and a measure of treachery.

"The compiler cannot find one true record of the Indians ever massacring a group of White folk...

"On the other hand, there are on record at least a thousand massacres of Indians by Whites, and in every case the massacre was made possible by shocking treachery, by absolute disregard of the most solemn and binding treaties and promises."

The Chief then gives several historical examples of "massacres' starting with the first: the 21st Christmas Eve Celebration of the Pious Pilgrim Forefathers at Cos Cob, Conn., in which some 400 friendly and peaceful men, women and children (mostly women and children) - the whole village in fact - were ruthlessly destroyed.

FINAL NOTE

You may obtain "A Study Kit on the Hopi Indians", "A Study Kit on the Indian Situation", "Various Items on Various Indian Nations", "Back Copies of INDIAN VIEWS (a news and views magazine)" and other related literature by sending a request to: Craig c/o Thomas Banyacya, Independent Hopi Nation, Box 112, Oraibi, Arizona, U.S.A.

II. The Spartans of the West

NO WORLD-MOVEMENT ever yet grew as a mere doctrine. It must have some noble example; a living, appealing personality; some man to whom we can point and say, "This is what we mean." All the great faiths of the world have had such a man, and for lack of one, many great and flawless truths have passed into the lumber-room.

To exemplify my outdoor movement, I must have a man who was of this country and climate; who was physically beautiful, clean, unsordid, high-minded, heroic, picturesque, and a master of Woodcraft, besides which, he must be already well-known. I would gladly have taken a man of our own race, but I could find none. Rollo the Sea-King, King Arthur, Leif Ericsson, Robin Hood, Leatherstocking, all suggested themselves, but none seemed to meet the requirements, and most were mere shadows, utterly unknown. Surely, all this pointed the same way. There was but one figure that seemed to answer all these needs: that was the *Ideal Indian* of Fenimore Cooper and Longfellow.

For this reason, I took the Native American, and called my organization "Woodcraft Indians." And yet, I am told that the prejudice against the word "Indian" has hurt the movement immensely. If so, it is because we do not know what the Indian was, and this I shall make it my

sad and hopeful task, at this late day, to have our people realize.

We know more about the Redman to-day than ever we did. Indeed, we knew almost nothing of him twenty years ago. We had two pictures offered us; one, the ideal savage of Longfellow, the primitive man, so noble in nature that he was incapable of anything small or mean or wicked; the other was presented by those who coveted his possessions, and, to justify their robberies, they sketched the Indian as a dirty, filthy, squalid wretch, a demon of cruelty and cowardice, incapable of a human emotion, and never good till dead.

Which of these is the true picture? Let us calmly examine the pages of history, taking the words and records of Redmen and white, friends and foes of the Indian, and be prepared to render a verdict, in absolute accordance with that evidence, no matter where it leads us.

Let us begin by admitting that it is fair to take the best examples of the red race, to represent Indian philosophy and goodness; even as we ourselves would prefer being represented by Emerson, Tolstoi, Lincoln, Spencer, Peabody, General Booth, or Whitman, rather than by the border ruffians and cut-throat outlaws who were the principal exemplars of our ways among the Indians.

It is freely admitted that in all tribes, at all times, there were reprobates and scoundrels, a reproach to the people; just as amongst ourselves we have outcasts, tramps, drunkards, and criminals. But these were despised by their own people, and barely tolerated.

We must in fairness judge the Indian and his way of life and thought by the exemplifications of his best types: Hiawatha, Wabasha I, Tshut-che-nau, Ma-to-to-pa, Tecumseh, Kanakuk, Chief Joseph, Dull Knife, Washakie,

and many that loved their own people and were in no wise touched by the doctrines of the whites.

If from these men we gather their beliefs, their teachings, and the common thoughts that guided their lives, we may fairly assume that we have outlined the creed of the best Indians.

THE INDIAN'S CREED

These are the main thoughts in the Redman's creed:

(1) While he believed in many gods, he accepted the idea of one Supreme Spirit, who was everywhere all the time; whose help was needed continually, and might be secured by prayer and sacrifice.

(2) He believed in the immortality of the soul, and that its future condition was to be determined by its behavior in this life.

(3) He reverenced his body as the sacred temple of his spirit; and believed it his duty in all ways to perfect his body, that his earthly record might be the better.

We cannot, short of ancient Greece, find his equal in physical perfection.

(4) He believed in the subjection of the body by fasting, whenever it seemed necessary for the absolute domination of the spirit; as when, in some great crisis, that spirit felt the need for better insight.

(5) He believed in reverence for his parents, and in old age supported them, even as he expected his children to support him.

(6) He believed in the sacredness of property. Theft among Indians was unknown.

(7) He believed that the murderer must expiate his crime with his life; that the nearest kin was the proper avenger, but that for accidental manslaughter compensation might be made in goods.

(8) He believed in cleanliness of body.

(9) He believed in purity of morals.

(10) He believed in speaking the truth, and nothing but the truth. His promise was absolutely binding. He hated and despised a liar, and held all falsehood to be an abomination.

(11) He believed in beautifying all things in his life.

He had a song for every occasion — a beautiful prayer for every stress. His garments were made beautiful with painted patterns, feathers, and quill-work. He had dances for every fireside. He has led the world in the making of beautiful baskets, blankets, and canoes; while the decorations he put on lodges, weapons, clothes, dishes, and dwellings, beds, cradles, or grave-boards, were among the countless evidences of his pleasure in the beautiful, as he understood it.

(12) He believed in the simple life.

He held, first, that land belonged to the tribe, not to the individual; next, that the accumulation of property was the beginning of greed that grew into monstrous crime.

(13) He believed in peace and the sacred obligations of hospitality.

(14) He believed that the noblest of virtues was courage, and that, above all other qualities, he worshipped and prayed for. So also he believed that the most shameful of crimes was being afraid.

(15) He believed that he should so live his life that the fear of death could never enter into his heart; that when the last call came he should put on the paint and honors of a hero going home, then sing his death song and meet the end in triumph.

If we measure this great pagan by our Ten Commandments, we shall find that he accepted and obeyed them, all

but the first and third: that is, he had many lesser gods besides the one Great Spirit, and he knew not the Sabbath Day of rest. His religious faith, therefore, was much the same as that of the mighty Greeks, before whom all the world of learning bows; not unlike that of many Christians and several stages higher than that of the Huxley and other modern schools of materialism.

THE DARK SIDE

These are the chief charges against the Indian:

First: He was cruel to his enemies, even torturing them at the stake in extreme cases. He knew nothing about forgiving and loving them.

In the main, this is true. But how much less cruel he was than the leaders of the Christian Church in the Middle Ages! What Indian massacre will compare in horror with that of St. Bartholomew's Eve or the Massacre of Glencoe? Read the records of the Inquisition, or the Queen Mary persecutions in England, or the later James II. abominations for further light!

There was no torture used by the Indians that was not also used by the Spainards. Every frontiersman of the Indian days knows that in every outbreak the whites were the aggressors; and that in every evil count — robbery, torture and massacre — they did exactly as the Indians did. "The ferocity of the Redman," says Bourke, "has been more than equaled by the ferocity of the Christian Caucasian." ("On the Border with Crook," p. 114.)

There are good grounds for stating that the Indians were cruel to their enemies, but it is surprising to see how little of this cruelty there was in primitive days. In most cases the enemy was killed in battle or adopted into the tribe; very,

very rarely was he tortured. Captain Clark says of the Cheyennes:

"There is no good evidence that captives have been burned at the stake, flayed alive, or any other excruciating torture inflicted on persons captured by these fierce, war-loving and enterprising barbarians." ("Sign Language," p. 106.)

But we know now that the whites did use diabolical tortures in their dealings with the Indian, and deliberately and persistently misrepresented him in order to justify their own atrocities.

The whites, however, had print to state their case, while the Indians had none to tell their story or defend them. Furthermore, it is notorious that all massacres of Indians by the whites were accomplished by treachery *in times of peace*, while all Indian massacres of whites were *in time of war*, to resist invasion. At present, I know of no exception to this rule.*

In almost every case, it must be said that the army officers and men were personally guiltless. They were impressed with the heroism of the Indians, admired them for their bravery, were horrified by the wickedness of the orders sent them, and did all they could to mitigate the atrocious policies of the shameless Indian Bureau. But there were instances in which the army officers showed themselves the willing tools of the politicians. Among the notorious cases was the cold-blooded massacre, in 1864, by Col. J. H. Chivington, of several hundred Cheyennes. Men, women, and children had surrendered and disarmed, and were, indeed, at the time, under military protection. The fiendish cruelty and cowardice of that one attack on these defenseless beings was enough to more than justify

*Many supposed massacres by Indians are now known to have been the work of whites disguised as Indians.

everything the Cheyennes have ever done to the race of the assassins. (See "Century of Dishonor," pp. 341–358.)

Still worse was the Baker massacre of Blackfeet, on January 23, 1870.

A border ruffian, a white man named Clark, had assaulted a young Indian, beating him severely, and the Indian, in retaliation, had killed Clark and gone off into Canada. Without troubling to find the guilty party, or even the band he belonged to, Brevet Col. E. M. Baker, major Second Cavalry, stationed at Fort Shaw, marched out, under orders from Gen. Philip H. Sheridan, to the nearest Indian village, on Marias River; as it happened, they were peaceable, friendly Indians, under Bear's Head. Without warning, the soldiers silently surrounded the sleeping village. But the story is better told by Schultz, who was on the spot later, and heard it all from those who saw:

"In a low tone Colonel Baker spoke a few words to his men, telling them to keep cool, aim to kill, to spare none of the enemy; and then he gave the command to fire. A terrible scene ensued. On the day previous, many of the men of the camp had gone out toward the Sweetgrass Hills on a grand buffalo hunt; so, save for Chief Bear's Head and a few old men, none were there to return the soldiers' fire. Their first volley was aimed low down into the lodges, and many of the sleeping people were killed or wounded in their beds. The rest rushed out, men, children, women, many of the latter with babes in their arms, only to be shot down at the doorways of their lodges. Bear's Head, frantically waving a paper which bore testimony to his good character and friendliness to the white men, ran toward the command on the bluff, shouting to them to cease firing, entreating them to save the women and children; down he also went with several bullet holes in his body. Of the more than four hundred souls in camp at the time, very few escaped. And when it was all over, when the last wounded woman and child had been put out of misery, the soldiers piled the corpses

on overturned lodges, firewood and household property, and set fire to it all.

"Several years afterward I was on the ground. Everywhere scattered about in the long grass and brush, just where the wolves and foxes had left them, gleamed the skulls and bones of those who had been so ruthlessly slaughtered. 'How could they have done it?' I asked myself, time and time again. 'What manner of men were these soldiers who deliberately shot down defenseless women and innocent children?' They had not even the excuse of being drunk; nor was their commanding officer intoxicated; nor were they excited or in any danger whatever. Deliberately, coolly, with steady and deadly aim they shot them down, killed the wounded, and then tried to burn the bodies of their victims. But I will say no more about it. Think it over, yourself, and try to find a fit name for men who did this." ("My Life as an Indian," pp. 41–2.)

According to G. B. Grinnell, one hundred and seventy-six innocent persons were butchered on this day of shame; ninety of them women, fifty-five babies, the rest chiefly very old or very young men, most of the able-bodied hunters being away on a hunt. No punishment of any kind was given the monster who did it.

There is no Indian massacre of whites to compare with this shocking barbarity, for at least the Indian *always had the excuse that war had been declared*, and he was acting on the defensive. Of a similar character were the massacres at Cos Cob, 1641; Conestoga, 1763; Gnadenwhütten, 1782; Coquille River, 1854; Wounded Knee, 1890; and a hundred more that could be mentioned. And no punishment was ever meted out to the murderers. Why? First, because apparently the Bureau at Washington approved; second, because "An Indian has no legal status; he is merely a live and particularly troublesome animal in the eye of the law." (New York *Times*, February 21, 1880.) (See "Century of Dishonor," p. 367.) Governor Horatio Seymour says:

"Every human being born upon our continent, or who comes here from any quarter of the world, whether savage or civilized, can go to our courts for protection — except those who belong to the tribes who once owned this country. The cannibal from the islands of the Pacific, the worst criminals from Europe, Asia or Africa, can appeal to the law and courts for their rights of person and property — all save our native Indians, who, above all, should be protected from wrong." (Century of Dishonor," title-page.)

And this is the land whose Constitution grants equal rights to all alike. This is the land that waxes virtuously indignant when Russia expels or massacres Nihilists, Poles or Jews. Have we not enough courage left to face the simple truth that every crime of despotism in Russia has been more than doubled in atrocity by what has but recently been done in America? Nihilists, Jews and Poles were certainly breaking the law, usually plotting against the Government, when attacked. Russia never used burnings at the stake, as did the American unofficial Indian-killers. And never did Russia turn batteries of machine-guns on masses of men, women and children who were absolutely quiet, unarmed, helpless and submissive: who had indeed thrown themselves on the mercy of the Government, and were under its protection.

Americans were roused to a fury of indignation by doubtful newspaper accounts of Spanish misrule in Cuba. But the atrocities so credited to Spain pale into insignificance beside the unspeakable abominations proved against the United States by records of its own officials in its dealings with the native American race during the last hundred years.

There are many exceptions to this charge that the Indian is cruel to his enemies, enough, almost, to justify a complete rebuttal, and among these was none more honor-

ably distinguished than Tecumseh, the war chief of the Shawnees; perhaps the greatest of all historic Indians. Like a new incarnation of Hiawatha, he planned a defensive federation of the whole red race, and led them in war, that he might secure for them lasting peace. All great Indians had taught the doctrine "Love your friend." But Tecumseh was the first in authority to extend the heaven-taught precept, so they should be *kind*, at least, to their enemies; for he put an end in his nation to all torturing of prisoners.

Above all whose history is fully known, Tecumseh was the ideal noble Redman realized; nevertheless, he was not alone; Wabasha, Osceola, Kanakuk, and Wovoka must be numbered among those whose great hearts reached out in kindness even to those who hated them.

Tecumseh taught, "Love your enemy after he is conquered"; Kanakuk preached non-resistance to evil; Wovoka, "Be kind to all men."

Second: The Indian had no property instincts. He was a Socialist in all matters of large property, such as land, its fruits, rivers, fish, and game.

So were the early Christians. "And all that believed were together; had all things in common, and sold their possessions and goods, and parted them to all men, as every man had need." (Acts, ii., 44–45.)

They considered that every child had a right to a bringing up, and every old person to a free living from the tribe. We know that it worked well, for there was neither hunger nor poverty, except when the whole tribe was in want. And we know also that there were among them no men of shameful, monstrous wealth.

Third: He was improvident. He is *now*, just like our own drunkards. He was *not*, until after the Great Degradation that we effected in him. All the old travelers,

testify that each Indian village had its fields of corn, beans, and pumpkins. The crops were harvested and safely carried them over long periods when there was no other supply. They did not believe in vast accumulations of wealth, because their wise men had said that greed would turn their hearts to stone and make them forget the poor. Furthermore, since all when strong contributed to the tribe, the tribe supported them in childhood, sickness and age. They had no poor; they had no famine until the traders came with whiskey and committed *the crimes for which we as a nation have yet to answer.*

Fourth: He was dirty. Many dirty habits are to be seen to-day among the Reservation Indians, but it was not so in the free days. A part of the old Indian's religion was to take a bath every day the year round for the helping of his body. Some tribes bathed twice a day. Every village had a Turkish bath in continual use. It is only the degraded Indian who has become dirty, and many of the whites who oftenest assail him as filthy never take a bath from birth to judgment day.

Fifth: He was lazy. No one who saw the Indian in his ancient form has preferred this charge. He was not fond of commercial manufacturing, but the regular work of tilling his little patch of corn and beans he did not shirk, nor the labor of making weapons and boats, nor the frightful toil of portaging, hunting and making war. He undertook these at all times without a murmur.

Many men will not allow their horses to bear such burdens as I saw the Chipewyans bear daily, without a thought of hardship, accepting all as a part of their daily lot.

Sixth: He degraded woman to be a mere beast of burden. Some have said so, but the vast bulk of evidence to-day goes to show that while the women did the household drudgery and lighter tasks, the men did all the work be-

yond their partners' strength. In making clothes, canoes, and weapons, as well as in tilling of the fields, men and women worked together. The woman had a voice in all the great affairs, and a far better legal position than in most of the civilized world to-day.

Seventh: He was treacherous. Oh! how ill it becomes *us* to mention such a thing! Every authority tells us the same — that primitive Redman never broke a treaty; his word was as good as his bond; that the American Government broke every treaty as soon as there was something to gain by doing so. Captain J. G. Bourke thus scores the continual treachery of the whites: "The occasional treachery of the aborigines," says he, "has found its best excuse in the unvarying Punic faith of the Caucasian invader." ("On the Border with Crook," p. 114.)

THE BRIGHT SIDE

But let us look for evidence of the Indian's character among those who saw with their own eyes, and had no object to serve by blackening the fair fame of the bravely dying race.

It would be easy to fill a large volume with startling and trustworthy testimony as to the goodness of the old Indian of the best type; I shall give a few pages bearing on the Indian life and especially relating to the various characteristics for which the Redman has been attacked, selecting the testimony preferably from the records of men who knew the Indian before his withering contact with the white race.

REVERENCE

In 1832 George Catlin, the painter, went West and spent eight years with the unchanged Indians of the Plains. He lived with them and became conversant with their lives. He has left one of the fullest and best records we have of the

Redman. From his books I quote repeatedly. Concerning the Indian's religion, he says:

"The North American Indian is everywhere, in his native state, a highly moral and religious being, endowed by his Maker with an intuitive knowledge of some great Author of his being, and the Universe, in dread of whose displeasure he constantly lives, with the apprehension before him of a future state, where he expects to be rewarded or punished according to the merits he has gained or forfeited in this world."

* * * * * * *

"Morality and virtue I venture to say the civilized world need not undertake to teach them.

* * * * * * *

"I never saw any other people of any color *who spend so much of their lives* in humbling themselves before and worshipping the Great Spirit." (Catlin's "N. A. Indian," Vol. II., p. 243.)

"We have been told of late years that there is no evidence that any tribe of Indians ever believed in one overruling power; yet, in the early part of the seventeenth century, Jesuits and Puritans alike testified that tribes which they had met, believed in a god, and it is certain that, at the present time, many tribes worship a Supreme Being who is the Ruler of the Universe." (Grinnell's "Story of the Indian," 1902, p. 214.)

"Love and adore the Good Spirit who made us all; who supplies our hunting-grounds, and keeps us alive." (Teachings of Tshut-che-nau, Chief of the Kansas. J. D. Hunter's "Captivity Among the American Indians," 1798–1816, p. 21).

And, again, Hunter says (p. 216):

"A day seldom passes with an elderly Indian, or others who are esteemed wise and good, in which a blessing is not asked, or thanks returned to the Giver of Life, sometimes audibly, but more generally in the devotional language of the heart.

"Every Indian of standing has his sacred place, such as a tree, rock, fountain, etc., to which he resorts for devotional exercise, whenever his feelings prompt to the measure; sometimes many resort to the same place." (P. 221).

A typical prayer is recorded for us by Grinnell.

A Pawnee, in dire distress and despair, through a strong enemy, decided to sacrifice his horse to the unseen powers, that they might intercede for him with the Creator, and thus prayed beforehand:

"My Father [who dwells] in all places, it is through you that I am living. Perhaps it was through you that this man put me in this condition. You are the Ruler. Nothing is impossible with you. If you see fit, take this [trouble] away from me. Now you, all fish of the rivers, and you, all birds of the air, and all animals that move upon the earth, and you, O Sun! I present to you this animal. You, birds in the air, and you, animals upon the earth, we are related; we are alike in this respect, that one Ruler made us all. You see how unhappy I am. If you have any power, intercede for me." (Grinnell's "Story of the Indian," p. 213.)

Capt. W. P. Clark, one of our best authorities on the Plains Indians, says: "There are no people who pray more than Indians." ("Indian Sign Language," 1885, p. 309.)

And, again, he says:

"Indians make vocal petitions to the God or Force which they wish to assist them, and also make prayer by pointing the long stem of the pipe. The Poncas call the sun God or Grandfather, and the earth Grandmother, and pray to both when making supplications. Running Antelope, a chief of the Uncapapa Band of Sioux, said in regard to pointing the pipestem, that the mere motion meant, 'To the Great Spirit: give me plenty of ponies; plenty of meat; let me live in peace and comfort with my wife, and stay long with my children. To the Earth, my

Grandmother: let me live long; hold me good and strong. When I go to war, give me many ponies and let me count many "coups." In peace, let not anger enter my heart.'" (P. 309.)

But the best account of the Indian's belief and mode of worship is given to us by Dr. Charles A. Eastman, himself a Sioux Indian; he has written of the things that were his daily life in youth. He says:

"When food is taken, the woman murmurs a 'grace' as she lowers the kettle, an act so softly and unobtrusively performed that one who does not know the custom usually fails to catch the whisper: 'Spirit partake!' As her husband receives the bowl or plate, he likewise murmurs his invocation to the spirit. When he becomes an old man, he loves to make a notable effort to prove his gratitude. He cuts off the choicest morsel of the meat and casts it into the fire — the purest and most ethereal element." ("Soul of the Indian," 1911, pp. 47–48.)

"The first *hambeday*, or religious retreat, marked an epoch in the life of the youth, which may be compared to that of confirmation or conversion in Christian experience. Having first prepared himself by means of the purifying vapor bath, and cast off, as far as possible, all human or fleshly influences, the young man sought out the noblest height, the most commanding summit in all the surrounding region. Knowing that God sets no value upon material things, he took with him no offerings or sacrifices, other than symbolic objects, such as paints and tobacco. Wishing to appear before Him in all humility, he wore no clothing save his moccasins and breech-clout. At the solemn hour of sunrise or sunset, he took up his position, overlooking the glories of earth, and facing the 'Great Mystery,' and there he remained, naked, erect, silent, and motionless, exposed to the elements and forces of His arming, for a night and a day to two days and nights, but rarely longer. Sometimes he would chant a hymn without words, or offer the ceremonial 'filled pipe.' In this holy trance or ecstasy the Indian mystic found his highest happiness, and the motive power of his existence." ("Soul of the Indian," Eastman, pp. 7–8.)

"In the life of the Indian there was only one inevitable duty, the duty of prayer — the daily recognition of the Unseen and Eternal. His daily devotions were more necessary to him than daily food. He wakes at daybreak, puts on his moccasins and steps down to the water's edge. Here he throws handfuls of clear cold water into his face, or plunges in bodily. After the bath, he stands erect before the advancing dawn, facing the sun as it dances upon the horizon, and offers his unspoken orison. His mate may precede or follow him in his devotions, but never accompanies him. Each soul must meet the morning sun, the new, sweet earth, and the Great Silence alone!

"Whenever, in the course of the daily hunt, the red hunter comes upon a scene that is strikingly beautiful or sublime — a black thunder-cloud, with the rainbow's glowing arch above the mountain; a white waterfall in the heart of a green gorge; a vast prairie tinged with the blood-red of sunset — he pauses for an instant in the attitude of worship. He sees no need for setting apart one day in seven as a holy day, since to him all days are God's." ("Soul of the Indian," Eastman; pp. 45–6.)

In the light of all this evidence, is it to be wondered that most of the early historians who lived with the primitive Indians of the Plains, were led to believe, from their worship of God, their strict moral code, their rigid laws as to foods clean and unclean, and their claborate system of bathings and purifications, that in these red men of the New World, they had indeed found the long-lost tribes of Israel?

CLEANLINESS

Nothing will convince some persons but that "Yankees have tails," because, in their nursery days, these persons always heard it was so. That is exactly the attitude of the world on the subject of dirty Indians.

Alexander Henry II., a fur and whiskey trader, who did his share in degrading the early Indians, and did not love them, admits of the Mandans, in 1806:

"Both men and women make it a rule to go down to the river and wash every morning and evening." ("Journal," Vol. I., p. 325.)

"These people, like their neighbors, have the custom of washing, morning and evening." ("Journal," Vol. I., p. 348.)

Catlin, after eight years in their lodges (1832–40) says that notwithstanding many exceptions, among the wild Indians the "strictest regard to decency and cleanliness and elegance of dress is observed, and there are few people, perhaps, who take more pains to keep their persons neat and cleanly, than they do." (Vol. I., p. 96.)

"In their bathing and ablutions at all seasons of the year, as a part of their religious observances — having separate places for men and women to perform these immersions — they resemble again [the Jews]." (Vol. II., p. 233.)

J. W. Schultz, who spent his life among the Blackfeet, comments on their wonderful hardiness. During the intensest zero weather, he, himself, wore twice as much clothing as they did, and yet was suffering severely, while "They never froze, nor even shivered from the cold. They attributed their indifference to exposure, to the beneficial effect of their daily baths, which were always taken, even if a hole had to be cut in the ice for the purpose. And they forced their children to accompany them, little fellows from three years of age up, dragging the unwilling ones from ther beds, and carrying them under their arms to the icy plunge." ("My Life as an Indian," pub. 1907; p. 63.)

This same experienced observer says:

"I have seen hundreds of white homes — there are numbers of them in any city — so exceedingly dirty, their inmates so slovenly, that one turns from them in absolute disgust, but I have seen nothing like that among the Blackfeet." (P. 413.)

Friendly enthusiasts like Catlin may sometimes get only part of the facts, but the trained observers of the Smith-

sonian Institution usually have absolute and complete evidence to offer. Here is J. O. Dorsey's paragraph on Omaha cleanliness:

"The Omahas generally bathe (hica) every day in warm weather, early in the morning and at night. Some who wish to do so, bathe also at noon. Jackson, a member of the Elkgens, bathes every day, even in winter. He breaks a hole in the ice on the Missouri River, and bathes, or else he rubs snow over his body. In winter the Omahas heat water in a kettle and wash themselves (kigcija). . . . The Ponkas used to bathe in the Missouri every day." (Dorsey, 3th Ann. Dep. Eth.; p. 269.)

Every Indian village in the old days had a Turkish bath, as we call it; a "Sweat Lodge," as they say, used as a cure for inflammatory rheumatism, etc. Catlin describes this in great detail, and says:

"I allude to their vapor baths, or *sudatories*, of which each village has several, and which seem to be a kind of public property — accessible to all, and resorted to by all, male and female, old and young, sick and well." (Vol. I., p. 97.)

The "Sweat Lodge" is usually a low lodge covered with blankets or skins. The patient goes in undressed and sits by a bucket of water. In a fire outside, a number of stones are heated by the attendants. These are rolled in, one or more at a time. The patient pours water on them. This raises a cloud of steam. The lodge becomes very hot. The individual drinks copious draughts of water. After a sufficient sweat, he raises the cover and rushes into the water, beside which, the lodge is always built. After this, he is rubbed down with buckskin, and wrapped in a robe to cool off.

This was used as a bath, as well as a religious purification.

I have seen scores of them. Clark says they were "common to all tribes," (p. 365). Every old-timer knows that they were in daily use by the Indians and scoffed at by the white settlers who, indeed, were little given to bathing of any kind.

CHASTITY

About one hundred years ago the notorious whiskey-trader, Alexander Henry, already mentioned, went into the Missouri region. He was a man of strange character, of heroic frame and mind, but unscrupulous and sordid. His only interest and business among the Indians was beating them out of their furs with potations of cheap alcohol. This fearless ruffian penetrated the far Northwest, was the first trader to meet certain Western tribes, and strange to tell he wrote a full, straightforward and shocking account of his wanderings and methods among the red folk he despised for not being white. In spite of arrogance and assumed superiority, his narrative contains much like the following:

"The Flatheads on the Buffalo Plains, generally encounter the Piegans and fight desperately when attacked. They never attempt war themselves, and have the character of a brave and virtuous people, not in the least addicted to those vices so common among savages who have had long intercourse with Europeans. Chastity is particularly esteemed, and no woman will barter her favors, even with the whites, upon any mercenary consideration. She may be easily prevailed upon to reside with a white man as his wife, according to the custom of the country, but prostitution is out of the question —she will listen to no proposals of that nature. Their morals have not yet been sufficiently debauched and corrupted by an intercourse with people who call themselves Christians, but whose licentious and lecherous manners are far worse than those of savages. A striking example is to be seen throughout the N. W. country, of the depravity and wretchedness of the natives; but as one

advances into the interior parts, vice and debauchery become less frequent. Happy those who have the least connection with us, for most of the present depravity is easily traced to its origin in their intercourse with the whites. That baneful source of all evils, spirituous liquor, has not yet been introduced among the natives of the Columbia. To the introduction of that subtle poison among the savage tribes may be mainly attributed their miserable and wretched condition." [So at once he set about introducing it. E. T. S.] (A. Henry's Journal, 1811; pp. 710–11.)

Jonathan Carver, who traveled among the Sioux from 1766–9, says:

"Adultery is esteemed by them a heinous crime, and punished with the greatest rigor." (Travels, 1796; p. 245.)

George Catlin, after his eight years among the wild Mandans of the Missouri (1832), says of them:

"Their women are beautiful and modest — and amongst the respectable families, virtue is as highly cherished and as inapproachable, as in any society whatever." (Vol. I., p. 121.)

Colonel R. I. Dodge, an Indian fighter and hater, says:

"The Cheyenne women are retiring and modest, and for chastity will compare favorably with women of any other nation or people . . . almost models of purity and chastity." ("Hunting-grounds of the Great West," p. 302.)

I am well aware that the Crows, the Arapaho and some West coast tribes were shockingly immoral in primitive times, but these were the exceptions, and in consequence they were despised by the dominant tribes of the Plains.

BRAVERY

Old-time travelers and modern Indian fighters agree that there was no braver man on earth, alive or in history, than the Redman. Courage was the virtue he chiefly honored. His whole life and training were with the pur-

pose of making him calm, fearless and efficient in every possible stress or situation.

Father Lafitau said of the Eastern Indians, in 1724:

"They are high-minded and proud; possess a courage equal to every trial; an intrepid valor; the most heroic constancy under torments, and an equanimity which neither misfortune nor reverses can shake." (Moeurs des Sauv. Amer.)

"An Indian meets death, when it approaches him in his hut, with the same resolution he has often faced him in the field. His indifference relative to this important article, which is the source of so many apprehensions to almost every other nation, is truly admirable. When his fate is pronounced by the physician, and it remains no longer uncertain, he harangues those about him with the greatest composure." (Carver's "Travels Among the Sioux," 1766–9; p. 261.)

"The greatest insult that can be offered to an Indian, is, to doubt his courage." (J. D. Hunter, "Captivity"; 1798–1816; p. 301.)

"These savages are possessed with many heroic qualities, and bear every species of misfortune with a degree of fortitude which has not been outdone by any of the ancient heroes either of Greece or of Rome." (Carver's "Travels Among the Sioux," 1766–9; pp. 221–2.)

None of us are likely to question the Redman's prowess when we remember for example that Black Hawk with 40 warriors utterly routed 270 American riflemen in 1832, Chief Joseph in 1877 with inferior weapons beat the American soldiers over and over again with half their number, and in 1878 Dull Knife with 69 warriors fought and defied 2000 American troops for over four months.

THRIFT AND PROVIDENCE

Every Indian village in the old days had its granaries of corn, its stores of dried beans, berries, and pumpkin-strips, as well as its dried buffalo tongues, pemmican and deer's meat. To this day all the Fisher Indians of the north and west dry great quantities of fish, as well as berries, for the famine months that are surely coming.

Many of the modern Indians, armed with rifles, have

learned to emulate the white man, and slaughter game for the love of slaughter, without reference to the future. Such waste was condemned by the old-time Indians, as an abuse of the gifts of God, and which would surely bring its punishment.

When, in 1684, De la Barre, Governor of Canada, complained that the Iroquois were encroaching on the country of those Indians who were allies of the French, he got a stinging reply from Garangula, the Onondaga Chief, and a general statement showing that *the aborigines had game-laws*, not written, indeed, but well known, and enforced at the spear-point, if need be: "We knock the Twightwies [Miamis] and Chictaghicks [Illinois] on the head, because they had cut down the trees of peace, which were the limits of our country. They have hunted beaver on our lands. They have acted contrary to the customs of all Indians, for they left none of the beavers alive, they killed both male and female." (Sam G. Drake's "Indian Biog." 1832, p. 111.)

Hunter says of the Kansas Indians:

"I have never known a solitary instance of their wantonly destroying any of those animals [buffalo, elk, and deer], except on the hunting-grounds of their enemies, or encouraged to it by the prospect of bartering their skins with the traders." (Hunter's "Captivity," 1798–1816, p. 279.)

"After all, the Wild Indians could not be justly termed improvident, when the manner of life is taken into consideration. They let nothing go to waste, and labored incessantly during the summer and fall, to lay up provisions for the inclement season. Berries of all kinds were industriously gathered and dried in the sun. Even the wild cherries were pounded up, stones and all, made into small cakes, and dried, for use in soups, and for mixing with the pounded jerked meat and fat to form a much-prized Indian delicacy." ("Indian Boyhood," Eastman; pp. 237–8.)

Their wise men were not blind to the dangers of greed, as we know, from many sources, and, in particular, their attitude toward money-getting is full of interest:

"The Indians, except those who live adjoining to the European colonies, can form to themselves no idea of the value of money; they consider it, when they are made acquainted with the uses to which it is applied by other nations, as the source of innumerable evils. To it they attribute all the mischiefs that are prevalent among Europeans, such as treachery, plundering, devastations and murder." (Carver's "Travels," p. 158.)

Could we have a more exact paraphrase of "The love of money is the root of all evil?"

Beware of greed which grows into crime and makes men forget the poor. A man's life should not be for himself, but for his people. For them he must be ready to die.

This is the sum of Indian economic teaching. (See Eastman "Soul of Indian," pp. 94 and 99–103.)

CHEERFULNESS OR THE MERRY INDIAN

Nothing seems to anger the educated Indian, to-day, more than the oft-repeated absurdity that his race was of a gloomy, silent nature. Any one that has ever been in an Indian village knows what a scene of joy and good cheer it normally was. In every such gathering there was always at least one recognized fun-maker, who led them all in joke and hilarious jest. Their songs, their speeches, their fairy-tales are full of fun and dry satire. The reports of the Ethnological Bureau sufficiently set forth these facts.

Eastman, the Sioux, says on this subject:

"There is scarcely anything so exasperating to me as the idea that the natives of this country have no sense of humor and no

faculty for mirth. This phase of their character is well understood by those whose fortune or misfortune it has been to live among them, day in and day out, at their homes. I don't believe I ever heard a real hearty laugh away from the Indians' fireside. I have often spent an entire evening in laughter with them, until I could laugh no more. There are evenings when the recognized wit or story-teller of the village gives a free entertainment which keeps the rest of the community in a convulsive state until he leaves them. However, Indian humor consists as much in the gestures and inflections of the voice, as in words, and is really untranslatable." ("Indian Boyhood," p. 267.)

And, again, Grinnell:

"The common belief that the Indian is stoical, stolid, and sullen, is altogether erroneous. They are really a merry people, good-natured and jocular, usually ready to laugh at an amusing incident or a joke, with a simple mirth that reminds one of children." ("Ind. To-day," p. 9.)

There is, however, an explanation of our widespread misconception. Many a time in Indian camp or village, I have approached some noisy group of children or hilarious ring of those more grown. My purpose was wholly sympathetic, but my presence acted as a wet-blanket. The children were hushed or went away. I saw shy faces, furtive glances, or looks of distrust. They hate us; they do not want us near. Our presence is an evil influence in their joy. Can we wonder?

OBEDIENCE — REVERENCE FOR THEIR PARENTS AND FOR THE AGED

We cannot, short of the Jews or the Chinese, perhaps, find more complete respect for their parents than among the Indians. Catlin says:

"To each other I have found these people kind and honorable, and endowed with every feeling of parental, of filial, and con-

jugal affection, that is met in more enlightened communities. I have found them moral and religious; and I am bound to give them credit for their zeal, which is often exhibited in their modes of worship, however insufficient they may seem to us, or may be in the estimation of the Great Spirit." (Vol. II., p. 242.)

While Hunter, after living with the Kansas Indians for nineteen years, says:

"They are very assiduous and attentive to the wants and comforts, particularly, of the aged; and kind to all who require their assistance. And an Indian who failed in these respects, though he otherwise merited esteem, would be neglected and despised. To the credit of their morals, few such are to be found, except where debauched by the vices of the white people." (Hunter's "Captivity," 1798–1816; p. 251.)

Among the maxims laid down by the venerable Chief of the Kansas, was:

"Obey and venerate the old people, particularly your parents." ("Teachings of Tshut-che-nau, Chief of the Kansas;" Hunter; p. 21.)

Father J. F. Lafitau, the Jesuit missionary, was far from being predisposed in favor of savage ways or views, yet says of the Eastern Indians:

"Toward each other, they behave with a natural politeness and attention, entertaining a high respect for the aged." (Moeurs des Sauv. Am., 1724.)

"The Indians always took care of their aged and helpless. It was a rare exception when they did not." (Francis La Flesche, Conversation, April 27, 1912.)

There have been cases of Indians abandoning their very aged to die, but it was always done by request of the vic-

tims, under dire stress of hunger or travel, and was disapproved and denounced by all their great teachers.

During my Northern journey in 1907 I selected for one of my guides a fine young Indian named Freesay. At the end of our first journey I said to him: "Would you like to go with me still farther, to the Far North country, and see the things your people have not yet seen? I will give you good wages and a big present."

He replied: "Yes; I would like to go very much, but my uncle [his adoptive father] told me not to go beyond Pike's Lobstick, and so I cannot go." And he did not, though his uncle was 350 miles away. This was one case out of several noted, and many heard of. The Fifth Commandment is a very big, strong law in the wigwam.

KINDNESS

At every first meeting of red men and whites, the whites were inferior in numbers, and yet were received with the utmost kindness, until they treacherously betrayed the men who had helped and harbored them. Even Christopher Columbus, blind and burnt up with avarice as he was, and soul-poisoned with superstition, and contempt for an alien race, yet had the fairness to write home to his royal accomplices in crime, the King and Queen of Spain:

"I swear to your Majesties that there is not a better people in the world than these; more affectionate, affable or mild. They love their neighbors as themselves, and they always speak smilingly. (Catlin, "N. A. Indian," II., p. 246.)

Jonathan Carver, who lived among the Sioux from 1766–9, after speaking of their severity in dealing with enemies, says:

"But if they are thus barbarous to those with whom they are at war, they are friendly, hospitable, and humane in peace. It may with truth be said of them, that they are the worst enemies and the best friends of any people in the whole world." ("Travels," p. 157.)

"We shall likewise see them sociable and humane to those whom they consider as their friends, and even to their adopted enemies: and ready to partake with them of the last morsel, or to risk their lives in their defence." (P. 269.)

And, again:

"No people are more hospitable, kind and free than the Indians." (P. 171.)

"Nothing can exceed the tenderness shown by them to their offspring." (P. 247.)

Catlin, writing of the Plain Indians generally, says:

"To their friends, there are no people on earth that are more kind; and cruelties and punishments (except for capital offences) are, amongst themselves, entirely dispensed with." (Vol. II., p. 241.)

Schultz evidently went among the Blackfeet with the usual wrong ideas about the Indians, but he soon wrote:

"I have read, or heard, that an Indian's loss of to-day is forgotten on the morrow. That is certainly not true of the Blackfeet, nor the Mandans. Often and often I have heard many of the Blackfeet mourn for one dead long years since." ("My Life as an Indian," p. 154.)

And again:

"I have often heard the Blackfeet speak of various white men as utterly heartless, because they had left their parents and their youthful home to wander and seek adventure in a strange land. They could not comprehend how one with right feeling might

absent himself from father and mother, as we do, for months and years. 'Hard hearts,' 'stone hearts,' they call us, and with some reason." (Schultz, p. 155.)

"There are few people so generous as the Indians.

* * * * * * *

In their religious and war ceremonies, at their feasts, festivals, and funerals, the widows and orphans, the poor and needy are always thought of; not only thought of, . . . but their poverty and necessity are relieved.

* * * * * * *

"I have seen white men reduced to the last 'hard tack,' with only tobacco enough for two smokes, and with no immediate prospect of anything better than horse-meat 'straight.' A portion of the hard bread was hidden away, and the smokes were taken in secret. An Indian, undemoralized by contact with the whites, under similar circumstances, would divide down to the last morsel." (Clark's "Sign Language," p. 185 and 186.)

HOSPITALITY

This is a point that needs little discussing, even the sworn enemy was safe, once he was admitted to an Indian lodge "as a guest."

Carver says of the Sioux, in 1766 ("Travels," p. 172):

"No people are more hospitable . . . and free than the Indians."

And, again, I found them ready to share with their friends the last morsel of food they possessed. (P. 269.)

The Jesuits testify of the Iroquois, 1656:

"Hospitals for the poor would be useless among them, because there are no beggars; those who have are so liberal to those who are in want, that everything is enjoyed in common. The whole village must be in distress before any individual is left in necessity." ("Century of Dishonor," p. 379.)

Catlin, in 1832–40, enthusiastically writes of the Plains Indians and their hospitality:

"I have been welcomed generally in their country, and treated to the best that they could give me [for eight years], without any charges made for my board." (Vol. I., p. 9.)

"No matter how great the scarcity of food might be, so long as there was any remaining in the lodge, the visitor received his share without grudging." (Grinnell, "Ind. of To-day," p. 9.)

The same authority writes me:

"When Lone Chief had gone into the Lodge of the Chief of the enemy, and food and water had been given to him, the Chief stood up and spoke to his tribespeople saying, 'What can I do? They have eaten of my food, I cannot make war on people who have been eating with me and have also drunk of my water.'" ("Pawnee Hero Stories," pp. 59–60.)

TREATMENT OF THEIR WOMEN

"The social condition of the North Americans has been greatly misunderstood. The place of woman in the tribe was not that of a slave or of a beast of burden. The existence of the gentile organization, in most tribes, with descent in the female line, forbade any such subjugation of woman. In many tribes, women took part in the councils of the chiefs; in some, women were even the tribal rulers; while in all, they received a fair measure of respect and affection from those related to them." (Grinnell's "Story of the Indian," p. 244.)

This is Grinnell's summing up of what every student of Indians has known for long. Here in addition are the statements of other good authorities:

"I have often heard and read that Indian women received no consideration from their husbands, and led a life of exceedingly hard and thankless work. That is very wide of the truth, so

far as the natives of the northern plains were concerned. It is true, that the women gathered fuel for the lodge — bundles of dry willows, or limbs from a fallen cottonwood. They also did the cooking, and, besides tanning robes, converted the skins of deer, elk, antelope, and mountain sheep, into soft buckskin for family use. But never a one of them suffered from overwork; when they felt like it, they rested; they realized that there were other days coming, and they took their time about anything they had to do. Their husbands, never interfered with them, any more than they did with him in his task of providing the hides and skins and meat, the staff of life. The majority — nearly all of them — were naturally industrious, and took pride in their work; they joyed in putting away parfleche after parfleche of choice dried meats and pemmican; in tanning soft robes and buckskins for home use or sale, in embroidering wonderful patterns of beads or colored porcupine quills upon moccasin tops, dresses, leggings and saddle trappings. When robes were to be traded, they got their share of the proceeds." (Schultz, p. 64.)

"It has often been asserted that the 'Indian' did no work, even leaving the cultivation of the corn and squashes to the women. That the women in some of the tribes tended the crops, is true, but in others, like the Pueblos, they seldom or never touched hoe or spade. The Eastern men were hunting or building boats, or were on the war-path, hence it was necessary for the women to look after the fields." ("The N. A. of Yesterday," by F. S. Dellenbaugh, p. 333.)

Schultz tells us that the men had to make their own clothing. ("My Life as an Indian," p. 180.)

Prof. J. O. Dorsey writes of Omaha manners:

"Politeness is shown by men to women. Men used to help women and children to alight from horses. When they had to ford streams, the men used to assist them, and sometimes they carried them across on their backs." (Dorsey, 270–1; 3rd Ann. Rep. Ethn.)

"One of the most erroneous beliefs relating to the status and condition of the American Indian woman is, that she was, both before and after marriage, the abject slave and drudge of the

men of her tribe, in general. This view, due largely to inaccurate observation and misconception, was correct, perhaps, at times, as to a small percentage of the tribes and peoples whose social organization was of the most elementary kind politically and ceremonially, and especially of such tribes as were non-agricultural." ("Handbook of American Indians," Bur. Am. Ethn., p. 968.)

"Among the Iroquoian tribes—the Susquehanna, the Hurons, and the Iroquois — the penalties for killing a woman of the tribe were double those exacted for the killing of a man, because in the death of a woman, the Iroquoian lawgivers recognized the probable loss of a long line of prospective offspring." ("Handbook American Indian," p. 971.)

"In most, if not in all, the highly organized tribes, the woman was the sole master of her own body." ("Handbook North American Indian," p. 972.)

"The men are the warriors and hunters, though an old woman of rank usually steers the war-canoe." ("Coast Indian"; Niblack; 1889; p. 253.)

"A mother possessed the important authority to forbid her sons going on the war-path, and frequently the chiefs took advantage of this power of the woman, to avoid a rupture with another tribe." ("Handbook North American Indian," p. 971.)

"Roger Williams, with reference to another subject, brings this same respect for woman to view; he wrote: 'So did never the Lord Jesus bring any unto his most pure worship, for he abhors, as all men, yea, the very Indians, an unwilling spouse to enter into forced relations." ("Handbook North America," p. 972.)

"At a later day, and in the face of circumstances adverse to the Indians, Gen. James Clinton, who commanded the New York Division in the Sullivan expedition in 1779, against the hostile Iroquois, paid his enemies the tribute of a soldier, by writing in April, 1779, to Colonel Van Schaick, then leading the troops against the Onondaga, the following terse compliment: 'Bad as the savages are, they never violate the chastity of any woman, their prisoners.'"

"Among the Sioux and the Yuchi, men who made a practice of seduction were in grave bodily danger, from the aggrieved women and girls, and the resort by the latter to extreme meas-

ures was sanctioned by public opinion, as properly avenging a gross violation of woman's inalienable right — the control of her own body. The dower or bride-price, when such was given, did not confer it, it seems, on the husband, absolute right over the life and liberty of the wife: it was rather compensation to her kindred and household for the loss of her services." ("Handbook American Indian," pp. 972,3.)

"It is the universal testimony, as voiced by Portlock (1787), that they [the Coast Indians] treat their wives and children with much affection and tenderness." ("Voyages," p. 290.) "In the approach to political and industrial equality of the sexes, and in the respect shown for the opinions of their females, these Indians furnish another refutation of the old misconception concerning the systematic mal-treatment of the women by savages. Such a thing is incompatible with the laws of nature. Good treatment of the female is essential to the preservation of the species, and it will be found that this ill-treatment is more apparent than real." (Niblack, "Coast Indian," 1889, p. 238–9.)

That is, the sum of evidence, according to all reliable authority, plainly shows that the condition of the women among the primitive Indians was much as with white folks. They had the steady, dreary work of the household, while the men did the intermittent, yet much harder work of portaging, hunting and fighting. But the Indian woman had several advantages over her white sister. She owned the house and the children. She had absolute control of her body. There could be no war without her consent; she could and often did become the Head Chief of the Nation.

Awashonks, the Woman Chief of Seconset, R. I. (1671), and Wetamoo, the beautiful woman Sachem of the Massachusetts Wampanoags (1662) were among the many famous women whose lives and positions give the lie to the tiresome calumny that the "Indian women were mere beasts of burden; they had no rights, nor any voice in their public affairs."

COURTESY AND POLITE BEHAVIOR

There has never been any question of the Redman's politeness. Every observer remarks it. I have seen countless cases of it, myself. The white who usurped his domain are immeasurably his inferiors in such matters.

For fuller testimony, let us note these records by early travelers:

"Toward each other, they behave with natural politeness and attention." (Pere Lafitau, 1724.)

Catlin says of the Mandans:

"They are handsome, straight, and elegant in their forms — not tall, but quick and graceful; easy and polite in their manners, neat in their persons, and beautifully clad." (Catlin; Vol. I., p. 96.)

"The next and second Chief of the [Mandan] tribe is Ma-to-to-pa (The Four Bears). This extraordinary man, though second in office, is undoubtedly the first and most popular man in the nation. Free, generous, elegant and gentlemanly in his deportment — handsome, brave and valiant; wearing a robe on his back with the history of his battles emblazoned on it, which would fill a book of themselves, if properly translated. This, readers, is the most extraordinary man, perhaps, who lives at this day, in the atmosphere of Nature's nobleman." (Catlin; Vol. I., p. 92.)

Omaha politeness: "When persons attend feasts, they extend their hand and return thanks to the giver. So, also, when they receive presents.

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"If a man receives a favor and does not manifest his gratitude, they exclaim, 'He does not appreciate the gift; he has no manners!'

* * * * * * *

"Mothers teach their children not to pass in front of people, if they can avoid it." (Dorsey, 3d Ann. Rep. Bur. Eth., 1881–2, p. 270.)

TEEPEE ETIQUETTE — THE UNWRITTEN LAW OF THE LODGE

(*Gathered chiefly from observations of actual practice, but in many cases from formal precept.*)

Be hospitable.

Always assume that your guest is tired, cold, and hungry.

Always give your guest the place of honor in the lodge, and at the feast, and serve him in reasonable ways.

Never sit while your guest stands.

Go hungry rather than stint your guest.

If your guest refuses certain food, say nothing; he may be under vow.

Protect your guest as one of the family; feed his horse, and beat your dogs if they harm his dog.

Do not trouble your guest with many questions about himself; he will tell you what he wishes you to know.

In another man's lodge follow his customs, not your own

Never worry your host with your troubles.

Always repay calls of courtesy; do not delay.

Give your host a little present on leaving; little presents are little courtesies and never give offence.

Say "Thank you" for every gift, however small.

Compliment your host, even if you strain the facts to do so.

Never walk between persons talking.

Never interrupt persons talking.

Let not the young speak among those much older, unless asked.

Always give place to your seniors in entering or leaving the lodge; or anywhere.

Never sit while your seniors stand.

Never force your conversation on any one.

Speak softly, especially before your elders, or in presence of strangers.

Never come between any one and the fire.

Do not touch live coals with a steel knife or any sharp steel.

Do not stare at strangers; drop your eyes if they stare hard at you; and this, above all, for women.

The women of the lodge are the keepers of the fire, but the men should help with the heavier sticks.

Always give a word or sign of salute when meeting or passing a friend, or even a stranger, if in a lonely place.

Do not talk to your mother-in-law at any time, or let her talk to you.

Be kind.

Show respect to all men, but grovel to none.

Let silence be your motto till duty bids you speak.

Thank the Great Spirit for each meal.

HONESTY

Catlin says:

"As evidence of . . . their honesty and honor, there will be found recorded many striking instances in the following pages.

* * * * * * *

"I have roamed about, from time to time, during seven or eight years, visiting and associating with some three or four hundred thousands of these people, under an almost infinite variety of circumstances;

* * * * * * *

and under all these circumstances of exposure, no Indian ever betrayed me, struck me a blow, or stole from me a shilling's worth of my property, that I am aware of." (Vol. I., p. 9–10.)

"Never steal, except it be from an enemy, whom it is just that we should injure in every possible way." ("Teachings of Tshut-che-nau, Chief of Kansas," Hunter; p. 21.)

"Among [between] the individuals of some tribes or nations,

theft is a crime scarcely known." (Hunter's "Captivity Among American Indians," 1798–1816; p. 300.)

"Theft was unknown in an Indian camp." (G. B. Grinnell; "Indians of To-day," p. 8.)

Every traveler among the highly developed tribes of the Plains Indians tells a similar story, though, of course, when at war, it was another matter.

Even that rollicking old cut-throat, Alexander Henry II, says after fifteen years among the Wild Indians: "I have been frequently fired at by them and have had several narrow escapes for my life. But I am happy to say they never pillaged me to the value of a needle." ("Journal" 1799–1814, p. 452.)

In my own travels in the Far North, 1907, I found the Indians tainted with many white vices, and in many respects degenerated, but I also found them absolutely honest, and I left valuable property hung in trees for months, without fear, knowing that no wild Indian would touch it.

There is a story told of Bishop Whipple:

He was leaving his cabin, with its valuable contents, to be gone some months, and sought some way of rendering all robber-proof. His Indian guide then said: "Why, Brother, leave it open. Have no fear. There is not a white man within a hundred miles!"

On the road to a certain large Indian Ojibway village in 1904 I lost a considerable roll of bills. My friend, the white man in charge, said: "If an Indian finds it, you will have it again within an hour; if a white man finds it, you will never see it again, for our people are very weak, when it comes to property matters."

Finally, to cover the far Southwest, I found that the experience of most travelers agrees with the following:

"I lived among the Wild Indians for eight years (1872–1880); I know the Apaches, the Navajos, the Utes, and the Pueblos, and I never knew a dishonest Indian." (Robert A. Widenmann, West Haverstraw, N. Y.)

TRUTHFULNESS AND HONOR

"Falsehood they esteem much more mean and contemptible than stealing. The greatest insult that can be offered to an Indian, is, to doubt his courage: the next is to doubt his honor or truth!

* * * * * * *

"Lying, as well as stealing, entails loss of character on habitual offenders; and, indeed, an Indian of independent feelings and elevated character will hold no kind of intercourse with any one who has been once clearly convicted." (Hunter's "Captivity Among Indians," 1797–1816, p. 301.)

"This venerable, worn-out warrior [the Kansas Chief, Tshut-che-nau, Defender of the People], would often admonish us for our faults and exhort us never to tell a lie." (Hunter, p. 21.)

"On all occasions, and at whatever price, the Iroquois spoke the truth, without fear and without hesitation." (Morgan's "League of the Iroquois," p. 330.)

"The honor of their tribe, and the welfare of their nation is the first and most predominant emotion of their hearts; and from hence proceed in a great measure all their virtues and their vices. Actuated by this, they brave every danger, endure the most exquisite torments, and expire triumphing in their fortitude, not as a personal qualification, but as a national characteristic." (Carver's "Travels," p. 271.)

The Indian's assent to a treaty was always binding. I cannot discover a case of breach, excepting when the whites first broke it; and this does not mean the irresponsible whites, but the American Government. The authorities at Washington never hesitated to break each and every

treaty apparently, as soon as some material benefit seemed likely to accrue.

Col. R. I. Dodge says:

"The three principal causes of wars with the Indians are:

"First, Non-fulfilment of treaties by the United States Government.

"Second, Frauds by the Indian agents.

"Third, Encroachments by the whites." ("Hunting-grounds of the Great West," 1878, pp. XLIII–XLIV.)

Captain John G. Bourke, who served under General Crook in 1872, when the Apaches were crushed by overwhelming numbers and robbed of their unquestioned heritage, says:

"It was an outrageous proceeding, one for which I should still blush, had I not long since gotten over blushing for anything that the United States Government did in Indian matters." ("On the Border with Crook," p. 217.)

"The most shameful chapter of American history is that in which is recorded the account of our dealings with the Indians. The story of our Government's intercourse with this race is an unbroken narrative of injustice, fraud and robbery." (Grinnell's "Blackfoot Lodge Tales," 1892, p. IX.)

In brief, during our chief dealings with the Redman, our manners were represented by the border outlaws, the vilest criminals the world has known, absolute fiends; and our Government by educated scoundrels of shameless, heartless, continual greed and treachery.

The great exception on American soil was that of William Penn. He kept his word. He treated the Indians fairly; they never wronged him to the extent of a penny, or harmed him or his, or caused a day's anxiety; but continued his loyal and trusty defenders." (See Jackson's "Century of Dishonor.")

How is it that Canada has never had an Indian war or an Indian massacre? Because the Government honorably kept all its treaties, and the Indians themselves were honorable, by tradition; they never yet broke a treaty. In northwestern Canada, there were two slight outbreaks of half-breeds (1871 and 1885), but these were misunderstandings, easily settled. There was little fighting, no massacres, and no heritage of hate in their track.

What wonder that all who could, among the Indian tribes, moved over the "Medicine Line," and dwell in Canada to-day!

TEMPERANCE AND SOBRIETY

When the white traders struck into the West with their shameful cargoes of alcohol to tempt the simple savages, it was the beginning of the *Great Degradation* for which we must answer.

The leading Indians soon saw what the drink habit meant, and strove in vain to stem the rising current of madness that surely would sweep them to ruin.

About 1795, Tshut-che-nau, chief of the Kansas, did his best to save the youth of his people from the growing vice of the day.

"'Drink not the poisonous strong-water of the white people;' he said, 'it is sent by the Bad Spirit to destroy the Indians.' He preached, but preached in vain." (J. D. Hunter, p. 21.)

Pere Lafitau says, in 1724:

"They never permit themselves to indulge in passion, but always, from a sense of honor and greatness of soul, appear masters of themselves." (P. 378, "Century of Dishonor.")

In 1766, living among the Sioux, Carver writes:

"We shall find them temperate, both in their diet and potations (it must be remembered that I speak of those tribes who have little communication with Europeans) that they withstand with unexampled patience, the attacks of hunger, or the inclemency of the seasons, and esteem the gratification of their appetites but as a secondary consideration.' ("Travels," p. 269.)

Concerning the temperance of the Wild Indian, Catlin writes, in 1832:

"Every kind of excess is studiously avoided.

* * * * * * *

"Amongst the wild Indians in this country, there are no beggars — no drunkards — and every man, from a beautiful natural precept, studies to keep his body and mind in such a healthy shape and condition as will, at all times, enable him to use his weapons in self-defense, or struggle for the prize in their manly games." (Catlin, Vol. I., p. 123.)

And, how was it he fell from these high ideals? Alas! we know too well. G. B. Grinnell has sent me a record which, in one form or another, might have been made about every western tribe:

"The Reverend Moses Merrill, a missionary among the Oto Indians from 1832 to the beginning of 1840, kept a diary from which the following account is taken:

"'April 14, 1837. Two men from a trading expedition in the Indian country called on me to-day. They state that one half of the furs purchased in the Indian country are obtained in exchange for whiskey. They also stated that the Shiennes, a tribe of Indians on the Platte River, were wholly averse to drinking whiskey, but, five years ago — now (through the influence of a trader, Captain Gant, who, by sweetening the whiskey, induced them to drink the intoxicating draught), they are a tribe of drunkards.'" ("Trans. and Repts. Nebraska State Historical Society, IV.," p. 181.)

After describing the rigid dieting that formed part of the Indian's training, Eastman adds:

"In the old days, no young man was allowed to use tobacco in any form until he had become an acknowledged warrior and had achieved a record." ("Ind. Boy.," p. 50.)

PHYSIQUE

We need but little evidence on this head. All historians, hostile or friendly, admit the Indian to have been the finest type of physical manhood the world has ever known. None but the best, the picked, chosen and trained of the whites, had any chance with them. Had they not been crushed by overwhelming numbers, the Indians would own the continent to-day.

Grinnell says ("Indians of To-day," p. 7.):

"The struggle for existence weeded out the weak and the sickly, the slow and the stupid, and created a race physically perfect, and mentally fitted to cope with the conditions which they were forced to meet, so long as they were left to themselves."

Speaking of the Iroquois in *primitive condition*, Brinton says that physically "they were unsurpassed by any other on the continent, and I may even say by any other people in the world." ("The American Race," p. 82.)

The most famous runner of ancient Greece was Phidippides, whose record run was 152 miles in 2 days. Among our Indians such a feat would have been considered very second rate. In 1882, at Fort Ellice, I saw a young Cree who, on foot, had just brought in despatches from Fort Qu' Appelle (125 miles away) in twenty-five hours. It created almost no comment. I heard little from the traders but cool remarks like, "A good boy"; "pretty good run." It was obviously a very usual exploit, among Indians.

"The Tarahumare mail carrier from Chihuahua to Batopilas, Mexico, runs regularly more than 500 miles a week; a Hopi messenger has been known to run 120 miles in 15 hours." ("Handbook American Indians," Part II., p. 802.)

The Arizona Indians are known to run down deer by sheer endurance, and every student of southwestern history will remember that Coronado's mounted men were unable to overtake the natives, when in the hill country, such was their speed and activity on foot.

We know that white men's ways, vices, and diseases have robbed them of much of their former physique, and yet, according to Dr. Daniel G. Brinton ("The American Race," 1891.)

"The five Companies (500 men) recruited from the Iroquois of New York and Canada, during the Civil War, stood first on the list among all the recruits of our army, for height, vigor, and corporeal symmetry." (Grinnell's "Indian of To-day," p. 56.)

The wonderful work of the Carlisle Indian School football team is a familiar example of what is meant by Indian physique, even at this late date, when the different life has done so much to bring them low.

(While this was in press the all round athletic championship of the world was won at the Olympic games (1912) by James Thorpe, a Carlisle Indian. He was at best the pick of 300,000, while against him were white men, the pick of 300,000,000.)

The whole case, with its spiritual motive, is thus summed up by Eastman in his inspiring account of the religion of his people, the Dakotas:

"The moment that man conceived of a perfect body, supple, symmetrical, graceful, and enduring — in that moment he had laid the foundation of a moral life. No man can hope to maintain such a temple of the spirit beyond the period of adolescence,

unless he is able to curb his indulgence in the pleasures of the senses. Upon this truth the Indian built a rigid system of physical training, a social and moral code that was the law of his life.

"There was aroused in him as a child a high ideal of manly strength and beauty, the attainment of which must depend upon strict temperance in eating and in the sexual relation, together with severe and persistent exercise. He desired to be a worthy link in the generations, and that he might not destroy by his weakness that vigor and purity of blood which had been achieved at the cost of so much self-denial by a long line of ancestors.

"He was required to fast from time to time for short periods and to work off his superfluous energy by means of hard running, swimming and the vapor bath. The bodily fatigue thus induced, especially when coupled with a reduced diet, is a reliable cure for undue sexual desires." (Eastman's "Soul of the Indian," pp. 90–92.)

In their wonderful physique, the result of their life-long, age-long training, in their courage, their fortitude, their skill with weapons, their devoted patriotism, they realize more than any other modern race has done the ideal of the Spartan Greek, with this advantage; that, in his moral code, the Indian was far superior.

IN GENERAL

"I admit," says Father Lallemant, of the Hurons, "that their habits and customs are barbarous in a thousand ways, but, after all, in matters which they consider as wrong, and which their public condemns, we observe among them less criminality than in France, although here the only punishment of a crime is the shame of having committed it." ("Century of Dishonor," p. 378.)

Even stronger is the summary of the Jesuit Father, J. F. Lafitau:

"They are high-minded and proud; possess a courage equal to every trial, an intrepid valor, the most heroic constancy under

torments, and an equanimity which neither misfortunes nor reverses can shake. Toward each other they behave with a natural politeness and attention, entertaining a high respect for the aged, and a consideration for their equals which appears scarcely reconciliable with that freedom and independence of which they are so jealous." (Moeurs des Sauv. Amer., 1724, quoted in "Century of Dishonor" p. 378.)

Long afterward the judicial Morgan in his League of the Iroquois, says, (p. 55):

"In legislation, in eloquence, in fortitude, and in military sagacity, they had no equals.

"Crimes and offences were so infrequent, under their social system, that the Iroquois can scarcely be said to have had a criminal code."

Captain John H. Bourke, who spent most of his active life as an Indian fighter, and who, by training, was an Indian hater, was at last, even in the horror of an Indian-crushing campaign, compelled to admit:

"The American Indian, born free as the eagle, would not tolerate restraint, would not brook injustice; therefore, the restraint imposed must be manifestly for his benefit, and the government to which he was subjected must be eminently one of kindness, mercy and absolute justice, without necessarily degenerating into weakness. The American Indian despises a liar. The American Indian is the most generous of mortals; at all his dances and feasts, the widow and the orphan are the first to be remembered." (Bourke's "On the Border with Crook," p. 226.)

"Bad as the Indians often are," says this same frontier veteran, "I have never yet seen one so demoralized that he was not an example in honor and nobility to the wretches who enrich themselves by plundering him of the little our Government apportions for him." (Bourke's "On the Border with Crook," p. 445.)

Catlin's summary of the race is thus:

"The North American Indian, in his native state, is an honest, hospitable, faithful, brave; warlike, cruel, revengeful, relentless — yet honorable — contemplative and religious being." (Vol. I., p. 8.)

Omitting here what he gives elsewhere, that the Redman is clean, virtuous, of splendid physique, a master of woodcraft, and that to many of his best representatives, the above evil adjectives do not apply.

Bishop Whipple thus sums up the wild Indian, after intimate knowledge, during a lifetime of associations, ("Century of Dishonor," Jackson; p. VII.):

"The North American Indian is the noblest type of a heathen man on the earth. He recognizes a Great Spirit; he believes in immortality; he has a quick intellect; he is a clear thinker; he is brave and fearless, and, until betrayed, he is true to his plighted faith; he has a passionate love for his children, and counts it a joy to die for his people. Our most terrible wars have been with the noblest types of the Indians and with men who had been the white man's friends. Nicolet said the Sioux were the finest type of wild men he had ever seen."

Why, then, has he so long been calumniated? "Because," explains the Bishop, "Ahab never speaks kindly of Naboth whom he has robbed of his vineyard. It soothes conscience to cast mud on the character of the one whom we have wronged."

When General Crook, after he had crushed, and enabled the nation to plunder the Apaches, was ordered to the northward on a similar expedition against the Sioux, a friend said to him, "It is hard to go on such a campaign," the General replied, "Yes, it is hard; but, sir, the hardest thing is to go and fight those whom you know are in the right." ("Century of Dishonor," p. VI.)

Finally, let me reproduce in full the account by Bonneville, from which I have already selected portions:

In 1834, he visited the Nez Perces and Flatheads, and thus sums up these wholly primitive Indians, for they were as yet uncorrupted by the whiskey-trader or those who preached the love of money.

"They were friendly in their dispositions, honest to the most scrupulous degree in their intercourse with the white man." (P. 200.) "Simply to call these people religious would convey but a faint idea of the deep hue of piety and devotion which pervades their whole conduct. Their honesty is immaculate, and their purity of purpose and their observance of the rites of their religion are most uniform and remarkable. 'They are certainly more like a nation of saints than a horde of savages.'" ("Captain Bonneville's Narrative;" by Washington Irving, p. 171, 1837.)

It would, I know, be quite easy to collect incidents — true ones — that would seem to contradict each of these claims for the Redman, especially if we look among the degraded Indians of the Reservations. But I do not consider them disproofs any more than I consider our religion disproved by the countless horrors and wickedness recorded every day as our daily history, in every newspaper in every corner of the land. The fact remains that this was the ideal of the Indian, and many times that ideal was exemplified in their great men, and at all times the influence of their laws was strong.

One might select a hundred of these great Indians who led their people, as Plato led the Greeks or as Tolstoi led the Russians, and learn from each and all that dignity, strength, courtesy, courage, kindness, and reverence were indeed the ideals of the teepee folk, and that their ideal was realized more or less in all their history — that the noble Redman did indeed exist.

The earliest of the northern Indians to win immortal fame was the great Mohawk, Hiawatha. Although the Longfellow version of his life is not sound as history, we know that there was such a man; he was a great hero; he stood for peace, brotherhood, and agriculture; and not only united the Five Nations in a Peace League, but made provision for the complete extension of that League to the whole of America.

Pontiac, the Napoleon of his people; Tecumseh, the chevalier Bayard, who was great as warrior and statesman, as well as when he proclaimed the broad truths of humanity; Dull Knife, the Leonidas of the Cheyennes; Chief Joseph, the Xenophon of the Nez Perces; Wabasha, Little Wolf, Pita-Lesharu, Washakie, and a hundred others might be named to demonstrate the Redman's progress toward his ideals.

SUMMARY

Who that reads this record can help saying: "If these things be true, then, judging by its fruits, the Indian way must be better than ours. Wherein can we claim the better thought or results?"

To answer is not easy. My first purpose was to clear the memory of the Redman. To compare his way with ours, we must set our best men against his, for there is little difference in our doctrine.

One great difference in our ways is that, like the early Christians, the Indian was a Socialist. The tribe owned the ground, the rivers and the game; only personal property was owned by the individual, and even that, it was considered a shame to greatly increase. For they held that greed grew into crime, and much property made men forget the poor.

Our answer to this is that, without great property, that is

power in the hands of one man, most of the great business enterprises of the world could not have been; especially enterprises that required the prompt action impossible in a national commission. All great steps in national progress have been through some one man, to whom the light came, and to whom our system gave the power to realize his idea.

The Indian's answer is, that all good things would have been established by the nation as it needed them; anything coming sooner comes too soon. The price of a very rich man is many poor ones, and peace of mind is worth more than railways and skyscrapers.

In the Indian life there was no great wealth, so also poverty and starvation were unknown, excepting under the blight of national disaster, against which no system can insure. Without a thought of shame or mendicancy, the young, helpless and aged all were cared for by the nation that, in the days of their strength, they were taught and eager to serve.

And how did it work out? Thus: Avarice, said to be the root of all evil, and the dominant characteristic of our race, was unknown among Indians, indeed it was made impossible by the system they had developed.

These facts long known to the few are slowly reaching all our people at large, in spite of shameless writers of history, that have done their best to discredit the Indian, and to that end have falsified every page and picture that promised to gain for him a measure of sympathy.

Here are the simple facts of the long struggle between the two races:

There never yet was a massacre of Indians by whites — and they were many — except in time of peace and made possible by treachery.

There never yet was an Indian massacre of whites except in times of declared war to resist invasion.

There never yet was an Indian war but was begun by the whites violating their solemn treaties, encroaching on the Indians' lands, stealing the Indians' property or murdering their people.

There never yet was a successful campaign of whites against Indians except when the whites had other Indians to scout, lead and guide them; otherwise the Redmen were too clever for the whites.

There never yet was a successful war of whites against Indians except when the whites were in overwhelming numbers, with superior equipments and unlimited resources.

There cannot be the slightest doubt that the Indian was crushed only by force of superior numbers. And had the tribes been united even, they might possibly have owned America to-day.

Finally, a famous Indian fighter of the most desperate period thus summarizes the situation and the character of the dispossessed:

"History can show no parallel to the heroism and fortitude of the American Indians in the two hundred years' fight during which they contested inch by inch the possession of their country against a foe infinitely better equipped, with inexhaustible resources, and in overwhelming numbers. Had they even been equal in numbers, history might have had a very different story to tell." (Gen. Nelson A. Miles, U. S. A., Letter, February 16, 1912.)

I never yet knew a man who studied the Indians or lived among them, without becoming their warm friend and ardent admirer. Professor C. A. Nichols, of the Southwestern University, a deep student of Indian life, said to me, sadly, one day last autumn: "I am afraid we have stamped out a system that was producing men who, taken all around, were better than ourselves."

Our soldiers, above all others, have been trained to hate the Redmen, and yet the evidence of those that have lived years with this primitive people is, to the same effect as that of missionaries and travelers, namely, that the high-class Indian was brave; he was obedient to authority. He was kind, clean and reverent. He was provident, unsordid, hospitable, dignified, courteous, truthful, and honest. He was the soul of honor. He lived a life of temperance and physical culture that he might perfect his body, and so he achieved a splendid physique. He was a wonderful hunter, a master of woodcraft, and a model for outdoor life in this country. He was heroic and picturesque all the time. He knew nothing of the forgiveness of sin, but he remembered his Creator all the days of his life, and was in truth one of the finest types of men the world has ever known.

We set out to discover the noble Redman. Have we entirely failed?

Surely, it is our duty, at least, to do justice to his memory, and that justice shall not fail of reward. For this lost and dying type can help us in many ways that we need, even as he did help us in the past. Have we forgotten that in everything the white pioneer learned of woodcraft, the Indian was the teacher? And when at length came on the white man's fight for freedom, it was the training he got from the Redman that gave him the victory. So again, to fight a different enemy to-day, he can help us. And in our search for the ideal outdoor life, we cannot do better than take this Indian, with his reverence and his carefully cultured physique, as a model for the making of men, and as a pattern for our youth who would achieve high manhood, in the Spartan sense, with the added graces of courtesy, honor and truth.

The world knows no higher ideal than the Man of Galilee; nevertheless, oftentimes, it is helpful to the Plainsmen climbing Mount Shasta, if we lead them, first, to Sheep-Rock Shoulder, before attempting the Dome that looks down upon the clouds.

. . . . . .

STANDARD INDIAN BOOKS

"Drake's Indian Chiefs, the lives of more than 200 Indian Chiefs, by Samuel G. Drake. Boston. 1832.

"Adventures of Captain Bonneville," by Washington Irving, in 3 vols. London. 1837. An amazing record of the truly noble Redmen.

"North American Indians," by George Catlin, in 2 vols. London. 1866. A famous book; with many illustrations.

"Life Amongst the Modocs," by Joaquin Miller, Bentley & Son. London. 1873. A classic. The story of a white boy's life among the uncontaminated Redmen.

"Indian Sign Language," by W. P. Clark. Philadelphia, Pa. 1884. A valuable cyclopedia of Indian life, as well as the best existing treatise on Sign Language.

"A Century of Dishonor," by Helen Jackson (H. H.). Boston. 1885. Treats of the shameful methods of the U. S. in dealing with Indians, an unbroken record of one hundred years of treachery, murder and infamy.

"On the Border With Crook," by John G. Bourke, U. S. A. Scribner's Sons. New York. 1891. A soldier account of the Apache War. Setting out an Indian hater, he learned the truth and returned to make a terrible arraignment of the U. S. Government.

"Indian Boyhood," by Charles A. Eastman, M. D. Mc-

Clure, Phillips & Co. New York. 1902. A Sioux Indian's story of his own boyhood.

"The Story of the Indian," by G. B. Grinnell. Appleton & Co. New York. 1902.

"Two Wilderness Voyagers," by F. W. Calkins. Fleming H. Revell Co. New York. 1902. The Indian Babes in the Woods.

"Lives of Famous Indian Chiefs," by W. B. Wood. American Indian Hist. Pub. Co. Aurora, Ill. 1906.

"My Life as an Indian," by J. W. Schultz. Doubleday, Page & Co. New York. 1907. A white man's life among the Blackfeet in the old days.

"Handbook of American Indians," by F. W. Hodge and associates. Pub. in 2 large vols. by Smithsonian Institution, Washington, D. C. 1907. This is a concise and valuable encyclopedia of Indian names and matters.

"Famous Indian Chiefs I have Known," by Gen. O. O. Howard. U. S. A. The Century Co. New York. 1908. Treats of Osceola, Washakie, etc. from the white man's standpoint.

"The Soul of the Indian," by Charles A. Eastman. Houghton, Mifflin Co. Boston & New York. 1911. A Sioux Indian's account of his people's religion.

"Legends of Vancouver," by Pauline Johnson. McClelland, Goodchild & Stewart, Ltd., Toronto, Ont. 1912. A valuable collection of charming legends gathered on the West coast.

"Sign Talk," by Ernest Thompson Seton. Doubleday, Page & Co., Garden City, New York. 1918. A universal signal code without apparatus, for use in army, navy, camping, hunting, and daily life.

Besides these the Annual Reports of the Bureau of Ethnology (1878 to date, Smithsonian Institution, Washington, D. C.), are full of valuable information about Indians.

Appendix F

United States of America
Office of
Personnel Management Washington, D.C. 20415

APR 26 1979

In Reply Refer To: Your Reference:

Mr. William T. White, Jr.
Assistant Staff Director
for National Civil Rights Issues
United States Commission on Civil Rights
Washington, D.C. 20425

Dear Mr. White:

In connection with my presentation before the Commission's consultation on religious discrimination on April 9th, 1979, I furnished copies of the "interim" regulations issued by the Office of Personnel Management to implememt Title IV, Adjustment of Work Schedules for Religious Observances, of Public Law 95-390. At that time, I also offered, in response to the Vice Chairman's request, to obtain copies of any supplemental regulations and/or instructions issued by Executive agencies and to furnish them to the Commission for inclusion in the record.

The supplemental issuances of various Executive agencies are enclosed. In the process of obtaining copies of agency issuances on this subject, we found that most agencies published only minimal guidelines to their operating activities, and, in most cases, transmitted the instructions contained in our interim regulations on this subject. This, in my view, is due primarily to the fact that the Office of Personnel Management implementing instructions were, of necessity, issued as "interim" regulations in order to comply with the requirement in Title IV to issue implementing regulations within 30 days of enactment.

The Office of Personnel Management is currently in the process of developing "final" regulations to be published as proposed rulemaking in the Federal Register in the very near future. After completion of the required review period and receipt of comments from agencies, unions, and other interested parties, we will publish these as final regulations. They will be incorporated in title 5 of the Code of Federal Regulations, and they will be applicable to Executive agencies.

I hope you find this additional information useful.

Sincerely yours,

S. Gettman

Seymour Gettman, Chief
Office of Leave and Pay Administration
Policy
Compensation Division

Enclosures

CON 114-24-3
January 1979

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF PERSONNEL
WASHINGTON, D.C. 20250

PUBLISHED IN ADVANCE OF INCORPORATION
IN DPM CHAPTER 550
RETAIN UNTIL SUPERSEDED.

October 17, 1978

PERSONNEL LETTER NO. 550-18

SUBJECT: Adjustment of Work Schedules for Religious Observances

Here is an advance copy of FPM Letter 550-71, October 2, 1978, which explains how work schedules now may be adjusted for religious observances by working compensatory time. Please note that this compensatory time has no relationship to the premium pay provisions of Title 5 and the Fair Labor Standards Act.

Agencies shall establish a manual system for recording this compensatory time until a method is devised to capture such time by a Transaction Code on the T&A. The compensatory time worked or advanced shall be shown as "01" time on the T&A. The Remarks block should show "(number of hours) compensatory hours worked or advanced for religious observances."

Advanced compensatory time in a pay period shall be repaid by the following pay period. Supervisors should be advised to review T&A's carefully where such compensatory time is advanced to assure that the time is repaid in accordance with this requirement.

Director of Personnel

Attachment
(One copy
per Agency)

INQUIRIES: Classification, Pay, and Staffing Resources Division
Extension 73185

LIMITED DISTRIBUTION: Agency Personnel Officers

ARMY

01 03 PP UUUU OCT 78

HQ

HQDA WASH DC//DAPE-CPR//

AIG 7150

UNCLAS

SUBJ: ADJUSTMENT OF WORK SCHEDULES FOR RELIGIOUS OBSERVANCES

1. FPM LTR 550-71, 2 OCT 78, SUBJ AS ABOVE, WILL SOON BE DISTRIBUTED THROUGH PUBLICATIONS SUPPLY CHANNELS. IT CONTAINS THE INTERIM REGULATIONS TO BE FOLLOWED BY EXECUTIVE AGENCIES IN CARRYING OUT A NEW SECTION OF CHAPTER 55 OF TITLE 5, WHICH PROVIDES FOR COMPENSATORY TIME OFF FOR RELIGIOUS OBSERVANCES.

2. BECAUSE OF THE IMMEDIACY OF CERTAIN DAYS OF RELIGIOUS OBSERVANCE FOR SOME FEDERAL EMPLOYEES [illegible] EARLY OCTOBER, COMMANDS ARE ASKED TO DISSEMINATE THIS MSG, WHICH CONTAINS THE FOLLOWING: ANY OF THE CHANGED LAW AND INTERIM REGULATIONS, TO ALL OPERATING CPO FOR THE INFORMATION OF MANAGERS, EMPLOYEES, AND EMPLOYEE LABOR ORGANIZATIONS:

CPR Reading

[illegible]/TEST/PPM/DAPE-CPR/71427
3 OCT 78

[illegible] P. COSS/C-DAPE-CPR/52715

UNCLASSIFIED

02 03

A. WHEN PERSONAL RELIGIOUS BELIEFS REQUIRE EMPLOYEES TO ABSTAIN FROM WORK DURING CERTAIN PERIODS, THEY MAY ELECT TO WORK COMPENSATORY OVERTIME AND RECEIVE, IN LIEU OF OVERTIME PAY, AN EQUAL AMOUNT OF COMPENSATORY TIME OFF.

B. REQUESTS MAY BE DISAPPROVED IF MODIFICATIONS IN WORK SCHEDULES INTERFERE WITH THE EFFICIENT ACCOMPLISHMENT OF AN AGENCY'S MISSION.

C. THE COMPENSATORY OVERTIME MAY BE WORKED BEFORE OR AFTER THE PERIOD OF TIME OFF. ADVANCED COMPENSATORY TIME OFF SHOULD BE REPAID WITHIN A REASONABLE AMOUNT OF TIME.

D. THE PREMIUM PAY PROVISIONS OF TITLE 5 AND THE FLSA DO NOT APPLY TO COMPENSATORY OVERTIME WORK PERFORMED BY AN EMPLOYEE FOR THIS PERIOD.

E. IF NO PRODUCTIVE OVERTIME IS AVAILABLE TO BE WORKED BY THE EMPLOYEE AT THE TIME IT IS INITIALLY REQUESTED, ALTERNATIVE TIMES SHOULD BE ARRANGED FOR THE PERFORMANCE OF THE COMPENSATORY OVERTIME WORKED. THESE REQUESTS ARE TO BE ACCOMMODATED TO THE MAXIMUM EXTENT POSSIBLE.

03 73

4. CPO ARE REMINDED OF THEIR OBLIGATION UNDER E.O. 11491, AS AMENDED, TO NOTIFY AND CONSULT OR NEGOTIATE, AS APPROPRIATE, WITH RECOGNIZED UNIONS.

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Administration
Washington, D.C. 20230

Commerce

November 6, 1978

MEMORANDUM FOR: Principal Personnel Officers

From: Joseph C. Brown
Director of Personnel

Subject: Scheduling of Compensatory Overtime and Time Off for Religious Observances

FPM Letter 550-71 announced the change in law and regulation which authorizes the scheduling of compensatory overtime work for the express purpose of using compensatory time off in lieu of annual leave or leave without pay for employees whose personal religious beliefs require them to be absent from work during certain periods of time. Until the Civil Service Commission issues further instructions, the provisions of this memorandum will govern the scheduling of such overtime work and the granting of compensatory time off.

This special statutory provision operates without regard to the overtime pay provisions of Subpart A of Part 550 of Title 5, Code of Federal Regulations, and Section 7 of the Fair Labor Standards Act of 1938. The decision to authorize compensatory overtime work for reasons of religious observances must be made on individual bases after consideration of the organization's ability to reasonably accommodate the employee without undue hardship on the conduct of the work of the organization.

Employees who ask to be scheduled for compensatory overtime work under the provisions of this instruction are to be informed that:

a. Compensatory overtime work subsequent to the absence will be scheduled within six pay periods following the pay period in which the absence occurred, at mutually convenient times whenever possible. If there is no bona fide work to be performed in the initial six pay periods, the time may be extended for six additional pay periods. If overtime work cannot be provided within the foregoing periods of time, the employee's original request for time off will be deemed to have been a request for annual leave or leave without pay, and the leave record will be amended accordingly.

b. If the overtime work is to precede an absence for religious reasons, it should be scheduled within six pay periods prior to the absence, so that the compensatory time will be used during the same span of time as other compensatory time. If it happens that the employee is not absent from work as planned, the compensatory time is not available to cover other absences and does not entitle the employee to premium pay for the extra hours of work already performed. However, if the employee's planned absence is cancelled to

accommodate the needs of the work unit, the compensatory time may be retained for later use.

c. The religious needs of employees with part-time tours of duty may be met by scheduling extra hours of duty outside the normal weekly tour of duty, without the necessity of working more than 8 hours in a tour of duty or 40 hours in a workweek.

In determining whether an employee's request for a change in the work schedule for religious reasons is deserving of consideration, supervisors ordinarily may rely upon the employee's request and such explanation as the employee chooses to give. In doubtful cases, the following principles should be considered:

a. The Civil Rights Act includes "all aspects of religious observance and practice, as well as belief" in the broad term of "religion." (42USC 2000e(j)).

b. The Equal Employment Opportunity Commission holds that "a belief held with the strength of traditional religious convictions falls within the Act regardless of whether it is the belief of an organized religion." (EEOC Decision 72-1579, April 21, 1972, CCH EEOC DEC 4654, 1973)

c. The terms "religion" and "religious beliefs" do not encompass merely unique personal moral preference. Brown v. Pena 441 F. Supp. 1382 (D. Fla. 1977).

d. The Supreme Court has characterized a religious belief or practice as "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group and intimately related to daily living." (Wisconsin v. Yoder, 406 U.S. 205 (1971)).

U.S. Department of Energy
Washington, D.C.

ANNOUNCEMENT

HQ A 3610.1

Energy

11-27-78
EXPIRES: 2-27-79

SUBJECT: ADJUSTMENT OF WORK SCHEDULES FOR RELIGIOUS OBSERVANCES

Public Law 95-930, titled Adjustment of Work Schedules for Religious Observances, was signed by the President on 9-29-78.

It provides that an employee may elect to work compensatory overtime for the purpose of taking time off without charge to leave when personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek.

Under the law, an employee who elects to work compensatory overtime for this purpose shall be granted (in lieu of overtime pay) an equal amount of compensatory time off (hour for hour) from his or her scheduled tour of duty. However, the law also provides that an employee's election to work compensatory overtime or to take compensatory time off to meet his or her religious obligations may be disapproved if such modifications in work schedules interfere with the efficient accomplishment of the Department's mission.

Employees who wish to elect to work the compensatory time as provided under the law should inform their supervisors as early as possible so that the supervisor can consider the request and make necessary adjustments. If no productive overtime is available to be worked by the employee at such time as he or she may initially request, alternative times should be arranged for the performance of the compensatory overtime work.

Any questions on this should be referred to the Employee/Labor Relations Branch on 566-9372 or your servicing Personnel Management Operations Unit.

FOR THE SECRETARY OF ENERGY:

William S. Heffelfinger
Director of Administration

DISTRIBUTION: All Headquarters Personnel

INITIATED BY: Office of Personnel Management

FORM ERDA-321
(3-75)
ERDAM 0270
Previous Editions are Obsolete

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U.S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

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(See reverse side for instructions.)

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☐ S Single Address
☒ M Multiple Address
☐ T Title Address
☐ B Book Message

FOR COMMUNICATION CENTER USE

MESSAGE IDENTIFICATION

NR: DTG: Z

6. FROM
LLOYD W. GRABLE, DIR. OF PER.
OFFICE OF PERSONNEL MANAGEMENT
U.S. DEPARTMENT OF ENERGY
WASHINGTON, DC 20545

7. OFFICIAL BUSINESS

(Signature of certifying official)

8. DATE

(TIME) A.M. P.M.

9. TO
THOSE ON ATTACHED LIST

COMMUNICATION CENTER ROUTING

69 Elite 69 Pica

UNCLASSIFIED/N O N W D. THE PRESIDENT SIGNED THE FEDERAL EMPLOYEES FLEXIBLE AND COMPRESSED WORK SCHEDULES ACT OF 1978 INTO LAW ON SEPTEMBER 29, 1978, (PUBLIC LAW 95-390). TITLE IV OF THIS ACT AMENDS TITLE V, UNITED STATES CODE, TO PROVIDE THAT A FEDERAL EMPLOYEE MAY ELECT TO WORK COMPENSATORY OVERTIME FOR THE PURPOSE OF TAKING TIME OFF WITHOUT CHARGE TO LEAVE WHEN PERSONAL RELIGIOUS BELIEFS REQUIRE THAT THE EMPLOYEE ABSTAIN FROM WORK DURING CERTAIN PERIODS OF THE WORKDAY OR WORKWEEK. WE WILL SEND YOU A COPY OF THE ADVANCE EDITION OF FPM LETTER 550-71 CONTAINING THE REGULATIONS PERTAINING THERETO. PLEASE NOTE THAT THIS LAW WAS PASSED ON SEPTEMBER 29 AND WAS EFFECTIVE DURING THIS WORKWEEK.

BE BRIEF—ELIMINATE UNNECESSARY WORDS

10. ORIGINATOR *(On separate lines, Enter Name, Mail Sta., & Tel. Ext.)*
EO'SULLIVAN:PH
6219-20 Mass.
376-1786

11. CLASSIFIED BY *(If different from Originator)*

12. DOWNGRADING/DECLASSIFICATION STAMP *(If Required)*

STAMP CLASSIFICATION, UNCLASSIFIED OR OUO

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Sent 5/31/78

THEREFORE, AFFECTED EMPLOYEES WHO HAD REQUESTED ANNUAL LEAVE TO OBSERVE RELIGIOUS DAYS WHICH OCCURRED DURING THE WEEK MAY, IF THEY CHOOSE, WORK COMPENSATORY OVERTIME, WITHIN A REASONABLE AMOUNT OF TIME AND NOT HAVE THE TIME OFF CHARGED TO THEIR LEAVE ACCOUNTS. EXCEPT IN VERY UNUSUAL CASES, FEDERAL AGENCIES ARE EXPECTED TO ACCOMMODATE EMPLOYEE'S REQUESTS TO WORK COMPENSATORY OVERTIME SO THEY CAN OBSERVE THEIR RELIGIOUS HOLIDAYS. PLEASE CALL ELEANOR O'SULLIVAN ON FTS 376-4468 IF YOU HAVE QUESTIONS. END/ELO:ph

CONCURRENCE	
RTG. SYMBO	AD-122
INITIALS/SIG	DWood
DATE	10/ /78
RTG. SYMBO	AD-12
INITIALS/SIG	GPlowe
DATE	10/ /78
RTG. SYMBO	AD-11
INITIALS/SIG	Schulm
DATE	10/ /78
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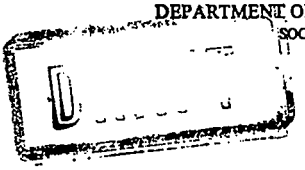
bcc: Lois Schutte
Furman Layman
Clarence Hardy

AD-122:EO'Sullivan:ph:10/5/78:376-1786

HEW

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION



TO : See Below

DATE: April 16, 1979

REFER TO: SMH

FROM : Robert L. Spotts, Acting Chief
Policy Management Branch
Division of Policy Management and Research, OHR, OMBP

SUBJECT: Draft Personnel Guide Chapter IV, SSA Guide 5-1, Appendix M Leave to Accommodate Religious Needs--ACTION

REPLY REQUESTED BY MAY 25, 1979

This transmits a proposed revision of SSA's Guide on Leave to Accommodate Religious Needs for review and comment by your component.

The draft appendix updates policies and procedures on the administration of leave to accommodate religious needs. More detailed instructions on the implementation of Public Law 95-390, "Adjustment of Work Schedules for Religious Observances," enacted September 29, 1978, have been included. The information applies to all SSA employees

Comments should be sent to the Policy Management Branch, Division of Policy Management and Research, OHR, OMBP, G-408 West High Rise. Regional Personnel Officers are requested to send their comments to the Division of Personnel Policy, Office of Personnel Policy and Communications, HEW, for consolidation and transmittal to the Policy Management Branch. If members of your staff have any questions, they may call Mary Dilworth or Delores Douglass on FTS 934-3570.

Robert L. Spotts (mh)
Robert L. Spotts

Addressees
Office of Acting Associate Commissioners
Office of Associate Commissioner, OFA
Office of Associate Commissioner, OHA
Office of Deputy Director, OCSE
Office of Acting Director, Equal Opportunity
Office of Regional Commissioners
Regional Personnel Offices
Servicing Personnel Offices
National AFGE
AFGE Local 1923

Attachment

DRAFT

cc:
OPPC

LEAVE TO ACCOMMODATE RELIGIOUS NEEDS

CONTENTS

A. PURPOSE AND SCOPE

This appendix provides policy and guidelines on the administration of leave to accommodate the religious needs of SSA employees.

B. POLICY

1. The policy of SSA is to accommodate employees requesting time off from work when personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek, provided the employee's absence does not interfere with the efficient accomplishment of the agency's mission. Mere inconvenience will not justify refusal of an accommodation.

C. AVAILABLE OPTIONS

To accommodate the employee's request for time to observe a religious holiday or observance, the following options are available:

1. Annual Leave - Leave approving officials shall be liberal in approving accrued annual leave. This policy permits the granting of annual leave without the employees providing a justification.

2. Leave Without Pay - Leave approving officials shall make every reasonable effort to approve requests for LWOP to meet religious needs. When an employee requests LWOP for the first time in any leave year, the supervisor shall give the employee SSA Form 1981, Effects of Leave Without Pay (LWOP) on Your Employment.

3. Changing Tour of Duty - Management may consider changing the daily tour of duty to accommodate an employee's religious needs if the employee has a recurring need for time off from work. Information on the procedure and the designated officials with the authority to change tours of duty in headquarters, program service centers and data operations centers are found in SSA Personnel Instruction 610-1, "Establishing or Changing Tours of Duty" and SSA Personnel Instruction 250-10 "Authority to Establish or Change Workweeks and Work Schedules." Others should refer to HEW Personnel Instruction 250-10, "Establishing Workweeks and Work Schedules."

4. Part-Time Employment - Because part-time employment may impact on organizational ceilings and the accomplishment of the unit's work, the supervisor should consult higher management regarding the use of this option. If it is mutually agreeable to both management and the employee, the employee may elect part-time employment. The supervisor shall refer the employee to the servicing personnel office for an explanation of the impact of part-time employment on employee rights and benefits.

5. Compensatory Time Off - Public Law 95-390, "Adjustment of Work Schedules for Religious Observances," enacted September 29, 1978, provides that a Federal employee may elect to work compensatory overtime for the purpose of taking time off without charge to leave when personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek. Employees who elect this overtime work will be granted equal compensatory time off from their scheduled tour of duty for religious observance, amd waive the right to premium pay for such overtime worked. Non-exempt FLSA employees, as well as exempt employees, need not use such compensatory time within the same week it is earned unless the religious observance occurs during that week.

The employee may work compensatory overtime before or after the grant of compensatory time off. If no productive overtime is available to be worked at the time of the initial request, alternative times will be arranged. Unless adjusting the working schedule interferes with the efficient accomplishment of the agency's mission, supervisors are expected to accommodate the employee's request.

There are no restrictions regarding the kind of religious holiday or religious observance. Any personal religious belief would allow an employee to ask for time off and the opportunity to make it up. Flextime lends itself to accommodating employees requesting compensatory overtime since they can usually work at least 2 additional hours a day without any special arrangements. Employees not under flextime will be accommodated by assignment of overtime at alternative times within the administrative workweek unles it interferes with the efficient accomplishment of the agency's mission.

a. Requesting and Scheduling

(1) Employees may request compensatory time off for religious observances by submitting a completed SF-71, "Application for Leave," to the immediate supervisor before the religious event. In the space provided for remarks, the employee must state "this leave is because my personal religious belief requires me to refrain from work for a religious observance for (this day) or (portion of the day)."

(2) Only after the supervisor approves an employee's request for compensatory time off and schedules the overtime, will the employee work overtime. While the employee's request to work at specific times must be considered, authority for scheduling the time to be worked is vested in the supervisor. Most compensatory time to be earned will be acheduled when the leave is approved. In the few instances where thia is not practical, the supervisor will schedule the overtime work as the work is needed.

(3) In accordance with Chapter IV, SSA Guide 5-1, Appendix C, "Scheduling and Restoration of Annual Leave," employees should be contacted during March and September to prepare a 6-month schedule of leave. After considering the work needs and trying to resolve imbalances for the same day(s) off, conflicts will generally be resolved in favor of the employee with the earliest service computation date. Subsequent conflict among the same employees will be resolved by granting leave or compensatory time off to the next senior employee whose request has not been previously granted. After the 6-month schedule has been made, other requests for leave will be considered on a first come basis.

b. Accumulating and Repaying

(1) Compensatory overtime may not be worked more than 6 months in advance of the time it is to be taken.

(2) Employees may, upon request, be allowed to accumulate or repay compensatory time off in increments of less than 1 hour (but not less than 15 minutes) when:

(a) the balance of compensatory time used is 8 hours or less, or

(b) the amount of compensatory time requested and approved is 8 hours or less.

Employees are required to work at least 1 hour compensatory overtime on each day they are earning or repaying a balance in excess of 8 hours.

(3) By HEW's directive a grant of advanced compensatory time off must be repaid before the end of the 8th pay period after the pay period in which it is used. Any leave not repaid by the expiration date will be charged to annual leave, if available, or to leave without pay. It is the supervisor's responsibility to assure that the opportunity is provided to make up for time off already approved; it is the employee's responsibility to take advantage of the opportunities offered or to obtain approval to work at other times.

c. Forfeiture of Accumulated Compensatory Time - As a general rule, accumulated compensatory time is forfeited if not used for the religious observance by the date designated on the SF-71. Exceptions will be made under the following conditions:

(1) When scheduled compensatory time off is precluded by personal illness or injury or

(2) When an exigency of the public business, as declared by an authorized official, causes the use of scheduled compensatory time off to be denied.

When either of the above conditions exist, use of the earned compensatory time may be deferred for 8 pay periods following the date designated on the initial SF-71. If the employee requests time off for another religious observance during this time, the earned compensatory time will be used. If no religious observance occurs within the 8 pay periods, it will be taken as regular compensatory time off.

Compensatory hours earned for religious observances are not reflected on the form OS-340, Earnings and Leave Statement. Therefore, the supervisor must direct the timekeeper to correct the form SSA-2042, Administrative Time and Leave Card to reflect the forfeiture. The supervisor must also inform the employee, in writing, of the forfeiture.

To assure compliance with the time limits prescribed for earning and using compensatory time off, the supervisor will review the timekeeper's record each pay period. The employee will indicate his/her agreement with the record by initialing and dating the timekeeper's record each pay period.

d. Recording Compensatory Overtime Hours - A memorandum, "Compensatory Time Off for Religious Observances," 78-14, October 13, 1978, from the Division of Pay Services and Payroll Accounting, formerly the Division of Central Payroll and Reports Processing, provides:

"Compensatory time (earned and used) for religious observances is not recorded in the 'comp' columns on the back or the 'compensatory' blocks Q and S on the front.

(1) Compensatory hours earned for religious observances should be recorded in the "remarks section" of the timecard. The date(s) and number of hours should be recorded on the HEW-564 or SSA-2042 Administrative Time and Leave Card.

(2) Compensatory time used for religious observances should be recorded in the "OTH" column on the back of the time card and block R "COURT" on the front.

To provide a running total of the amounts used and earned, SSA timekeepers will adapt the SSA-2042, Administrative Time and Leave Record, for full/time employees:

Change the last three columns to:

Comp Time (r.o.)		
W	U	Bal.

Because very few part/time employees work regular compensatory time, the spaces under "comp time" can be annotated to show "r.o." for part time employees who work/use compensatory time for religious observances.

E. DOCUMENTATION

It is essential that supervisors document specifically and in detail occasions when it is not possible to accommodate an employee's requests for time to meet religious needs. The documentation must show the options requested and the reason for the denial. Because an employee may exercise the right to file a discrimination complaint in the event of a denial, management must be prepared to show that every reasonable means of accommodating the employee's religious needs have been explored.

U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

ADMINISTRATION

HUD

NOTICE 78-59

600.1

December 29, 1978

EXPIRES: June 29, 1979

SUBJECT: Adjustment of Work Schedules for Religious Observances

1. GENERAL

a. The Federal Employees Flexible and Compressed Work Schedules Act of 1978 was approved on September 29, 1978, and provides that Federal employees may be allowed to adjust their work schedules for religious observances. The employees may elect to work compensatory overtime to offset time off without charge to leave when personal religious beliefs require them to abstain from work on certain days. Under the law, any employee who elects to work compensatory overtime to substitute for time off for religious purposes shall be granted, in lieu of overtime pay, an equal amount of compensatory time off on an hour for hour basis.

b. Compensatory overtime for the purpose of religious observances applies to all Federal employees regardless of grade. The premium pay provisions for overtime work in Title 5, United States Code and the Fair Labor Standards Act do not apply to compensatory overtime work performed by an employee for this purpose. Since this compensatory overtime work may not be converted to overtime and paid, the maximum salary limitation prescribed in Title 5, United States Code is not applicable.

c. Agencies are encouraged by the Civil Service Commission to make every effort possible to approve the request of any employee for compensatory overtime for the purpose stated in this Notice. However, the employee's request may be disapproved if the requested change in work schedule interferes with the efficient accomplishment of the Department's mission. The Department is not obligated to approve requests in such circumstances.

APS:DISTRIBUTION: W-1, W-2, W-3, W-3-1, W-4, R-1, R-2, R-3-2, R-4, R-4-1, R-4-2, R-5, R-5-1, R-5-2, 018

d. For the purpose stated in this Notice, the employee may work compensatory overtime before or after the compensatory time off is granted. Compensatory time off granted in advance must be repaid by an equal amount of compensatory overtime work within a period of 13 pay periods following the period in which the time off was granted. Compensatory time off that is not repaid within the prescribed period will be converted to annual leave or leave without pay, as appropriate.

2. PROCEDURES

a. Compensatory time off for religious observances will be requested in writing by the employee and approved by the employee's supervisor. The written request and supervisor's approval will be retained by the Timekeeper for a period of three years after the close of the leave year.

b. Compensatory time off for religious observances will not be reported on the Time and Attendance Report (T&A), forms HUD-8111 and HUD-8111A. The Timekeeper will maintain a record of all compensatory overtime worked and all compensatory time off for religious observances for each employee so involved on a control form similar to that shown in Attachment 1. For as long as an employee has compensatory overtime worked hours to his/her credit or compensatory time off that has not been repaid, a report will be made to the supervisor each pay period.

c. On the basis of the report provided by the Timekeeper, the supervisor will counsel the employee with respect to using time to his/her credit or making up time off already granted.

d. When compensatory time off is not repaid within the prescribed period, the Timekeeper will prepare a HUD-286, Adjustment of Time and Attendance Report, charging the absence to annual leave or leave without pay (LWOP), as appropriate, and forward it to the Payroll Branch. (See Attachment 2.)

3. EFFECTIVE DATE.

The effective date of this new law is September 29, 1978. Therefore, the provisions of the law apply to all religious holidays after that date. If leave charges have already been made on the T&A's and the employee wishes to avail himself/herself of the provisions of the law, the leave charge should be changed to regular hours using the HUD-286 which is forwarded to the Payroll Branch. The Timekeeper will maintain a record of the compensatory time off to ensure that it is repaid by the compensatory overtime work within six months of the date of the employee's return to duty.

4. CHANGE TO HANDBOOK 600.1, HOURS OF DUTY ABSENCE AND LEAVE

A Change to Handbook 600.1 will be published as soon as possible.

ATTACHMENT 1

ADJUSTMENTS OF WORK SCHEDULES
FOR RELIGIOUS OBSERVANCES

Employee's Name		SSN		Organization Code				
Compensatory Time Off				Compensatory Time Earned				HUD-286 Processed
Date		Total Hours	n_i	Date		Total Hours	n_t	
From	To			From	To			

ATTACHMENT 2

Form HUD-286, Adjustment of Time and Attendance Report

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ADJUSTMENT OF TIME AND ATTENDANCE REPORT			Send original to Payroll Branch, APS Retain copy.	
NAME OF EMPLOYEE	SOC. SEC. NO.	OFFICE CODE	PAY PERIOD END DATE	BLOCK CODE

☐ ANNUAL LEAVE ☐ LWOP ☐ SICK LEAVE ☐ OTHER *(Specify)*_____	NO. HOURS	DATE

REMARKS:

_____
(Supervisor or Designee)

_____
(Date)

PREVIOUS EDITION MAY BE USED UNTIL EXHAUSTED GPO 823-245 HUD-286 (8-77)

United States Department of the Interior

Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

OCT 4 1978

PERSONNEL MANAGEMENT BULLETIN NO. 78-100 (550)

Subject: Adjustment of Work Schedules for Religious Observances - FPM Interim Regulations

To: Personnel Officers

The Civil Service Commission has issued interim instructions pursuant to Title IV of Public Law 95--enacted September 29, 1978. Because of the immediacy of certain days of religious observances for some Federal employees which occur in early October and fall on normal workdays, and in view of the requirement that Commission regulations be issued within 30 days of enactment, the Department of the Interior shall be governed by the attached interim regulation.

Harry Givens Jr.

Chief, Division of Labor-Management Relations

Attachment

INQUIRIES: Harry Givens, Jr., Chief, Division of Labor-Management Relations, Room 5202, Ext. 6754

DISTRIBUTION: Bureau Headquarters and Field

BULLETIN EXPIRES: December 31, 1978

Advance edition 9/29/78

United States Civil Service Commission

FPM Letter 550-71

Federal Personnel Manual System

FPM Letter 550-71

Published in advance of incorporation in FPM chapter 550
RETAIN UNTIL SUPERSEDED

SUBJECT: Adjustment of Work Schedules for Religious Observances

Washington, D C 20415
October 2, 1978

Heads of Departments and Independent Establishments:

1. The President signed the Federal Employees Flexible and Compressed Work Schedules Act of 1978 into law on September 29, 1978 (Public Law 95- *). Title IV of this Act, entitled "Adjustment of Work Schedules for Religious Observances," amends title 5, United States Code, to provide that a Federal employee may elect to work compensatory overtime for the purpose of taking time off without charge to leave when personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek. Under this law, any employee who elects to work compensatory overtime for this purpose shall be granted (in lieu of overtime pay) an equal amount of compensatory time off (hour for hour) from his or her scheduled tour of duty. However, the law also provides that under appropriate regulations an employee's election to work compensatory overtime or to take compensatory time off to meet his or her religious obligations may be disapproved by an agency if such modifications in work schedules interfere with the efficient accomplishment of an agency's mission. (Note: Title IV is permanent legislation and bears no relation to the 3-year experimental program of flexible and compressed workweeks otherwise authorized by the Act.)

2. The Civil Service Commission plans to promulgate further regulations for implementing title IV of the Act for Executive agencies. (Note: The statute requires agencies cited in subparagraphs (C) through (G) of section 5541(1) of title 5, United States Code, to prescribe their own regulations for implementing title IV of this Act.) Because of the immediacy of certain days of religious observance for some Federal employees which occur in early October and fall on normal workdays, and in view of the requirement that Commission regulations be issued within 30 days of enactment, Executive agencies shall be governed by the following interim regulations:

Part 550 - PAY ADMINISTRATION
(GENERAL)

Subpart J - Adjustment of Work Schedules for Religious Observances

550.1001 Coverage.

This subpart applies to each employee in or under an Executive agency as defined by section 105 of title 5, United States Code.

550.1002 Compensatory Time Off for Religious Observances.

(a) These interim regulations are issued pursuant to title IV of Public Law 95- enacted September 29,1978. Under the law and these regulations, an employee whose personal religious beliefs require the abstention from work during certain periods of time may elect to engage in overtime work for time lost for meeting those religious requirements.

Inquiries: Bureau of Policies and Standards, Advisory Services Office, extension 25582 or 63-25582

CSC Code: 550, Pay Administration (General)

Distribution: FPM (advance edition limited)

*Public Law number not available at time of the initial printing.

(b) To the extent that such modifications in work schedules do not interfere with the efficient accomplishment of an agency's mission, the agency shall in each instance afford the employee the opportunity to work compensatory overtime and shall in each instance grant compensatory time off to an employee requesting such time off for religious observances when the employee's personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek.

(c) For the purpose stated in (b) above, the employee may work such compensatory overtime before or after the grant of compensatory time off. A grant of advanced compensatory time off should be repaid by the appropriate amount of compensatory overtime work within a reasonable amount of time. Compensatory overtime shall be credited to an employee on an hour for hour basis or authorized fractions thereof. Appropriate records will be kept of compensatory overtime earned and used.

(d) The premium pay provisions for overtime work in subpart A of part 550 of title 5, Code of Federal Regulations, and section 7 of the Fair Labor Standards Act of 1938, as amended, do not apply to compensatory overtime work performed by an employee for this purpose.

(e) These interim regulations shall remain in effect until superseded by further regulations on this subject by the Civil Service Commission.

(Note: An agency is expected to accommodate to an employee's request to work compensatory overtime. If no productive overtime is available to be worked by the employee at such time as he or she may initially request, alternative times should be arranged for the performance of the compensatory overtime work.)

3. Agencies are reminded of their obligation under E.O. 11491, as amended, to notify and consult or negotiate, as appropriate, with recognized unions.

4. A copy of title IV of Public Law 95- is attached.

By direction of the Commission:

Raymond Jacobson
Executive Director

Attachment

Attachment to FPM Ltr. 550-71

[Title IV of Public Law 95- , enacted September 29, 1978]

ADJUSTMENT OF WORK SCHEDULES FOR RELIGIOUS OBSERVANCES

Compensatory Time Off For Religious Observances

Sec. 401. (a) Subchapter V of chapter 55 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 5550a. Compensatory time off for religious observances

"(a) No later than 30 days after the date of the enactment of this section, the Civil Service Commission shall prescribe regulations providing for work schedules under which an employee whose personal religious beliefs require the abstention from work during certain periods of time, may elect to engage in overtime work for time lost for meeting those religious requirements. Any employee who so elects such overtime work shall be granted equal compensatory time off from his scheduled tour of duty (in lieu of overtime pay) for such religious reasons, notwithstanding any other provision of law.

"(b) In the case of any agency described in subparagraphs (C) through (G) of section 5541 (1) of this title, the head of such agency (in lieu of the Commission) shall prescribe the regulations referred to in subsection (a) of this section.

"(c) Regulations under this section may provide for such exceptions as may be necessary to efficiently carry out the mission of the agency or agencies involved."

(b) The analysis for chapter 55 of title 5, United States Code, is amended by adding after the item relating to section 5550 the following:

"5550a. Compensatory time off for religious observances."

(b) To the extent that such modifications in work schedules do not interfere with the efficient accomplishment of an agency's mission, the agency shall in each instance afford the employee the opportunity to work compensatory overtime and shall in each instance grant compensatory time off to an employee requesting such time off for religious observances when the employee's personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek.

(c) For the purpose stated in (b) above, the employee may work such compensatory overtime before or after the grant of compensatory time off. A grant of advanced compensatory time off should be repaid by the appropriate amount of compensatory overtime work within a reasonable amount of time. Compensatory overtime shall be credited to an employee on an hour for hour basis or authorized fractions thereof. Appropriate records will be kept of compensatory overtime earned and used.

(d) The premium pay provisions for overtime work in subpart A of part 550 of title 5, Code of Federal Regulations, and section 7 of the Fair Labor Standards Act of 1938, as amended, do not apply to compensatory overtime work performed by an employee for this purpose.

(e) These interim regulations shall remain in effect until superseded by further regulations on this subject by the Civil Service Commission.

(Note: An agency is expected to accommodate to an employee's request to work compensatory overtime. If no productive overtime is available to be worked by the employee at such time as he or she may initially request, alternative times should be arranged for the performance of the compensatory overtime work.)

3. Agencies are reminded of their obligation under E.O. 11491, as amended, to notify and consult or negotiate, as appropriate, with recognized unions.

4. A copy of title IV of Public Law 95- is attached.

By direction of the Commission:

Raymond Jacobson
Executive Director

Attachment

Geological Survey (Interior)

(3) Annual leave does not accrue during the period covered by a lump-sum payment or while on terminal leave.

B. Annual leave accrues to a full-time employee while on LWOP. However, each time 80 hours of LWOP are accumulated, leave credits are reduced by 4 hours, 6 hours, or 8 hours, depending on the employee's leave category. Exception: No leave accrues when an employee has been on LWOP for an entire leave year.

.4 Granting Annual Leave. Prior approval of annual leave is required except in emergencies. (See SM 370.630.1.4A and C for approval authority.)

A. Advance Scheduling.

(1) To avoid forfeiture at the end of the leave year, annual leave must be scheduled for use during the leave year or if cancelled, it must be rescheduled. In any event, the use of the leave must have been scheduled before the start of the third biweekly pay period prior to the end of the leave year.

(2) The scheduling and rescheduling must be in writing (SF-71, Application for Leave, may be used) and must include the following:

(a) The date that the leave was approved by the official having authority to approve leave.

(b) The dates during which the leave was scheduled for use and the amount of leave (days/hours) so scheduled.

B. Vacation and Holy Days Observance Policy.

(1) The Department encourages employees to use for rest and relaxation the annual leave to which they are entitled under the leave laws and to take at least two weeks vacation annually rather than to use up all their leave in shorter periods. Leave schedules are to be arranged so that each employee has an opportunity to use annual leave with full consideration for his/her wishes, provided the work program does not suffer unduly.

(2) Employees shall be granted annual leave to observe established holy days of their faith, if they can be spared. However, an employee may elect to work compensatory overtime in order to take time off without charge to leave when personal religious beliefs require that the employee not work during certain periods (see SM 370.550.1.6A(3)).

time off is forfeited. An employee is prohibited from receiving overtime pay or compensatory time off if it would cause his/her aggregate rate of pay for a pay period to exceed the maximum scheduled rate for grade GS-15. The maximum number of hours of compensatory time off that may be granted is the number of overtime hours for which the employee would be entitled to receive compensation at the overtime rate before reaching the prorated aggregate limitation for the pay period in which the overtime work was performed (37 Comp. Gen. 362).

(3) An employee may request to work overtime to make up for time taken when personal religious beliefs require that the employee abstain from work. If no productive overtime is available at the time the request is made, an alternative time should be arranged for the overtime work. In this case the employee is granted an equal amount of compensatory time off in lieu of overtime pay. The provisions for using compensatory time are the same as stated in Par. (2) above.

B. Title 5 U. S. Code.

Overtime is paid at the rate of one and one-half times an employee's basic pay. However, for General Schedule employees if the basic pay is more than the minimum rate of grade GS-10, the overtime pay is based instead on the GS-10 minimum rate.

If a General Schedule employee's basic workweek includes a daily tour of duty of more than 8 hours and the hourly rate of basic compensation exceeds the hourly rate of overtime compensation, he/she is paid the basic rate for each hour of his/her daily tour within the basic workweek.

C. Fair Labor Standards Act. Computation of overtime under FLSA is based on the employee's "regular" rate of pay. The "regular" rate is derived by totalling all includable payments made for all hours of actual work for the week (see Paragraph .5B for definition of actual work) and then dividing the result by the total hours of actual work. The employee is then entitled to an additional one-half the regular rate for each hour worked beyond 40 hours for the week. The following types of payments are included in computing the regular rate of pay: Basic rate of pay, night shift differential, hazard pay, Sunday premium pay, cost-of-living allowance, and post differential. The following are excluded in computing the regular rate: Overtime pay for work in excess of 8 hours a day, payments for periods of nonwork (annual, sick, or other paid leave and holidays), cash awards, and other payments which are not for actual hours of employment.

Natl Park Su (INTERIOR)

United States Department of the Interior

NATIONAL PARK SERVICE
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

MAR 2 1 1979

NATIONAL PARK SERVICE PERSONNEL MANAGEMENT LETTER NO. 79-13 (550)(610)

SUBJECT: Adjustment of Work Schedules for Religious Observances

TO: Field Directorate

The Federal Employees Flexible and Compressed Work Schedules Act of 1978 was signed into law on September 29, 1978, (Public Law 95-390). Title IV of this Act provides that a Federal employee may elect to work compensatory time for the purpose of taking time off without charge to leave when personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek.

It should be noted that Title IV is permanent legislation and bears no relation to the 3-year experimental program of flexible and compressed workweeks also authorized by the Act. Requests made under Title IV must be approved unless it can be shown that such modifications in work schedules interfere with the efficient accomplishment of an agency's mission.

Associate Director, Administration

INQUIRIES: Branch of Compensation, Evaluation, and Employee Relations
Telephone (202) 343-4077

DISTRIBUTION: Directorate and Field Directorate

UNITED STATES GOVERNMENT

memorandum

Justice

DATE: OCT 17 1978

Harry H. Flickinger
Director, Personnel and Training Staff

Adjustment of Work Schedules for Religious Observances

Heads of Offices, Boards, and Divisions

The President signed the Federal Employees Flexible and Compressed Work Schedules Act of 1978 into law on September 29, 1978. Title IV of the act provides that an employee may elect to work compensatory overtime for the purpose of taking time off without charge to leave when personal religious beliefs require that an employee abstain from work during certain periods of the workday or workweek. This memorandum provides interim instructions for administering this new law.

Under this law any employee who elects to work compensatory overtime in lieu of time off for religious observances shall be granted (in lieu of overtime pay) an equal amount of compensatory time off (hour for hour) from his or her scheduled tour of duty. However, the law provides, also, that under appropriate regulations an employee's election to work compensatory overtime or to take compensatory time off to meet his or her religious obligations may be disapproved by an agency if such modifications in work schedules interfere with the efficient accomplishment of an agency's mission.

Employees who were granted annual leave for religious observances after September 29, 1978, may, with their supervisors' approval, have the charge to annual leave changed to reflect that they were in a compensatory leave status for the period of their absence. The supervisor and the employee are to determine a mutually agreeable time when productive overtime work may be performed to offset the time off for religious observance.

An amended time and attendance report must be submitted for changes to leave taken in pay period 21. Compensatory time off in lieu of annual leave for subsequent pay periods is to be reported under object class 1414.

Further instructions on this subject will be provided soon. In the meantime, questions may be addressed to Mr. Harold F. Sylvester, Associate Director, Personnel and Training Staff, on 633-4615.

United States Civil Service Commission

Federal Personnel Manual System

FPM Letter 550-71

FPM Letter 550-71

Published in advance of incorporation in FPM chapter 550
RETAIN UNTIL SUPERSEDED

Washington, D. C. 20415
October 2, 1978

SUBJECT: Adjustment of Work Schedules for Religious Observances

Heads of Departments and Independent Establishments:

1. The President signed the Federal Employees Flexible and Compressed Work Schedules Act of 1978 into law on September 29, 1978 (Public Law 95-390). Title IV of this Act, entitled "Adjustment of Work Schedules for Religious Observances," amends title 5, United States Code, to provide that a Federal employee may elect to work compensatory overtime for the purpose of taking time off without charge to leave when personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek. Under this law, any employee who elects to work compensatory overtime for this purpose shall be granted (in lieu of overtime pay) an equal amount of compensatory time off (hour for hour) from his or her scheduled tour of duty. However, the law also provides that under appropriate regulations an employee's election to work compensatory overtime or to take compensatory time off to meet his or her religious obligations may be disapproved by an agency if such modifications in work schedules interfere with the efficient accomplishment of an agency's mission. (Note: Title IV is permanent legislation and bears no relation to the 3-year experimental program of flexible and compressed workweeks otherwise authorized by the Act.)

2. The Civil Service Commission plans to promulgate further regulations for implementing title IV of the Act for Executive agencies. (Note: The statute requires agencies cited in subparagraphs (C) through (G) of section 5541(1) of title 5, United States Code, to prescribe their own regulations for implementing title IV of this Act.) Because of the immediacy of certain days of religious observance for some Federal employees which occur in early October and fall on normal workdays, and in view of the requirement that Commission regulations be issued within 30 days of enactment, Executive agencies shall be governed by the following interim regulations:

Part 550 - PAY ADMINISTRATION (GENERAL)

Subpart J - Adjustment of Work Schedules for Religious Observances

550.1001 Coverage.

This subpart applies to each employee in or under an Executive agency as defined by section 105 of title 5, United States Code.

550.1002 Compensatory Time Off for Religious Observances.

(a) These interim regulations are issued pursuant to title IV of Public Law 95-390 enacted September 29,1978. Under the law and these regulations, an employee whose personal religious beliefs require the abstention from work during certain periods of time may elect to engage in overtime work for time lost for meeting those religious requirements.

Inquiries: Bureau of Policies and Standards, Advisory Services Office, extension 25582 or 63-25582

CSC Code: 550, Pay Administration (General)

Distribution: FPM (advance edition limited)

(b) To the extent that such modifications in work schedules do not interfere with the efficient accomplishment of an agency's mission, the agency shall in each instance afford the employee the opportunity to work compensatory overtime and shall in each instance grant compensatory time off to an employee requesting such time off for religious observances when the employee's personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek.

(c) For the purpose stated in (b) above, the employee may work such compensatory overtime before or after the grant of compensatory time off. A grant of advanced compensatory time off should be repaid by the appropriate amount of compensatory overtime work within a reasonable amount of time. Compensatory overtime shall be credited to an employee on an hour for hour basis or authorized fractions thereof. Appropriate records will be kept of compensatory overtime earned and used.

(d) The premium pay provisions for overtime work in subpart A of part 550 of title 5, Code of Federal Regulations, and section 7 of the Fair Labor Standards Act of 1938, as amended, do not apply to compensatory overtime work performed by an employee for this purpose.

(e) These interim regulations shall remain in effect until superseded by further regulations on this subject by the Civil Service Commission.

(Note: An agency is expected to accommodate to an employee's request to work compensatory overtime. If no productive overtime is available to be worked by the employee at such time as he or she may initially request, alternative times should be arrar for the performance of the compensatory overtime work.)

3. Agencies are reminded of their obligation under E.O. 11491, as amended, to notify and consult or negotiate, as appropriate, with recognized unions.

4. A copy of title IV of Public Law 95-390 is attached.

By direction of the Commission:

Raymond Jacobson
Executive Director

Attachment

[Title IV of Public Law 95-390, enacted September 29, 1978]

ADJUSTMENT OF WORK SCHEDULES FOR RELIGIOUS OBSERVANCES

Compensatory Time Off For Religious Observances

Sec. 401. (a) Subchapter V of chapter 55 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"5550a. Compensatory time off for religious observances

"(a) No later than 30 days after the date of the enactment of this section, the Civil Service Commission shall prescribe regulations providing for work schedules under which an employee whose personal religious beliefs require the abstention [illegible] during certain periods of time, may elect to engage in overtime work for time lost for meeting those religious requirements. Any employee who so elects to perform overtime work shall be granted equal compensatory time off from his scheduled tour of duty (in lieu of overtime pay) for such religious reasons, notwithstanding any other provision of law.

"(b) In the case of any agency described in subparagraphs (C) through (G) of section 5541 (1) of this title, the head of such agency (in lieu of the Commission) shall prescribe the regulations referred to in subsection (a) of this section.

"(c) Regulations under this section may provide for such exceptions as may be necessary to efficiently carry out the mission of the agency or agencies involved."

(b) The analysis for chapter 55 of title 5, United States Code, is amended by adding after the item relating to section 5550 the following:

"5550a. Compensatory time off for religious observances."

Labor

DLS MEMORANDUM TO FPM LETTER 550-71

U.S. DEPARTMENT OF LABOR

OCT 6 1978

PERSONNEL MEMORANDUM 550-1

MEMORANDUM FOR: PERSONNEL OFFICERS

FROM: FRANK A. YEAGER, Acting Director of Personnel Management

SUBJECT: Adjustment of Work Schedules for Religious Observances

The President has signed a law which provides that employees may elect to work "compensatory overtime" for the purpose of taking time off without charge to leave when personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek.

The attached FPM Letter 550-71, dated October 2, 1978, describes the new law; includes the language of the law; and provides interim Civil Service regulations for immediate use of the law.

Use of the new law is to start immediately, retroactive to and including October 2, 1978. Such use is to be in accordance with the interim Civil Service regulations, and is to be the responsibility of individual supervisors.

We are not issuing supplemental policy or procedural instructions now, but plan to do so later. Our only stipulation now is that uses of the law--i.e., absences for religious observances, and the preceding or subsequent compensatory overtime work--are not to be recorded on Time and Attendance Cards, at least until further notice. Instead, each supervisor is to set up and keep appropriate intraoffice records to assure that time absent is matched by compensatory time worked. These records are to be retained indefinitely.

Please note in particular the following features of the law and regulations:

1. It is mandatory that employees be given the option provided by the law unless management can show that there would be interference with effective accomplishment of program mission.

2. Employees must be allowed to elect to work compensatory overtime for qualifying absences retroactive to and including October 2, 1978, unless such election would interfere with accomplishment of program mission.

3. Time and Attendance Cards must be corrected retroactively to and including October 2, 1978, in order to remove charges to leave when the employee elects to make up the absence by working compensatory overtime.

4. The new compensatory overtime work is not to be confused with overtime for premium pay purposes, or with compensatory time off in lieu of overtime premium pay.

We will soon issue a Spotlight to all employees regarding the new law. In the meantime, please tell your managers, supervisors, and employees as quickly as possible about the law and its use. Note that any terms to control use of the law beyond those found in this memorandum will require coordination with the unions. Such coordination will be handled by the Office of Labor-Management Relations, OASAM.

Attachment

INQUIRIES:	Bill Rowland, 8-523-6563
CODE:	FPM Chapter 550
DISTRIBUTION:	List 80
MEMORANDUM EXPIRES:	When superseded
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ATTACHMENT TO Advance edition 9/29/78
DLS MEMORANDUM TO FPM LETTER 550-71

United States Civil Service Commission FPM Letter 550-71

Federal Personnel Manual System

FPM Letter 550-71

Published in advance of incorporation in FPM chapter 550
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Washington, D C 20415
October 2, 1978

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2. The Civil Service Commission plans to promulgate further regulations for implementing title IV of the Act for Executive agencies. (Note: The statute requires agencies cited in subparagraphs (C) through (G) of section 5541(1) of title 5, United States Code, to prescribe their own regulations for implementing title IV of this Act.) Because of the immediacy of certain days of religious observance for some Federal employees which occur in early October and fall on normal workdays, and in view of the requirement that Commission regulations be issued within 30 days of enactment, Executive agencies shall be governed by the following interim regulations:

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Inquiries: Bureau of Policies and Standards, Advisory Services Office, extension 25582 or 63-25582
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Distribution: FPM (advance edition limited)

*Public Law number not available at time of the initial printing.

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(c) For the purpose stated in (b) above, the employee may work such compensatory overtime before or after the grant of compensatory time off. A grant of advanced compensatory time off should be repaid by the appropriate amount of compensatory overtime work within a reasonable amount of time. Compensatory overtime shall be credited to an employee on an hour for hour basis or authorized fractions thereof. Appropriate records will be kept of compensatory overtime earned and used.

(d) The premium pay provisions for overtime work in subpart A of part 550 of title 5, Code of Federal Regulations, and section 7 of the Fair Labor Standards Act of 1938, as amended, do not apply to compensatory overtime work performed by an employee for this purpose.

(e) These interim regulations shall remain in effect until superseded by further regulations on this subject by the Civil Service Commission.

(Note: An agency is expected to accommodate to an employee's request to work compensatory overtime. If no productive overtime is available to be worked by the employee at such time as he or she may initially request, alternative times should be arranged for the performance of the compensatory overtime work.)

3. Agencies are reminded of their obligation under E.O. 11491, as amended, to notify and consult or negotiate, as appropriate, with recognized unions.

4. A copy of title IV of Public Law 95- is attached.

By direction of the Commission:

Raymond Jacobson
Executive Director

Attachment

ATTACHMENT TO
DLS MEMORANDUM TO FPM LETTER 550-71
Attachment to FPM Ltr. 550-71

[Title IV of Public Law 95- , enacted September 29, 1978]

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"(b) In the case of any agency described in subparagraphs (C) through (G) of section 5541 (1) of this title, the head of such agency (in lieu of the Commission) shall prescribe the regulations referred to in subsection (a) of this section.

"(c) Regulations under this section may provide for such exceptions as may be necessary to efficiently carry out the mission of the agency or agencies involved."

(b) The analysis for chapter 55 of title 5, United States Code, is amended by adding after the item relating to section 5550 the following:

"5550a. Compensatory time off for religious observances."

United States Civil Service Commission

CSC EL No. A-484

Employee Letter

OPM

Washington, D. C. 20415

December 29, 1978

SUBJECT: Adjustment of Work Schedules for Religious Observances

A recently enacted change in the law provides that Federal employees who are required by personal religious beliefs to abstain from work for religious observances shall be granted the opportunity to work compensatory overtime, instead of charging leave, for the time off granted for such purposes.

Any Commission employee who wishes to request time off during duty hours to participate in religious observances and desires to work compensatory overtime, in lieu of taking leave, for the period of absence must make the request in writing to the supervisor or official who normally approves other requests for leave.

Each request to work compensatory overtime under these circumstances will require an adjustment in the employee's work schedule. Therefore, the request should be made as far in advance as possible, but not later than 48 hours before the beginning of the time off. This will enable the supervisor to adjust work schedules and activities with minimal disruption of the office.

The compensatory overtime may be worked either before or after the actual time taken off for a religious observance. Generally, it must be worked within a period of 30 days before or 30 days after the time taken off, and must be worked at the rate of an hour for each hour taken off for this purpose. Both the time taken off for religious reasons and the compensatory overtime worked to substitute for the absence granted must be charged in even-hour amounts.

Employees will be paid at their regular hourly rates of pay for the compensatory overtime worked for this purpose, since compensatory overtime worked in this manner is exempt from all other provisions of overtime and premium pay contained in Title 5, U.S.Code and the Fair Labor Standards Act.

Supervisors will approve requests to work compensatory overtime for time off granted for participation in religious observances, unless the required modification in work schedules to accommodate the request would interfere with the effective accomplishment of the Commission's mission. If no work is available at the time the employee requests to work compensatory overtime, another time will be arranged, if possible.

In situations where the nature of the work requires certain accommodations (close supervision or access to equipment or facilities that are available only during certain hours, etc.) that cannot be readily obtained during periods outside the normal workday, managers and supervisors will attempt to make suitable alternative arrangements to accommodate the request. If suitable alternative arrangements cannot be made without interfering with the efficient accomplishment of the Commission's mission, the employee's request may be denied.

Sue A. Van Voorhis

Sue A. Van Voorhis, Director
Personnel and Labor Relations

DISTRIBUTION: A

LETTER EXPIRES: October 20, 1979

CSC FORM 755 10/76

Office of Personnel Management

OPM Personnel Manual

OPM Personnel Manual Letter 550-1

OPM PM Letter No. 550-1

Washington, D. C. 20415
January 8, 1979

SUBJECT: Adjustment of Work Schedules for Religious Observances

Retain until Incorporated into OPM Personnel Manual Chapter 550

An amendment to Title 5, U.S. Code entitled "Adjustment of Work Schedules for Religious Observances," was enacted on September 29, 1978. This amendment provides that Federal employees who are required by personal religious beliefs to abstain from work may elect to work compensatory overtime, in lieu of charging leave, for the time off for such religious observances.

The following guidance is effective immediately:

Managers and supervisors are required under the law and regulations to permit employees to modify their work schedules, to the extent that the requests do not interfere with essential work of the Commission, to abstain from work because of religious reasons. They must also permit employees granted such requests the opportunity to work compensatory overtime, in lieu of charging leave, for the time taken off for such religious reasons.

Employees may be granted the opportunity to work the period of compensatory overtime either before or after the actual period of time taken off for such purposes. Normally, the compensatory time must be worked within a total period of 30 days before or 30 days after the period of absence, unless there are compelling operational reasons, as determined by the supervisor or manager, for extending this period of time.

The compensatory time must be worked at the rate of an hour for each hour taken off for this purpose. Both the time taken off for religious reasons and the compensatory overtime worked to substitute for the absence

Inquiries: Policy and Program Development Office, PLRD, (632-6118)

Code: 550, Pay Administration (General)

Distribution: Bureau Directors, Regional Directors, and Heads of Staff Offices

Letter Expires: October 20, 1979

RECYCLED PAPER

OPM FORM 658-A 1/79

granted must be charged in even-hour amounts.

The compensatory overtime worked for this purpose will be paid for at the employees' regular hourly rate of pay, since compensatory overtime worked in this manner is exempt from all other provisions of overtime and premium pay contained in Title 5, U.S. Code and the Fair Labor Standards Act.

If no work is available to be worked at the time the employee requests to work compensatory overtime, another time should be arranged. In situations where the nature of the work requires certain accommodations (close supervision or access to equipment or facilities that are available only during certain hours, etc.) that cannot be readily obtained during periods outside the normal workday, managers and supervisors may deny an employee's request to work compensatory overtime, if suitable alternative arrangements cannot be made to accommodate the request. Any such denial on this basis must be documented in writing, showing the reasons for denying the request.

Employees wishing to take time off for religious reasons and work compensatory overtime, in lieu of charging leave, for the period of absence must request the time off, in writing, from the official with authority to approve requests for other types of leave (usually the immediate supervisor). Normally, such requests for leave should be made at least 48 hours in advance so that the supervisor will have time to ensure that adequate office coverage is maintained.

The Commission soon will publish additional guidance to all agencies on implementing the amendment. Those instructions, when issued, will supersede the instructions contained here in any areas of conflict, and where they expand or clarify the preliminary guidance issued in FPM Letter 500-71, dated October 2, 1978.

Sue A. Van Voorhis

Sue A. Van Voorhis, Director
Personnel and Labor Relations

INFORMATION: Adjustment of Work for Religious Observances

Edward W. Scott, Jr.
Assistant Secretary for Administration M-16

All Assistant Secretaries
Heads of Operating Administrations

On September 29 a law was passed which provides that an employee whose personal religious beliefs require the abstention from work during certain periods of time may elect to engage in overtime work for time lost for meeting those religious requirements. Interim regulations pertaining to this law have been issued in the form of Federal Personnel Manual Letter 550-71.

This law permits any employee to work compensatory overtime (in lieu of receiving overtime pay) and be granted an equal amount of compensatory time off (hour for hour) from his or her scheduled tour of duty. The employee may work such compensatory overtime before or after the compensatory time off is granted. A grant of advanced compensatory time off should be repaid by the appropriate amount of compensatory overtime work within a reasonable period of time.

Certain questions have arisen on how to deal with situations where employees, unaware of the new law, used annual leave to observe certain religious holidays in early October, shortly after the legislation was passed. We encourage that every attempt be made, in keeping with the spirit of the law, to allow those employees to work an amount of compensatory overtime equal to the amount of leave used to observe those religious holidays. We further encourage the wide dissemination of information about the new law so that all employees may benefit from it equally.

A copy of the new law and the Civil Service Commission's related interim regulations are attached.

VA

Veterans Administration
Washington, D.C. 20420

CIRCULAR 00-78-63

December 1, 1978

ADJUSTMENT OF WORK SCHEDULES FOR RELIGIOUS OBSERVANCES

1. The Civil Service Commission recently issued FPM Letter 550-71, dated October 2, 1978, entitled "Adjustment of Work Schedules for Religious Observances." The FPM Letter contains interim regulations to implement Title 5 of Public Law 95-390, approved September 29, 1978. Title IV of Public Law 95-390 and the interim regulations provide that an employee *may elect* to work compensatory overtime for the purpose of taking time off without charge to leave when *personal* religious beliefs require that an employee abstain from work during certain periods of the workday or workweek. Under the law and interim regulations, an employee who elects to work compensatory overtime for this purpose shall be granted (in lieu of overtime pay) an equal amount of compensatory time off (hour for hour) from his or her tour of duty, and thereby avoid an annual leave or leave without pay charge. Among other things, the law and interim regulations also provide for the following:

a. An employee's election to work compensatory overtime in order to take time off for religious observance purposes shall be granted unless the employee's absence would interfere with the efficient accomplishment of the agency's mission.

b. An employee may work such compensatory overtime either before or after the grant of compensatory time off.

c. The overtime pay provisions for the pay system applicable to an employee and the FLSA (Fair Labor Standards Act) overtime pay provisions do not apply to compensatory overtime work performed by an employee for religious obervance purposes. In other words, compensatory overtime worked for the purpose of offsetting time off for religious observance purposes shall not be considered hours of duty for overtime, including FLSA overtime, purposes.

2. Additional guidelines and procedures will be furnished at a later date. Meanwhile, however, each facility Director should:

a. Approve each employee's (applies to each employee in or under an executive agency which, in VA, would include General Schedule, Title 38, Federal Wage System, and Canteen Service employees) election for religious time off and related request to work compensatory overtime for such time off (to the extent possible, compensatory overtime should be performed within a reasonable time either before or after the religious time off), unless the granting of such time off to an employee will *significantly* affect your ability to effectively meet mission (e.g., patient care) requirements.

b. Keep accurate and complete records for each employee of:

(1) Time off for religious observance purposes; and

(2) Compensatory overtime worked by an employee to offset time off taken for religious observance purposes.

(Note: Additional VA guidelines are to be subsequently issued which will contain instructions for handling these records for timekeeping and payrolling purposes. Until additional instructions are provided, however, time off for religious observance purposes shall be considered as authorized absence and duty performed, but not coded as authorized absence in the coding areas of time and attendance report. Instead, for interim recordkeeping purposes, the "Remarks" block of the time and attendance report, VA Form 4-5631, should indicate the date(s), time period(s), and number of hours for each instance during a pay period an employee was excused from duty or performed compensatory overtime work for religious observance purposes under Public Law 95-390.

In addition to the above, special guidelines must be applied to the Director, Nursing Service, and to each full-time DM&S (Department of Medicine and Surgery) physician and dentist (including career and noncareer residents), podiatrist, and optometrist who take time off for religious observance purposes for only a portion of the employee's scheduled workday. These special guidelines are necessary to reconcile *hours* of religious time off

or compensatory overtime worked against the minimum leave charge of one calendar *day* which applies to these employees. Accordingly, with respect to determining appropriate leave charge when religious time off has been taken for which compensatory overtime has been or will be performed, religious time off *shall* be considered as duty performed, whereas, compensatory overtime performed *shall not* be considered as duty performed.)

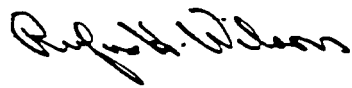
c. Bring the contents of this circular to the attention of all employees and allow employees who may have used annual leave or LWOP (leave without pay) for religious time off purposes on or following September 29, 1978, the opportunity to elect to work the appropriate amount of compensatory overtime and thereby have the used annual leave recredited to the employee's leave account or, in the case of LWOP, to be paid retroactively for such LWOP. (NOTE: employees should be advised, and you should be aware, that if an employee had performed duty in excess of his or her scheduled tour of duty in a week in which LWOP was taken, retroactive cancellation of the LWOP charge may affect the employee's entitlement to overtime pay for that week.)

3. A copy of this circular and FPM Letter 550-71 should be furnished to each labor organization at a facility which holds exclusive recognition for a unit of employees covered by the provisions of the FPM Letter. Further, local management should observe the requirements of Section 11(a) of Executive Order 11491, as amended, to "meet and confer" with such exclusively recognized labor organization(s) concerning the procedures to be utilized in implementing this circular and the FPM Letter and the impact on affected employees in the unit of recognition.

4. Questions concerning religious time off for General Schedule or Federal Wage System employees should be referred to Classification and Pay Service (057D), extension 2226 or 2747; questions concerning religious time off for Title 38 employees should be referred to Recruitment and Placement Service (054D), extension 2501. Questions concerning recordkeeping and information to be entered in the "Remarks" of the time and attendance report should be referred to Finance Service, Payroll Fiscal Policy Division (047C3), extension 5007.

5. This circular expires November 30, 1979.

By direction of the Administrator:



Rufus H. Wilson
Deputy Administrator

Distribution: Same as RPC: 5110
FD

Advance edition 9/29/78

United States Civil Service Commission

Federal Personnel Manual System

FPM Letter 550-71

FPM Letter 550-71

Published in advance of incorporation in FPM chapter 550
RETAIN UNTIL SUPERSEDED

SUBJECT: Adjustment of Work Schedules for Religious Observances

Washington, D. C. 20415
October 2, 1978

Heads of Departments and Independent Establishments:

1. The President signed the Federal Employees Flexible and Compressed Work Schedules Act of 1978 into law on September 29, 1978 (Public Law 95- *). Title IV of this Act, entitled "Adjustment of Work Schedules for Religious Observances," amends title 5, United States Code, to provide that a Federal employee may elect to work compensatory overtime for the purpose of taking time off without charge to leave when personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek. Under this law, any employee who elects to work compensatory overtime for this purpose shall be granted (in lieu of overtime pay) an equal amount of compensatory time off (hour for hour) from his or her scheduled tour of duty. However, the law also provides that under appropriate regulations an employee's election to work compensatory overtime or to take compensatory time off to meet his or her religious obligations may be disapproved by an agency if such modifications in work schedules interfere with the efficient accomplishment of an agency's mission. (Note: Title IV is permanent legislation and bears no relation to the 3-year experimental program of flexible and compressed workweeks otherwise authorized by the Act.)

2. The Civil Service Commission plans to promulgate further regulations for implementing title IV of the Act for Executive agencies. (Note: The statute requires agencies cited in subparagraphs (C) through (G) of section 5541(1) of title 5, United States Code, to prescribe their own regulations for implementing title IV of this Act.) Because of the immediacy of certain days of religious observance for some Federal employees which occur in early October and fall on normal workdays, and in view of the requirement that Commission regulations be issued within 30 days of enactment, Executive agencies shall be governed by the following interim regulations:

Part 550 - PAY ADMINISTRATION
(GENERAL)

Subpart J - Adjustment of Work Schedules for Religious Observances

550.1001 Coverage.

This subpart applies to each employee in or under an Executive agency as defined by section 105 of title 5, United States Code.

550.1002 Compensatory Time Off for Religious Observances.

(a) These interim regulations are issued pursuant to title IV of Public Law 95- enacted September 29,1978. Under the law and these regulations, an employee whose personal religious beliefs require the abstention from work during certain periods of time may elect to engage in overtime work for time lost for meeting those religious requirements.

Inquiries: Bureau of Policies and Standards, Advisory Services Office, extension 25582 or 63-25582

CSC Code: 550, Pay Administration (General)

Distribution: FPM (advance edition limited)

*Public Law number not available at time of the initial printing.

(b) To the extent that such modifications in work schedules do not interfere with the efficient accomplishment of an agency's mission, the agency shall in each instance afford the employee the opportunity to work compensatory overtime and shall in each instance grant compensatory time off to an employee requesting such time off for religious observances when the employee's personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek.

(c) For the purpose stated in (b) above, the employee may work such compensatory overtime before or after the grant of compensatory time off. A grant of advanced compensatory time off should be repaid by the appropriate amount of compensatory overtime work within a reasonable amount of time. Compensatory overtime shall be credited to an employee on an hour for hour basis or authorized fractions thereof. Appropriate records will be kept of compensatory overtime earned and used.

(d) The premium pay provisions for overtime work in subpart A of part 550 of title 5, Code of Federal Regulations, and section 7 of the Fair Labor Standards Act of 1938, as amended, do not apply to compensatory overtime work performed by an employee for this purpose.

(e) These interim regulations shall remain in effect until superseded by further regulations on this subject by the Civil Service Commission.

(Note: An agency is expected to accommodate to an employee's request to work compensatory overtime. If no productive overtime is available to be worked by the employee at such time as he or she may initially request, alternative times should be arranged for the performance of the compensatory overtime work.)

3. Agencies are reminded of their obligation under E.O. 11491, as amended, to notify and consult or negotiate, as appropriate, with recognized unions.

4. A copy of title IV of Public Law 95- is attached.

By direction of the Commission:

Raymond Jacobson
Executive Director

Attachment

Attachment to FPM Ltr. 550-71

[Title IV of Public Law 95- , enacted September 29, 1978]

ADJUSTMENT OF WORK SCHEDULES FOR RELIGIOUS OBSERVANCES

Compensatory Time Off For Religious Observances

Sec. 401. (a) Subchapter V of chapter 55 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 5550a. Compensatory time off for religious observances

"(a) No later than 30 days after the date of the enactment of this section, the Civil Service Commission shall prescribe regulations providing for work schedules under which an employee whose personal religious beliefs require the abstention from work during certain periods of time, may elect to engage in overtime work for time lost for meeting those religious requirements. Any employee who so elects such overtime work shall be granted equal compensatory time off from his scheduled tour of duty (in lieu of overtime pay) for such religious reasons, notwithstanding any other provision of law.

"(b) In the case of any agency described in subparagraphs (C) through (G) of section 5541 (1) of this title, the head of such agency (in lieu of the Commission) shall prescribe the regulations referred to in subsection (a) of this section.

"(c) Regulations under this section may provide for such exceptions as may be necessary to efficiently carry out the mission of the agency or agencies involved."

(b) The analysis for chapter 55 of title 5, United States Code, is amended by adding after the item relating to section 5550 the following:

"5550a. Compensatory time off for religious observances."

GSA

GENERAL SERVICES ADMINISTRATION
WASHINGTON, D. C. 20405

ADM 516
December 1, 1978

GSA NOTICE

SUBJECT: Adjustment of work schedules for religious observances

1. Purpose. This notice is to inform all employees of the provisions of Title IV of Public Law 95-390, which was signed by the President on September 29, 1978.

2. What the law does.

a. The law provides that a Federal employee may elect to work compensatory overtime for the purpose of taking time off without charge to leave or loss of pay when personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek. Any employee who elects to work compensatory overtime for this purpose should be granted (in lieu of overtime pay) an equal amount of compensatory time off (hour for hour) from his or her scheduled tour of duty. The compensatory overtime may be worked before or after the compensatory time off. A grant of advanced compensatory time off should be repaid by the appropriate amount of compensatory overtime work within a reasonable time.

b. The law also provides that an employee's election to work compensatory overtime or to take compensatory time off to meet religious obligations may be disapproved if such modification in work schedules interferes with the efficient accomplishment of the agency's mission. All agency regulations and other existing laws regarding earning and use of compensatory time as well as those applying to the payment of overtime are superseded by Title IV of Public Law 95-390 for the purpose of adjusting work schedules for religious observances. The law in no way abridges an employee's right to request leave or to request to have his or her hours of work adjusted for time off for religious observances.

3. Effective date of the law. The law was effective on September 29, 1978. Since employees may have already taken leave for religious observances in early October, they may wish to exercise the option made available under Public Law 95-390 retroactively. In such cases, an amended GSA Form 856-B, Time and Attendance Record, should be prepared as shown in par. 4.

4. Recordkeeping. The automated payroll system is not programed to handle this new category of compensatory time. Accordingly, manual records should be kept by both the time and attendance clerks and the payroll clerks. This compensatory time should not be recorded in the regular compensatory leave column on the front of the GSA Form 856-B. The

Distribution: E; K

"remarks" section should be annotated to SEE REVERSE. The following information should be shown on the reverse of the GSA Form 856-B for each pay period that any compensatory time for religious observance is either used or earned: (a) Balance forward; (b) number of hours both earned and used; (c) dates and clock time of this compensatory time; and (d) employee's initials. For example:

RT (Religious Time) Balance Forward 0

10/4/78	8a.m.-12m	4 RT Used
10/5/78	4:30p.m.-5:30p.m.	1 RT earned
10/6/78	4:30p.m.-5:30p.m.	1 RT earned
	Balance	-2

The time and attendance clerk should keep a manual record of this compensatory time on the reverse of the GSA Form 873, Annual Attendance Record-1978.

5. Implementing instructions. The GSA handbooks, Time and Leave Administration (OAD P 6010.4) and Time and Attendance (OAD P 6010.6) will be updated to provided guidance and instructions on this subject.

JAY SOLOMON
Administrator

FEDERAL PRISON SYSTEM WASHINGTON, D.C. 20534

Policy Statement

NUMBER 5360.2

DATE NOV 28 1978

SUBJECT: RELIGIOUS BELIEFS AND PRACTICES OF COMMITTED OFFENDERS

1. PURPOSE. To provide policy guidelines relating to religious beliefs and practices of committed offenders.

2. POLICY. It is the policy of the Bureau of Prisons to extend to committed offenders the greatest amount of freedom of, and opportunity for pursuing, individual religious beliefs and practices as is consonant with the requirements of maintaining security, safety, and orderly conditions in the institution. It includes distributing, as widely as possible, available resources among the many kinds of services and activities which contribute to these aims.

   a. Chaplains employed by the Bureau, contract personnel, or volunteers are available to serve the religious needs of committed offenders in the institution. Assistance shall be accessible to all inmates to deepen and expand their knowledge, understanding and committment to the beliefs and principles of the religion of their choice. The Chaplains are available to provide pastoral care and counseling.

   b. Achieving these purposes will often entail drawing upon resources beyond those normally available within the institution, including clergy or representatives of other faith groups in the community.

   c. No one will disparage the religious beliefs of any committed offender, nor deliberately seek to persuade an inmate to change religious affiliation.

   d. An inmate may designate any or no religious preference and may change his designation at any time.

3. DIRECTIVES AFFECTED. P.S. 5360.1 (NS) 7300.43C (OS) November 30, 1977 is hereby cancelled.

4. REGULATION OR RELIGIOUS ACTIVITIES. Conflict between an individual's religion inspired inclinations and the need to comply with the requirements of civil authority may become particularly acute in a correctional facility. Although we seek to minimize such conflicts, there are constraints in correctional settings which must be recognized.

a. Religious Services. Insofar as possible, all services of worship, religious activities, and meetings of a religious nature within the institution shall be open to any inmate. All religious activities shall be coordinated by staff chaplaincy personnel, under the general supervision of the Warden. If an institution has no staff chaplain, this authority shall be exercised by the staff member designated by the Warden.

(1) Institutional rules, regulations, and policies in regard to the safety of the individual, the safety of the institution, the orderly conduct of the affairs of the institution, and acceptable conduct of inmates shall apply to all meetings of a religious nature.

(2) Attendance at all religious worship services, activities and meetings is voluntary. There shall be no restriction of attendance because of race, color, nationality or creed. The chapel may be open during the noon meal hours for prayer and worship. Normally meetings of a religious nature are scheduled so as not to conflict with inmates' work assignments. When deemed necessary for security or safety, the Warden may limit the attendance at any religious meeting or discontinue the activity.

(3) Services of worship, religious activities, and meetings of a religious nature shall be scheduled with reasonable frequency. The availability of staff supervision must be taken into consideration as well as a recognition of the proportionate sharing of time and space available in terms of the total demand.

(4) Personal liturgical apparel and items, such as robes, prayer shawls, prayer rugs, phylacteries may be retained within the context of maintaining security, safety, and orderly conditions in the institution and in accord with Policy Statement No. 20000. 1C Custodial Manual. Such items may be worn or used during scheduled religious services or in private devotional observances. Religious headgear, such as yarmulkes and kufis, may be worn as prescribed by the respective faith groups, within the context of maintaining security, safety, and orderly conditions in the institution and in accord with P.S. 5500.1(NS) P.S. 2000I.1C (OS) Custodial Manual. A documented determination of a faith group's official prescriptions concerning religious headgear will be obtained by the institutional chaplain, from the national representatives of that faith group.

b. Religious Materials. Inmates who wish to retain religious books, publications, and materials must comply with the general rules and regulations of the institution regarding the retention and accumulation of personal property. Literature, publications or books about religion or religious teaching shall be permitted under the guidelines of P.S. 5266.1(NS) P.S. 7300.42D(OS)October 18, 1977 "Incoming Publications. reasonable portion of the budget of the Chaplains should be devoted to the procurement of a variety of religious literature.

a. Religious Services. Insofar as possible, all services of worship, religious activities, and meetings of a religious nature within the institution shall be open to any inmate. All religious activities shall be coordinated by staff chaplaincy personnel, under the general supervision of the Warden. If an institution has no staff chaplain, this authority shall be exercised by the staff member designated by the Warden.

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d. Diet

(1) A committed offender may abstain from eating those food items served to the general population, which are prohibited by the religion of the inmate.

(2) As a once a year accommodation, arrangements can be made with an inmate religious group to have a special meal meeting liturgical standards of the religion. If the representatives of the organization request it, based upon written or documented necessity provided by the representatives, specially prepared food items meeting religious requirements may be purchased by the institution. Funds for such purchases may be provided from Chaplaincy Services monies, and/or from inmates' commissary accounts, and/or from funds provided by the community organization.

(3) Other policy statements concerned with Diet: P.S. 4746.1(NS) P.S. 22001.2A(OS) Kosher Food, P.S. 4754.1(NS) P.S. 22001.1(OS) Use of Pork or Pork Derivatives.

e. Religious Holidays. Every effort will be made to facilitate the observance of important religious holidays that do not coincide with legal holidays. Observance of a particular religious holiday must be in accord with specific requirements of a faith group; e.g., fasting, worship, diet, work proscription.

The request for a specific observance will be initiated by the inmate. The specific religious requirements involved will be verified by a Chaplain or appropriate religion consultant.

If an inmate is excused from work in fulfillment of a holiday requirement, that inmate may be scheduled for work on other days to compensate for loss of work.

5. THIS POLICY STATEMENT WILL BE TRANSLATED INTO SPANISH.

Norma A. Carlson

NORMAN A. CARLSON
Director

MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS

COMMISSION ON ACCREDITATION
FOR CORRECTIONS
6110 Executive Boulevard, Suite 750
Rockville, Maryland 20852

August, 1977

Inmate Rights

4280 Written policy and procedure ensure the right of inmates to have access to courts. (Essential)

DISCUSSION: Inmates should have the right to present any issue, including challenging the legality of their conviction or confinement; seeking redress for illegal conditions or treatment while under correctional control; pursuing remedies in connection with civil legal problems; and, asserting against correctional or other government authority any other rights protected by constitutional or statutory provision or common law.

4281 Written policy and procedure ensure and facilitate the right of inmates to have access to attorneys and designated counsel substitutes. (Essential)

DISCUSSION: Access to attorneys and counsel substitutes, including other inmates, staff and ombudsmen, should be facilitated. Such access can help ameliorate grievances and individual and group tensions. The use of counsel substitutes, particularly for representation at major disciplinary proceedings and with civil rights assistance, is consistent with court decisions, and provides additional resources for legal services.

4282 Written policy and procedure exist to assist inmates in making confidential contact with attorneys and their authorized representatives; such contact includes, but is not limited to, telephone communications, uncensored correspondence and visits. (Essential)

DISCUSSION: Institutional authorities should assist inmates in making confidential contact with attorneys and their authorized representatives, who may include law students, special investigators, lay counsel or other persons who have a legitimate connection with the legal issue being pursued. Provision should be made for visits during normal institutional hours, uncensored correspondence, telephone communication, and after-hours visits where requested on the basis of special circumstances.

4283 Written policy and procedure grant inmates access to legal assistance from individuals with legal training or from law library facilities. (Essential)

DISCUSSION: The constitutional right of access to the courts requires that, when requested, inmates receive assistance in preparing and filing legal papers. This should include assistance from persons with legal training, law school legal assistance programs, the public defender's office or law library facilities. As suggested by state court rulings, the law library should include, at a minimum: state and federal constitutions, state statutes and decisions, procedural rules and decisions and related commentaries, federal case law materials, court rules and practices treatises, legal periodicals and indexes.

4284 Written policy and procedure grant inmates access to paper, typewriters or typing service and other supplies and services related to legal matters. (Essential)

DISCUSSION: The institution should make reasonable efforts to assist inmates with the preparation and processing of their legal documents. Items such as paper, typewriters or typing service, and carbon paper should be provided all inmates who request them and should be available free of charge to indigent inmates.

4285 Written policy and procedure protect inmates from personal abuse and corporal punishment. (Essential)

DISCUSSION: In instances where physical force or disciplinary detention is required, only the least drastic means necessary to secure order or control should be used. Administrative segregation should be used to protect inmates from themselves or other inmates.

4286 Inmates are addressed by name rather than prison number. (Important)

DISCUSSION: Inmates should be addressed by their proper name to preserve their individual identity and to ensure their personal dignity.

4287 Written policy and procedure requiring a healthful environment for inmates include, but are not limited to:

Single cell occupancy, or closely supervised multiple occupancy in dormitories;
Clean and orderly surroundings;
Toilet, bathing, handwashing and laundry facilities;
Lighting, ventilation and heating;
Compliance with all state and federal fire and safety regulations;
A wholesome and nutritionally adequate diet; and
Clean, fitting and seasonable clothing. (Essential)

DISCUSSION: Each correctional institution should fulfill the right of each person in its custody to a healthful place in which to live. Single cell occupancy should be considered a primary goal. The institution should ensure the cleanliness of all areas of the facility and should comply with federal and state health and safety regulations. Independent safety and sanitation inspections should be conducted annually. (See related standards 4142, 4143 and 4144.)

4288 The institution fulfills the right of inmates to basic medical and dental care. (Essential)

DISCUSSION: Health care services should be comparable in quality to those available to the general citizenry of the state in which the institution is located. Medical care provided inmates should include, at a minimum:

Assessment of health needs and general condition of the inmate at admission;
A thorough physical examination by or under the supervision of a licensed physician upon admission;
Medical and dental services performed by persons with appropriate training under the supervision of a licensed physician or dentist;
Availability of emergency medical and dental treatment on a 24-hour basis;
Access to a licensed medical facility; and
Provision for inmate access to medical and dental personnel.

(See related standard 4253.)

4289 Written policy and procedure grant inmates access to recreational opportunities and equipment, including, when the climate permits, outdoor exercise. (Essential)

DISCUSSION: Exercise and recreation are essential to good health. The institution should provide inmates a well-designed and comprehensive recreation program. Special effort should be made to provide daily physical exercise for those inmates in restricted living units. (See related standard 4419.)

4290 Written policy prohibits inmates from participating in medical or pharmaceutical testing for experimental or research purposes. (Essential)

DISCUSSION: Although it is recognized that such experimentation can contribute to the achievement of legitimate goals for society, it would not be possible to

protect inmates involved in such experiments from injury or even death. The chief executive officer has the obligation and responsibility to ensure the well-being of all inmates. (See related standard 4127.)

4291 Written policy and procedure govern voluntary inmate participation in nonmedical and nonpharmaceutical testing. (Essential)

DISCUSSION: Inmate participation in nonmedical, nonpharmaceutical testing should be permitted only after a review of the research design indicates the probability that no negative effects will accrue to the inmates in the program. This review should be conducted by a review board of at least three staff members, one of whom is a licensed physician.

4292 The written plan for regular search of facilities and persons confined in the institution has been reviewed by legal counsel to ascertain the legality of the plan. (Essential)

DISCUSSION: Although the control of weapons and contraband is essential to the safety and well-being of an adult correctional institution, this need does not justify unrestricted searches of inmates and their property. A legal review of the search plan helps ensure that such searches are "suitably restricted," and that the frequency and manner of administrative searches is reasonable. (See related standard 4163.)

4293 Where a new crime is suspected, written policy and procedure govern searches and the preservation of evidence; searches are authorized only by the chief executive officer or designate. (Essential)

DISCUSSION: Policy and procedure governing searches directed at solving a possible new crime should include provisions for ensuring the legal protection of the inmate and the preservation of evidence for the state. Because searches may result in new criminal charges against inmates and because persons in free society would be afforded protection from similar searches under the fourth amendment, the institution should adopt specific regulations detailing the manner in which such searches are to be conducted and under what circumstances.

4294 Written policy and procedure ensure that inmates are not subjected to discrimination based on race, religion, nationality, sex or political belief. (Essential)

DISCUSSION: Inmates should be assured equal opportunities to participate in all institution programs. Work assignments and all administrative decisions likewise should be made without discrimination. All remedies available to noninstitutionalized citizens should be available to inmates in case of discriminatory treatment.

4295 Written policy and procedure grant inmates the choice to refuse to participate in institutional programs, except work assignments. (Important)

DISCUSSION: No offender should be required or coerced to participate in programs or treatment, nor should an inmate's refusal to participate constitute reason to penalize the inmate in any way. All able-bodied inmates are expected to accept work assignments. (See related standard 4380.)

4296 Written rules of inmate conduct specify prohibited behavior and penalties that may be imposed for rule violations. (Essential)

DISCUSSION: Conduct specified as prohibited should be limited to observable behavior that can be shown clearly to have a direct, adverse effect on the institution, another inmate or a staff member. The institution is required to provide written notice of an alleged violation. The sanctions that can be imposed should be related to the gravity of the offense. (See related standards under Inmate Rules and Discipline.)

4297 The institution has written policy, which each inmate reads, signs and dates, stating institution rules and regulations, including disciplinary procedures. (Essential)

DISCUSSION: Written procedures should specify how the rules and regulations are issued and presented to new inmates as well as how revisions to rules and regulations are distributed to all inmates.

4298 Where a language or literacy problem may prevent an inmate from understanding institution rules and regulations, assistance is provided the inmate either from a staff member or another qualified individual under the supervision of a staff member. (Essential)

DISCUSSION: Rules and regulations governing inmate conduct are of limited value unless the inmate understands them.

4299 The plan for handling minor violations by inmates provides that offenders are informed of the specific charges of misconduct and are given an opportunity to explain or deny them; offenders are notified if a report of violation is placed in their file; offenders can request a review of the appropriateness of the action; and, where inmates are found not guilty, all reference to the incident is removed from their file. (Essential)

DISCUSSION: Minor violations usually are those punishable by no more than a reprimand or loss of commissary, entertainment or recreation privileges for not more than 24 hours. The institution should take all reasonable steps to ensure that inmates understand what is expected of them so that they may avoid the consequences of inappropriate behavior. Inmates charged with violations of conduct should be informed of the specific charges against them and should be given an opportunity to present evidence to contradict or mitigate the charges.

4300 The plan for handling major violations by inmates includes at least the following administrative due process procedures:

Written rules specify offenses;
Rules provide sanctions;
Inmate receives copy of rules;
Inmate receives written notice of charges prior to hearing;
Inmate receives prior notice of time of hearing;
Continuance is allowed to prepare defense;
Impartial tribunal conducts hearing;
Inmate personally appears at hearing;
Inmate hears evidence, except confidential information;
Inmate makes own statement;

Inmate calls relevant witnesses;
Inmate may be represented by a staff member;
Decision is based solely on evidence;
Decision is rendered in writing;
Records are made of hearing;
An appeals process is available;
Inmate may appeal decision;
Inmate is notified of rights of appeal;
Inmate is notified of appeal outcome; and
Record is expunged if guilt is not established. (Essential)

DISCUSSION: Specific time limits should be set and stated in writing for completion of each step in the process. Inmates should be allowed to confront and cross-examine adverse witnesses, provided there is no threat to institution security. (See related standard 4325.)

4301 There is a written inmate grievance procedure, which is made available to all inmates. (Essential)

DISCUSSION: A grievance procedure is an administrative means for the expression and resolution of inmate problems. The institution's grievance mechanism should include: (1) provision for written responses to all grievances, including the reasons for the decision; (2) provision for response within a prescribed, reasonable time limit, with special provisions for responding to emergencies; (3) provision for advisory review of grievances; (4) provision for participation by staff and inmates in the design and operation of the grievance procedure; (5) provision for access by all inmates, with guarantees against reprisal; (6) applicability over a broad range of issues; and (7) means for resolving questions of jurisdiction.

4302 Written policy and procedure govern inmate classification; provision is made for input from the inmate. (Essential)

DISCUSSION: Decisions that determine or change an inmate's status can have a major effect on the inmate's degree of freedom, access to correctional services, basic conditions of existence within a correctional system and eligibility for release. Written guidelines should specify criteria for the different classifications offenders may be assigned, and the frequency of status reviews or the circumstances that may prompt such reviews. The guidelines also should provide for notice to inmates when their status is being reviewed; inmate participation in decisions that affect them; and availability of the guidelines to inmates who may be affected by them.

4303 Written policy and procedure allow freedom in personal grooming, except where a valid state interest justifies otherwise. (Essential)

DISCUSSION: Inmates should be permitted freedom in personal grooming so long as their appearance does not conflict with the institution's requirements for safety, security, identification and hygiene. All regulations imposed should be the least restrictive necessary.

4304 Written policy and procedure ensure the constitutional right of inmates to practice their religion, subject only to the limitations necessary to maintain institutional order and security. (Essential)

DISCUSSION: All religions should be accorded equal status and protection. Provision should be made for access to appropriate facilities, clergymen or spiritual advisers, publications and religious symbols, and for opportunities to adhere to dietary and other requirements of the various faiths. In determining what constitutes legitimate religious practices, the chief executive officer or designate should consider only whether there is literature stating religious principles that support the practices and whether the practice is recognized by a group of persons who share common ethical, moral or intellectual views. The number of persons who practice the religion, the newness of the religion or the absence from the religion of a concept of Supreme Being should be irrelevant in determining what constitutes legitimate religious practices.

4305 Written policy and procedure grant inmates the right to receive visits, subject only to the limitations necessary to maintain institutional order and security. (Essential)

DISCUSSION: Because strong family and community ties increase the likelihood that the inmate will succeed after release, visits to inmates should be encouraged. Provision should be made for visitation in pleasant surroundings, with minimum surveillance to ensure privacy. Arrangements always should be made to ensure inmates confidential visits with attorneys.

No restrictions should be placed on inmate visitation rights, except where the chief executive officer or designate can provide substantial justification for the restriction. (See related standards in Mail and Visiting.)

4306 Written policy and procedure grant inmates the right to communicate or correspond with persons or organizations subject only to the limitations necessary to maintain institutional order and security. (Essential)

DISCUSSION: Access to the public is an integral part of rehabilitation. Inmates should be permitted to communicate with their families and friends, as well as with public officials, the courts and their attorneys. All correspondence should be uncensored. (See related standards in Mail and Visiting.)

4307 Written policy and procedure provide inmates reasonable access to the general public through the communications media, subject only to the limitations necessary to maintain institutional order and security. (Essential)

DISCUSSION: Except in emergencies, such as institutional disorders and escapes, inmates should have free access to the general public through the communications media or other legitimate intermediary. Inmates should be permitted to conduct confidential interviews with the media, to publish books and articles and to sell or exhibit any creative objects or works.

4308 Co-educational institutions are designed to accommodate both sexes. (Essential)

DISCUSSION: Co-educational institutions should be smaller than other institutions and should have similar numbers of male and female inmates. There should

be separate living quarters for male and female inmates, and physical contact should be discouraged. No maximum security institution should be co-educational.

4309 In co-educational institutions, male and female inmates have equal access to all programs and activities. (Essential)

DISCUSSION: Male and female inmates should be encouraged to participate equally in all institution programs and activities. There should be no discrimination in work assignments.

Religious Services

4430 ~~Written~~ policy and procedure ensure access to religious programs for all inmates who are affiliated or wish to become affiliated with religious denominations or groups. (Essential)

DISCUSSION: It is the responsibility of the institution to ensure that all inmates are able to exercise their constitutional right to practice their religious beliefs. Information on religious services should be made available to inmates at the time of orientation and inmates should be kept informed about opportunities to participate in religious programs on a continuing basis. (See related standard 4304.)

4431 A staff member coordinates and supervises the institution's religious programs. (Essential)

DISCUSSION: Because it is not feasible to provide full-time representatives of all denominations represented in the inmate population, there should be a single staff member to coordinate religious services and community resources to meet the religious needs of inmates.

4432 There is a systematic approach to determine the personnel requirements for the religious programs to ensure all inmates access to staff and services. (Essential)

DISCUSSION: Provision should be made to formally determine each inmate's religious beliefs and practices and to ensure that they are accommodated.

4433 Written policy and procedure ensure that inmates have access to religious publications and have opportunities to adhere to the dietary and other requirements of the various faiths. (Essential)

DISCUSSION: It is the responsibility of the institution to ensure that all inmates have the opportunity to practice their religion. However, as indicated by court

rulings, the institution is not required to protect this freedom where religious practices interfere with the order and security of the institution or where such practices entail special privileges not allowed the general inmate population. (See related standard 4304.)

4434 The institution provides facilities and equipment for the conduct of religious programs for inmates. (Essential)

DISCUSSION: Ideally, the religious services program should be conducted in a separate building or section of the institution that includes sufficient space for religious services, counseling and chaplains' offices. Equipment, office supplies and secretarial help should be provided commensurate with the needs of the religious program personnel.

4435 Religious program personnel have access to all areas of the institution. (Essential)

DISCUSSION: The chief executive officer should instruct all staff members to assist chaplains in making their rounds.

4436 Written policy and procedure provide for inmates to have personal contact with representatives of their respective faiths upon request, pursuant to institution visitation rules and regulations. (Essential)

DISCUSSION: Inmates should be permitted to receive visits from accredited representatives of their respective faiths during normal visiting hours. Provision also should be made for emergency visits at any time.

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