UNITED STATES
COMMISSION ON
CIVIL RIGHTS

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Washington, D.C. 20425

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MEMORANDUM FOR: WILLIAM J. HOWARD
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SUBJECT: Administration of Justice in the Context of Public, Nonviolent Demonstrations

I. INTRODUCTION

This memorandum identifies recurring civil rights complaints which the Commission has received from participants in recent nonviolent, public demonstrations in several cities. Although, in preparing this memorandum, Commission staff has had numerous contacts with organizations and individuals involved in social protest over an array of causes,[1] alleged police misconduct brought to the Commission's attention for the most part involves Operation Rescue.[2] Some of these allegations are identified below. Discussed also are related State and Federal standards and remedies.

The allegations do not complain of having been arrested. Rather, among other things, they complain of intentional and unwarranted infliction of pain by police officials, gross

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[1] In preparing this memorandum, Commission staff initiated contact with, among others, representatives of the American Civil Liberties Union, National Lawyer's Guild, Committee in Solidarity with the People of El Salvador, People for the Ethical Treatment of Animals, Jonah House, Community for Creative Nonviolence, Peace Resource Center, International Association of Police Chiefs, National Organization of Black Law Executives, the Police Executive Research Foundation, Commission for the Accreditation for Law Enforcement Agencies, FBI Academy, and police in Atlanta, Baltimore, West Hartford, and Washington, D.C. Although Commission staff spoke with an extremely diverse number of organizations known to hold nonviolent demonstrations, many of these groups explicitly indicated that they preferred not to submit complaints because of a distrust of government. As part of staffs' review, several videotapes of demonstrations were also viewed.

[2] Operation Rescue demonstrators attempt to prevent targeted abortion clinics from conducting abortions by holding "sit-ins" at clinic entrances. When police order the demonstrators to leave, they refuse to do so, going limp as a way of symbolizing, or expressing solidarity with, the defenseless posture of unborn infants. This so-called passive resistance has the effect of making their arrest and removal more difficult.

It should be noted that the Commission's authorizing statute, while expressly prohibiting the agency from studying or collecting information about laws and governmental policies with respect to abortion, 42 U.S.C. § 1975c(e), permits examination of denials of equal protection in the administration of justice in the context of nonviolent, social protest whatever its subject matter. For a discussion of the agency's jurisdiction over denials of equal protection in the administration of justice toward Operation Rescue demonstrators, see Memorandum for Melvin L. Jenkins, Acting Staff Director, U.S. Commission on Civil Rights, from William J. Howard, General Counsel, U.S. Commission on Civil Rights (Aug. 8, 1989).

disregard for pain and injury resulting from use of plastic handcuffs, improper use of mace, improper use of nunchukus,[3] denials of the right to counsel, excessive or unreasonable bail, sexual abuse, and unwarranted and improperly conducted strip and cavity searches. Many complaints indicate injuries involving fractures, dislocations, serious sprains, and nerve damage.[4] The law governing excessive force by police officials is relevant to most of these allegations and is therefore discussed. The propriety of strip searches, and other police conduct alleged to constitute sexual assault, is also discussed.

I. COMPLAINTS

Complaints received involve public demonstrations in Atlanta, Georgia; Boston, New Bedford, and Brookline, Massachusetts; Denver, Colorado; Dayton, Ohio; Madison, Wisconsin; New York City; Washington, D.C.; Pittsburgh, Pennsylvania; Los Angeles, San Diego, Sacramento, Santa Cruz, and the Concord Naval Weapons Station in Concord, California;[5] South Bend, Indiana; and West Hartford, Connecticut.

Many police departments arrest demonstrators and transport them to police vehicles and from vehicles to detention facilities by carrying them, sometimes by stretcher. This year, however, has seen the advent of police use of "pain compliance" techniques[6] against nonviolent public demonstrators, techniques normally reserved for use against individuals who must be subdued to effect an arrest. Staff review of videotapes, affidavits, statements, and news articles reveals gruesome results.

A newspaper account describes a demonstration this spring in California:

> Those arrested offered passive resistance. . . . Deputies applied arm-holds and twisted wrists to control those being dragged away. . . . "They were using the pain compliance hold," Daly said, "I could feel something snap when they grabbed me."[7]

At a recent Connecticut demonstration, a man who went limp when arrested stated:

> I was lifted slightly off the ground when one of the officers . . . twisted my left wrist and lifted me . . . . [S]omething popped in my left wrist. The pain was

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[3] A nunchuku is an oriental martial arts weapon which, in the context of the allegations received, have been employed by police as a means of compelling demonstrators to refrain from going limp when being arrested.

[4] It should be noted that on July 20, 1989, the House of Representatives voted to approve an amendment to the HUD appropriations bill for fiscal year 1990 that would withhold Community Development Block Grant funding from municipalities where "three or more employees, acting on orders of superiors of such municipality, have been convicted hereafter of the use of unnecessary force against nonviolent civil rights demonstrators." CONG. REC. H4011 (July 20, 1989). The Walker measure is now before the Senate under the sponsorship of Senator William Armstrong.

[5] California Assemblyman Gilbert Ferguson told a Sacramento news conference that police "have been brutalizing peaceful, passive demonstrators" by using "undue force" in Los Angeles, San Diego, Sacramento, Santa Cruz and Chico, California. *Los Angeles Times*, July 19, 1989, part 1, p. 2, Col. 6.

[6] Common pain compliance techniques include:

a. "Locks" and "twists" against the elbow, forearm, hand, wrist or fingers. (These can result in fractured wrists, dislocated elbows and other broken bones;)
b. Twisting of ears;
c. Pressure against mastoid pressure points;
d. Insertion of fingers in nostrils and attempting to lift a person.

[7] *Santa Cruz Sentinel*, May 7, 1989.

> immediate and intense and I came close to passing out. . . . I was denied a trip to the hospital because I wouldn't give my name.[8]

Some individuals who withstood the pain of the holds found the pain compliance escalate by use of combinations:

> I was handcuffed behind my back with flexible, elastic style restraints. Officers then applied extreme pain pressure to my wrists in an attempt to make me stand. After I refused, pressure was applied to my ears and nose. . . . I was lifted off the ground by all of my weight being hung on my wrists. I believe that my left arm was broken during this procedure.[9]

Another complaint alleges that the actions of the police went beyond conventional pain compliance techniques:

> While carrying me into the police station with my hands cuffed tightly to my back, the policemen used the [nightsticks] to pull my elbows into a very unnatural position. They pulled my fingers and thumbs backwards to the point where I thought they could break. They also bent my wrists as hard as they could. Because these methods did not make me "break," one officer said to the other, "I have a way to make this guy walk," and they then put the [nightclub] between my legs and jerked me up, attempting to carry me in this fashion. This method seemed . . . designed to crush my testicles, and I must admit to relief when my head and upper body tumbled to the floor.[10]

Videotapes reviewed by Commission staff evidence a removal method, the "strappado" technique, where police officers half carry, half drag demonstrators. A person is arrested, cuffed with plastic handcuffs, and removed by weaving nightsticks over and under each forearm.[11] In one example of "carries" involving nightsticks:

> One policemen told another something like "We know how to make him move," and then I was pulled by the neck (fingers digging under my chin near my ears) and then carried on a nightstick under my armpits. My wrists were tightly bound behind my back with plastic handcuffs which all but cut off circulation.[12]

Another demonstrator claims:

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[8] Letter from Red Truck, John Doe #58 and John Doe #3 (June 1989).

[9] Affidavit of demonstrator arrested in West Hartford (June 17, 1989). Upon examination of the injury, the affidavit states:

> The doctor stated that he believed my wrist to have a clean break, hairline fracture just above the wrist. He administered some neurological tests on my hand and fingers and concluded that my hand and finger suffered neurological damage.

Id.

[10] Affidavit of demonstrator arrested in West Hartford (June 17, 1989).

[11] Videotapes from demonstration in West Harford (June 17, 1989).

[12] Affidavit of demonstrator arrested in West Hartford (June 17, 1989).

> Twice I made the following statement to the arresting officer and all of the officers there: "Officer, we are peaceful, non-violent, and will not resist. It is not necessary to inflict pain on us or to use pressure points." The response from the officer was, *"If you walk, we won't hurt you."*[13]

A disregard for the force used against compliant demonstrators is alleged in this complaint:

> I was . . . harshly rolled over onto my stomach, and a nylon cord-like wrist cuffs were placed on my wrists. . . . The officers sat me up and forced my wrists upward with enough force to inflict great pain . . . . At the time they forced me up as if to make me walk, I felt my left wrist snap very loudly and painfully. I knew immediately they had broken it and screamed out, "Man, you broke my wrist!" But the officer continued to apply more force to it, bending it even further toward my forearm. Not one officer acknowledged my statement [that the my wrist was broken] nor my request for medical attention. . . .[14]

A young woman in a Pennsylvania demonstration claims that an officer expressed complete disregard for whether the use of force was acceptable:

> [A] female officer screamed, "Let go, we are not carrying her, we're gonna drag her up these steps, see how they like that." She twisted my left arm until my elbow was almost facing backward (in and around toward my head). The male officer bent my right arm behind my neck and head so that my elbow was pointing Northwest and then applied pressure to my neck. They proceeded to drag me up the steps in this manner. Just as I thought I would pass out from the pain, I could actually feel my consciousness leaving, their hands slipped and I hit the steps. . . .[15]

In addition to the holds described as examples above, nunchukus were used against Operation Rescue demonstrators in Los Angeles, San Diego, and La Mesa, California. The nunchukus, or "nunchuks," can produce both great localized pain and serious compression or impact of skin, tissue, nerves and bones. In this regard, a video tape of a recent Los Angeles demonstration reviewed by Commission staff shows a man's arm being broken, complete with the audible snap of the bone. Complaints received by the Commission demonstrate that nunchuck-holds not only produce high levels of pain, but the very nature of the holds, applying pressure against joints and extremely sensitive parts of the body, produces a high likelihood of injury.

A fundamental issue is whether pain compliance techniques, particularly the use of nunchukus, can ever be justified in the context of arresting nonresisting, passive demonstrators. On this, present and former police executives offer significantly different views. Some, such as Los Angeles Police Department Chief Daryl Gates, believe that use of pain compliance is acceptable against passive persons. Others consider pain compliance acceptable only against violent resisters. Use of nunchukus are rarely considered appropriate.

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[13] Affidavit of demonstrator arrested in West Hartford (June 17, 1989)(emphasis added).

[14] Affidavit of demonstrator arrested in West Hartford (June 17, 1989).

[15] Affidavit of demonstrator arrested in Pittsburgh (March 11, 1989).

In court papers filed this summer, a Los Angeles Police Captain justified the escalation of force used by police against passive demonstrators, stating that "the demonstrators have an unusual capacity to withstand pain. . . . With this unique ability to withstand pain comes the possibility of injury since a greater degree of pain is required to induce compliance by the arrestee."[16]

Injuries due to the use of plastic handcuffs have been the objects of numerous complaints to the Commission. While these handcuffs are defended as the only way of securing mass arrests due to an inadequate supply of traditional handcuffs, the complaints would have one believe that they are being used to exact punishment. Whether intended or not, if plastic handcuffs cause injury or unnecessary pain, one must question whether their use can be justified.

Plastic handcuffs, unlike conventional handcuffs, do not have a double lock which prevents them from tightening while on. The FBI Academy's Unit Chief in charge of teaching arrest techniques advised Commission staff that plastic cuffs are not as secure. As a result, officers may "snug up" the cuffs tightly to prevent escape, making injury more likely. Females may also be more likely to be hurt with plastic cuffs because of small wrists and musculature, which may make the officer tighten the cuffs more to prevent escape.[17]

Sit-in demonstrators in West Hartford, Connecticut, describe the effects of the plastic cuffs:

> My plastic cuffs had been pulled so tight on my way into the courthouse that my fingers on both hands starting ballooning up, and they were in great pain.[18]

> While being dragged from the back stairwell by two officers, my wrist was bent, causing considerable pain. I was then handcuffed. The initial handcuffs were so tightly dawn to my wrists, behind my back that the cuffs broke. Another plastic handcuff was then put on my wrists, behind my back, and drawn so tightly that blood circulation was cut off to my fingers and hands.[19]

Demonstrators in Los Angeles were allegedly arrested, taken to jail and detained in a lockup without removing handcuffs for 8 hours. Another complainant indicates that the handcuffs were not removed for one to two hours, even though he, too, was secure in the lockup. It is also alleged that numerous requests to loosen the handcuffs, even when hands were discolored or wrists bleeding, were ignored.

In at least two cities, West Hartford and Pittsburgh, it has been alleged that police removed badges, name tags, and any other identifying items before arrests were effected through pain compliance holds. Newspaper accounts and photographs of the West Hartford demonstration confirm this. Though the explanation given for this by police was that they feared demonstrators would be harmed by contact with badges and other emblems pinned to their uniforms, one is hard-pressed to deny the appearance of a purposeful attempt to frustrate allegations of police misconduct by keeping officers' identities a mystery.

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[16] Declaration in Opposition to Issuance of a Temporary Restraining Order, John v. City of Los Angeles (#89-4766-R) (Aug. 10, 1989).

[17] Telephone interview with Lawrence A. Bonney, Unit Chief, Physical Training Unit, FBI Academy (Aug. 29, 1989).

[18] Affidavit of demonstrator arrested in West Hartford (June 17, 1989).

[19] Affidavit of demonstrator arrested in West Hartford (June 17, 1989).

A retired lieutenant colonel using passive resistance at an Operation Rescue in Connecticut stated:

> Since I was in the United States Army . . . I recognized the officers were out of uniform. They had no tags or badges, but as I recall, one or two had other insignificant accommodations on their shirts, perhaps a marksmanship badge of some sort. . . .[20]

Even reporters for local papers were swept up by unidentified police in their mass arrests:

> I was arrested Saturday morning while covering a news event in West Hartford, Connecticut. Police Officers without badges or name tags handcuffed me, took my press pass, notebook and purse. It was 11 hours before I saw my possessions again and 12 before I was able to make a phone call.[21]

A women who broke Operation Rescue's rule of silence stated:

> I panicked and asked the arresting officer for his badge number. He answered, "Never mind." I then said this is against the law. He answered, "No it isn't." I then asked to be taken to the hospital. . . . The medical report states that I sustained a sprain to the right shoulder and bruises to the right arm.[22]

The Department of Justice has indicated that complaints of police officers hiding their identities would be investigated.

In cities such as New Bedford and Brookline, Massachusetts, and Sacramento, California, it has been reported that mace was used against passive, nonresisting demonstrators:

> Approximately 100 people, many of them women, some with babies in arms, had assembled at dawn in an unannounced occupation of the street entrance to the abortion facility [in Sacramento, California] . . . . When the protestors ignored orders to disperse, the police without apparent threat of arrest or warning, took canisters from their belts and began to spray the crowd with Mace. . . . Much of the incident, including the actual macing of the crowd, was videotaped by an unidentified amateur photographer. Clips of the tape were obtained by television stations and shown on the evening news programs.[23]

In Los Angeles, at least two passive demonstrators were maced, apparently only because they were heavy--one an "oversized" woman, the other a "heavy" man.[24]

The Director of the Police Executive Research Foundation, among others, indicates that mace should only be used on those resisting arrest and not on passive nonviolent demonstrators.[25]

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[20] Affidavit of demonstrator arrested in West Hartford (June 17, 1989).

[21] Sheila Chase, *Staten Island Advance* (June, 6, 1989).

[22] Letter from demonstrator arrested in West Hartford (April 1989).

[23] *The Catholic Herald*, July 12, 1989.

[24] Telephone interview with Chet E. Gallagher (Aug. 22, 1989).

[25] Telephone interview with Darrel Stevens, Executive Director, Police Executives Research Forum (Aug. 28, 1989).

There have been numerous complaints of sexual harassment by police during a demonstration in Pittsburgh, Pennsylvania. According to many accounts, women were subject to unnecessary strip searches, excessive frisks, and dragged around the police station by their bras with their hands cuffed behind their backs.

A college woman reported of her Pittsburgh arrest:

> One guy was gonna carry me up the stairs but the other guy said not to and make it hard on me. . . . He grabbed me between my breasts and dragged me up the stairs by my wire-rimmed bra. My breasts were fully exposed as I was being dragged up the stairs. My hands were still behind my back and I couldn't pull my top down. Then I was taken to another room and thrown to the floor.[26]

Another woman in the same rescue reported difficulty with a matron assigned to perform strip searches:

> After I had my picture taken I was carried up the stairs. Before being carried a policeman pulled up my shirt in order to expose me. Then he and one other policeman took me up the stairs. One, whose name was . . . , after she realized I wouldn't stand, threatened to take off my clothes . . . and molest me in front of the male guards.[27]

Other women complained of male police officers taking full advantage of their passive resistance:

> As I was being carried onto the bus, one of the officers, . . . reached down my pants to carry me and told the other guy, "Hey just reach down her pants.". . . Then when we got to the Allegheny County Jail . . . people grabbed my clothes and just heaved me way up in the air much more than was necessary and I just felt like I as flying through the air. . . . When they carried me out they . . . lifted my shirt up [and] it went over my head and I couldn't see anything . . . --they carried me that way up the whole flight of stairs and I think down a couple hallways and left us on the floor. They made no effort to cover me in any way. . . . I'm really afraid of police officers now and I always thought they were there to protect us.[28]

> They threw me in, . . . and rolled me over a bunch of people. . . . I was the last one out. He got me out and they laughed and he put his arms around me and held me around my boobs, ... And he squeezed super hard and I thought he was trying to break my ribs. . . .[29]

One woman reported the following acts of sexual harassment:

> [W]hen I was being dragged onto the bus . . . I was drug by my ponytail and a lot of my hair came out . . . . I was dragged out in front of a table and they asked--told me to get up and I didn't say anything back. Then the male officer

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[26] Affidavit of demonstrator arrested in Pittsburgh (March 16, 1989).

[27] Affidavit of demonstrator arrested in Pittsburgh (March 16, 1989).

[28] Statement by demonstrator arrested in Pittsburgh (March 16, 1989).

[29] Statement by demonstrator arrested in Pittsburgh (March 16, 1989).

> started to undo my coat and he tried to undo my pants and I just like pushed my stomach out so that he wouldn't be able to. . . . And then he opened my coat and they stood me up on my feet and I went limp and they raised me to the table. Then a male officer frisked me, a female was standing there but a male officer actually touched me . . . on my breasts and also between my legs. . . . I felt them pull my T-shirt and my bra all the way up above my head . . . [and] one of the guards . . . punch[ed] me in the chest on this side and on this side and I have bruises . . . I don't know if it was two or three and I felt one of the guards take me by my breast and squeeze and I have bruises all around where he squeezed with his fingers . . . .[30]

Another common complaint has been that the police and courts in certain cities have practiced complaint stacking, or filing multiple charges against a demonstrator as a form of special punishment. Rather than simply giving one charge, as with a common violent miscreant, a demonstrator will find himself with numerous charges lodged against him. Frequent complaints have been voiced that police, without cause, add the charge of resisting arrest or assault and/or battery on an officer to the trespass charge. This creates the possibility that a defendant may face increased fines and longer consecutive sentences, and arrests that may have been misdemeanors quickly become felonies. Many jurisdictions set bail by the number and substance of charges, so multiple charges increase the bail. Locales such as Las Vegas have a strict procedure against this.

Bail is only to be used as an instrument to ensure that a suspect will not flee, not as an instrument of punishment. However, there have been numerous complaints of excessive or bail out of proportion to that of similar cases:

> The bails set demonstrated a complete lack of consistency. Those who chose to identify themselves at the bail hearing were given a bail of $500 and released. This $500 was set regardless if the charge was a felony or misdemeanor. Others who chose to remain as John or Jane Doe had bails set at $2,500, $4,000, or $5,000 for the same felony charges. Those charged with misdemeanors also had different bails set which ranged from $5,000 to $2,500 for identical charges. All who did not identify themselves were reprimanded to jail. . . . These facts make it appear that bails were set arbitrarily [and] for punitive purposes as opposed to insuring that the defendants return for arraignment.[31]

In addition, there have been allegations that even after bond has been met for demonstrators, the police would refuse to release them:

> After the arrest we were taken to "The Farm," a jail that appeared very well kept from the outside. . . . Inside the conditions were deplorable. Parts of the ceiling loose, peeling paint, roaches everywhere . . . . We were denied all privileges; mail, visitors, outdoor recreation and clergy visits. This incarceration lasted for eight days, despite the fact we gave our names and posted bail.[32]

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[30] Statement by demonstrator arrested in Pittsburgh (March 16, 1989).

[31] Affidavit of demonstrator arrested in West Hartford (June 17, 1989).

[32] Letter from demonstrator arrested in Atlanta (Aug. 8, 1989).

The following account appeared in the *Hartford Courant*, concerning a 63-year-old woman who participated as a prayer supporter in the Connecticut demonstration:

> Within 20 minutes of arriving, she was among several hundred picketers who were ordered to move off the privately owned parking lot near the abortion clinic. "They were nudging us in the backs to keep moving. . . . I wasn't moving fast enough, but there was a baby carriage and my daughter with a baby next to me, . . . I lost my balance and [an officer] followed this up with a very forceful shove. I was lying face down and he was twisting my arms. He continued to twist my shoulders and elbows up with his stick . . . . I was offering no resistance. I didn't even hear I was under arrest. I was in horrible pain. I didn't know anything," she said. [She] went straight from jail to St. Francis Hospital for treatment of cuts, bruises and a swollen left forearm that she feared might be a broken wrist.[33]

Below is a typical complaint of an individual who at his arraignment identified himself as Baby Jane or Baby John Doe to a Connecticut magistrate and stayed limp throughout his imprisonment:

> I was dragged face down by use of a nightstick between my shoulder blades. My face was cut and I sustained torn right shoulder ligaments. . . . [At Enfield Medium Security Prison], I refused to walk off the bus and was dragged, face down, head first down the bus steps. I was dragged and thrown in a mud puddle . . . and dragged by the arms into the gym. . . . I was asked to walk to strip search. I told the officer I wouldn't resist but would become vulnerable and helpless. He assumed I'd walk, reach for my arm, and his fingernail struck my left eye, which immediately tore. . . . The doctor discovered a severe laceration across my left cornea. . . .[34]

The leaders of the Connecticut demonstration appeared to be singled out for the crueler treatment:

> Halfway down the long public hallway they dumped me on the floor and said they were going to use the "crotch carry." They put one billy club between my legs, and then lifted me up into the air, my whole weight riding on the billy club under my crotch. Still telling me to walk, one officer kept kicking me in the leg. As we approached the end of the hallway, one of the officers laughed and said, "Ramming speed!" as if they were going to ram my head into the wall. When we got to the elevator, they did bang my head into the wall and then dumped me on the floor. . . . The "crotch carry" and other pain holds were used to transport me out to the bus. . . . I turned my head to see about 20 rescuers sitting in seats at the back of the bus. All looked dazed. So I started all of us singing. The huge officer commanded me to stop which I did not. So he got some tape and proceeded to put four strips of tape across my mouth.[35]

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[33] *Hartford Courant*, Aug. 14, 1989.

[34] Affidavit of demonstrator arrested in West Hartford (June 17, 1989).

[35] Affidavit of demonstrator arrested in West Hartford (June 17, 1989).

It was commonly reported that police refused medical treatment to those whom they had injured:

> When I stated to faint they pushed my head into the corner of the elevator. . . . He told me to get up and walk, but when I tried, he grabbed me by the hair and dragged me along the length of the bus and threw me on top of other people. Then I must have passed out. When they were taking the people off the bus, they were calling me the "dead girl.". . . The paramedic looked at me and wanted to take my handcuffs off, but the policemen wouldn't let her. . . .Then they took me upstairs to the courtroom and took my handcuffs off. My right shoulder was very painful. The paramedic looked at me again and said I was in shock. She wanted to take me to the hospital, but [the officer] said [I could] only leave if it was life or death.[36]

Complaints from Pittsburgh indicate that police there used a women's asthma attack against her as a method of pain compliance:

> I didn't know whether it was because of when they hit me or what and then I was not able to breathe . . . and I couldn't catch my breathe and my lungs felt like they were going to collapse . . . . And that's when the nurse came up to me and said "Do you need oxygen?" And I nodded yes, because I couldn't breathe any more and she screamed for the oxygen. . . . So, they had the oxygen tank there by that point and the nurses were getting ready to administer it . . . . She had it in her hand and I reached for it and the man in the suit . . . put his hand over it and said "I'm sorry, we can't give you anything. We can't give you oxygen until you give your name.". . . At that point even if I wanted to give my name I couldn't because I couldn't breathe. . . . And the nurses didn't know what to do. They were standing there and they had the oxygen tank in their hand and finally one of the nurses said, "I, can't bear to see this," and put it over my head and the oxygen started to come. . . .[37]

II. STANDARDS AND REMEDIES

Constitutional provisions relevant to these and other allegations received from passive demonstrators are the Fourth amendment (unreasonable seizure of the person), Fifth amendment (federal due process where federal action is involved), Sixth amendment (right to counsel and to be apprised of charges), Eighth amendment (cruel and unusual punishment after conviction), and Fourteenth amendment (due process clause protects pretrial detainees from use of excessive force that amounts to punishment). The First amendment's free speech, petition, and assembly provisions do not apply where demonstrators are trespassing.

Relevant federal statutes are 42 U.S.C. § 1983 (prohibiting persons acting under color of state law from depriving persons of rights, privileges, or immunities secured by the Constitution and laws), 42 U.S.C. § 1997 *et seq.* (the Civil Rights of Institutionalized Persons Act, which permits the Attorney General to seek injunctive relief for a pattern or practice of violations of the Constitution or laws by pre-detention facilities), 18 U.S.C. § 241 (making it unlawful to conspire against a citizen to deprive him of rights under the Constitution or laws), and 18 U.S.C. § 242 (making it unlawful to deprive any inhabitant of his civil rights under color of state law).

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[36] Affidavit of demonstrator arrested in West Hartford (June 17, 1989).

[37] Statement of demonstrator arrested in Pittsburgh (March 16, 1989).

State law tort claims such as assault, false imprisonment, battery, and intentional infliction of emotional distress are, of course, also relevant, as well as state and local ordinances governing public demonstrations or police misconduct.

If unreasonable, unnecessary, or excessive force is used by a police officer or person acting under color of law, an individual may have recourse against the government officer and government entity.[38] Whether the force is excessive or unnecessary is based on whether the officer's actions were reasonable under the circumstances. Frequently, the standard of reasonableness is phrased as that force which an ordinarily prudent person would have considered necessary under the circumstances.[39] Hindsight or disregard for the officer's need for split-second decisions is inappropriate.[40]

While at the State level, the general principal is that an officer may use such force as is reasonably necessary to effect an arrest, subdue someone, prevent the destruction of property or evidence, or defend himself,[41] there are nuances. Maryland, for example, while providing essentially the same formulation for excessive force as other States, provides a police officer with limited immunity, allowing assault and battery claims against an officer only if he acted with malice.[42] Moreover, State and Federal standards governing excessive force may differ, as the following explains:

> the role of the federal constitution in regulating state law enforcement must be carefully defined and limited in order to provide no more than an outer regulatory framework. Within this framework, substantial discretion must be left to the states

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[38] *E.g., Courtney v. Reeves*, 635 F.2d 326 (1981).

[39] *E.g., Stark v. Town of Merryville*, 396 So.2d 569, *writ denied*, 399 So.2d 621 (1981).

[40] *Graham v. Connor*, 57 U.S. Law. Week 4513 (1989)

[41] Under *Florida* case law, for example, "[t]he limit of the force to be used by the police is set at the exercise of such force as reasonably appears necessary to carry out the duties imposed upon the officer by the public . . . . [T]he officer can never use more force than reasonably appears to be necessary, or subject the person arrested to unnecessary risk of harm." *City of Fort Pierce v. Cooper*, 190 So.2d 12, 14 (Fla. App. 1966) (*quoting City of Miami v. Albro*, 120 So.2d 23, 26 (Fla. App. 1960)). In *Cooper*, the plaintiff sued both the municipality and the police officer, alleging negligence and assault and battery.

In *Pennsylvania*, the use of force by police officers is warranted when necessary to effect a lawful arrest, to prevent escape, or to overcome resistance of an individual subject to arrest or lawfully in custody. 1971 Pa. Op. Atty. Gen. No. 94. In Pennsylvania, an officer is "justified in the use of any force which he believes to be necessary to effect the arrest . . . ." 18 PA. CONS. STAT. ANN. § 508 (Pundon's 1983).

In *Louisiana*, the rule has been stated that, while the use of force in effecting an arrest is a legitimate police function, unreasonable or excessive force may make the officer and employer liable for injuries. *Kyle v. City of New Orleans*, 353 So.2d 969, *on remand*, 357 So.2d 1389, *writ denied*, 359 So.2d 1307 (1977).

In *Tennessee*, an arresting officer is privileged to use only that force necessary to effect an arrest. *City of Mason v. Banks*, 581 S.W.2d 621 (Tenn. 1979).

In *California*, the applicable statute provides that when an arrest is being made, "if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest." 3 CAL. PENAL CODE § 843 (West 1970). Although the California statute does not refer to persons who do not resist arrest, case law has stated that an officer may use the force necessary to make the arrest. *People v. Almarez*, 12 Cal. Rptr. 111, 190 Cal.App.2d 380 (1961).

In *Illinois*, police may use whatever force is reasonably necessary to sustain a lawful arrest. *People v. Lees*, 208 N.E.2d 656, *rehearing denied* (Ill. App. 1965). *See* ILL. REV. STAT ch. 38, § 7-5(a).

[42] *Wilson v. Jackson*, 505 A.2d 913 (Md. App. 1986); *Davis v. Muse*, 441 A.2d 1089 (Md. App. 1982).

> to determine whether to pursue further regulation and, if so, how to go about the task.[43]

One reason why statutes, case law and police policy are not more explicit on the subject of excessive force is that statutes and caselaw invariably deal with the extreme cases, *i.e.*, where the force used is deadly or produces extensive injury. In one sense, these are the simple cases: the gravity of the injury is clear. Another reason is that complaints of excessive force causing less serious injury are unlikely to appear in court, thereby resulting in rulings which would provide guidance on the issue. The credibility given to the police, coupled with the costs of litigation, make such suits unprofitable.

Until recent Supreme Court cases,[44] many lower Federal courts applied a subjective rather than objective standard to the issue of whether the force used was reasonable. The subjective standard, which emphasized the officer's motivation and extent of the injury, diminished the probability of success except in the most egregious cases.

Kyle v. City of New Orleans, a 1977 Louisiana Supreme Court decision, presents a fair identification of factors appropriate in determining whether force is necessary to effect an arrest.[45] The factors include (1) the known character of the arrestee, (2) the risks and dangers faced by officers, (3) the nature of offense involved, (4) the chance of escape, (5) the existence of alternative methods of arrest, (6) physical size, (7) strength, (8) the weaponry of officers as compared to arrestee, and (9) exigencies of the moment.

Criminal Law Provisions. Police may be prosecuted under 18 U.S.C. §§ 241 and 242 by the U.S. Department of Justice.[46] The efficacy of these provisions is questionable. Because these are criminal statutes, the charge must be proven beyond a reasonable doubt. In addition, the defendant must be shown to have acted with the specific intent to deny the victim his constitutional rights. Additionally, the criminal sanctions do not provide compensation for the victim. Reliance on the government to bring a § 242 charge also makes the possibility of a suit dependent on a third party. Some have also criticized the reluctance of the government to bring suits against the police, who are relied upon for investigation in other cases.[47] Use of § 1983 and its objective reasonableness standard and lower burden of proof presents a more realistic approach.

Former Assistant Attorney General Drew S. Days, III, Civil Rights Division head, noted that §§ 241 and 242 are limited in their ability to deter police brutality:

> A prosecution for police misconduct does not address itself to the activities of a police department as such or of a city administration per se, but only to the actions

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[43] Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law,* 1985 DUKE L. J. 849, 851 (1985).

[44] *See Graham v. Connor,* 57 U.S. Law Week 4513 (1989), and *Daniel v. Williams,* 474 U.S. 327 (1986). For a discussion of the objective reasonableness standard for § 1983 cases, see the text accompanying notes 54-67.

[45] *Kyle,* 353 So.2d at 973. Although the argument is phrased as what is necessary to effect an arrest, this mischaracterizes the issue. This memorandum talks of force after the arrest has been effected. The only issue is what force is necessary to transport the person to the police station. The factors set forth in the text, however, are an accurate barometer for this issue of "transportation."

[46] The Criminal Section of the Civil Rights Division of the Department of Justice enforces the statute, usually in conjunction with local U.S. Attorneys.

[47] Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office,* 118 U. PA. L. REV. 1023, 1024-25 (1970).

> of one or more officers in a given circumstance, framed by and limited to the wording of the criminal indictment.[48]

Compared to Federal criminal laws and prosecutors, the state sanctions and prosecutors offer several advantages. As noted by the Commission in WHO IS GUARDING THE GUARDIANS?:

> [L]ocal prosecutors have a wide of charges that can be brought in [police misconduct] cases . . . . [T]hese may include murder, manslaughter, negligent homicide, aggravated battery, battery, aggravated assault, and assault . . . .[49]

Besides more flexibility in applying criminal sanctions, state prosecutors frequently have more attorneys and personnel than their Federal counterparts, making action simpler.

Section 1983. The primary civil basis for addressing alleged violations of Federal law is § 1983.[50] The statute provides that a person, including aliens,[51] may bring suit against an police officer or correctional officer acting under color of law of a state[52] who deprives one of rights under Federal law and the U.S. Constitution.[53] Damages, including punitive damages, and injunctive relief are available under the Section. An officer acts under color of law if he attempts to make an arrest or perform any other function with which he would normally be charged with carrying out. Even if the officer was acting illegally, he would still be considered to be operating under color of law.

In *Graham v. Connor*, a recent § 1983 ruling,[54] the Supreme Court applied a reasonableness standard to a claim of excessive force by the police,[55] stating that the reasonableness of a search or "seizure depends not only on *when* it is made, but *how* it is carried out."[56] As a result, said the Court, "all" claims against law enforcement personnel based on excessive force--deadly and nondeadly--in connection with arrests, investigatory

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[48] *Police Practice and the Preservation of Civil Rights*, A Consultation Sponsored by the United States Commission on Civil Rights 141 (Dec. 12-13, 1978).

[49] *U.S. Commission on Civil Rights*, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES 102-03 (1981).

[50] § 1983 was originally § 1 of the Civil rights Act of 1871, which was the congressional response to lawlessness in the South directed towards blacks and whites who were assisting them.

[51] *Simon v. Lovgren*, 368 F.Supp. 265 (D.V.I 1973).

[52] United States territories and the District of Columbia are also covered by § 1983.

[53] § 1983 states in full:

> Every Person who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

While § 1983 refers to any rights, privileges, or immunities secured by the Constitution and laws, not all Federal law is cognizable under § 1983. *E.g., Adickes v. S. H. Kress Co.*, 398 U.S. 144 (1970) (Title II of the 1964 Civil Rights Act could not be enforced under § 1983).

[54] *Graham v. Connor*, 54 U.S. Law Week 4513 (1989).

[55] Most lower courts had been applying a substantive due process standard. The due process standard was premised on the existence of four factors: (1) the need for the use of force, (2) the relationship between the need for the force and the amount of force actually used, (3) the injury inflicted, and (4) the malicious and sadistic application of the force.

[56] *Graham*, 57 U.S. Law Week at 4516 (emphasis in original).

stops or other "seizures" of free citizens should be reviewed under the objective reasonableness standard of the Fourth Amendment.[57]

Under the *Graham* decision, the reasonableness of the force used will be based upon the perspective of a reasonable officer at the time without any assessment of intent or motive. Any determination of whether the force was reasonable requires a "careful balancing"[58] comparing the "nature and quality of the intrusion on the Fourth Amendment's interests"[59] and the "countervailing governmental interest."[60] "Not every push or shove, even if it may seem unnecessary . . ." arises to a Fourth Amendment violation.[61] The factors to be considered include "the severity of the crime . . ., whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting or attempting to evade arrest by flight."[62]

The objective reasonableness test provides a lower threshhold of liability for excessive force claims than the substantive due process test previously used by numerous lower courts.[63] The Court looked, among other things, to the extent of injury and to the existence of malicious and sadistic intent. The Court made clear that neither injury nor motivation are necessary elements of a Fourth Amendment excessive force claim.[64]

Under limited circumstances, a good faith defense under § 1983 extends limited immunity to the actions of a law enforcement official.[65] The immunity normally is available where the officer acts on the basis of a standard reasonably believed to be valid at the time.[66] *Harlow v. Fitzgerald* identified that the limited immunity would not be applicable if the law was "clearly established." Even if the law is clearly established, the officer could avoid liability by proving that the standard was unknown or that the officer could not reasonably be expected to know the standard.[67]

Municipalities. Neither States nor their agencies have been held liable under § 1983.[68] By contrast, municipalities have been held liable. In 1978, the Supreme Court, in *Monell v. Department of Social Services*, overruled a 17-year-old decision,[69] holding that municipalities

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[57] *Id.* The Fourth Amendment is applicable because it guarantees citizens the right "to be secure in their persons . . . against unreasonable . . . seizures" of the person. By comparison to the situations requiring the application of the Fourth Amendment, liability for actions taken against a convicted criminal would normally be determined by reference to the Eighth Amendment. *See Whitley v. Albers*, 475 U.S. 312 (1986) (excessive force against a convicted prisoner).

[58] *Graham*, 57 U.S. Law Week at 4516.

[59] *United States v. Place*, 462 U.S. 696, 703 (1983), *quoted in Graham*, 57 U.S. Law Week at 4516.

[60] *Graham*, 57 U.S. Law Week at 4516.

[61] *Id.* (*quoting Johnson v. Glick*, 481 F.2d 1028, 1033, *cert. denied*, 414 U.S. 1033 (1973)).

[62] *Id.*

[63] In perhaps the seminal case for the subjective determination of excessive force under § 1983, Judge Henry Friendly opined that the need for the force, the relationship between the need and the actual force, the extent of injury, and whether the forces was maliciously and sadistically inflicted are factors for the legality of the force used. *Johnson v. Glick*, 481 F.2d 1028 (1973).

[64] 57 U.S. Law Week at 4516.

[65] *Pierson v. Ray*, 386 U.S. 547 (1951).

[66] *Id.* at 555. In contrast to the Federal limited immunity is the broader scope of immunity which denies recovery except when the police act with malice. Maryland is such an example. *See* text accompanying note 42.

[67] 457 U.S. 800, 818 (1982).

[68] States receive immunity under the Eleventh Amendment. *See Quern v. Jordan*, 440 U.S. 332 (1979). *Olson v. California Adult Auth.*, 423 F.2d 1326, *cert. denied*, 398 U.S. 914 (1970) (state agency).

[69] *Monroe v. Pape*, 365 U.S. 167 (1961).

could be liable under § 1983 if the violation was pursuant to a policy statement, ordinance, regulation, or decision officially adopted.[70] In *Adickes v. S.H. Kress & Co.*, action taken as a result of a custom even if not formally approved through official channels would produce liability if the custom was "so permanent and well settled as to constitute a 'custom or usage' with the force of law."[71] *Owen v. City of Independence*[72] extended municipal liability to preclude the assertion of a qualified immunity even if the officer acted in good faith and was entitled to the immunity.

While a municipality can be liable under § 1983, the premise for the liability cannot be *respondeat superior*, that is, the liability cannot be predicated solely upon the employer-employee relationship of the municipality and officer. The statute requires causation for liability, and vicarious liability under *respondeat superior* is an inappropriate basis for this liability.[73] Although the Supreme Court was willing to assess damages under *Monell* and *Owens*, it refused to allow punitive damages against a municipality, even though permissible against the individual.[74]

Section 1997. The Civil Rights of Institutionalized Persons Act (CRIPA) permits the United States Attorney General to pursue equitable relief against States engaging in a pattern or practice of depriving institutionalized persons of constitutional rights, privileges, or immunities. Institutionalized persons includes individuals confined in any facility which is "owned, operated, or managed by, or provides services on behalf of any State or political subdivision" and includes a correctional institution, pretrial detention facility, or institution for persons with disabilities.[75]

With passage of CRIPA, Congress responded to the need for the Federal government to "redress systematic deprivations of constitutional and Federal statutory rights" of individuals in state institutions, including jails, lockups, and institutions for the handicapped.[76] Under the statute, the United States Attorney General has the authority to initiate, and intervene in, civil suits against institutions run by State or local governments to prevent "egregious or flagrant conditions" depriving persons of rights, privileges, and immunities protected by the Constitution or Federal law. The deprivation of rights must be part of "a pattern or practice of resistance to the full enjoyment of such rights."[77]

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[70] 436 U.S. 658 (1978).

[71] 398 U.S. 144, 169 (1970).

[72] 455 U.S. 662 (1980).

[73] *Monell*, 436 U.S. at 692.

[74] *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

[75] 42 U.S.C.A. § 1997(1)(A), (B)(i), (ii) & (iii) (1981). CRIPA's major section, Section 1997a, reads in pertinent part:

> (a) Whenever the Attorney General has reasonable cause to believe that any State or political subdivision . . ., official . . . or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in or confined to an institution, . . . to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General . . . may institute a civil action . . . .

42 U.S.C.A. § 1997a.

[76] S. REP. No. 416, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 787, 788.

[77] 42 U.S.C.A. § 1997a.

Police Policy. In addition to legal standards established by State or Federal governments, frequently law enforcement agency rules, general and special orders, and policies describe limitations on force. As the National Advisory Commission on Criminal Justice Standards and Goals has noted, police agencies should acknowledge the existence of the broad range of discretion exercised by all agencies and officers, but "the acknowledgement should take the form of comprehensive policy statements that publicly establish the limits of discretion, that provide guidelines for its exercise within those limits, and that eliminate discriminatory enforcement of the law."[78] The National Commission has also observed that police manuals often deal with only the uncontroversial and mechanical functions.[79] "Only in the police service," that Commission noted, there exists "tremendous authority [for arrest decisions] delegated without administrative guidelines":

> Administrative guidelines often have not been developed because of the difficulty in formulating policy or because the agency believes that unlimited discretion is preferable to stated policy.[80]

The solution to this, according to the National Commission, is that:

> Unnecessary discretion should be eliminated . . ., and appropriate control established to provide flexible guidance. To eliminate unnecessary discretion, police agencies should identify situations where the individual officer's discretion to make physical arrests is restricted or eliminated.[81]

A legal standard is of little value if it is not subject to precise standards formulated by the legislature, judiciary, or police administrator. Considerable policy formulation resides with police chiefs and other police policy makers. Some police forces have effectively used this authority. The Las Vegas police manual, for example, provides that

> This Department force will accomplish the police mission as efficiently and unobtrusively as possible with the highest regard for human dignity and liberty of all persons and with minimal reliance upon the use physical force and authority. Any type or kind of force exercised by the use of lethal or nonlethal weapons shall be restricted to self protection, the protection of others, or to prevent the escape of an offender and only to the degree minimally necessary to accomplish a lawful police task. . . . In accordance with this policy, electronic devices which emit a charge capable of stunning or shocking an individual are not an option. As such, these devices are not part of the authorized uniform or equipment.[82]

Application of Standards to Specific Issues Raised in the Complaints. In applying the above standards to specific misconduct issues, the primary problem is that the reasonableness standard establishes few guidelines. The only guideposts are the factors to be considered in

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[78] National Advisory Commission on Criminal Justice Standards and Goals, *Police,* Standard 1.3., p. 21 (1973).

[79] *Id.* at Commentary to Standard 1.3, p. 22.

[80] *Id.* at 23-24.

[81] *Id.* at 24.

[82] Las Vegas Metropolitan Police Department Manual, para. 4-102.04 (Accreditation Standard 1.03.1) (1988).

any balancing. The Supreme Court suggested some factors in *Graham*. Other courts, such as in *Kyle*, have established further factors for a proper determination.[83] Though as a general matter pain compliance techniques may be justifiable where persons are actively resisting arrest, their use in connection with arrests of nonresisting, limp demonstrators clearly raises a Fourth Amendment issue. The balancing factors in *Graham*, *i.e.*, the severity of the crime, the threat of the arrestee, the existence of active resistance, and an attempt to flee, compel one to conclude that pain compliance techniques against passive demonstrators are impermissible. With the easy availability of alternative methods to transport the arrestee (hand carry, stretcher, gurney, or drag), the use of arm locks, wrist twists, and mastoid holds seem disproportionate, particularly when, as is often the case in the Operation Rescue demonstrations, the individuals against whom pain compliance techniques are used are women, elderly persons, handicapped persons, or ministers. One is hard-pressed to find probable cause that these individuals pose a threat to the officer.

There is little reason for police to use painful or potentially injurious tactics. The dangers to the officer are nonexistent except for possible injury in carrying the individual.[84] Even accepting that injury may occur if the officer tries to carry a demonstrator, stretchers and the proper deployment of trained personnel make injury unlikely. As noted, for example, in the Las Vegas police manual, "[a]ny type or kind of force exercised by the use of lethal or nonlethal weapons shall be restricted to self protection, the protection of others, or to prevent the escape of an offender and only to the degree minimally necessary to accomplish a lawful police task."[85] This standard establishes a careful policy which informs its officers of the limitations in the use of force. Whether force is necessary to bring a passive arrestee to the police station requires asking what the alternatives are and what government objective is served by using greater, more painful force with the higher likelihood of injury. The means of bringing an arrested persons to jail range from the mild alternatives of carrying or using stretchers, to come-along holds or pain compliance techniques, to the more dangerous use of nunchukus.

The application of painful and injury-producing force once the arrest has been accomplished does not fit with the statutory provisions and case law. In a recent settlement involving the Concord Naval Weapons station, the police agreed to a permanent injunction against pain compliance techniques for those who do not resist.[86] The use of nunchukus, which produces excruciating pain when twisted around a person's wrist, also seems wholly inappropriate. If one were to find a comparison to the use of nunchukus, hitting an individual on the wrist with a police baton would accomplish a similar result. Though the pain would help persuade an individual to stop being limp, this practice is considered an inappropriate technique, and accepted rules governing use of batons would appear to apply with more force to the nunchukus. In Commission staff discussions with approximately a dozen present and former law enforcement individuals and instructors, these persons consider use of the nunchukus inappropriate.

With regard to the allegations of unwarranted and improperly conducted strip searches, as a general rule, police officials will normally conduct a pat-down or frisk on a person arrested or detained. The extent of the search is dependent upon the attendant circumstances.

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[83] See the text accompanying note 45.

[84] The commonly expressed concern is a fear of a back injury to the officer.

[85] Las Vegas Metropolitan Police Department Manual, para. 4-102.04 (Accreditation Standard 1.03.1) (1988).

[86] Interview with Ed Chen, attorney, San Francisco American Civil Liberties Union (Aug. 28, 1989)

Many police forces will conduct a strip search of any arrested person.[87] By way of contrast, although the Las Vegas Police Department used to conduct strip and cavity searches of everyone taken into custody, it no longer does so unless the individual will be permanently housed or if probable cause exists that weapon or contraband are hidden on detainee's person. If a strip search is conducted, approval of a sergeant is necessary.[88]

Several cases do not permit strip and cavity searches unless there is probable cause to believe the individual is concealing weapons or contraband.[89] The courts have dealt with a number of strip search cases under § 1983. In one case, a woman was arrested for shoplifting, taken to police headquarters and strip searched. The court determined that the propriety of the search was a question of fact for the jury. In a second case, a court considered a body cavity search unnecessary and "extremely troubl[ing]."[90]

In *Bell v. Wolfish*, Associate Justice Rehnquist wrote that in applying the Fourth Amendment standard, one must balance "the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."[91] *Wolfish* permitted strip searches for pretrial detainees--individuals charged but not yet tried for a crime--after a contact visit with outsiders. In these searches, however, they were only visual searches with no body contact with the prisoner. Emphasizing the balancing required, *Wolfish* does not stand for the proposition that strip searches can always be permitted in a pretrial detainee situation--only that a realistic look at the justification for the search and the nature and scope of search be balanced.[92] Certainly, the magnitude of the invasion must be considered. A "hands on" body cavity search should be considered an offense against "personal dignity" and not condoned without reason which is appropriate only in the most compelling cases.[93]

Where women arrested for misdemeanors and temporarily detained were strip searched in lockups without reason to believe that they carried concealed weapons or contraband, the searches were declared illegal.[94] A similar decision was rendered when a strip search was conducted on a nonmisdemeanor traffic offender who was kept overnight in a lockup.[95]

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[87] *See* M. Avery and D. Rudovsky, *Police Misconduct: Law and Litigation* 2-17 (2d ed. 1982).

[88] Las Vegas has two jails--Clark County and the City--and strip and cavity searches are not routine in either.

[89] *Logan v. Shealy*, 660 F.2d 1007 (1987); *Smith v. Jordan*, 527 F. Supp. 167 (S.D. Ohio 1981); *Salinas v. Breier*, 517 F. Supp. 1272 (E.D. Wis. 1981) (contact cavity searches of woman and boy; searches were more than could be justified by any safety concerns); *U.S. ex rel. Guy v. McCauley*, 385 F. Supp 193 (E.D. Wis. 1974). *See also People v. Seymour*, 398 N.E.2d 1191 (Ill. App. 1979). Cases have held that students, persons charged with misdemeanors, and prison visitors where no reasonable suspicion exists they are carrying contraband cannot be indiscriminately strip searched. *See Police Misconduct* at 2-18.

[90] *Bovey v. City of Lafayette*, 586 F. Supp 1460, 1469-71 (1984).

[91] *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

[92] *See, e.g., Bono v. Saxbe*, 620 F.2d 609 (1980) (court questioned the need for searches after noncontact visits); *Roscom v. City of Chicago*, 550 F. Supp 153 (1982).

[93] *Wolfish*, 441 U.S. at 594 (Marshall, J., dissenting). As one court noted, a strip search is "demeaning, dehumanizing, . . .[and] repulsive . . . ." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (1983) (citing the adoption of an opinion in *Tinetti v. Wittke*, 620 F.2d 160 (1980).

[94] *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (1983). The women were arrested for misdemeanor offenses. Illinois subsequently passed a statute prohibiting strip searches of persons arrested for traffic, regulatory, or misdemeanor offenses absent a reasonable belief that the arrestee is concealing weapons or controlled substances. *Ill. Rev. Stat.* ch 38, § 103-1(c). An arrest for narcotics or probable cause to believe that a person has controlled substances would be adequate reason for a strip search. *Salinas v. Breier*, 695 F.2d. 1073 (1982); *United States v. Klein* 522 F.2d 296 (1975).

[95] *Tinetti v. Wittke*, 620 F.2d 160 (1980).

As an example of the limitations imposed by a police force, the Milwaukee Police Academy Search and Seizure Manual establishes a policy for strip and cavity searches. The policy emphasizes that a search would depend on the nature of the crime, sometimes requiring a complete disrobing, sometimes a body cavity search. Such detailed searches would be made only in extraordinary cases where probable cause existed that something was hidden and with only such force as necessary. Any cavity search would be done by a doctor under sanitary conditions. Except for emergencies, the manual indicated that a search warrant should be obtained.[96] While this procedure would not be required in each instance, it sets forth a reasoned policy that balances the interests of the government and the party.

With regard to charges of sexual violations, an officer who takes advantage of his official functions to sexually caress or obtain sexual favors from a female detainee would be in clear violation of the rights of the individual both under State and Federal law. The officer's actions are under color of law because they were performed or initiated in uniform in performance of his otherwise valid obligations.[97] In one case, a Federal court of appeals acknowledged that the officer could be liable. The officer in several instances arrested women, then fondled them and even offered to release them for sexual favors.[98]

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[96] The provisions of the manual are set forth in *Salinas v. Breier*, 695 F.2d 1073, 1080 (1982).

[97] To suggest that the performance of an illegal act while involved in a government function is not action under color of law would establish an impossible rule for permitting § 1983 to operate. In *United States v. Classic*, the Court noted that the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 313 U.S. 299, 326 (1941).

[98] *Harris v. City of Pagedale*, 821 F.2d 499 (1987). The primary issue before the court was whether the municipality could be held liable for the actions of the officer, concluding that it could. The court indicated that the officer would be properly liable under § 1983.

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

September 14, 1989

MEMORANDUM FOR THE COMMISSIONERS

THRU: WILLIAM J. HOWARD
General Counsel

FROM: JEFFREY P. O'CONNELL JPOC
Assistant General Counsel

SUBJECT: Administration of Justice Briefing Agenda

The Briefing will begin at 9:15 a.m., Friday, September 15, 1989, in Conference Room 512. Each panelist will have 10 minutes for a presentation, followed by questions from Commissioners and staff.

PANEL 1. [Approximate time--9:15 a.m.--9:35 a.m.]

Linda K. Davis, Chief, Criminal Section, Civil Rights Division, Department of Justice. Ms. Davis will discuss the role of the Civil Rights Division in enforcing the relevant Federal civil rights laws. Ms. Davis has been Chief of the Criminal Section since 1984.

PANEL 2. [Approximate time--9:35 a.m.--10:30 a.m.]

Chief Robert McCue, West Hartford, Ct. Police. Chief McCue has been in police work for over 30 years. Chief McCue will discuss his view on the appropriate arrest and post arrest procedures for nonviolent demonstrators. He will address his department's actions at the well-publicized West Hartford demonstrations. Chief McCue is an advocate of pain compliance techniques against passive demonstrators who, when arrested, go limp instead of going to the police vehicle. Chief McCue ordered that the arresting officers' badges and nametags be removed for safety reasons.

Chief Melvin C. High, assistant chief of police for the D.C. Metropolitan Police's Field Operations Bureau. Chief High commands all police operations, as well as the Criminal Investigation Division and Youth Division.

Dr. Lawrence Sherman, president of the Crime Control Institute and professor of criminology, University of Maryland. Dr. Sherman received his Ph.D. from Yale University in 1976. Dr. Sherman participated in the Commission's 1978 consultation, Police Practices and the Preservation of Civil Rights.

PANEL 3. [Approximate time--10:40 a.m.--11:45 a.m.]

Don Jackson, former Hawthorne, Cal. police sergeant. While engaged in a sting operation against Long Beach, California police, Mr. Jackson, with NBC cameras secretly capturing the advent, was arrested by officers after the vehicle in which he was operating was stopped by police. Mr. Jackson's head was pushed through a plate glass window. The nationally televised

videotapes, along with other sting operations, has made Mr. Jackson a leader in the concern about racism and excessive force in California police departments. Mr. Jackson can present numerous stories of police misconduct.

Charles Litekey, nonviolent peace activist, and member of the Veterans for Peace, Vietnam Veterans Fasting for Reconciliation with Vietnam, and the Vietnam Veterans Speaker's Alliance. Mr Litekey is a former priest and a chaplain in Vietnam who turned in his Congressional Medal of Honor as a protest. He currently farms and is writing a book.

Chet E. Gallagher, long-time Las Vegas, Nev. police officer, who has participated in several Operation Rescue demonstrations. In police work for almost 20 years, Mr. Gallagher has been has a B.S. in Criminal Justice. Mr. Gallagher is the founder of Pro-Life Police.

Kenneth H. Medeiros, Executive Director, Commission on the Accreditation for Law Enforcement Agencies. Mr. Medeiros will discuss his commission's role in establishing standards for police departments.

VIDEOTAPE [approximate time--11:45 a.m.--noon]
Brief videotapes of actual arrests of nonviolent demonstrators and Don Jackson's nationally televised arrest in Long Beach, California will be shown.

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

September 13, 1989

MEMORANDUM FOR THE COMMISSIONERS

SUBJECT: Monitoring of Racial Incidents

Attached for your information are three monitoring memoranda covering:

1. Bensonhurst, New York;
2. Raleigh, North Carolina; and
3. Virginia Beach, Virginia

We will continue to provide updates to your concening the matters noted above as well as other incidents as they are reported.

MELVIN L. JENKINS
Acting Staff Director

Attachments

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

Eastern Regional Division
1121 Vermont Avenue, N.W. Rm. 710
Washington, D.C. 20425

DATE: September 12, 1989

RE: Bensonhurst Killing: Isolated Incident
Or Indicator of Social Ills?

FROM: Tino Calabia
New York State Advisory Committee

THRU: John I. Binkley, Director
Eastern Regional Division

TO: Melvin L. Jenkins
Acting Staff Director

As a possible indication of the level of bias-related tension in New York, race has surfaced in the struggle for the mayoralty of America's biggest city.

Party primaries take place in New York City today with the Democratic contest being widely seen as polarized by race. One poll last week showed New York City incumbent Mayor Ed Koch trailing his black challenger, Manhattan Borough President David Dinkins, by 49 percent to 42 percent, as Dinkins gained 90 percent of the support of blacks and Koch gained 80 percent support among Jewish voters.[1]

The Wall Street Journal may have captured the situation in one headline: "New York Mayoral Primary Hinges on Race Issue. . . ," with the Journal reporter writing that

> Pollsters say the race-related killing of a black youth in the Bensonhurst section of Brooklyn last month has served as the lightening rod for the campaign.[2]

At the same time, a Washington Post reporter observed that:

> Dinkins' campaign has been galvanized by the recent murder of a black teenager in Bensonhurst, and he con-

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[1]Howard Kurtz, "The Polarization of N.Y. Democrats," The Washington Post, Sept. 10, 1989, p. A-8, and Don Terry, "Black Voters Say It's Time for Dinkins," New York Times, Sept. 10, 1989, p. 42.

[2]Neil Barsky, "New York Mayoral Primary Hinges on Race Issue as Koch Struggles to Win His Fourth Nomination," Wall Street Journal, Sept. 11, 1989, p. A-20.

> stantly talks about how he would try to ease racial tensions as the city's first black mayor.[3]

Though the New York Times endorsed Mayor Koch for a fourth term, in its lengthy editorial evaluating his candidacy, the editorial board stated that his

> strengths and weaknesses are what they have been since he took office almost 12 years ago. He retains his skill as an executive, but his capacity to govern remains impaired by his insensitivity to blacks.[4]

Other Racial Killings in the '80s

Whether a black wins the primary or even the Mayor's Office, one black New York City resident recently stated that, "I don't care, personally, who the Mayor is, things in this town have just gone too far. We don't feel safe here." A nurse's aide, the young woman is the niece of one of three black youths assaulted along with Yusef K. Hawkins, who was allegedly murdered by a white gang in Bensonhurst last month, and she is also the cousin of Michael Griffith, the man killed in the 1986 Howard Beach attack when white youths chased him into highway traffic.[5]

The family relationship of two victims to the nurse's aide may well be characterized as coincidental, but the recent killing has recalled other black victims of gang violence during this decade in New York City. They include Willie Turks, murdered in Gravesend in 1982; the Howard Beach death of Griffith in 1986; and the Staten Island death of Derek A. Tyrus last October.[6] (A more recent assault in Brooklyn did not result in death, but Paul Trotman of East Flatbush was reportedly surrounded by six white youths and struck in the head with a bat on August 16, 1989; he lay hospitalized in a coma at least a week.[7])

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[3]Howard Kurtz, "N.Y. Mayoral Primary Is Cliffhanger," Washington Post, Sept. 7, 1989, p. A-3.

[4]"The Case for Ed Koch--and His Duty," New York Times, Sept. 3, 1989, p. E-12.

[5]Michael T. Kaufman, "Despair Comes Twice to a Brooklyn Family," New York Times, Aug. 26, 1989, p. A-26.

[6]Howard W. French, "Hatred and Social Isolation May Spur Acts of Racial Violence, Experts Say," New York Times, Sept. 4, 1989, p. 31 (hereafter cited as "Times' H.W. French article").

[7]J. Zamgba Browne, "Brutal Race Attack Puts Black Youth in a Coma," Amsterdam News, Aug. 26, 1989, p. 1.

The Bensonhurst Case

As to the death of Hawkins, the available facts indicate that the 16-year-old and three friends had taken the subway to Bensonhurst and arrived after 9:00 on the evening of August 23rd. The four had gone to inquire about a used car advertised for sale by a young Greek immigrant living in Bensonhurst, a predominantly white neighborhood in Brooklyn. On their way to the car owner's apartment, the black youths were confronted by about 10 whites, some of whom were wielding bats and at least one of whom had a pistol. After four shots were fired at close range, Hawkins died from two shots to the chest.[8]

Several white youths were arrested soon after the incident and charged with assault, riot, aggravated harrassment, violations of civil rights, and menacing. Initially two were indicted for murder. A week after the incident, an 18-year-old white dropout surrendered to upstate police and was subsequently indicted in Brooklyn on two counts of second degree murder and also charged with other counts. Although the dropout has claimed not being present when Hawkins was shot, he has reportedly been identified by witnesses as the gunman at the shooting.[9] Subsequent court developments include additional murder indictments against two of the suspects.[10]

Many of the media accounts report that the white youths had been expecting to confront minority youths who were thought to have been invited to the birthday party of a white Bensonhurst female. The white youths reportedly included one who sought the attention of the female for himself. This motive was mentioned in several accounts including a lengthy New York Times article citing other factors discussed by six social scientists interviewed about the Bensonhurst murder.[11]

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[8]J.N. Baker, T. Clifton, K. Fararo, "A Racist Ambush in New York: Armed With Bats and a Gun, Whites Kill a Black Youth," Newsweek, Sept. 4, 1989, p. 25 (hereafter cited as "September 4, 1989 Newsweek article"), and Donatella Lorch, "The Car-Seller, Too, Feels Racial Killing's Impact," New York Times, Sept. 3, 1989, p. 40.

[9]Ralph Blumenthal, "Police Search for 18-Year-Old in Killing of Brooklyn Youth," New York Times, Aug. 26, 1989, p. 1, and Craig Wolff, "Youth Is Indicted as Bensonhurst Gunman," New York Times, Sept. 7, 1989, p. B-1.

[10]Marvin Howe, "4th Suspect Faces Murder Charge in Death of Youth in Bensonhurst," New York Times, Sept. 9, 1989, p. 28.

[11]Times' H.W. French article.

Subsequent Developments

After the incident, four protest demonstrations led by various blacks occurred, and on at least two occasions, the protestors were met with open hostility from some white onlookers. During one demonstration, a Bensonhurst resident was quoted as saying "This is Bensonhurst. It is all Italian. We don't need these niggers."[12] On the other hand, during an earlier march, 44 police officers and at least two demonstrators were reportedly injured when police attempted to prevent several thousand demonstrators from crossing the Brooklyn Bridge.[13]

The news media, as evidenced from the foregoing, not only covered the efforts by the criminal justice system to apprehend suspects but also ran numerous stories on bigotry, with the Bensonhurst case serving as the catalyst for a more general discussion. In addition, over 70 members of the business and labor communities took out a full-page Sunday New York Times advertisement "to express [their] outrage at the tragic death of 16-year-old Yusuf Hawkins . . . [and to] call on all New Yorkers to join [them] in making clear that racial hatred and bigotry are intolerable and must stop now and forever."[14]

Meanwhile, a national newsweekly reported that the New York City police recorded 286 bias-related crimes in 1985; however, "by 1987 the count jumped well past 400."[15] Upon being interviewed about the case, however, one sociologist stated that "We don't know whether things are getting better or worse, but the number of visible incidents is rising. . . . I'm not sure that there's an iceberg under the tip."[16]

Tino Calabia

TINO CALABIA, Field Representative
New York State Advisory Committee

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[12]Dennis Hevesi, "500 March in Bensonhurst for 4th Protest of Slaying," New York Times, Sept. 3, 1989, p. A-40.

[13]Ibid.

[14]"Yusuf Hawkins: 1973-1989," New York Times, Sept. 3, 1989, p. E-14.

[15]September 4, 1989 Newsweek article.

[16]Sam Roberts, "Once Again, Racism Proves to Be Fatal in New York City," New York Times, Sept. 3, 1989, p. E-6.

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

DATE: September 12, 1989

REPLY TO ATTN OF: Eastern Regional Division (ERD)

SUBJECT: New information on developments in the Jim Loo hate killing in Raleigh N.C.

TO: Melvin L. Jenkins
Acting Staff Director

Thru: John I. Binkley
Director, ERD

The following new information regards the Ming Hai (Jim) Loo murder case and the Commission's on-site factfinding in Raleigh, North Carolina on August 18, 1989. The report also supplements the earlier staff monitoring report on August 8, 1989. The earlier report and recent news clippings are appended as attachments A and B.

Wake County District Attorney Colon Willoughby reported to staff that since his meeting with Commissioners Buckley, Chan and Guess, several legal actions were concluded involving Robert Piche, 35, and Lloyd Piche, 29, who were charged with the Loo murder.

Charges against both men for inciting and engaging in riot have been dropped because of insufficient evidence. A charge of second degree murder against Lloyd Piche has been dismissed on the basis of no probable cause. Lloyd Piche pleaded not guilty to two misdemeanor charges of assault involving another Asian American who was with Loo at the time of the murder. Lloyd Piche was found guilty of the misdemeanors and sentenced to six months in jail. In the case of Robert Piche, probable cause was found and a grand jury issued a true bill of indictment on the charge of second degree murder. An arraignment on the charge is expected for either September 18 or 25, 1989, depending on Court scheduling.

Willoughby explained that second degree murder is a class C felony in Wake County punishable by a maximum of 50 years to life. If a defendant is found guilty, the judge who imposes sentence will have wide discretion but will probably use the State's presumptive sentence guidelines. The judge may also be influenced by a showing of aggravating or mitigating factors which could justify imposing a longer or shorter term than the guideline. The presumptive sentence for second degree murder is 15 years.

Willoughby said he is aware of newspaper reports that the FBI intends to monitor the local prosecution of the Loo case but his office has not been contacted on the matter by the agency.

Dr. Po Chan, chairman of the Jim Loo American Justice Coalition, formed on August 27, 1989, reported to staff that on the advice of legal counsel the group is urging the national office of the Organization of Chinese Americans (OCA) and similarly Federal agencies like the Commission and the FBI to assume a low key effort with respect to the case at this time. Their intent with this strategy is to minimize the opportunity for Piche's defense attorney to argue for leniency in the local courts based on the expectation that the defendant may face a more serious Federal charge. OCA executive director Melinda Yee said their office will defer to the local group's wishes. Special Agent Albert Koehler who is in-charge of the case for the FBI's Raleigh office was unavailable for comment.

Chan described the Jim Loo American Justice Coalition as multiracial, consisting of ten organizations. The Coalition formed principally to monitor the Wake County District Attorney's actions with regard to the Loo case. It also formed as a representative of the victim's family most of whom live in Charlottesville, VA.

EDWARD DARDEN
Civil Rights Analyst

attachments

Sources:
Dr. Po Chan, chairman, Jim Loo American Justice Coalition;
Mr. Franklin Chow, administrative assistant, Organization of Chinese Americans;
Ms. Christina Davis-McCoy, community educator and field coordinator, North Carolinians Against Racist and Religious Violence
Dr. Joseph DiBona, member, North Carolina Advisory Committee to the Commission;
Ms. L. Darlene Graham, member, North Carolina Advisory Committee to the Commission;
Mr. Donald Harris, director, Raleigh Human Resources Department Civil Rights Division;
Dr. Ping-Chuan Hu, president, Research Triangle Area Chinese American Society (TACAS)
Mr. C. Colon Willoughby, Jr., Wake County District Attorney;
Ms. Melinda Yee, executive director, Organization of Chinese Americans, Inc.

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

ATTACHMENT - A

DATE: August 8, 1989

REPLY TO ATTN OF: Eastern Regional Division (ERD)

SUBJECT: Hate killing in Raleigh, NC

TO: Melvin L. Jenkins, Acting Staff Director

In response to your request for information on yesterday, staff researched the following details of a recent incident of racial violence in Raleigh, N.C.

Mr. Ming Hai Loo, 24, of Cary, NC, an Asian American of Chinese ancestry died on Monday, July 31, 1989, as a result of blows to the head from the butt of a handgun sustained in an altercation with two white males in Raleigh, NC. Local police described the incident as racially motivated. Mr. Robert Cornelius Piche, 35, and his brother Mr. Lloyd Ray Piche, 29, are in police custody in Wake County jail, arrested on charges of murder, and awaiting indictment.

Newspaper accounts report the incident began early evening on Saturday, July 29, 1989, in the Cue-N-Spirits pool hall on Atlantic Avenue in Raleigh. Mr. Loo entered the pool hall with four companions, three of whom were also of Chinese ancestry and one of Vietnamese ancestry. Their group encountered verbal harassment from the suspects immediately. The harassment led to an altercation that spilled outside into an adjacent parking lot. Witnesses reported the suspects believed Loo and his party were Vietnamese and attacked them as symbols of the Vietnam war. During the fighting, Robert Piche apparently used a shotgun as a club to strike the victims but missed and lost the weapon while swinging it. He returned to his vehicle, obtained a handgun, and rejoined the fighting. Police charged that the handgun delivered the fatal blow which led to Loo's death.

Local news media reported the incident and Loo's funeral held on August 6, 1989 in Raleigh. According to Mr. Sean Bailey, reporter for the Raleigh News and Observer newspaper, who reported on Loo's funeral for the newspaper, there is a good deal of local interest in the case and he expects to file several more stories. He said Commissioner Sherwin T.S. Chan, through Gloria Lam, contacted the newspaper and suggested factfinding by the agency was likely to occur. Bailey asked several questions about Commission plans which staff referred to the press officer. ERD staff was also contacted by The Organization of Chinese Americans. The group asked what plans the agency has in connection with the incident.

Attached are copies of news articles staff obtained from the News and Observer and the Organization of Chinese Americans.

Sources: Sean Bailey, reporter, Raleigh News and Observer; and Franklin Chow, acting executive director, Organization of Chinese Americans.

JOHN I. BINKLEY
Director, ERD

Raleigh News and Observer, Aug. 1, 1989

Chinese slain in Raleigh pool hall attack

By NED GLASCOCK
Staff writer

A young Chinese man who had lived most his life in Raleigh was killed in what police described as a racially motivated attack at a pool hall, and police charged two men Monday in the killing.

Ming Hai Loo, 24, of 120 Byrum St., Cary, was hit on the back of the head with a pistol early Saturday outside the Cue-N-Spirits pool hall on Atlantic Avenue, police said. "Jim," as he was known to friends, was conscious when he was taken to Wake Medical Center early Saturday morning, but he died Monday at 8:06 a.m., a hospital spokesman said.

Police charged Robert Cornelius Piche, 35, with murder, carrying a concealed weapon and possession of drug paraphernalia. Lloyd Ray Piche, 29, was charged with murder. Warrants listed their addresses as "Anywhere." Both were being held without bond in the Wake County jail Monday.

Raleigh police Lt. C.R. Stinson said events leading to the attack began about midnight Friday at the Cue-N-Spirits in the Brentwood Shopping Center.

Jim Ta, 21, who said he was best friends with Mr. Loo, said a group of five young Asian men entered the pool hall. The suspects were already inside and began harassing them almost immediately, he said.

Lt. Stinson said the two white men "started pushing and shoving and using slang language toward the Orientals. They were saying they didn't like Orientals."

Mr. Ta, who was among the five, said the men told him and his friends that "they didn't like Vietnamese. The only reason they gave us was they said their brothers went over to Vietnam in the war, and they never came back."

The two whites did not realize, however, that only one of the five in Mr. Loo's group was Vietnamese. Mr. Loo was born in China and came to Raleigh when he was about 12.

"We didn't want to fight them," Mr. Ta said. "We all said to each other, 'Let's just avoid them.' "

But a few minutes later, things turned ugly.

"Jim Loo went up to the bar to buy a beer, and the guy came over and shoved him," Mr. Ta said. "They started arguing, and then all of a sudden it went outside."

Mr. Ta said he and his friends were trying to leave, but the two whites would not let them.

Lt. Stinson said one of the white men took a shotgun from a parked car and swung the butt of it at one of the group — Lanh Tang of Tivoli Court — but missed. The other white man tried to hold Mr. Tang, and the gunman swung a second time. But Mr. Tang got free, and the shotgun flew from the man's hands and broke on the ground, Lt. Stinson said.

The man took the weapon back to the car and returned with a pistol, the lieutenant said. The man swung it at Mr. Ta, but he ducked.

"I was beside Jim Loo," Mr. Ta said. "I saw him swing, so I stepped back, and he hit Jim Loo. He went down, and I kneeled down

See CHINESE, page 10A

Chinese is slain in attack

Continued from page 1A

beside him to see what's wrong. I pulled his hand from his eye, and I saw blood coming from under his eye."

Lt. Stinson said that Mr. Loo had fallen face first onto a broken Budweiser beer bottle, which slashed an inch-long cut under his left eye.

Meanwhile, Lt. Stinson said, a police officer operating radar nearby saw a crowd gathering in the parking lot and drove over to investigate. The gunman stuck the weapon in the rear of his waistband and ran around the back of the building, but the officer was able to catch both suspects.

At first, Mr. Ta said, his friend appeared not to be seriously injured.

"He was talking to me, telling me his head hurt," Mr. Ta said. "I thought he was going to be OK. Just his face was cut. I didn't know his brain was damaged."

No one else was seriously injured.

Mr. Ta said the group had never had trouble at the Cue-N-Spirits before.

About 11 p.m. Friday, Mr. Loo had gotten off work from his job as a waiter in a Chinese restaurant in Cary. "He said a bunch of people, friends, had invited him to play pool," said his boss and friend, Ivy Chiou.

He drove to the pool hall alone in his red Conquest, which he had bought with his earnings as a waiter. Mr. Loo had been saving his money so he could attend N.C. State University, said Nicole Langford, a friend of Mr. Loo's.

Her mother, Patty Langford, said the killing had shocked the area's Asian community. "I'm hearing a lot from the community: Why are we here? We came all this way to be killed? It's just not right."

Staff photo by Gary Allen

William Loo, 13, weeps at the graveside of his brother, Ming Hai; police say he was slain in a racially motivated attack

Chinese man buried as friends express fear

By [illegible] Staff Writer

As eight men struggled with Ming Hai Loo's purple coffin Saturday afternoon, the young Chinese man's mother cried to her dead son: "Don't be afraid."

But in the wake of the 24-year-old's death, it is the living who say they feel fear. Police have described the killing as racially motivated.

About 100 people attended Loo's funeral in Cary and in interviews expressed fright, outrage, shock and confusion about his death.

Robert C. Piche and Lloyd R. [illegible] have been charged in the slaying of Loo outside the Cue 'N' Spirits pool hall on Atlantic Avenue on July 29.

Witnesses have said assailants attacked Loo "because they didn't like Vietnamese" and because "their brothers went over to Vietnam in the war, and they never came back."

Loo came to the United States from China when he was 12. In the attack, he received a blow to his head from the butt of a pistol and died two days later. Four of his friends — three Chinese and one Vietnamese — witnessed the incident.

Hung Le, a Vietnamese friend of Loo's who was not present during the attack, shook his head in disgust and disbelief.

"His brothers go to Vietnam, never come back, that's absolutely not our fault," he said, referring to what the witnesses reported. "We come here because we can't live with communist people. If we wanted to kill American people, we would have stayed with North Vietnamese. We are here for freedom. We are on your side."

Loo's friend The Phan said the incident had shattered his image of Raleigh. "To me, Raleigh is the most peaceful city I've known," he said. "Now, it looks like the fear is coming to every Oriental here because Jim has been killed."

During the graveside service at Hillcrest Cemetery, Loo was buried in a ritual incorporating the traditions of Buddhism, Taoism and Confucianism.

By the grave, apples, bananas and melons covered a table and surrounded an incense burner and

See CHINESE, page 25A

Chinese bury Loo amid fear

Continued from page 25A

picture of Loo, draped in black. Like much about the ritual, the food was symbolic and intended to help the man in the afterlife. Similarly, Loo's favorite clothes were burned and "paper money" was dropped into his grave site and burned so he could buy what he needs in the hereafter.

"Burning the paper money can help him pass through any difficult times he may eventually encounter on his way to heaven," said Dr. Bruce Ballon, an ophthalmologist and student of China, in an interview at the funeral.

Loo's friends burned cigarettes for him and threw dirt on his coffin.

Throughout the 45-minute ceremony, Loo's mother, Kit Yu Loo, cried so loud and hard the muscles in her legs wrenched with each wail. In an interview, Diane Lee said Mrs. Loo, who spoke only Chinese, was repeatedly telling her son how much she loved him because she was unsure he knew that when he was alive.

"She was saying she was very strict with him when he was young," Mrs. Loo said. "She wanted him to know she loved him because when he was young, she was strict with him, making him come home and do his homework rather than letting him play with friends."

Staff photo by Gary Allen

Food and incense surround a picture of Ming Hai Loo during the slain man's funeral

At the start of the funeral, Mrs. Loo cried out to her son: "Your mother is here. Your father is here. Your friends are here. You must be brave."

His friends described Mr. Loo as "warm, sensitive and caring." For the past five years, he had worked as a waiter at the Empress of China restaurant in Cary. After saving his money, he recently enrolled in N.C. State University, where he intended to get a business degree.

Some members of the Oriental community in Raleigh said Loo's death reminded them of a similar killing in Detroit in 1982. Victor Chin, who was Chinese, died after two men beat him with a baseball bat outside a Detroit bar. One was an unemployed autoworker who thought the man was Japanese. Both men were acquitted, but public outrage triggered federal civil rights charges against the assailants; one was convicted.

"It's ridiculous that we, as Asian people living in North Carolina, have to worry about going out at night and being attacked because we're Asian, not Caucasian," said Deborah Hsu, a zoology major at Duke University. "It's very similar to the Vincent Chin case."

Mrs. Lee, who is white and married to Y.C. Lee, a Chinese, said the tragedy of Loo's death reveals a myth about the United States melting pot.

"Jim Loo's family came to America to pursue the American Dream, and now that dream has died with Jim Loo's death," she said. "He was deprived of his basic right to live because someone didn't like his appearance. To me, that's a tragedy. As Mario Cuomo has said, 'We're not a melting pot, we're a mosaic because we really haven't melted yet.'"

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世界日報 綜合新聞

World Journal 8/3/89

又一個「陳果仁」!?

誤爲越南人·兩名白人男子悍然行兇

盧明希遭槍托毆擊重傷不治

北卡州慘案·涉嫌種族歧視·僑社譁然

【本報記者余俐俐北卡洛麗市二日電】即將於今夏進入北卡州立大學就讀的二十四歲華裔青年盧明希，上週六（七月廿九日）凌晨被兩名白人男子誤爲越南人，以槍托擊打成傷，於三十一日清晨不治死亡。警方已將兩名兇嫌逮捕。由於此案含有濃厚的種族歧視色彩，已在當地大受矚目。

盧明希出生於中國大陸，在北卡州首府洛麗市完成高中教育，隨即在當地韓國華僑經營的皇后餐館打工，剛剛取得今夏大學入學許可。上週末下工後，與五名年輕朋友（其中一名爲越南裔），至北洛麗地區彈子房打彈子，而發生慘案。

據目擊者在警局表示，當五名年輕人進入彈子房時，兇嫌皮爾兄弟二人（Robert Piche，三十五歲，Lloyd Piche，二十九歲）已在內。挑釁幾乎立刻開始，兇嫌二人揚言不歡迎東方人，不喜歡越南人，因他們的兄弟參加越戰，從此即未回來。盧明希等五人有意避開事端，但兇嫌拿出槍來，指令數人至外面，又再至車內拿槍，以槍托擊打，盧明希逃避不及，遭打中後腦，倒地再被打到破裂的啤酒瓶，造成腦部嚴重受損，經送醫急救，延至週一（卅一日）清晨死亡。

兇嫌二人被捕後已被控謀殺、攜帶武器及毒品多項罪名，不准交保。兇嫌在偵訊時所登記地址爲「任何地方ANYWHERE」。

皇后餐館邱姓東主表示，盧明希爲一善良而勤奮工作的男孩，在皇后打侍者工已三年，與他感情親若子女。顧客也均成爲朋友，誰也沒有想到會有此意外。事發後，華人僑社前來慰問者甚衆，並有美國友人送花附卡片，對於社區發生這種事引以爲恥。

北卡州洛麗地區華人對此案極爲憤慨，當地唯一華人組織華美協會會長胡乘權，代表華人慰問由維吉尼亞州趕來的盧明希父母，並擬結盟社團的力量，對案情做更深入的了解，協助聘請律師，循司法途徑爲死者尋求公正公平的審判。

盧明希喪事已定週六（五日）舉行。

ATTACHMENT - B

Raleigh Times
aug 18, 1989

Orientals say they seldom encounte racial discriminatio

E.C.R.

By TREVA JONES
Staff writer

Some say racial hatred was responsible for the death of Jim Loo. But other Asians in the Triangle say they haven't faced outright animosity.

They say they can buy or rent homes, work, run their businesses and pursue their studies like anyone else. City and state agencies that investigate discrimination say they seldom receive a complaint from an Asian.

Dr. Jason C.H. Shih, a professor at N.C. State University, says he hasn't felt anti-Asian prejudice.

"I think there is enough room for everybody to grow here," he said.

But the slaying of Loo, who was born in Hong Kong, has Dr. Shih and other Asian-Americans concerned.

Ming Hai "Jim" Loo, 24, of Cary died two days after a July 29 attack outside a Raleigh billiard parlor. The two brothers charged with killing him, witnesses said, thought Loo was Vietnamese.

'We can only speak from our own feelings but we feel we are accepted.'

the Rev. Han-Sen Ch
Raleigh Chinese
Christian Church

"I think the racism is ri
there" in Loo's death, said
Shih, a professor of poultry
ence and a member of the Tr
gle Area Chinese American S
ety.

Today, a delegation of the U
Civil Rights Commission, wh
members are appointed by
president and Congress, is
Raleigh to talk with members
local Asian and civil rights orga
zations and to look into Lo
death. The group has no enfor
ment power, but the high-visib
ty visit is intended to relay
message of concern about

See ORIENTALS, page

Orientals report few acts of bias

Continued from page 1A

prosecution of the Loo case.

Robert C. Piche, 35, and Lloyd R. Piche, 29, have been charged with murder in the slaying.

The case also is being watched closely by the diverse population of Asian Americans in and around Raleigh.

There might be as many as 8,000 people of Asian extraction in the Triangle, with Chinese the most numerous. In recent years, refugees from Southeast Asia have settled here.

The Asians in the Triangle include many professional people attracted by Triangle universities and the Research Triangle Park. A number own their own businesses.

Asians have become part of the Triangle's social fabric. For example, Lillian Woo, born in Honolulu of Chinese parents, is executive director of the North Carolina Chapter of the American Institute of Architects and was a candidate for state auditor in 1976.

Dr. Paul Z. Zia, a Chinese man who has lived in Raleigh nearly 30 years, headed the NCSU civil engineering section for 10 years and now is a distinguished university professor.

Several dozen people of Asian descent were interviewed in the wake of the Jim Loo slaying. None reported discrimination in such situations as finding housing, getting a doctor or getting children into schools.

Some, however, said they had heard their share of racial insults.

Until the night Jim Loo was attacked, frequent verbal slurs were the strongest kind of racial intolerance his friend Lanh Tang had experienced.

"Most Orientals expect it," said Mr. Tang, who was with Loo at the pool hall that night. Mr. Tang, a waiter in a local Chinese restaurant, is Vietnamese.

Michael Lee, who is studying at NCSU on a grant from the Taiwanese government, said some Asians worry that Loo's murder left them vulnerable to racial attack. "People feel someday this might happen to me," he said.

Mr. Lee and his wife, Ada, will return to Taiwan with their two children in a couple of years. "The first thing I thought when I heard the news [about Loo] was I can go back home and my son will not have to deal with this," Mrs. Lee said.

> 'They [Asians] are part of the community, but because of the language, they may no be totally integrated into the society.'
>
> Donald Hong, UNC-CH professor

But the Rev. Han-Sen Che pastor of the Raleigh Chines Christian Church, said his parish ioners had not told him of an anti-Asian sentiment in the Trian gle.

"We can only speak from ou own feelings," said Mr. Chen, wh has been in the Triangle fiv months, "but we feel we ar accepted."

Donald Hong, a visiting assis tant professor of pharmacy at th University of North Carolina a Chapel Hill, said he thoug Asians were well-integrated int the community — on the surface

"They are part of the commun ty, but because of the language they may not be totally integrate into the society," said Mr. Hong who lives in Raleigh.

Mr. Hong said he had exper

enced some prejudice. Recently, some teenagers made remarks and nonsense sounds, as if they were trying to speak Chinese, when they saw Mr. Hong.

"It's just basically this underlying thing," he said. "I'm not sure they mean to be derogatory. It's happened so many times."

David Sungsoo Kang, 26, a Korean native who owns Far East Collections on Hargett Street, chose Raleigh four years ago as a business location because of the area's growth.

Mr. Kang said many Asians weren't well-integrated in the community because they had lived in it only a short time. Others, such as teachers and professors, stay longer and are part of the community, he said.

"Sometimes if you go into more rural areas, people stare" at Orientals, said Mr. Kang, although he doesn't think it is prejudice.

"It's more of a novelty," he said of his Korean features.

In Raleigh, Lutheran Family Services assists about 150 Asians annually with housing, medicine, social support, food, furniture and English. Family Service workers also help Asians with adjustment problems and culture shock.

Most people are very supportive of the Asians, said Gove G. Elder, one of the service's case managers, but some endure racial remarks or slurs.

City and state human relations agencies have heard few complaints from Asians.

The Loo case is the first involving an Asian that the Raleigh Human Resources and Human Relations Advisory Commission has heard, said Jessie Cannon, the group's chairman.

Jim L. Stowe, director of the North Carolina Human Relations Council, said his office received about 3,000 complaints a year and did full investigations on about 100 to 150 of them. He recalls only one case involving an Asian, earlier this year.

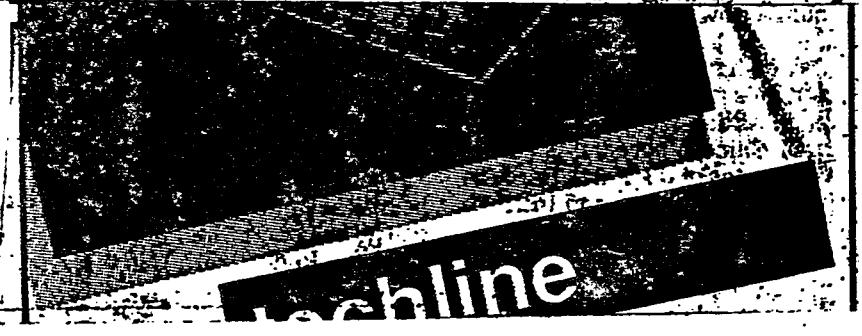
"That doesn't mean it hasn't happened, but we've up to this point not heard of it," she said.

Three Civil Rights Commission members are expected to interview a number of people in the Triangle, including representatives of Asian groups, police, an assistant district attorney and officials of the city human relations commission. The group will make a report to the full Civil Rights Commission next month.

The 1980 census counted about 4,000 Asians among the 531,167 residents of Wake, Durham and Orange counties. It counted about 2,500 in Wake, 1,000 in Durham and 300 in Orange. The largest group, 1,225, was Chinese. Next largest was Asian Indian, 927; Japanese, 538; Korean, 508; Vietnamese, 476; and Filipino, 270.

But the number has increased greatly since then. One indication is the number of Asian students enrolled in public schools in the three counties. In 1981, the first year such figures were kept, there were 857 Asian students in Triangle schools. By 1988, that figure had risen to 2,080.

Ned Glascock contributed to this story.



Raleigh
News & Observer
Aug 18, 1989

Staff photo by Gary A
David Sungsoo Kang, left, and Jon Choi chose Raleigh fo
their Far East Collections store because of its growth

Asians in Triangle say bias not overt

By TREVA JONES
Staff writer

Some say racial hatred killed Jim Loo, but other Asians in the Triangle say they haven't faced outright animosity.

They say they can buy or rent homes, work, run their businesses and pursue their studies like anyone else. City and state agencies that investigate discrimination say they seldom receive a compla
from an Asian.

Dr. Jason C.H. Shih, a p
fessor at N.C. State Unive
ty, says he hasn't felt a
Asian prejudice.

"I think there is enou
room for everybody to gr
here," he said.

But the slaying of Loo,
was born in Hong Kong,
Dr. Shih and other Asi
Americans concerned

See ORIENTALS, page 16A

Orientals report few acts of bias

Continued from page 1A

Ming Hai "Jim" Loo, 24, of Cary died two days after a July 29 attack outside a Raleigh billiard parlor. The two brothers charged with killing him, witnesses said, thought Loo was Vietnamese.

"I think the racism is right there" in Loo's death, said Dr. Shih, a professor of poultry science and a member of the Triangle Area Chinese American Society.

Today, a delegation of the U.S. Civil Rights Commission, whose members are appointed by the president and Congress, will be in Raleigh to talk with members of local Asian and civil rights organizations and to look into Loo's death. The group has no enforcement power, but the high-visibility visit is intended to relay a message of concern about the prosecution of the Loo case.

Robert C. Piche, 35, and Lloyd R. Piche, 29, have been charged with murder in the slaying.

The case also is being watched closely by the diverse population of Asian Americans in and around Raleigh.

There might be as many as 8,000 people of Asian extraction in the Triangle, with Chinese the most numerous. In recent years, refugees from Southeast Asia have settled here.

The Asians in the Triangle include many professional people attracted by Triangle universities and the Research Triangle Park. A number own their own businesses.

Asians have become part of the Triangle's social fabric. For example, Lillian Woo, born in Honolulu of Chinese parents, is executive director of the North Carolina Chapter of the American Institute of Architects and was a candidate for state auditor in 1976. Dr. Paul Z. Zia, a Chinese man who has lived in Raleigh nearly 30 years, headed the NCSU civil engineering section for 10 years and now is a Distinguished University Professor.

Several dozen people of Asian descent were interviewed in the wake of the Jim Loo slaying. None reported discrimination in such situations as finding housing, getting a doctor or getting children into schools.

Some, however, said they had heard their share of racial insults.

Until the night Jim Loo was attacked, frequent verbal slurs were the strongest kind of racial intolerance his friend Lanh Tang had experienced.

"Most Orientals expect it," said Mr. Tang, who was with Mr. Loo at the pool hall that night. Mr. Tang, a waiter in a local Chinese restaurant, is Vietnamese.

Michael Lee, who is studying at NCSU on a grant from the Taiwanese government, said some Asians worry that Loo's murder left them vulnerable to racial attack. "People feel someday this might happen to me," he said.

Mr. Lee and his wife, Ada, will return to Taiwan with their two children in a couple of years.

"The first thing I thought wh
heard the news [about Loo] w
can go back home and my son
not have to deal with this," M
Lee said.

But the Rev. Han-Sen Ch
pastor of the Raleigh Chin
Christian Church, said his
rishioners had not told him of
anti-Asian sentiment in the Tri
gle.

"We can only speak from
own feelings," said Mr. Chen, w
has been in the Triangle f
months, "but we feel we
accepted."

Donald Hong, a visiting
sistant professor of pharmacy
the University of North Carol
at Chapel Hill, said he thou
Asians were well-integrated
the community — on the surfa

"They are part of the c
munity, but because of the l
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Three Civil Rights Commission members are expected today to interview a number of people in the Triangle, including representatives of Asian groups, police, an assistant district attorney and officials of the city human relations commission. The group will make a report to the full Civil Rights Commission next month.

While there might be 8,000 Asians living in the Triangle, there is no recent documented estimate by the U.S. Bureau of the Census, by school systems or local and state planning agencies.

The 1980 census counted about 4,000 Asians among the 531,167 residents of Wake, Durham and Orange counties. It counted about 2,500 in Wake, 1,000 in Durham and 200 in Orange. The largest group, 1,225, was Chinese. Next largest was Asian Indian, 927; Japanese, 538; Korean, 508; Vietnamese, 476; Filipino, 270; Hawaiians, 70; Guamanian, 4 and Samoans, 11.

But the number has increased greatly since then. One indication is the number of Asian students enrolled in public schools in the three counties. In 1981, the first year such figures were kept, there were 857 Asian students in Triangle schools. By 1988, that figure had risen to 2,080.

Ned Glascock contributed to this story.

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

September 14, 1989

MEMORANDUM FOR THE COMMISSIONERS

SUBJECT: Supplemental Commission Meeting Briefing Book

This notebook contains the following documents:

1. Memorandum to the Commissioners on the Status of FY 1990 Appropriations
2. Memorandum on the Administration of Justice in the Context of Public, Nonviolent Demonstrations
3. Memorandum on Monitoring of Racial Incidents in Bensonhurst, New York; Raleigh, North Carolina, and Virginia Beach, Virginia
4. Redraft of Statement on Bigotry and Violence
5. Review of FY 1989 Activities
6. Status of Earmarks through September 9, 1989

MELVIN L. JENKINS
Acting Staff Director

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

September 13, 1989

MEMORANDUM FOR THE COMMISSIONERS

SUBJECT: Status of FY 1990 Appropriations

As you are aware, the House voted zero funding for the Commission due to lack of authorization legislation. However, a Senate Subcommittee for Appropriations for the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies recommended that the Commission be funded at the same level as of FY 1989, $5,707,000. The matter will go before the full Appropriations Committee for consideration (see attached).

I will keep you apprised of further developments as they occur.

MELVIN L. JENKINS
Acting Staff Director

Attachments

COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION

SALARIES AND EXPENSES

Appropriations, 1989	$6,936,000
Budget estimate, 1990	14,589,000
House allowance	14,300,000
Committee recommendation	14,300,000

The Committee recommends an appropriation of $14,300,000. This is $7,364,000 more than the fiscal year 1989 appropriations to date but $289,000 below the budget estimate and the same as the House allowance. The recommended increase is needed to restore amounts reduced in fiscal year 1989 due to the availability of unobligated balances, which are not available in fiscal year 1990.

The Commission is authorized by Public Law 98–101 and was activated during fiscal year 1985. The Commission plans and develops activities, encourages participation by private organizations and State and local governments, coordinates activities throughout all the States, and serves as a clearinghouse for the collection and dissemination of information about bicentennial events and plans.

The funds recommended in the bill will provide for the requested salaries and expenses of the members of the Commission, the executive director and permanent staff members and other expenses, including travel, communications, rental of space, printing, and other administrative items.

The Committee has included $705,000 to be made available to the National Park Service for the purchase of the historic landmark house and surrounding 25 acres to establish the Charles Pickney National Historic Site as authorized in Public Law 100–421. Snee Farm, the estate of Charles Pickney, is one of the 13 historic homesteads associated with a framer of the Constitution that has not been destroyed by development. The purchase of the house and property will permit the establishment of this national historic site.

COMMISSION ON CIVIL RIGHTS

SALARIES AND EXPENSES

Appropriations, 1989	$5,707,000
Budget estimate, 1990	7,857,000
House allowance	
Committee recommendation	5,707,000

The Committee recommends an appropriation of $5,707,000, the same amount as the fiscal year 1989 appropriations to date. The recommendation is $2,150,000 below the budget request, but $5,707,000 more than the House allowance which did not provide for this item.

The Committee recommends continuing the restrictions in force in 1989. Funding earmarks are included for regional offices and State advisory committees ($2,000,000) and monitoring of civil rights enforcement ($700,000).

COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION

SALARIES AND EXPENSES

For necessary expenses of the Commission on the Bicentennial of the United States Constitution as authorized by Public Law 98–101 (97 Stat. 719–723), $14,300,000, *to remain available until expended, and in carrying out the purposes of this Act, the Commission is authorized to enter into contracts, grants, or cooperative agreements as directed by the Federal Grant and Cooperative Agreement Act of 1977 (92 Stat. 3; 31 U.S.C. 6301, of which $705,000 shall be available to the National Park Service to carry out provisions of Public Law 100–421, and* of which $7,500,000 is for carrying out the provisions of Public Law 99–194, including $3,142,000 for implementation of the National Bicentennial Competition on the Constitution and the Bill of Rights and $4,358,000 for educational programs about the Constitution and the Bill of Rights below the university level as authorized by such Act.

COMMISSION ON CIVIL RIGHTS

SALARIES AND EXPENSES

For necessary expenses of the Commission on Civil Rights, including hire of passenger motor vehicles $5,707,000, of which $2,000,000 is for regional offices and $700,000 is for civil rights monitoring activities: Provided,

That not to exceed $20,000 may be used to employ consultants: Provided further, That not to exceed $185,000 may be used to employ temporary or special needs appointees: Provided further, That none of the funds shall be used to employ in excess of four full-time individuals under Schedule C of the Excepted Service exclusive of one special assistant for each Commissioner whose compensation shall not exceed the equivalent of 150 billable days at the daily rate of a level 11 salary under the General Schedule: Provided further, That not to exceed $40,000 shall be available for new, continuing or modifications of contracts for performance of mission-related external services: Provided further, That none of the funds shall be used to reimburse Commissioners for more than 75 billable days, with the exception of the Chairman who is permitted 125 billable days. Provided further, That the General Accounting Office shall audit the Commission's use of this appropriation under such terms and conditions as deemed appropriate by the Comptroller General and shall report its findings to the Appropriations Committees of the Senate and House of Representatives.

NEWS & OBSERVER
RALEIGH, N. C.

AUG 11 89

Groups to monitor trial in death linked to racism

By SEAN M. BAILEY
Staff writer

Representatives of several groups against racial and religious violence said Thursday that they would monitor the state's prosecution of two brothers in the case of a young Chinese-American who died in what police described as a racially motivated attack.

"Our demand is simple and fair; we demand that justice be done," said Raymond S.H. Yang, a member of the Triangle Area Chinese American Society. "To achieve that goal, we demand that the most experienced and best prosecutor be assigned to Jim Loo's case."

At a news conference at the Raleigh Municipal Building, representatives of seven groups denounced the slaying of Ming Hai Loo, 24, of Cary, and promised to monitor the prosecution.

Mr. Loo died after being attacked by two men who allegedly said that they didn't like Vietnamese because of kin who "went over to Vietnam in the war and never came back."

Robert C. Piche and Lloyd R. Piche have been charged with murder in the July 29 slaying outside the Cue-N-Spirts pool hall on Atlantic Avenue in North Raleigh.

Christina Davis-McCoy, a member of North Carolinians Against Racist and Religious Violence, said her group and others wanted authorities to know that the case would be watched closely.

"We need to name this death for what it was, racially motivated, and as a community come to terms with this racism," Ms. McCoy said.

C. Colon Willoughby, Wake district attorney, was on vacation and could not be reached. Indictments are expected in the case next week.

Ms. McCoy said there had been signs of growing anti-Asian sentiment. For instance, she said, handbills appeared on telephone poles last spring with the message "Keep America, America" and labeling Japan "the silent invader."

"The rise of anti-Asian-American nativism is frightening," she said. "It is critical that all the citizens of Raleigh and the state of North Carolina stand by the family of Mr. Loo and reject the sentiments that brought his death.

"We look to the Wake County district attorney's office to pursue with vigor the prosecution of Mr. Loo's assailants. We hope Mr. Willoughby will not lose sight of the crime's racial motivation."

On Tuesday, members of the U.S. Commission on Civil Rights announced they would conduct a fact-finding tour to Raleigh. They expect to meet with police officials, the district attorney's office and members of the local Asian community.

WASHINGTON, D.C. 20005

Front Page | Edit Page | Other Page

AUG 10 1989

RALEIGH, NC
THE CAROLINIAN

WEEKLY--7,626

Murderous Hate

City Condemns Racial Atta[illegible]

Two [illegible] In Brutal Altercation

[illegible] Members of the U. S. Commission on Civil Rights will visit Raleigh next week to gather information on a murder police say was racially motivated. [illegible] The murder of Chinese [illegible] [illegible] Hai Loo, 24, at a pool room in North Raleigh has brought concern from a range of human rights groups as well as condemnation of the incident from the City of Raleigh Human Resources and Human Relations Advisory Commission.

[illegible]

[illegible] violence [illegible] North Carolina has often led the country in bigoted attacks against black people and gay people in the 1980s. We extend our sympathy to the entire Asian-American community in North Carolina and intend to work to let them know the alleged actions of the Piche brothers do not represent the feelings of the majority of North Carolinians [illegible]

Loo's murder takes place in a rising tide of bigoted violence directed against African-Americans, Asian-Americans and others in the United States. A 1986 U. S. Civil Rights Commission report concluded that anti-Asian violence was a national problem. According to a Wall Street Journal article, the U. S. Department of Justice said that anti-Asian incidents rose 62 percent in 1985

(See HATE MURDER, P. 2)

HATE MURDER

(Continued from page 1)

over the year earlier.

[illegible]oo died after he was struck on the he[illegible] with a pistol outside a pool hall Ju[illegible] 29 in the Brentwood Shopping Cen[illegible]r. According to Raleigh police, Loo [illegible]as killed in an altercation that start[illegible] after racial slurs were made by you[illegible] men who throught Loo and friends [illegible]ith him were Vietnamese.

Vietn[illegible]ese, African-Americans and His[illegible]ics live in the area and frequent the pool room. According to some residents the area has major problems with drugs and other crimes and most recently more racial incidents in front of a convenience store and near the apartment complexes.

Voting at its meeting Aug. 2, the Human Resources and Human Relations Advisory Commission expressed its regret for the "senseless attack and killing" and asked all citizens of Raleigh to respect the civil rights and human dignity of all citizens regardless of their differences."

The commission called on the Mayor and the City Council to appoint a member of the Asian community the Commission and promised to seek information from the Asian community about racism its members have encountered.

The commission also urged the Raleigh Police Department to give special attention to this homicide and any other hate crimes reported in Raleigh.

"There is no place for violent and murderous hate in Raleigh," the commission stated in the resolution. "Civil rights are for all persons."

The four members of the U. S. Commission on Civil Rights will investigate the killing and report to the full commission, whose eight members are appointed by the president and Congress.

The visit might result in a recommendation from the Commission that its North Carolina advisory committee conduct a study of bigotry and violence in the state.

Police charged Robert Cornelius Piche, 35, with murder, carrying a concealed weapon and possession of drug paraphernalia. Lloyd Ray Piche, 29, was charged with murder.

Police say the two white men "started pushing and shoving and using slang language toward the Orientals. They were saying they did not like Orientals."

Police said one of the white men took a shotgun from a parked car and swung the butt of it at one of the group, but missed. The gunman swung a second time and the shotgun flew from the man's hand and broke on the ground.

The man took the weapon back to the car and returned with a pistol with which he struck Loo.

The events leading to the attack began about midnight at the Cue-N-Spirits in the Brentwood Shopping Center and the only reason given for the attack was the suspects said they did not like Orientals, their brothers went over to Vietnam in the war and never came back.

Loo was Chinese.

Raleigh News and Observer Aug. 9, 1989

Commission to study Asian's death

By SEAN M. BAILEY
Staff writer

Four members of the U.S. Commission on Civil Rights will come to Raleigh next week to investigate the killing of a young Chinese man, which police say was racially motivated.

They will gather information about the killing, which happened outside a North Raleigh pool hall July 29, and report to the full commission, whose eight members are appointed by the president and Congress.

Melvin Jenkins, acting staff director of the commission, said Tuesday that while it has no enforcement power, members often engage in "moral persuasion" as they follow up on incidents of racial violence. When the four members come to Raleigh Aug. 18, they intend to meet with police, the Wake District Attorney's Office and members of the local Asian-American community.

The visit might result in a recommendation from the commission that its North Carolina advisory committee conduct a study of bigotry and violence against Asian-Americans living in the state, he said.

Sherwin Chan, a commission member from California, said that at this stage the group's mission is strictly to learn what happened.

"Our only plans are for fact-finding," he said. "I don't have any reason to believe justice is not being done. So far I have faith in the system."

The commission members will investigate the death of Ming Hai Loo, who police said was attacked by two men who said they did not like Vietnamese.

Witnesses have said that Loo's attackers said "their brothers went over to Vietnam in the war, and they never came back." They said the men had attacked Loo and four of his friends, first swinging the butt of a shotgun, which later shattered on the ground, and then hitting Loo in the head with the butt of a pistol. Loo died two days later.

Police have charged brothers Robert C. Piche and Lloyd R. Piche with murder. A Wake grand jury is expected to consider indictments in the case later this month.

C. Colon Willoughby Jr., Wake district attorney, said his office was gathering information on the incident, but he said its actions would not be influenced by racial considerations.

Chinese-Americans in Raleigh have expressed concern that the incident not turn out like a similar one in Detroit in 1982.

In that case, two men, including a laid-off autoworker, beat Vincent Chin to death, believing he was Japanese. The men were acquitted of murder, but outrage in the Chinese-American community led to federal prosecution of the men on civil rights charges. One was convicted.

Last week, the Raleigh Human Resources and Human Relations Advisory Commission passed a resolution condemning the killing. It also asked the City Council to appoint a member of the local Asian-American community to its board.

8/9/89
News & Observer

Asian's death target of commission probe

By SEAN M. BAILEY
Staff writer

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Sherwin Chan, a commission member from California, said that at this stage the group's mission is strictly to learn what happened.

"Personally, I'm very concerned," he said. "But everything must be based in fact."

He said the group had no intention of interfering with the legal process.

"Our only plans are for fact-finding," he said. "I don't have any reason to believe justice is not being done. So far I have faith in the system."

The commission members will investigate the death of Ming Hai Loo, who police said was attacked by two men who said they did not like Vietnamese.

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See PANEL, page 2C

Panel to probe death

Continued from page 1C

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Press Intelligence, Inc.
WASHINGTON, D.C. 20001
Page Page Page Other
RALEIGH, NC
TIMES AUG 9 1989
E - 32,809 88

Asian's death target of rights probe

E.C.R (2)

By SEAN M. BARLEY
Staff writer

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See CIVIL RIGHTS, page 7A

Civil rights panel looks into slaying

Continued from page 1A

...session in the state later this month.

C. Colon Willoughby Jr., Wake district attorney, said his office was gathering information on the incident, but he said its actions would not be influenced by racial considerations.

"A decision to prosecute cannot be based on the race of the victim or the race of the defendant," he said.

Chinese-Americans in Raleigh have expressed concern that the incident will turn out like a similar one in Detroit in 1982.

In that case, two men, including a laid-off autoworker, beat Vincent Chin to death, thinking he was Japanese. The men were acquitted of murder, but outrage in the Chinese-American community led to federal prosecution of the men on civil rights charges. One was convicted.

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I-887

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

SEP 12 1989

DATE: September 12, 1989

REPLY TO
ATTN OF: ERD

SUBJECT: Virginia Beach, Virginia Violence

TO: Melvin L. Jenkins
Acting Staff Director

Attached is a preliminary report of the incidents in Virginia Beach and the conditions and history leading to those incidents on the 1989 Labor Day Weekend.

John I. Binkley
Bobby D. Doctor

Attachments: Newsclips

INTRODUCTION

During Labor Day weekend in Virginia Beach, Virginia, the nation was shocked to see yet another civil disturbance with racial connotations. Approximately 100,000 visitors were in Virginia Beach. Mostly young blacks, many of whom are students were attending, by ever increasing numbers, an informal gathering of black fraternities that began 10 to 12 years ago on a private beach that has become known as "Greekfest" as it has expanded greatly. This is described in more detail in the background section.

Virginia Beach is a rapidly growing city of over 400,000 residents at the mouth of the Chesapeake Bay. It shares an area known as the Tidewater or Hampton Roads with Norfolk, Chesapeake, Portsmouth, Newport News, and Hampton. The population of this area is over one million. There are many military installations in the area and a large transient population.

The black population of Virginia Beach is about 10 percent as is the black percent on the police force. There is one black city councilman elected from a predominantly black district. Some council members are elected from districts, others at large. One person characterized the general racial conditions in Virginia Beach as more conservative than racist. Until recently there were no blacks in top management in the city government. There are now a few, including the personnel

manager. The low black population and its subsequent lack of representation in government contrasts sharply with some of its neighbors where up to 50 percent of the population is black. There is a black mayor in Newport News and until recently, one in Portsmouth. The inference drawn by one person is that the low black population leaves them without much influence in Virginia City.

After the incidents over Labor Day weekend, staff was asked to do a rapid review of the situation. Two staff members spent two days in Virginia Beach and interviewed public officials and private individuals whose names and positions are listed in the Appendix. In addition, staff attended the first full-blown press conference by the city officials in the aftermath of the weekend.

This is, by time constraints, a limited report on a long-developing, complex situation which needs a more thorough investigation including confirming statements and interviews on which to build meaningful conclusions and recommendations.

BACKGROUND TO GREEKFEST

September 1985

The sixth Labor Day beach party was held at Croatan Beach. It is believed that this traditional beach party started as a word-of-mouth event between Hampton and Howard Universities. For the first time, promoter Theodore Holloway of Theorac Promotions in Adelphi, Maryland, sponsored an event at the Dome. Approximately 500 persons attended the promoter's "East Coast College Jam" party at the Dome.

After the Labor Day events of 1985 and the growing number of college students attending, letters were written by city officials to the Presidents of Old Dominion University and Norfolk State University, to open a channel of communication regarding the Labor Day Beach Party and to solicit their assistance. The University presidents indicated they were cognizant of the beach party celebration, but emphasized that the function was organized by student body associations from local universities, fraternities and alumni association.

September 1986

Approximately 8,000 people attended the seventh Labor Day Beach Party held at Croatan Beach, resulting in overcrowding and parking problems. The Croatan residents and civic league express concerns about the size of the crow, traffic congestion and emergency vehicle access to their community. During the 1986 Labor Day weekend, the promoter held a one night event at the

Dome with a capacity crowd of 1,800 in attendance and with an estimated 1,500 to 2,000 people waiting outside. The event closed early due to overflow crowds.

November 1986

The city again sought assistance of local universities. On November 12, 1986, city officials met with representatives from Old Dominion, Norfolk State, and Hampton Universities and representatives from the South Rudee Shores Civic League and Croatan residents. The consensus was that Croatan Beach was not a suitable location for the annual beach party due to a lack of parking, restroom facilities, and square footage of beach area. Emphasis was placed on organizing the Labor Day activities at another beach that would serve the needs of the attendees. Camp Pendleton was recommended as a potential site. Representatives from the three local universities agreed to meet with black social organizations on campus to discuss alternate sites for 1987 Labor Day activities.

February 1987

The Deputy City Manager met with Major General John Castles and requested the use of Camp Pendleton as a site for the Labor Day beach party. The request was denied due to a conflict with long-range plans for this area.

May 1987

Promoter Teddy Holloway agreed that the crowd needed to be redirected to the oceanfront area and away from the small beach at Croatan.

The Deputy City Manager sent letters to the Dean of Students at Hampton University and Norfolk State University asking that they discourage the students from using Croatan Beach due to "severely limited parking, lack of public restrooms and lifeguard services and limited ingress/egress to the community." The letter emphasized the use of the oceanfront public beaches as an alternate.

August 1987

The Deputy City Manager sent two letters to the Pan Hellenic Council of more than 30 identified universities and colleges. The letters discouraged the use of Croatan Beach and suggested the use of the oceanfront beaches and included a list of regulations the city wanted to emphasize.

September 1987

During the Labor Day weekend of 1987, thousands of students held their party at the oceanfront beaches and about 300 remained at Croatan. Due to overcrowding of the Dome in 1986, the city moved the promoter's events to the Pavillion. The promoter extended the events to include two nights. The Pavillion was filled to capacity of 7,500 with no major problems occurring.

1988

Because events in 1987 did not include any major incidents, it was agreed that students would again be diverted to the oceanfront beach and letters were again sent to the Pan Hellenic Councils and local universities and colleges. The Pavillion was

rented to the promoter for an additional third night of events. In 1988, the promoter named the Labor Day Beach party as "Greekfest."

September 1988

On Friday night of Labor Day weekend, the promoter's Welcome Party at the Pavillion had limited attendance. On Saturday night a beach party was sold out to a capacity crowd of 5,400. On Sunday, the capacity was 7,500. Due to gate-crashing, the crowd inside grew to 9,000 while approximately 3,000 persons gathered outside the building. There were minor injuries, behavioral and crowd control problems and traffic gridlock that prevented emergency vehicle access to the Pavillion. This caused serious concern about the Pavillion's capacity to handle such a large event and about the safety and welfare of Pavillion employees and the public in attendance. During the weekend, police reported pedestrian and vehicular traffic on Atlantic Avenue heavier than on any other weekend. Crowds stayed out on the streets later than usual (5:00 a.m. instead of 3:00 a.m.) and grew from an estimated 20,000 on Friday to an estimated 40,000 persons on Monday night. Crowd control and traffic problems became serious. Traditionally, on Monday night of Labor Day the crowds disperse by 6:00 p.m., but in 1988 crowds were estimated at approximately 40,000 by 6:00 p.m. Disorderly behavior occurred, bottles and other missiles were thrown at police from hotels, pedestrian traffic came to a virtual standstill and there were several groups of people causing disturbances up and down Atlantic Avenue.

City officials met with the promoter immediately after the Labor Day weekend and in the months following. It was determined that the Pavillion was no longer large enough to accommodate the large crowd at "Greekfest." The city suggested larger facilities that might have the capacity to handle the crowd to the promoter and notified him by letter on September 22, 1988, that the Pavillion would not be available for "Greekfest 1989."

During this period city officials were being advised and assisted by staff of the Community Relations Service of the U.S. Department of Justice in preparing for the 1989 Labor Day weekend. Among other things, the city engaged a consultant who is an expert on demonstration and crowd control.

January 1989

As a precaution and in response to the problems identified with large holiday crowds, especially those of college-age, the city began researching other resort cities to see how they handle these situations. Representatives from the city's police department and the convention and visitor development department visited the cities of Ft. Lauderdale and Daytona Beach, Florida.

After the 1988 Labor Day disturbances, merchants petitioned the city to keep "Greekfest" celebrants out of the city. In partial response the city council adopted new city ordinances to help ensure public safety and orderly conduct by visitors and residents throughout the year. These ordinances covered drinking in public, objects thrown from windows and the restriction or regulation of the movement of people and vehicles by police.

April 1989

The city manager appointed a Beachfront Events Committee to plan to accommodate the unique needs of affinity groups through communications and law enforcement enhancements. Between April and August, 1989, this committee met on 10 occasions and took four tours of the oceanfront area during peak times to determine how to best handle a large crowd.

June 1989

City staff and the Beachfront Events Committee Chairman met with promoters of "Greekfest" to help identify alternate sites for promoting the event. It was determined that a stadium or park environment with ample parking space was necessary to accommodate the needs of the promoter.

July 1989

Until July 8, the city was not aware that a decision had been made by the fraternities and sororities or the promoter for "Greekfest" to return to Virginia Beach in spite of limited facilities and resources. On that date, a student picnic was held in Phiadelphia, Pennsylvania and reportedly 60,000 handbills were distributed encouraging students to attend "Greekfest 1989" in Virginia Beach.

Throughout the summer, additional efforts were made to inform visitors and residents of the new local ordinances:

- Beginning in early July, the police department printed and distributed brochures explaining city ordinances to oceanfront hotels and motels and provided that same

brochure to hotels and motels for mailing to pre-registered guests.

- o In July, the office of public information placed and advertisement describing local ordinances and regulations in the Beacon. That same advertisement was placed in the Beacon during the week prior to Labor Day and in This Week At The Beach publication.
- o In August, the office of public information sent a press release with the same local ordinance information to local print, radio, and television representatives. This same information was aired on the city municipal cable access station, MCN 29 and on the Beach Cable System operating exclusively at the oceanfront.
- o An additional 80,000 local ordinance brochures, including 30,000 with an insert of hotel regulations, were distributed prior to and during the Labor Day weekend by the Courtesy Patrol, hotels/hotels and the visitor information center.

August 1989

The city's existing Courtesy Patrol operated by Ocean Occasions was enhanced for the Labor Day weekend by the addition of volunteers from the adult alumni community leadership. SuperHost training was provided to these volunteers in the week prior to Labor Day. These volunteers were on the boardwalk and Atlantic Avenue until midnight each day of the Labor Day weekend.

The police department expanded services at the oceanfront for the Labor Day weekend including arrangements for possible assistance from the Virginia State Police and the National Guard Military Police. The police chief recorded a message to the citizens on MCN 29 describing the precautionary measures taken to ensure a safe and enjoyable environment for all visitors and residents during the Labor Day weekend.

- The office of public information staffed a Media Information Center at the Pavillion to facilitate the dissemination of accurate and current Labor Day weekend information to the media. City officials and members of the Beachfront Events Committee observed the weekend activities at the 21st Street Holiday Inn during the weekend.
- Police officers were provided with additional human relations and stress management training from the police department and the Comprehensive Health Division.

Other enhancements for the 1989 Labor Day weekend included:

- Additional portable toilets were placed at the oceanfront.
- 15 new lights and 9 upgrades to light at the oceanfront
- Volunteer Courtesy Patrol operated from the Holiday Inn at 21st Street and worked with the office of public information to provide information dissemination and verification.

- Emergency Medical Services operated at the same capacity as a major festival weekend. The Public Works Department provided enhanced street and beach maintenance.

In late 1988 and again in March 1989, local and State NAACP officers attempted to set up meetings with city officials to discuss Labor Day 1989. Nothing ever developed. The NAACP had persons on the scene on Labor Day 1989 to provide support to youth and the city by distributing a pamphlet with information on assistance and services if needed.

LABOR DAY 1989

Students and others began arriving on Thursday and by Saturday night it was estimated that there were 100,000 visitors in Virginia Beach. This compared to 20,000-40,000 the year before. There are approximately 8,000 hotel and motel rooms in the beach area of about thirty blocks in length. This gives some idea of the crowded conditions. No one will make an estimate of how many of these 100,000 visitors were students. Subsequent records indicate that about half of those arrested were from the Tidewater/Hampton Roads area and the others were from "out-of-town." Estimates agree that about 95 percent of the visitors were black with a large majority of males.

Observers say it was clear to the black visitors that they were not welcome from their experiences in 1988 and the subsequent actions taken by the city. According to some, this was borne out by the behavior and attitudes of the police officers in their personal contacts and conduct with visitors and also the merchants, e.g., a police officer asking to a black youth driving a BMW, "Where'd you get the money for that car boy?" Some hotel rooms cost as much as $250, compared to a regular rate of $100. The visitors, the police, and the merchants co-existed in relative peace until Sunday morning, September 3. The media earlier had congratulated city officials for handling the large number of visitors with no problems.

No one can say exactly what happened to set off the looting. One observer related that he did not think the lawlessness was started by students even though they knew they were not welcome. The students came to party, not break the law, and their presence was their protest, he said.

Between 12:00 midnight and 1:00 a.m. Sunday, the crowds were more boisterous and many persons were on motel balconies and in windows. Some began throwing bottles and cans at crowds below. Riot-geared police were called (up to that time police were in class A uniform) and began rotating with others until all were in riot gear. Police began to clear the streets. The throwing of objects escalated, including furniture from rooms and persons on the streets started breaking windows and entering stores to loot. It was 5:00 a.m. before order was restored. One hundred stores were looted, according to the police department's count. No shots were fired by police, no tear gas used and, according to the mayor, only necessary force was used to control the situation.

The cleanup started immediately for safety, cosmetic and psychological reasons. No problems occurred during the day and things were normal for crowds as large as were present in Virginia Beach.

Sunday night the police decided to make a sweep of the streets as a precaution and during the process many persons were arrested for unlawful assembly. Sunday night 17 additional stores were looted. Again no shots were fired by police nor tear gas use.

On Monday the city was relatively quiet as many persons departed the area. Isolated looting of five to seven businesses took place Monday night.

Preliminary police reports show that 1,235 persons were cited for 1,200 offenses from Friday afternoon to Monday night. Of those cited, 220 were arrested for the following: disorderly conduct, 81; traffic violations, 602; alcohol violations, 317; nuisance charges, 164; and 129 other miscellaneous charges.

The police department reported that 30 officers were injured and several visitors, including two who suffered gunshot wounds not from a police officer. A person was injured when he jumped or fell from a fourth floor motel balcony overlooking a swimming pool into which others were observed jumping.

The Virginia Beach officials proudly take credit for continuing the crowds without inflicting any serious injuries, let alone fatalities, firing a shot, or using tear gas. In response to questions being raised about the use of excessive force by police, Mayor Meyera Oberndorfer said, "All police reports and our video tapes show that the city has used controlled response to situations that have arisen. If there are any questions raised regarding police force, the police have a procedure to investigate these questions and guide us in taking appropriate action."

As of this time two complaints of brutality have been filed with the U.S. Department of Justice which has announced that it is investigating possible civil rights violations along with the FBI.

The Virginia Beach Police Department set up three videotape cameras at strategic roof-top locations on Atlantic Avenue and took over 70 hours of videotape which has been edited to 40 minutes, a copy of which was given to staff. We were also offered the opportunity to view the full 70 hours if we wished, which we declined for the timebeing.

CONCLUSION

After the "Greekfest of 1988," city officials and merchants of Virginia Beach, with some degree of justification, were clearly determined to insure that a Greekfest of 1989, if in fact it took place at all, would be well controlled. A number of highly publicized activities occurred immediately after "Greekfest 1988" ended. A petition was circulated by the merchants expressing their opposition to "Greekfest 1989." A number of meetings between city officials and merchants took place, ending in the adoption by city officials of new codes of conduct for visitors to Virginia Beach and assurances that sufficient law enforcement personnel would be available to vigorously enforce compliance with these codes and other city ordinances.

As tens of thousands of black students began arriving in Virginia Beach for Greekfest 1989, there was a dramatic display of police presence along Atlantic Avenue, the main thoroughfare of the beach. And while city officials viewed this display of police presence as a signal that strict compliance with ordinances was expected, the students viewed this display as a signal that they were unwelcome in Virginia Beach. Thus, the tone was set for inevitable conflict.

In an effort to make the point regarding compliance with ordinances, as pointed out elsewhere, some 1,235 students and others were charged with over 1,200 offenses during the Labor

Day weekend. The students and civil rights activists charge that many of the harassing citations were made early in the weekend for offenses (jaywalking, shirtlessness, or standing in moving vehicles) that were enforced only among black students or those appearing to be black students. Be that as it may, these constant instances of confrontation taking place in front of increasingly large numbers of students would serve to bolster the students' feelings that they were not welcome because of their race.

As the confrontations between the police and students increased in numbers and hostility, the tensions correspondingly increased, thus leading to two nights of widespread looting and alleged instances of misconduct by law enforcement officers.

While the looting could certainly not be justified, the actions of city officials, some law enforcement officers and some merchants coupled with tens of thousands of students, many of them unruly, who felt they were being unduly harassed and economically exploited (prices in many establishments were dramatically increased) made for the development of the situation in the city. An outcome which already seems to be gearing up again for 1990 was reflected in the words of a message on a billboard at a business establishment on the beach -- "Never Again Greekfest" -- a threat or a challenge?

RECOMMENDATION

In the staff interview with the mayor, city manager, police chief, and assistant city attorney, the question was raised regarding Greekfest 1990. The city manager responded, with the others echoing agreement, that he did not want to deal with that question now given their continuing efforts to resolve the current situation. There was also some inference that they did not want to deal with that question ever which puts the area back to, or close to the position and attitudes which contributed significantly to the problems of Greekfest 1989.

It is clear that there is a need for a more objective review and program assistance in the Virginia Beach situation. If for no other reason than to challenge the "Never Again Greekfest" mentality, black students have indicated that they are going to return in 1990 to Virginia Beach. And city officials, merchants and other citizens of the area are going to respond to and prepare for that return. All of which potentially makes for another tense, volatile and disruptive situation that this time around could lead to loss of lives and even more property damage. It is therefore recommended that the Virginia Advisory Committee give strong consideration to conducting an extensive review of the Virginia Beach crisis with an eye towards identifying the problems and actions which should be undertaken to prevent a recurrence of the problems which confronted the Virginia Beach area over the Labor Day weekend.

APPENDIX

Persons Interviewed for Report:

Mayer Oberndorf, Mayor, Virginia Beach

Aubrey Watts, City Manager, Virginia Beach

Charles Wall, Chief of Police, Virginia Beach

Floyd Blow, Assistant City Attorney, Virginia Beach

John Perry, Member, City Council, Virginia Beach

Lawrence Dark, Director, Virginia State Human Relations Commission

Jon Case, Regional Director, Community Relations Service, U.S. Department of Justice (CRS)

Henry Mitchum, Field Representative, CRS

John Hughes, Field Representative, CRS

Jack Gravely, Virginia State President, NAACP

Bernard Holmes, Legal Counsel, NAACP

Brenda Andrews, Publisher, Journal & Guide (black newspaper)

Dr. Milton Reid, Publisher Emeritus, Journal & Guide

Curtis Harris, Virginia State Chairman, SCLC and member of the Virginia State Advisory Committee

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

September 13, 1989

MEMORANDUM FOR THE COMMISSIONERS

SUBJECT: Review of FY 89 Activities

Headquarters Activities

A year ago, you made me Acting Staff Director of the Commission. Since that time, I believe that we have achieved a stepup in Commission activities and accomplishments, despite level funding and a small staff. Those achievements are outlined below.

On the national level, we have completed the first statutory reports since June of 1985. The Immigration Control and Reform Act: Assessing the Evaluation Process was released in July 1989, and a second version incorporating the GAO hiring audit will be available this week. This project was accomplished in record time, and we are following up with Congress and interested groups to discuss the contents of the report.

A second statutory report, Medical Discrimination Against Children with Disabilities, will be released this week. This long-term project began in 1985. I expect a third statutory report, on enforcement of the Indian Civil Rights Act, to be available soon for your review. This is another long-term project that began in 1986.

By completing these statutory reports, we are once again fulfilling part of the mission that the Congress assigned to us.

We have completed other important reports as well. The Economic Status of Americans of Asian Descent: An Exploratory Investigation, released in February of this year, has been well received. You will have before you this month another in this series, The Economic Status of Black Women: An Exploratory Investigation.

Also before you this month is the revised statement on Intimidation and Violence: Racial and Religious Bigotry in America. Given the resurgence of racial tensions, reissuance of this statement is a start for the Commission to attempt to bring understanding and attention to the problem.

We also put out six issues of Civil Rights Update. I have directed staff to recommend ways to make this a more useful publication. The one issue of New Perspectives that we put out has garnered so much interest that we no longer have any copies of it.

Other publications in various stages of preparation will report on the consultations and briefings that the Commission held during the year. They include the Los Angeles forum on "Changing Perspectives on Civil Rights" and the companion Nashville forum, the three Roundtables on Asian Civil Rights in the 1990s, the consultation on testing, and the briefing on campus tensions. Other briefings during the year were the IRCA review in March and the administration of justice briefing at this month's meeting.

Taken together, these activities have covered a fairly broad spectrum, given the Commission's small staff and limited resources.

We have also begun to refocus on Federal enforcement of civil rights laws, another area of congressional interest. In March, I provided a preliminary review of the Department of Education's efforts through its Office for Civil Rights. Material has been gathered on other agencies, and once we have updated information on FY 90 appropriations for these activities, I will be providing you with an overall review. An important part of this process is reestablishing links with other agencies to make this an ongoing effort. We have also been monitoring the appointment of staff to the civil rights director positions. As of September, only one permanent director had been named; one other individual had been nominated but not confirmed.

You will have before you at this meeting an analysis of the recent Supreme Court decisions affecting civil rights, complementing the analysis of Richmond v. Crosson provided earlier in the year as well as the background work done for the resolution adopted in January recommending that the Supreme Court not overturn Runyon v. McCrary.

In the complaints area, for the first time we have provided the public with a toll-free number. This has been publicized, and efforts will continue to make that information available.

From a planning standpoint, we have cancelled projects that were languishing, infeasible, or outdated. We now have a manageable research program planned that will focus on emerging areas of concern, such as parental choice in education, as well as some areas that have been neglected, such as the civil rights of older Americans.

Administratively, we are making progress in bringing order to the procurement, budgetary, and personnel processes. We have dealt with the issues raised by the OPM and GAO audits. Administrative instructions and policy information statements have been issued on various topics. Computer support has been augmented in various areas, locally and through online services.

I have also given attention to revitalization of the Commission's library, which has suffered from lack of funds and staff. We are still not where I should like to be in this area, but we are making progress.

Observation of special events, such as black history month and the upcoming Hispanic and Native American recognition periods, has resumed under my direction. Staff have had the benefit of a debate between the Chairman and former Commissioner Frankie Freeman, as well as talks by State Advisory Committee members and James Farmer. I consider these important in helping new staff to learn what we are all about and in keeping all staff open to different ideas.

I have also made efforts to resume liaison with the various civil rights interest groups, as well as with congressional members on both sides of the aisle.

The regional program is back on track, and we have many accomplishments to report here.

Regional Program Activities

Although not all I wished to accomplish has transpired, I believe that an excellent start has been made. I believe that we can all feel pride in these achievements; I certainly do.

In my memorandum to you of January 5, 1989, I recapped FY 88 regional program activities and set forth regional program goals for FY 89. I projected an increased level of activities generally although resources were to remain the same.

This memorandum reports the results of regional program efforts in FY 89. Those results reflect further revitalization of the Commission's regional activities since FY 87, when 7 of 10 regional offices were closed and no SAC reports were published.

In FY 89, some 27 SAC reports were submitted to the Commissioners, nearly double the number (14) in FY 88, and 6 briefing memoranda were submitted, the same number as last year. The backlog of older SAC reports was virtually eliminated. Nearly two-thirds of the SACs held projects in FY 89, also an increase. Bigotry and violence, age discrimination issues, immigration reform, the administration of justice, and civil rights issues affecting American Indians were among the diverse subjects examined by the SACs.

Attached are summaries of most SAC activities in FY 89 SAC by SAC. A tentative schedule of SAC meetings during the first quarter of FY 89 also is provided.

MELVIN L. JENKINS
Acting Staff Director

Attachments

SAC Activities in FY 89

ALASKA

The Advisory Committee met once during the year. The meeting focused on planning a forum to address employment discrimination issues affecting Alaska natives in the Nome area.

The Advisory Committee's report, Minority and Womens' Business Enterprise Programs in Alaska, was accepted by the Commissioners in March and was subsequently published and disseminated throughout the State. The Chairman of the Commission forwarded the report to the Secretary of Transportation who responded, indicating that changes have been made in the operation of the State's set-aside program. The Advisory Committee is continuing to monitor this issue.

The Advisory Committee is scheduled for recharter in December 1989.

ARIZONA

The Arizona Advisory Committee held three meetings and two community forums. The two community forums were held in Phoenix and Tucson to collect data and information on the Immigration Reform and Control Act. The Committee is planning a project on education for the new fiscal year.

The Advisory Committee is scheduled for recharter in February 1990.

ARKANSAS

A summary report by the Advisory Committee, Equal Educational Opportunities in Little Rock, was approved by the Commissioners, published, and distributed.

The Committee met twice during the year. One meeting consisted of a community forum on the civil rights concerns of older Americans which resulted in a summary report approved by the Commissioners. At the second meeting a community forum was planned to be carried out during FY 90 on blacks in the Arkansas Delta. This will provide information to update a 1974 report on that topic.

During the year interim appointments were made to the Committee, and a recharter memorandum was prepared for Commission action in late 1989.

CALIFORNIA

The California State Advisory Committee held five meetings with one community forum in Berkeley, California. The forum held

was to collect information on bigotry and violence at the University of California. The Committee transmitted a report on the Immigration Reform and Control, now before the Commissioners for review.

The Committee is due for recharter in December 1989.

COLORADO

The Colorado Advisory Committee met five times during the fiscal year to consider its projects, plan community forums and approve its summary reports. It convened two one-day forums in October, one each in Grand Junction and Denver, on the proposed ballot measure to make English Colorado's official language.

The Commission approved two Advisory Committee reports, Implementation in Colorado of the Immigration Reform and Control Act: A Preliminary Review (January 1989), and Nativism Rekindled: A Report on the Effort to Make English Colorado's Official Language (awaiting publication).

Copies of the Immigration report have been forwarded to the Advisory Committee and participants at the five forums conducted on this issue in 1987. The Committee is awaiting the publication of the ballot measure report.

The SAC is expected to be rechartered in April 1991.

CONNECTICUT

The Advisory Committee met once, holding a forum on "Health and Mental Health Services for Southeast Asian Refugees." The forum was attended by Commissioner Chan who was at the time organizing three roundtable conferences on civil rights issues affecting Asian Americans. A first draft of the Committee's summary report has been completed.

The Committee is scheduled for recharter in September 1989.

DELAWARE

The Advisory Committee met once, releasing two summary reports. One report was on "Nutrition Services for Minority Elderly; Census Data and Hispanic Elderly; and State-Grant-In-Aid Program," and the second on "Legal Assistance Available to Minority Prisoners." The Committee also discussed three topics for possible projects in FY '90.

The Committee is scheduled for recharter in July 1990.

DISTRICT OF COLUMBIA

The Advisory Committee met twice during the year. At the first meeting, the Committee oriented five new members and initiated program planning. At the second meeting, the Committee adopted a project concept to investigate the effects of new limitations on minority business set aside programs. A SAC subcommittee met once, developed a project proposal, and planned a forum for February 1990. The Committee's report "AIDS Handicap Protection in Washington, D.C." was approved for publication by the Commissioners.

Upon his appointment, SAC Chair James Bank was commended for his civil rights record by former chairperson and former Mayor Walter Washington and current Mayor Berry. The Chair was recognized for developing a notable program for housing the District's homeless and improving community health services, among other accomplishments.

The Committee was rechartered in April 1989.

FLORIDA

The Advisory Committee met once during the year. The meeting was a briefing session focusing on police-community relations in Miami. A summary report, approved by the Committee unanimously, will be before the Commissioners at the Septembr meeting.

The Committee is scheduled for recharter in July 1990.

GEORGIA

The Advisory Committee met once during the year. At this planning meeting, the Committee planned a forum focusing on red-lining in Atlanta and hate-group activities in Georgia. A summary report on "Bigotry and Violence in Georgia" based on a forum held in FY 88 has been approved by the Committee and awaits Commissioner approval.

The Committee is scheduled for recharter in March 1990.

HAWAII

The Hawaii Advisory Committee met once during the year. The meeting addressed several issues, including the recent enactment of a statute establishing a State civil rights commission. The Committee also planed a public forum on the Native Hawaiian Homelands Program, which was scheduled for August 1989 and postponed due to Commission budgetary problems.

The Commissioners accepted a briefing memorandum from the Committee which addressed employment and affirmative action issues in State government.

The Advisory Committee recharter was considered by the Commissioners in July and is being revised to incorporate a requested change in its composition.

IDAHO

The Idaho Advisory Committee met twice during the year.

The meetings focused on planning a community forum on bigotry and violence. A final decision was made to conduct a five state forum, which would include the five northwestern States. The forum was planned for September 1989 and was postponed due to budgetary problems. A proposal for this project has been submitted and approved.

The Advisory Committee is scheduled to be rechartered in July 1990.

ILLINOIS

The Advisory Committee held two meetings during the year. The first was a meeting to plan a community forum to receive information on efforts to promote integration in Atrium Village and the South Suburbs of Chicago. The forum was conducted at the second meeting.

The Committee is scheduled for recharter in June 1990.

INDIANA

The Committee met to prioritize issues and plan a community forum to be held during the next fiscal year. A briefing memorandum was submitted to the Commissioners on the subject of civil rights concerns in Indianapolis and Gary.

The Committee is scheduled for recharter in October 1990.

IOWA

The State Advisory Committee met twice during FY 89. The first meeting was for the purpose of planning a community forum on selected civil rights issues in Iowa's public education. At a second meeting the Committee conducted the forum which focused on minority participation in talented and gifted programs and suspension rates of minority students.

Interim appointments were made to the SAC during the year, and the SAC was rechartered in July 1989.

KANSAS

The State Advisory Committee met once during FY 89 to prioritize issues and plan a community forum on college campus bigotry and violence. It will be conducted in the next fiscal year.

The SAC is scheduled to be rechartered in December 1989.

KENTUCKY

A summary report by the Advisory Committee, Civil Rights Issues in Kentucky, was approved by the Commissioners, published and distributed.

The Committee conducted a community forum during the year on the subject of the employment of minorities and women in State government. A summary report prepared from information gathered at this forum will be considered by the Commissioners at their October 1989 meeting.

LOUISIANA

A summary report by the Advisory Committee, The Administration of Justice for Homosexual persons in New Orleans, was approved by the Commissioners and is being prepared for publication. The Committee met twice during the year. One meeting focused on planning a community forum on voter registration procedures in Louisiana parishes. The forum was conducted during the second meeting. A summary of information gathered at this forum was approved by the Committee for consideration by the Commissioners at the October 1989 meeting.

The SAC is scheduled to be rechartered in September 1989.

MAINE

The Advisory Committee met twice this year. At the first meeting, the Committee decided against holding a community forum on "Bigotry and Violence Against Southeast Asian Refugees." At the second meeting, the Committee decided to hold a community forum on "Health Care Services to Limited-English Speaking Patients" and planned a press release of its report "Civil Rights Issues in Maine."

The Committee is scheduled for recharter in July 1990.

MARYLAND

The Advisory Committee met once during the year. The Committee oriented two new members and adopted a project proposal on

Asian American civil rights in the State. A forum on the subject is scheduled for November 29, 1989.

SAC Chairperson DeWayne Whittington became the first black person to head a county school system on the Eastern Shore of the State.

MASSACHUSETTS

The Advisory committee did not meet this fiscal year. Its summary report on "Stemming Violence and Intimidation Through the Massachusetts Civil Rights Act, which was based on a forum held in FY '88, was approved by the Commissioners in December 1988. The Committee plans to hold a forum on campus tensions in academic year 1989-90.

The Committee is scheduled for recharter in September 1989.

MICHIGAN

The Advisory Committee met twice during the year. At the first meeting plans were made for a community forum on the civil rights implications of minority students dropouts in Michigan. The forum was conducted at the second meeting. A summary report of information received at the forum has been prepared for consideration by the Commissioners at their October meeting. Two briefing memoranda by the SAC, Selected Civil Rights Issues in Detroit and Civil Rights Concerns in Michigan, also were submitted to the Commissioners.

Interim appointments were made to the Committee during the year, and it is scheduled for recharter in October 1989.

MINNESOTA

The State Advisory Committee met once during FY 89 to prioritize issues and plan for a community forum to be conducted during the next fiscal year on equal educational opportunity. A briefing report on bigotry and violence in Minnesota was just submitted to the Commissioners.

The SAC is scheduled to be rechartered in October 1989.

MISSOURI

The State Advisory Committee met twice during the year. At the first meeting plans were made for a community forum on bigotry and violence on Missouri's college campuses. The forum was conducted at the second meeting.

The SAC is scheduled to be rechartered in September 1989.

MONTANA

The Montana Advisory Committee met three times during the year. The first meeting was conducted to provide orientation for seven new members. Part of the orientation was a presentation by the Director of the Montana Human Rights Commission. At the subsequent meetings, it was decided to participate in the five state community forum on bigotry and violence. The forum was planned for September 1989 but was postponed due to budgetary problems.

The Advisory Committee is scheduled to be rechartered in July 1990.

NEBRASKA

The State Advisory Committee met twice during FY 89. At the first meeting plans were made for a community forum on the subject of bigotry and violence on Nebraska's college campuses. The forum was conducted at the second meeting.

During the year interim appointments were made to the Committee, and it was rechartered in June 1989.

NEVADA

The Nevada Advisory Committee met one time during this fiscal year. The Commission approved the Advisory Committee's report, The Impact of Two Consent Decrees on Employment at Major Hotel/Casinos in Nevada (June 1989) and copies were forwarded to the SAC and forum participants. The Commission forwarded letters to the U.S. Department of Justice and the U.S. Equal Employment Opportunity Commission regarding the role of those agencies in the enforcement of the initial decree signed in 1971 and still in effect.

The SAC is presently being considered for rechartering.

NEW HAMPSHIRE

The Advisory Committee met once this fiscal year. At this meeting, the Committee approved a briefing memorandum, "Treatment of Language-Minority Students in Manchester, N.H.", for submission to the Commissioners, and also decided to hold a community forum on "Language-Minority Students and High School Dropout in N.H.," appointing a planning subcommittee.

The Committee is scheduled for recharter in March 1990.

NEW JERSEY

The Advisory Committee met twice during the fiscal year. At the first meeting, the Committee adopted a project proposal on"In-school Segregation in Morris County Public Schools." The Committee held a forum on that subject at its second meeting. Its report, "Incidents of Bigotry and Violence in Essex County, N.J.," was approved for publication by the Commissioners.

The Committee is scheduled for recharter in September 1989.

NEW MEXICO

The Advisory Committee met once during the year and voted to conduct a public forum on Indian education issues. A proposal was developed and approved by the Staff Director. The forum was scheduled for September but was postponed due to Commission budgetary problems.

The Advisory Committee's report, Implementation in New Mexico of the Immigration Reform and Control Act: A Preliminary Review, was accepted by the Commissioners in March and was subsequently published and disseminated throughout the State.

The Advisory Committee is scheduled to be rechartered in February 1990.

NEW YORK

The Advisory Committee met twice. The first meeting focused on planning a community forum to followup on the 1990 census undercount. A community forum on the topic was held during the second meeting. The draft summary report "A Followup Forum on Census Undercounts and Preparations for the 1990 Census" is undergoing agency review.

This summer, SAC Chair, Professor Oi, presented testimony to the U.S. House Subcommittee on census and population, reporting on the two forums which the Committee held regarding census undercounts and related issues.

The Committee is scheduled for recharter in September 1990.

NORTH CAROLINA

The Advisory Committee met three times during the year. The first meeting featured Commission Chairman Allen, who assisted with orientation of the newly rechartered group. The Committee adopted a project concept on school segregation. The project proposal developed with the assistance of OPPR staff was

adopted by the Committee at its second meeting, and a one-day forum followed subsequently. A briefing report, prepared by the previous SAC on the topic, was subsumed under the current project rather than being submitted as a separate document.

The Committee is scheduled for recharter in July 1990.

NORTH DAKOTA

The North Dakota Advisory Committee met three times in this fiscal year. One meeting focused on planning a community forum on housing and utility rate issues on reservations in the State. A briefing session was conducted June 8 and the community forum was convened on June 9 in Bismarck to gather data from State and local officials, tribal representatives and utility company officials. The Advisory Committee is presently reviewing the transcript of the proceedings.

The Committee is scheduled for recharter in March 1990.

OHIO

The Advisory Committee met three times during the year. At the first meeting the Committee conducted a two-day forum on race relations in Toledo. At the second meeting the Committee reviewed and approved the summary report of the forum which was subsequently approved for publication by the Commissioners. At the third meeting a press conference was held to officially release the report to city officials and the public. The Committee was invited by the Mayor and City Manager to provide the city technical assistance in resolving race relation problems in Toledo.

The Committee is scheduled for recharter in October 1989.

OKLAHOMA

The Advisory Committee was scheduled to meet in July; however, the meeting was postponed due to Commission budgetary problems. The Committee was scheduled to decide on the topic for a new project.

The Advisory Committee's report, Selected Administration of Justice Issues Affecting American Indians in Oklahoma, was accepted by the Commissioners in May. The Committee is awaiting publication of the document, which will be disseminated throughout the State. The Committee is also monitoring hate group activity in Oklahoma.

The Advisory Committee is scheduled for recharter in March 1990.

OREGON

The Oregon Advisory Committee met once during the year. This was a planning meeting, and a decision was made to participate in the five state forum on bigotry and violence.

The Advisory Committee is scheduled to be rechartered in late 1989.

PENNSYLVANIA

The Advisory Committee met three times during the year. The first meeting focused on planning two community forums, which were held at the two subsequent meetings. Summary reports based on these forums, "Reporting Bias-Related Incidents: A Followup" and "Implementing the 1988 Fair Housing Act Amendments," are undergoing internal review.

The Committee is scheduled for recharter in September 1989.

RHODE ISLAND

The Advisory Committee met twice this fiscal year. At the first meeting, the Committee decided to hold a community forum on "Bigotry and Violence in Rhode Island," which was held at its second meeting. A summary report based on this forum is near completion.

The Committee released a report, "Implementation in Rhode Island of the Immigraton Reform and Control Act: A Preliminary Review."

The Committee is scheduled for recharter in December 1989.

SOUTH CAROLINA

The Advisory Committee met twice during the year. At the first meeting, the Committee adopted a project proposal on the long term effects of the current implementation of the Voting Rights Act. The Committee held a forum on the topic at its second meeting. The report of the forum is under development.

The Committee is scheduled for recharter in July 1990.

SOUTH DAKOTA

The South Dakota Advisory Committee met three times during the year. Chairman Allen addressed the Committee at one of the meetings and spoke of the Commission's goals and plans and answered questions from the Committee members. At subsequent meetings, the Committee decided to conduct a study on women and employment in South Dakota.

The Advisory Committee is scheduled to be rechartered in February 1990.

TENNESSEE

A summary report by the Advisory Committee, Discrimination in Public Higher Education in Tennessee, was approved by the Commissioners and is being prepared for publication.

The Committee was rechartered in December 1988 and met for purposes of orientation and to plan two projects: The compilation of a directory of civil rights agencies in the State, and a community forum on discrimination in Tennessee services industries.

TEXAS

The Texas Advisory Committee met four times during the year. The meetings were held to plan a public forum on civil rights issues relating to early childhood education. The forum was convened in Dallas on May 20. Participants included State and local education officials, private and community-based education organizations, researchers and other knowledgeable individuals. Superintendents of four major Texas school districts were among those sharing information with the Committee. A transcript was obtained and an Advisory Committee report is being prepared.

The Advisory Committee report, Implementation in Texas of the Immigration Reform and Control Act: A Preliminary Review, was accepted by the Commissioners in July. The Committee is awaiting publication of the document, which will be disseminated throughout the State.

The Advisory Committee is scheduled for recharter in February 1990.

UTAH

The Utah Advisory Committee met three times during the fiscal year. At the first meeting, the Committee planned a community forum on the implementation in the State of phases one and two of the Immigration Reform and Control Act. A briefing session was held May 17 and the community forum was convened May 18 in Salt Lake City. A transcript of the proceeding has been reviewed by the Committee and a report was submitted this month to the Office of the Staff Director.

The SAC is scheduled for recharter in July 1990.

VERMONT

The Advisory Committee met twice during the year. At the first meeting, the Committee was briefed on planned activities of the newly-established State Human Rights Commission. At the second meeting, the Committee decided to hold a community forum on the equal employment issues affecting older workers. The proposal for that forum is under internal review.

The Committee is scheduled for recharter in April 1990.

VIRGINIA

The Advisory Committee met once during the fiscal year. At this planning meeting, the Committee developed a project concept for a community forum. It is reviewing the proposal now.

The Committee is scheduled for recharter in October 1989.

WASHINGTON

The Washington Advisory Committee met twice during the year. At the first meeting, officials from the State government were asked to make presentations and answer questions concerning women and minorities in State employment. A decision was then made to continue to monitor State employment to better measure the progress of their affirmative action efforts. At the second meeting, a decision was made to participate in the five State community forum on bigotry and violence.

The Advisory Committee is scheduled to be rechartered in April 1990.

WEST VIRGINIA

The Advisory Committee met three times this fiscal year. The first two meetings were devoted to deciding and preparing for a community forum on "Civil Rights Laws and Legislation in West Virginia." The Committee wanted to invite the Governor of declare a civil rights day for West Virginia as a means of calling the attention of West Virginians to civil rights issues in the State, and hold a community forum as part of the civil rights day activities. As planned, the community forum was held during the Committee's third meeting.

A summary report, "Minorities and Women in Higher Education in West Virginia and Civil Rights Issues in the Huntington Area," was approved for publication by the Commissioners.

The Committee is scheduled for recharter in December 1989.

WISCONSIN

The Advisory Committee met twice during the year. At the first meeting plans were made for a community forum on discrimination against Chippewa Indians in northern Wisconsin. The forum was conducted at the second meeting. Subsequently, the Committee approved a summary report of the forum for submission to the Commissioners.

Another summary report by the SAC, Public Sector Efforts to Promote Employment and Business Opportunities for Minorities and Women in Milwaukee, was approved by the Commissioners for publication.

Interim appointments were made to the Committee during the year, and it is scheduled for recharter in March 1990.

WYOMING

The Wyoming Advisory Committee met twice during the year. The Committee invited staff from the State civil rights committee to make a presentation concerning civil rights issues in Wyoming. A decision was reached to participate in the five State forum on bigotry and violence.

The Commission approved the Advisory Committee's report, Civil Rights Issues in Wyoming, and copies were forwarded to all interested parties.

The Advisory Committee is scheduled for recharter in April 1990.

Tentatively Scheduled Meetings-First Quarter, FY 90

State	Month	Planning/Forum	
Alaska	October 5, 1989 in Anchorage	Planning	
Arkansas	November December	Forum Planning	Site to be determined
Arizona	October 24, 1989 in Phoenix	Planning	Site to be determined
California	November 3, 1989 in Los Angeles	Forum	
Colorado	October 30, 1989 in Denver	Planning	
Delaware	December 21, 1989	Forum	Site to be determined
D.C.	November 10, 1989	Planning	Site to be determined
Florida	October 20, 1989	Planning	Site to be determined
Georgia	November 16, 1989	Planning	Site to be determined
Hawaii	November 28, 1989 in Honolulu	Forum	
Idaho	Dec. 1 & 2, 1989 in Spokane, Washington	Forum	
Illinois	November	Planning	Site to be determined
Indiana	October	Planning	Site to be determined
Iowa	October	Planning	Site to be determined
Kansas	November	Forum	Site to be determined
Kentucky	October	Planning	Site to be determined

Louisiana	December	Planning	Site to be determined
Maine	October 20, 1989	Planning	Site to be determined
	December 12, 1989	Forum	" " "
Maryland	October 30, 1989	Planning	Site to be determined
	November 29, 1989	Forum	" " "
Massachusetts	October 31, 1989	Planning	Site to be determined
Michigan	December	Planning	Site to be determined
Minnesota	December	Forum	Site to be determined
Missouri	November	Planning	Site to be determined
Montana	Dec. 1 & 2, 1989 in Spokane, Washington	Forum	
Nebraska	December	Planning	Site to be determined
Nevada	November 10, 1989 in Reno	Planning	
New Hampshire	October 27, 1989	Planning	Site to be determined
New Jersey	December 4, 1989	Planning	Site to be determined
New Mexico	November 10, 1989 in Santa Fe	Forum	
North Carolina	December 14, 1989	Planning	Site to be determined
North Dakota	October 25, 1989 in Bismarck	Planning	
Ohio	December	Planning	Site to be determined

Oklahoma	October 24, 1989 in Tulsa	Planning	
Oregon	Dec. 1 & 2, 1989 in Spokane, Washington	Forum	
Pennsylvania	November 9, 1989	Planning	Site to be determined
Rhode Island	November 14, 1989	Planning	Site to be determined
South Carolina	December 13, 1989	Planning	Site to be determined
South Dakota	October 26, 1989 in Sioux Falls	Planning	
Tennessee	October	Planning	Site to be determined
	December	Forum	" " "
Texas	December 19, 1989 in San Antonio	Planning	
Utah	November 14, 1989 in Salt Lake City	Planning	
Vermont	October 12, 1989	Planning	Site to be determined
	December 12, 1989	Forum	" " "
Virginia	November 9, 1989	Planning	Site to be determined
Washington	Dec. 1 & 2, 1989 in Spokane, Washington	Forum	
West Virginia	November 10, 1989	Planning	Site to be determined
Wyoming	Dec. 1 & 2, 1989 in Spokane, Washington	Forum	

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

OFFICE OF STAFF DIRECTOR

September 14, 1989

MEMORANDUM FOR THE COMMISSIONERS

SUBJECT: Statement on Intimidation and Violence

Attached for your review and action is a redraft of the above draft incorporating comments received from Commissioners.

MELVIN L. JENKINS
Acting Staff Director

Attachment

Intimidation and Violence

Racial and Religious Bigotry in America

A Statement of the
United States Commission
on Civil Rights

September 1989

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 reestablished in 1983 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 denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Serve as a national clearinghouse for information in respect to discrimination or denial 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 Congress.

MEMBERS OF THE COMMISSION

William B. Allen, Chairman

Murray Friedman, Vice Chairman

Mary Frances Berry

Esther G. Buckley

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Francis S. Guess

Blandina Cardenas Ramirez

Melvin L. Jenkins, Acting Staff Director

CONTENTS

Chapter I

Introduction

In 1983 the U.S. Commission on Civil Rights published a statement entitled Intimidation and Violence--Racial and Religious Bigotry in America. That statement is now out of print. The Commission remains deeply concerned, however, about acts of violence perpetrated against racial and religious minorities. The media bring recurring accounts of intimidating and violent activities, which include cross burnings; defacement, destruction, and desecration of religious property, infliction of personal injury, and, in some cases, the deaths of human beings. In this statement, an updated reprint of the 1983 publication, the Commission seeks not only to express its continuing concern over the senseless and intimidating acts of violence motivated by racial and religious bigotry, but also to share its view of the nature and extent of the problem, to describe promising responses of public officials and community leaders to combat the problem, and to urge upon others a posture of condemnation against those who would violate the enduring values of a pluralistic society.

In preparing this statement, the Commission drew extensively upon information provided by some of its 51 State Advisory Committees, who have been monitoring related developments at State and local levels. 1/ Additional data were drawn from a variety of publications, reports, and the news media.

The Problem Illustrated

In Colorado on May 4, 1982, five persons were arrested for an alleged plot to kill two Federal judges and blow up Internal Revenue Service headquarters in downtown Denver. Police confiscated bombs, automatic weapons, and other firearms. One of those arrested was president of a local chapter of the United Klans of America. Media accounts alleged that all five persons had Klan connections. 2/

On March 10, 1982, a Jewish female student was shot five times with a BB gun on the University of Maryland campus at College Park, Maryland. The attacker shouted "Heil Hitler" as he fired and used other epithets that indicated anti-Jewish

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1/ In each State and the District of Columbia, the Commission has established Advisory Committees that keep the Commission abreast of civil rights developments at the State and local levels.

2/ Rocky Mountain News, May 5, 1982, p. 1.

feelings. An underground campus newspaper hailed the assailant as a hero and suggested that next time he use a flamethrower on the victim. 3/

In 1984 a Massachusetts State official reported physical assaults, such as beatings and rock throwings, vandalism of cars, arson, intimidation, and the use of racial epithets and slogans, against Cambodian, Vietnamese, and Laotian refugees resettled in the State. 4/ The State attorney general said, "Often, these individuals cannot even walk along the public streets without being physically attacked and threatened because of their race or national origin." 5/

In 1986 five white cadets at the Citadel in South Carolina, masked and wrapped in white sheets, entered the room of a black cadet, uttered obscenities, and left a charred

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3/ Baltimore Sun, May 18, 1982, p. 1.

4/ Diana Tanaka, assistant attorney general, Civil Rights Division, Massachusetts Department of the Attorney General, interview in Boston, Mass., Dec. 6, 1984, cited in U.S. Commission on Civil Rights, Recent Activities Against Citizens and Residents of Asian Descent (1986), p. 46 (hereafter cited as Commission Asian Report).

5/ Francis X. Bellotti, attorney general, "Bellotti Obtains Court Order Protecting Vietnamese Refugees," news release, Massachusetts Department of the Attorney General, Sept. 21, 1984, p. 1, cited in Commission Asian Report, p. 46.

paper cross. The black cadet subsequently withdrew from the school. 6/

In 1988 the Los Angeles County Human Relations Commission reported that hate crimes directed mostly at blacks and Jews reached the highest level since the agency began collecting data in 1980. 7/

These incidents illustrate the phenomenon of central concern in this statement, namely, intimidation and violence against racial and religious minorities that is rooted in unmitigated bigotry.

Working Definition

A bigot is "one obstinately or intolerantly devoted to his own church, party, belief, or opinion." 8/ Bigotry in the context of this statement is a rigid intolerance of differences

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6/ Richard Green, Jr., "5 Citadel Cadets Indicted Under Mask Law," Charleston News and Courier, Oct. 7, 1987.

7/ The commission said it did not think the growing numbers were a result solely of improved reporting, but that "such crimes are actually increasing." Los Angeles County Commission on Human Relations report to the Los Angeles County board of Supervisors, Hate Crime in Los Angeles County 1988 (February 1989), p. 1.

8/ Webster's New Collegiate Dictionary (1979)

and of those who hold such differences. It is this blind, unreasoned intolerance that makes racial and religious bigotry a form of racial and religious discrimination. When manifested in violent or intimidating ways, racial and religious bigotry represent a desire to deny the rights and freedoms of persons of different creed, color, race, or national origin. In sum, racial and religious bigotry result frequently in tactics to destroy "enemies" who are perceived as enemies only because they are "different." These tactics include a variety of efforts to intimidate, frighten, injure, ridicule, and, on occasion, kill those who hold different religious beliefs, subscribe to different cultural values, or exhibit racial characteristics unlike those of the bigot.

The particular focus of this statement, therefore, is upon the potential and actual denials of civil rights by groups or individuals whose racial and religious bigotry foment violence and social disruption. This Commission is concerned when the promulgation of hate and hostility based on extremist concepts of racial purity or religious certitude leads to illegal acts of force and violence. Lest the vision of America as a democratic and pluralistic society becomes a nightmare of hatred and divisiveness, we urge a heightened public awareness of the threat to civil rights posed by proponents of racial and religious bigotry.

Chapter 2

Extent and Significance of the Problem

Although it is impossible to measure with precision the extent of the problem of racial and religious bigotry in the United States, this chapter reviews the limited statistical data and shares the perceptions of knowledgeable observers in various parts of the country. In addition, the chapter focuses on the relationship of the problem to persistent racism and anti-Semitism.

Extent of the Problem

Not all acts of religious discrimination and bigotry are anti-Semitic in character, but statistical reports of such incidents are available and instructive. The Anti-Defamation League (ADL) of B'nai B'rith has maintained over the past decade a count of anti-Semitic incidents reported to its regional offices across the country. 1/ ADL records show that

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1/ The most recent of these annual reports is 1988 Audit of Anti-Semitic Incidents (Anti-Defamation League of B'nai B'rith, 1989) (hereafter cited as 1989 ADL Report).

since 1980 there has been a significant increase in reported episodes of anti-Semitic vandalism (377 in 1980, 715 in 1984, and 823 in 1988). 2/ In 1980 the ADL also began to compile statistics on reports of a more serious form of religious intimidation and violence, namely, "harassments, threats, and assaults." The number of such incidents reported in 1988 was more than quadruple the 1980 figure (458, up from 112). 3/

With respect to the national distribution of anti-Semitic vandalism, the ADL reports the following pattern:

The States of New York (208), California (121), Florida (89), and New Jersey (67) reported the most incidents in 1988.

The 1988 figure from Florida (89) shows a noticeable increase over 1987 and the most acts of such vandalism ever reported in an ADL audit for that State.

Maryland (36), Massachusetts (35), Pennsylvania (33), Illinois (29), Texas (23), and Georgia (22) constitute a second tier of States reporting 20 or more incidents of vandalism in 1988.

2/ Ibid., app. C, p. 40.

3/ Ibid.

The Northeast continued to be the region reporting the greatest number of incidents. 4/ The data also indicated that most of those arrested in connection with these incidents were young persons.

ADL went on to note that:

> In 1988 police departments in 19 states reported 124 arrests in connection with 57 of the incidents. Of those arrested, 111--approximately 90%--were under 21 years of age. In 1987, 58 incidents in 15 States had resulted in the arrest of 78 individuals, nearly 22% of whom were 21 or older--the highest percentage of arrests in that age group noted in any ADL audit.
>
> The fact that 1988 saw many more arrests than 1987, in connection with a comparable number of incidents, may indicate that many acts of anti-Semitic vandalism are being perpetrated by groups or gangs of youths, rather than by individual miscreants.
>
> Among those arrested for vandalizing Jewish institutions in 1988 were a number of teenage members of local "Skinhead" groups. They were arrested in Mobile, Alabama; Dallas, Texas; Oklahoma City, Oklahoma; and in Ventura, and San Diego, California. 5/

While the ADL collects anti-Semitic bias incident data nationwide, there is no uniform, comprehensive data collection nationally with respect to incidents involving racial bias. It, therefore, is impossible to measure whether such incidents

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4/ Ibid., pp. 8-10.

5/ Ibid., p. 9.

are increasing generally. As the Los Angeles County Commission on Human Relations report indicates, such data now are being collected by some State or local agencies and organizations. 6/ The Commission has continued to rely also on monitoring of bias incidents by its State Advisory Committees, and other sources, such as the Community Relations Service of the U.S. Department of Justice. 7/

Information is available, therefore, on patterns of incidents in various States and the role of Ku Klux Klan and neo-Nazi type organizations in them. For example, the Idaho Advisory Committee informed the Commission in 1986 that it had been told by an Idaho police official that racial and religious harassment had become a potential problem because of the numbers of various groups and persons sharing their philosophies, and their ability to disseminate their message. 8/ This same official further noted that persons with criminal backgrounds reportedly had become involved with these

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6/ See Hate Crime in Los Angeles County 1988, p. 8.

7/ Community Relations Service (CRS) staff reported that they responded to 276 racial incidents in 1986, compared to 166 incidents in 1982 and 44 in 1979. Dennis Wynn, media affairs officer, CRS, Department of Justice, letter to Tom Olson, press officer, U.S. Commission on Civil Rights, Jan. 21, 1987.

8/ Idaho Advisory Committee to the U.S. Commission on Civil Rights, Bigotry and Violence in Idaho (1986), p. 9.

groups, there was an increased presence of the Ku Klux Klan, and the groups had been conducting paramilitary activities. 9/

The Pennsylvania Advisory Committee informed the Commission in 1986 that it understood there had been a decline in incidents and rallies by extremist groups in most parts of the State. 10/ However, the regional director of the ADL noted that several incidents had occurred in western Pennsylvania, including the distribution of racist literature by Aryan Nations, a white supremacy group. 11/ Incidents including a firebombing of a black family's home in a predominantly white suburb of Pittsburgh also were reported. 12/

The Georgia Advisory Committee heard a report in 1987 from a close observer that Klan influence in the State was waning as a result of Federal probes but that an auxiliary group had increased its membership from 12 in 1985 to 385 in 1986. 13/

9/ Ibid.

10/ Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights, The Status of Bigotry and Violence in Southwestern and Southeastern Pennsylvania in the Mid-1980s, briefing memorandum to the Commission (March 1986), p. 5.

11/ Ibid., p. 6.

12/ Ibid., Aryan Nations flyers also had appeared in the Pittsburgh metropolitan area.

13/ Leonard Zeskind, research director, Center for Democratic Renewal, Atlanta, in Georgia Advisory Committee to the U.S. Commission on Civil Rights, Bigotry and Violence in Georgia (in progress).

A New Jersey State Police official told the New Jersey Advisory Committee in 1986 that racial and ethnic graffiti and vandalism were the types of incidents most often reported to the State police and that most such incidents were not the work of organized groups but juveniles. 14/

Further, the Illinois Advisory Committee reported activity by several categories of groups that espouse bigotry and violence, including the Ku Klux Klan, neo-Nazis, and the Christian Identity Movement and other church-related organizations. 15/

While the role of organizations and individuals in fomenting or carrying out bias incidents thus apparently varies from community to community, one relatively new hate organization has emerged as of particular concern. According to the Southern Poverty Law Center, neo-Nazi Skinheads represent a "unique and frightening phenomenon in the history of white supremacism in America." 16/ Originally teen gangs,

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14/ New Jersey Advisory Committee to the U.S. Commission on Civil Rights, Incidents of Bigotry and Violence in Essex County (1988), pp. 9-10.

15/ Illinois Advisory Committee to the U.S. Commission on Civil Rights, Bigotry and Violence in Illinois (1988), p. 2.

16/ Southern Poverty Law Center, "Skinheads Blamed for Year's Worst Attacks," Klanwatch Intelligence Report, February 1989, p. 1.

they are now being organized into a national network by older white supremacist groups, such as the White Aryan Resistance and the Aryan Nations. "Not since the Ku Klux Klan of the 1950s has a white supremacist group been so obsessed with violence, and so reckless in its disregard for the law," the center observed. 17/ The targets of its violence were said to have included not only blacks and Jews but Asian Americans, American Indians, Hispanics, and some whites as well. 18/

According to the Anti-Defamation League:

> The rise in the number of Skinheads has been paralleled by an increase in the amount of violent crime they have committed, including two homicides and numerous shootings, beatings and stabbings, mostly directed against members of minority groups. Skinheads have also been responsible for a significant number of vandalisms of synagogues and other Jewish institutions. 19/

Campus Bias Incidents

Bias-related incidents on college campuses have been the subject of numerous disturbing media reports in recent years. The ADL reported a sharp increase in incidents against Jews on campuses in 1988. 20/ For example, "spray-painted swastikas

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17/ Ibid., p. 1.

18/ Ibid., p. 5.

19/ Anti-Defamation League of B'nai B'rith, Civil Rights Division, Young and Violent: The Growing Menace of America's Neo-Nazi Skinheads (1988), p. 1.

20/ 1989 ADL Report, p. 7.

and anti-Semitic slogans such as 'Kill the Kikes'and 'Zionazi racists' were found on the wall of the Jewish Student Center at SUNY at Binghamton." The report also noted that abusive remarks and slurs, "combining anti-Semitism and sexism, have proliferated on numerous campuses." 21/

A racial brawl was reported at Amherst University in October 1986; racial epithets reportedly were carved in desks at Providence (R.I.) College; a black woman cyclist was harassed at the University of California at Berkeley; the American Indian president of the student body at Macalester College in St. Paul, Minnesota, received threatening letters with racial slurs after she wrote a campus newspaper article on racism; and University of Michigan students staged a sit-in to protest racial incidents, including the telling of racist jokes on a campus radio station. 22/ The Southern Poverty Law Center

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21/ Ibid., pp. 7-8.

22/ Hayes Johnson, "Racism Still Smolders on Campus," USA TODAY, May 10, 1988, p. 10. See also, e.g., Robert Barr, "Campus Unrest Sign of Racial Tensions," Binghamton Press and Sun-Bulletin, Apr. 19, 1988; Christopher Connell, "Campus Incidents Lead to New Push for Minority Enrollments," Washington Times, May 16, 1988; Michele N-K Collison, "Racial Incidents Worry Campus Officials, Prompt U. of Massachusetts Study," Chronicle of Higher Education, March 1987; Lee A. Daniels, "Prejudice on Campuses is Feared to be Rising," New York Times, Oct. 31, 1988; and Robert Zausner, "Racism Charges Trouble Penn State," Philadelphia Inquirer, Feb. 18, 1988, p. 1-A.

reported that white supremacist groups appear to have renewed attempts to recruit college youth, citing, for example, flyers distributed at Northwest Missouri State University asking students to join the Klan and warning that "The Knights of the Ku Klux Klan are watching you." 23/

There is some indication that an actual increase in campus bias incidents has occurred in recent years. 24/ As an ADL official observed, "These are the future leaders of our country, and it's disturbing to see on campuses, manifestations of the crudest form of bigotry and racism." 25/ A newspaper editorially pointed out that "Crude, overt racial bigotry has again come out of campus closets and onto the quads" when "[a] society's universities ought to be among its chief civilizing influences." 26/

23/ Adam Cohen, Southern Poverty Law Center, "White Supremacists Find Recruits on Campus," Klanwatch Intelligence Report, February 1989, p. 15.

24/ A Community Relations Service (CRS) official told the Commission in May 1989 that CRS casework on campus has "increased significantly," with the staff filings of "alerts" increasing from 48 in 1987 to 77 in 1988. Grace Flores-Hughes, Director, CRS, Department of Justice, remarks at May 18, 1989, briefing of U.S. Commission on Civil Rights, transcript, p. 9.

25/ "Anti-Semitic Incidents in 1988 Put at 5-Year High," New York Times, Jan. 29, 1989, p. 20, quoting Jeffrey P. Sinensky, director of ADL's civil rights division.

26/ "Racism: From Closet to Quad," New York Times, Apr. 1, 1987.

Significance of the Problem

The significance of the problem does not lie exclusively in the existence and activity of particular organizations that promulgate spurious doctrines of racial superiority and advocate religious persecution. What is significant, however, is the fact that these groups advocate openly the racist and discriminatory beliefs that surface in individuals and institutions despite efforts at their eradication. Were hatred and violence based on race, religion, or national origin practiced only by members of such groups, the problem would pale in scope as well as significance. Not all anti-Semites join a neo-Nazi organization, but every anti-Semite is a threat to the religious freedom of others. Not all racists join a hooded order, but every person who holds his or her own race to be superior or inviolate denigrates another and threatens its survival. Not every person who believes his or her culture, race, or religion is in jeopardy takes to paramilitary training, but every person who does so and gains the weaponry and skills requisite to armed violence is a menace to social cohesion and tranquility. In the final analysis, the problem is the continuing existence of racism and anti-Semitism that surface in the acts of some individuals and compose the rhetoric of a number of extremist organizations.

That an undercurrent of racism and religious prejudice persists is evidenced by the fact that groups espousing such views persist. Some have developed computer networks to

communicate with each other, sophisticated telephone message systems, and cable television programs to spread their message. 27/ Prejudice and animosity survive, not just in organizations known for creating divisive tension and intimidation, but also in numerous acts of religious and racial violence committed by persons similarly infected. Although the organizations themselves and the ideas expressed by their spokespersons are repugnant to most Americans, their significance to the Commission rests in the fact that such ideas are often expressed in illegal acts of discrimination against racial and religious minorities. In the next chapter, an attempt is made to identify the probable causes and contributing circumstances of such behavior. By understanding the causes and precipitative mechanisms, it may be possible to identify some useful remedies.

27/ See, for example, Stephen Miller, "Hi-Tech Racism," Black Enterprise, October 1987, p. 22, and National Institute Against Prejudice and Violence, Bigotry and Cable TV, Legal Issues and Community Responses (1988).

Chapter 3

Probable Causes and Contributing Circumstances

A number of explanations have been offered for the acts of bigotry and intimidation, reports of which have become so commonplace. For example, some believe that racial integration of neighborhoods is an important factor in bias incidents. The Southern Poverty Law Center reported that "move-in violence," such as arson attempts and cross burnings at the homes of minorities who had recently moved into mostly white areas, has been a serious problem in many metropolitan areas, such as Baltimore, Chicago, Cleveland, and Philadelphia, as well as Atlanta. 1/ By the same token, there is a school of thought that suggests that campus bias incidents tend to reflect white backlash in the face of increased minority student enrollments on formerly white campuses and resentment by some white

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1/ See generally Southern Poverty Law Center, Klanwatch, "Move-In" Violence: White Resistance to Neighborhood Integration in the 1980's (1987). A Justice Department official also suggested that racial incidents are the "unfortunate by-product of an essentially positive underlying development, the increasing integration of neighborhoods across the country." John Bolton, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, letter to Susan J. Prado, Acting Staff Director, U.S. Commission on Civil Rights, Mar. 30, 1987.

students at what they consider "preferential" treatment of minority persons through "set asides," "affirmative action," and other "race conscious," college-endorsed programs. 2/

A fundamental cause of bigotry-bred violence in the United States, according to some who have studied the problem, is the continuing presence and tenacious survival of deep-seated racism and anti-Semitism. One author, a Roman Catholic theologian, documents in scholarly detail the persistence through history of anti-Semitism and traces its manifestations from the classical Greek period to the present time. 3/ Edward H. Flannery's historical analysis of religious bigotry suggests that all forms of hostile prejudice against members of a particular group are often rooted in narrow theological concepts. These theological underpinnings account for the fact that institutionalized forms of racism and anti-Semitism

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2/ See, for example, Shelby Steele, "The Recoloring of Campus Life," Harper's Magazine, February 1989, pp. 47-55, and John Adams Wettergreen, "The New Bigotry on Campus," in U.S. Commission on Civil Rights, Perspectives, Spring/Summer 1989, forthcoming. Dr. Wettergreen argues that such programs actually are divisive in that they place high value on "cultural pluralism," rather than unity. "In other words, the greatly heightened racial and ethnic consciousness of the American university means both that there will be more incidents of bigotry and that many incidents which are not racially or ethnically bigoted will be thought to be so." Ibid., p. 13. See also Joseph Berger, "Campus Racial Strains Show 2 Perspectives on Inequality," New York Times, May 22, 1989.

3/ Edward H. Flannery, The Anguish of the Jews (New York: Macmillan, 1965).

frequently take on the appearance of religion itself, as well as the fact that acts of intimidation and violence are encouraged and perpetrated at times with zealous devotion to a contrived and convoluted set of racist beliefs.

The foregoing insights are illustrated in two major and infamous historical developments: the treatment of Jews in Nazi Germany and the perpetuation by the colonial settlers of America of the institution of slavery. The fanaticism of the Holocaust and the dehumanizing bondage of blacks in the United States provide evidence of the depths of degradation to which humanity can descend when bigotry and intolerance are institutionalized and officially condoned. In these situations the zeal of the racial and religious bigot can be seen clearly as ultimately antireligious, antidemocratic, and a perversion of humanistic as well as theological ideals.

Though contemporary America will never become a latter-day Nazi state or repeat the ignominy of slavery, the inescapable fact remains that the perverse traits of racism and anti-Semitism exist and are expressed in alarming, sometimes violent, ways by individuals and groups who make no secret of their prejudice against racial and religious minorities. The organizations they join provide an enclave of support for expressing and implementing ideas that are formed by a host of other influences encountered in the family, schools, and other situations.

This observation is not made to minimize concern over the groups themselves and the crucial role they play. Some reported acts of racial and religious intimidation are committed by persons who are said to have, or profess to have, past or present connections with organizations that preach hatred and advocate violence to vent that hatred. Even the perpetrators with no known or professed connection with such groups are clearly imitators of them and adopt their symbols of terror--the swastika, the burning cross, and the graffiti of hate and intimidation. In all cases, however, a major role of extremist groups is to provide the rhetoric of justification for acts perpetrated either by the groups themselves or individual imitators. As far as the victims are concerned, it matters little whether a group or an individual is responsible for the act; the terrorizing effects are the same.

Another role of hate groups, more ominous than the rhetoric of hate and advocacy of violence, has emerged in the past decade. Paramilitary training sites have been established where persons are trained in the use of sophisticated weapons, the manufacture of bombs, and the skills of guerrilla warfare. It has been claimed that these tactics are intended to prepare members to defend "the faith" from the enemies of "White

Christian America" or to ensure survival in an anticipated race war. 4/

Ted Gurr, an authority on violence in America, gave still another reason for taking these groups seriously when, before a congressional subcommittee on crime of the House Judiciary Committee, he identified a characteristic that runs directly counter to the American political tradition. Professor Gurr said:

> The contemporary Ku Klux Klan, National Socialist Party, and similar extremist groups are distinctively anti-democratic in their political beliefs and practices. The victims of anti-democratic violence have included, but were not limited to, ethnic minorities (blacks, Mexican-Americans) and religious minorities (Catholics, Jews). Whites of Protestant background also were often victimized because of their alleged criminality, immorality, or radical political views. Black Americans are not the only ones who need fear the resurgence of anti-democratic groups. 5/

Although one cause of racial and religious terrorism

4/ Georgia Advisory Committee to the U.S. Commission on Civil Rights, Perceptions of Hate Group Activity in Georgia (1982), pp. 2, 3.

5/ Professor Gurr characterizes these groups as "anti-democratic" because of "two characteristics that set them sharply apart from almost all other groups on the right of the American political spectrum. First, they reject some basic principles of democratic American society. They are prepared to deny equality of treatment or opportunity to ethnic and religious minorities, and they oppose the free expression of political and social opinions which contradict their own views. Second, they are prepared, collectively, if not in all individual instances, to use violence and to provoke violent confrontations in order to promote their objectives." The total statement and oral testimony appear in U.S. Congress, House, Committee on the Judiciary, Subcommittee on Crime, Increasing Violence Against Minorities, 96th Cong., 2nd sess. (Dec. 9, 1980), pp. 2, 4-23 (hereafter cited as Increasing Violence Against Minorities).

is widely acknowledged as being the persistence of racism and anti-Semitism, many observers appear in general agreement in identifying a number of circumstances and perceptions that contribute to the precipitation and exacerbation of overt acts of violence. In addition to the resentment by some whites of gains for minorities in housing and higher education, contributing circumstances are economic conditions, the mechanism of scapegoating, media treatment of advocates of violence, perceptions of retrenchment in civil rights enforcement, and failure on the part of law enforcement agencies to respond appropriately to specific incidents. 6/

Economic Conditions and Scapegoating

Rising unemployment, business failures, cuts in government programs and subsidies, increases in mortgage defaults, shrinking retail sales, declines in housing starts, and troubles in the auto and oil industries--these have been among components of the daily litany of economic news in some regions of this Nation. Although these conditions adversely affect a wide segment of the population, they have particularly severe repercussions on the poor and on racial minorities. Such

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6/ See, for example, Abt Associates, "Research Application Review--The Response of the Criminal Justice System to Bias Crime," Oct. 5, 1987, citing "increased economic competition from minorities...ethnic neighborhood transition, and a per-received decrease in government efforts to prevent discrimination in education, housing, and employment" as reasons behind bias crimes, p. 1 (hereafter cited as Abt Associates).

circumstances do not create bigots or cause acts of violence against racial and religious minorities, but coupled with the human propensity to find someone to blame, these conditions give rise to scapegoating, wherein negative and retaliatory feelings toward those perceived as causing economic difficulties are heightened. Under such circumstances, some whites severely affected by economic hardships believe that their hard times result from "reverse discrimination" in employment and a tax burden imposed upon them to support government programs that in their view provide undeserved advantages to minorities. Immigrants may also be perceived as threatening the economic well-being of such persons.

The report of the Commission's Advisory Committee in Michigan expanded on the theme that economic difficulties intensify the appeal of extremist groups to some whites who feel they must compete unfairly with blacks and other minorities for fewer jobs and shrinking resources:

> Private organizations in Michigan ranging from New Detroit to the Detroit Urban League have drawn similar conclusions. Public officials including U.S. Attorney Gilman, Wayne County Sheriff Lucas and representatives of the Detroit Department of Human Rights, the Saginaw Human Relations Department, and the Detroit Mayor's office have also pointed to the depressed economy. As Alexander Luvall, Special Assistant to the Mayor of Detroit observed, "when the economy is bad, it seems like the Klan starts marching again." 7/

7/ Michigan Advisory Committee to the U.S. Commission on Civil Rights, Hate Groups in Michigan: A Sham or a Shame (1982), p. 16 (hereafter cited as Michigan Report).

Professor Gurr also described the role of economic conditions and added additional insight:

> We know that most of the historical episodes of anti-democratic action occurred in times, in places and among people who suffered from economic dislocation....
>
> The evidence suggests that people who hold anti-democratic beliefs today are more likely than not to be economically marginal. They also tend to live in rural and small town America, areas where wages tend to be lower and economic opportunities fewer. These are the people who are most likely to be especially hard-pressed by inflation, by rising unemployment, and by static or declining real wages.
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> Their grievances in those circumstances tend to focus on the Federal Government and on minorities: on the Federal Government because of tax policies, and because they believe Federal spending policies have contributed to inflation; and minorities because they are believed to receive unfair advantage from Government programs. 8/

Media Treatment

White robes, masked hoods, storm trooper uniforms, swastika arm bands, and visible automatic weapons understandably attract media attention. Furthermore, the wearers of such regalia are hungry for press coverage and not beyond staging media events in an effort to spread the message of hostility and intimidation.

Journalist Dean Calbreath, writing for the Columbia Journalism Review, admits that he himself was used by the Klan

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8/ Increasing Violence Against Minorities, pp. 7-8. See also U.S. Commission on Civil Rights, Recent Activities Against Citizens and Residents of Asian Descent (1986), p. 39, in which the Commission found that factors contributing to anti-Asian sentiments in the U.S. included "competition between low-income refugees and other low-income groups for jobs and housing."

and unwittingly served its publicity purposes on many occasions. He also describes how other elements of the mass media have been similarly duped. Calbreath quotes one former Klan official as having claimed: "We used the press. We lied and did anything we could to make reporters happy. We intentionally staged things just to get coverage." 9/ Of course, most individual perpetrators of violent racial incidents, such as the recent killing of a black youth in Bensonhurst, New York, do not seek press coverage.

Although the press has a responsibility to report the news, it has not always done so with accuracy and appropriate perspective. Often statements, patently false, go unchallenged by interviewers of hate group spokespersons, thereby perpetuating stereotypic myths about racial and religious minorities. When the significance of events is exaggerated or inordinate attention is paid to minor side issues, the coverage is distorted. An example cited by the Michigan Advisory Committee illustrates the problem: "While over 3,000 attended the celebration [of the thirty-third anniversary of Israel] most of the media attention went to fewer than 20 Nazis who briefly demonstrated." 10/ In Missouri, a television report of racial tensions at a college included an interview with a Klan representative, sandwiched between other campus interviews,

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9/ "Kovering the Klan: How the Press Gets Tricked into Boosting the KKK," Columbia Journalism Review, March/April 1981, pp. 42-45.

conveying the erroneous impression that the Klan was active on the campus and leading to a deluge of calls to the school from frightened parents. 11/ The press must be more conscious of its power to aggravate already inflamed, tense racial situations.

Perceived Retrenchments in Civil Rights Enforcement

There is a widespread perception that the Federal Government in recent years relaxed its enforcement posture in the area of civil rights and cut back on social programs that have benefited many Americans. Bigots, reportedly, have been quick to interpret these initiatives as a lack of government concern for minorities who are now fair game for attacks that are expected to go unchallenged. 12/ Some public opinion polls have pointed to an increase in racial tensions, resulting in part from the perception of a personal message sent by President Reagan that civil rights went too far and that

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10/ Michigan Report, p. 20

11/ Missouri Advisory Committee to the U.S. Commission on Civil Rights, Campus Bias in Missouri, transcript of community forum in Columbia, Mar. 22, 1989.

12/ Michigan Report, pp. 16-17. See also Minnesota Advisory Committee to the U.S. Commission on Civil Rights, Bigotry and Violence in Minnesota (presentation by Elaine Valadez, chair, Governor's Task Force on Prejudice and Violence) (1989), forthcoming. For a more comprehensive statement of this view, see Frederick A. Hurst, commissioner, Massachusetts Commission Against Discrimination, "Racism in the Reagan Years, Resurgence or Reaffirmation?" in U.S. Commission on Civil Rights, Perspectives, Spring/Summer 1989, forthcoming.

in some subtle way "racism is permissible again." 13 /

In addition to the perception that government authority will not be imposed upon violators of civil rights, there may be those who assume that the perceived shift toward a conservative political philosophy in recent years provided license to express and act out their racial and religious hostility. These people frequently describe themselves as true (white) patriots who place (white) America first and are prepared to defend (white) democracy from its enemies. Professor Gurr pointed out:

> I want to make it very clear that anti-democratic attitudes of the kinds I have identified are not part of the American conservative philosophy.
>
> ...In general it has become more widely acceptable to oppose equal rights for women, to support legislation against forced busing, to restrict affirmative action programs and to oppose government intervention in social and economic affairs. These policy preferences all are associated in the public's eye with conservatism. Why not go several steps further and retaliate against the liberals, the blacks, the public officials who are responsible for, or who benefit from, these kinds of programs and activities?
>
> I am suggesting that this is the kind of mental process going on among people whom I have called anti-democratic. Right wing anti-democratic views probably are not more common now than they were 15 years ago. What has changed is that the shift in general public opinion has led

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13/ Samual G. Freedman, "New York Race Tension Is Rising Despite Gains", New York Times, Mar. 29, 1987. See also Josh Barbanel, "New Yorkers pessimistic on Race Relations, Poll Shows, New York Times, June 23, 1989, which noted the important role of public leadership and the role of race in the local mayoral political campaign.

> extremists to feel that it has become more acceptable to express their views openly and to act upon them. 14/

Law Enforcement Response

Effective police responses to incidents of racial and religious violence are necessary to keep such incidents from spreading. If the police fail to respond, or respond in ways that clearly demonstrate a lack of sensitivity, perpetrators can interpret the police inactivity as official sympathy or even sanction. A knowledgeable observer expressed the importance of effective official response well when he said:

> What is problematic, at least for members of anti-democratic organizations, is how much the police, prosecutors, judges, and juries are prepared to let them accomplish without imposing legal sanctions. What the Klans and the neo-Nazis are doing now can be regarded as a kind of testing, both of public opinion and of official response. Official responses which are tolerant, apathetic, or simply ineffective are likely to encourage more extremist action. 15/

A factor that affects police response is the widespread lack of hard, comprehensive, and comparative data concerning the number, location, and types of crime that are motivated by racial or religious bigotry. The slaying of a spouse in a domestic quarrel and the murder of a black person for "race-mixing" are both reflected in crime statistics as homicides. This Commission has learned of the existence of few statewide efforts to gather and report discretely those crimes

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14/ Increasing Violence Against Minorities, p. 8.

15/ Ibid.

apparently motivated by racial and religious bigotry. 16/ Police and community response can be affected adversely by the absence of reliable data on criminal violence motivated by bigotry because this gap in knowledge makes it difficult for police to measure trends, develop enforcement strategies, and allocate personnel. The lack of data also impairs the ability of policymakers and other concerned groups and individuals to assess the extent of the problem and develop adequate measures of prevention. 17/

Finally, some question whether bias crimes are vigorously prosecuted at State and local levels. For example, it has been argued that:

> For the most part, the criminal justice system--like the rest of society--has not recognized the seriousness of the hate violence problem. Police officers, prosecutors, and judges tend to regard most incidents as juvenile pranks, harmless vandalism, private matters between the involved parties, or acceptable behavior against disliked groups. Many criminal justice system personnel do not believe that hate violence exists in their community. Others are aware it exists but are reluctant to publicize the fact for fear their communities will be branded as racist or hotbeds of violence. Lack of police and prosecutor attention to bias

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16/ Such States include Connecticut, Illinois, Maryland, Minnesota, New Jersey, New York, Pennsylvania, and Virginia. Adele Terrell, program director, National Institute Against Prejudice and Violence, telephone interview, Apr. 3, 1989.

17/ Col. Leonard Suppenski, Baltimore County Police Department, remarks at briefing of the U.S. Commission on Civil Rights, Feb. 13, 1987.

crime often reflects the attitude of local residents who do not want minorities in their community. 18/

18/ Abt Associates, p. 2. See also Center for Democratic Renewal, They Don't All Wear Sheets: A Chronology of Racist and Far Right Violence--1980-1986, which concluded that "Bigoted violence has become a critical criminal justice issue of the late 1980s...[s]ections of our society remain unconvinced of the necessity to redress immediately the violence directed at some classes of victims...[I]n the overwhelming majority of instances, bigoted violence is simply ignored, dismissed as the work of young 'pranksters' or simply left unexplained." p. 18.

Chapter 4

Promising Responses

With respect to the fundamental cause of acts of bigotry and intimidation, the persistence of racism and anti-Semitism, there are no easy or quick solutions. Some State and local government and community leaders, however, have undertaken important steps to counter the influence of extremist groups and to minimize the incidence of bias-motivated acts. For example, in 1981 the Governor of Maryland established a task force on violence and extremism, which was the counterpart of the private sector Coalition Opposed to Violence and Extremism. During 6 years of meetings and public hearings, the Governor's task force led, among other things, to the establishment in Baltimore of the National Institute Against Prejudice and Violence to conduct relatively comprehensive research in this area. 1/ Similar task forces and coalitions have been established by government officials or community leaders elsewhere to air the problem and prepare strategies against it. 2/

1/ State of Maryland, Office of the Governor, Final Report of the Governor's Task Force on Violence and Extremism (1987), p. 149.

2/ See, for example, the discussion of the Kootenai County Task Force on Human Relations in the Idaho Advisory Committee to the United States Commission on Civil Rights, Bigotry and Violence in Idaho (1986), pp. 39-44.

Further, various State governments, such as North Carolina, Rhode Island, and Wisconsin, and also local governments have strengthened laws against bias-motivated crimes and amended or passed new laws prohibiting, among other things, paramilitary training, cross burnings, and the wearing of hoods or masks. 3/ In addition, various State agencies and higher education institutions have reacted to incidents of bigotry and violence on campus by studying apparent causes and proposing possible remedies. 4/

Improving Police Intervention

A number of police departments have responded to acts of racial and religious violence by forming specialized units.

3/ For a recent, detailed compilation of such State-by-State legal initiatives, as well as related Federal laws, see National Institute Against Prejudice and Violence, Striking Back at Bigotry: Remedies Under Federal and State Law for Violence Motivated by Racial, Religious, and Ethnic Prejudice (1986) and the 1988 Supplement (1988).

4/ See, for example, South Carolina State Human Affairs Commission, A Report on Hazing/Race Relations at the Citadel (1987), which reported that most black cadets found that forms of racial intimidation by white cadets, including name calling and ethnic jokes, "were not uncommon" (p. 21) and that the lack of black role models, such as black executives or professors, created "an environment lacking in ethnic diversity and cultural sensitivity." (p. 25). See also "Racism Report Praises Penn State But Outlines Room for Improvement," Philadelphia Inquirer, Mar. 9, 1989, which noted that a group of social scientists recommended, among other things, establishing a committee to define racial and sexual intolerance and to develop sanctions and consideration of a "crime stoppers" program with cash incentives for anonymous information on racial crimes. Another study, by the National Institute Against Prejudice and Violence, surveyed the frequency and awareness of "ethnoviolence" at the University of Maryland Baltimore County campus. Ethnoviolence on Campus, The UMBC Study (1987).

These units are responsible for gathering intelligence, preventing illegal acts and conspiracies, and swiftly apprehending persons who commit racially or religiously motivated crimes. In Boston a community disorders unit was created by special order of the police commissioner. The New England Regional Office described its work:

> The unit works closely with district police personnel, assisting them in identifying and investigating crimes which are racially motivated....[It] has been successful in educating the rest of the department about the seriousness of racially motivated crimes [and]...diligent in investigating [them]...[It also] works closely with the Civil Rights Division of the State Attorney General's Office and the local district attorney in prosecuting these cases. According to the director of the unit, in neighborhoods where civil rights violations have been successfully prosecuted, the number of such incidents has decreased. 5/

In Providence, Rhode Island, a somewhat different approach was taken:

> An undercover police unit called the Terrorist-Extremist Suppression Team was formed by the Mayor and the Police Chief to track the Klan, neo-Nazis and other extremist groups. Formed in May [1981], the Mayor explained that its members are experienced officers who would work full-time to obtain information. In July, evidence against five members of extremist groups was presented to a jury....The unit functions as an independent unit within the department to investigate all complaints of harassment which fall under both new and old laws. The unit is under the direct supervision of the chief of police....Thus far

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5/ U.S. Commission on Civil Rights, New England Regional Office, Regional Response, Nov. 13, 1981, p. 4-5. For a discussion of how Massachusetts uses its Civil Rights Act to prosecute hate crimes, see Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, Stemming Violence and Intimidation through the Massachusetts Civil Rights Act (1988).

> the unit has generated evidence presented to the grand jury based on old laws as well as the recent statute. [The police chief] believes that the long-term success of the unit depends on the public's awareness and utilization of it. He reported that the unit is in contact with ADL and is working with other community groups to encourage community support. 6/

Another police strategy was employed to respond to a planned Klan rally in Windham, Connecticut. Since earlier rallies in the State led to violence, the State's chief attorney and the head of the State department of public safety were able to obtain a court order banning weapons and allowing the State police to search persons going to the site and their vehicles. As a result of this authority and the announced intention to use it, violence was avoided. 7/ Similarly, police and the State bureau of investigation's handling of counterdemonstrations against civil rights marches in Forsyth County, Georgia, was praised by observers before the Georgia Advisory Committee. 8/

Prompt and effective police response to reported incidents requires careful, detailed planning. The Michigan Advisory Committee described the process used in Saginaw:

> In anticipation of potential disruptions, the city of Saginaw drew together representatives of the Human Relations Commission, law enforcement agencies, business leaders, media representatives and other community leaders

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6/ Ibid., p. 11.

7/ Ibid., p. 12.

8/ The bureau's antiterrorism task force handled security for the marchers during the counterdemonstrations. Georgia Advisory Committee to the U.S. Commission on Civil Rights, Bigotry and Violence in Georgia (forthcoming).

> to develop an appropriate response. An emergency mobilization plan for police personnel was created which spelled out lines of authority, operational procedures, use-of-force policies, procedures for arresting juveniles and adults, where individuals would be temporarily held, and guidelines governing other contingencies. 9/

Further, several States now collect and report information on hate incidents. State Advisory Committees have reported how these efforts are working. 10/

It is conceivable that some of these attempts to improve law enforcement, i.e., those having to do with heightened surveillance and undercover operations, could border on questionable or illegal invasions of privacy. In the Providence situation, for example, the American Civil Liberties Union expressed concern that the undercover team posed a possible threat to first amendment rights. 11/ Similar questions were raised about the State police searches connected with a Klan rally in Windham, Connecticut. 12/ In any event, care must be exercised to ensure that all measures taken are proper and lawful. To violate constitutional liberties in

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9/ Michigan Report, p. 23.

10/ See, for example, Connecticut Advisory Committee to the U.S. Commission on Civil Rights, Collecting Data on Bias-Related Incidents in Connecticut (1987): New York Advisory Committee to the U.S. Commission on Civil Rights, Reporting on Bias-Related Incidents in New York State (1988); and Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights, Reporting on Bias-Related Incidents in Pennsylvania (1988).

11/ New England Regional Office, Regional Response, Nov. 13, 1981, p. 15.

12/ Ibid., p. 12

order to protect civil rights would be self-defeating. It is improper to fight extremism with extremism. 13/

Education and Public Awareness

As noted earlier in this statement, the Anti-Defamation League monitors anti-Semitic activities through its regional offices and issues periodic reports. 14/ Klanwatch of the Southern Poverty Law Center is engaged primarily in factfinding activities and the provision of legal services. 15/ Further, the Center for Democratic Renewal in Atlanta publishes various reports on hate groups and activities, as well as a bimonthly newsletter on the activities of the Ku Klux Klan, the Aryan Nations, and other such groups. 16/

Media Response

Sensitive and nonsensational news coverage of acts of racial and religious violence and intimidation should be

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13/ See also National Institute Against Prejudice and Violence, Bigotry and Cable TV (1988), for an analysis of first amendment rights and the efforts of communities, including Cincinnati, Ohio, the East Bay area of California, and Pocatello, Idaho, to fight racist TV programs.

14/ ADL is headquartered at 823 United Nations Plaza, N.Y., N.Y. 10017.

15/ The Southern Poverty Law Center is located at 400 Washington Avenue, Montgomery, Ala. 36104.

16/ The center's mailing address is P.O. Box 50469, Atlanta, GA 30302. The address of the National Institute Against Prejudice and Violence, whose studies have been cited in this report, is 525 West Redwood Street, Baltimore, MD 21201.

encouraged. One way of doing so is reflected in earlier descriptions of public and private commissions, coalitions, or task forces. In most of these cases, newspaper editors, television producers, and other media representatives serve on such bodies established to examine the problem and recommend solutions. On other occasions, community organizations with civil rights interests have taken the initiative to contact opinionmakers to suggest existing or potential programs that provide factual and historical information about hate group activity and the ways in which it is best countered.

The television industry has a code that sets forth standards of responsible programming. In the treatment of news and public events, the code calls for reporting that is factual, fair, and unbiased. It advocates against the airing of "morbid, sensational or alarming details not essential to the factual reports" and states further that "pictorial material should be chosen with care and not presented in a misleading manner." The code acknowledges that "television provides a valuable forum for the expression of responsible views on public issues" and urges broadcasters to "seek out and develop with accountable individuals, groups and organizations, programs relating to controversial public issues of import to his/her fellow citizens." 17/ Were relevant portions of this

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17/ Broadcasting/Cablecasting Yearbook 1982, pp. D-15 to D-17.

code followed circumspectly by the electronic media, and similar principles by the print media, many of the problems arising in coverage of hate group activity might be eliminated.

Speaking Out

Running through virtually all the material on the subject of racial and religious violence is a belief in the indispensable need for strong and unambiguous statements from community leaders and elected officials that acts of racial and religious intimidation will not be tolerated. Members of hate groups of the kind discussed here view themselves as true patriots who stand as the last defenders of the American way. They must learn from repeated public statements, as well as the determined enforcement of law, that they are the most anti-American among us. Were they to succeed in having a one-race, one-ancestry Nation, then any semblance of the pluralism that is America would be destroyed. What is needed, according to most observers, is for more public officials to take repeated opportunities to express their disapproval in increasingly strong terms and definitive action.

Chapter 5

Conclusion

The U.S. Commission on Civil Rights concludes that the phenomenon of racial and religious violence and harassment is a continuing threat to the maintenance of a peaceful, democratic, and pluralistic society. Bigotry-bred violence and intimidation are manifestations of racism and anti-Semitism that still survive even after the years of effort spent on their eradication. The basic cause, the complex network of contributing circumstances, and the social and psychological dimensions that surround the increasing display of racial and religious violence and intimidation are easily understood in broad outline:

o When persons or groups derive primary satisfaction or esteem in thinking themselves superior to others;

o when a sense of group racial or religious superiority is evoked to advance the group itself at the expense, disadvantage, or persecution of another group;

o when religious doctrine is wittingly or unwittingly used to place guilt or to establish hostility toward another group;

o when competition increases or is perceived to increase for limited numbers of jobs, economic resources, government assistance, and college admissions;

o when government is perceived as either covertly supporting or unwilling to take punitive action with respect to entrenched discrimination;

o when some segments of society believe that the "American way of life" is about to be destroyed by internal and external "enemies";

then the circumstances are right for hatred and bigotry that can result in confrontations of serious proportions. Furthermore, when these are perpetrated in a spirit of righteous indignation and fueled by an expectation of media exposure and public tolerance, violence or harassment is not surprising.

The Commission further concludes that:

1. Precise measures of the extent of racial and religious violence and intimidation do not exist primarily because most Federal, State, and local law enforcement agencies have not devised methods for reporting and compiling statistics on crimes that involve clear signs of racial and religious motivation. Such data are needed to measure trends, develop

preventive programs, allocate resources, and adjust public policy. 1/

2. The criminal justice system is more likely to inspire confidence that it will respond swiftly and effectively to apprehend offenders, press for prosecutions, and exact appropriate punishments when the racial, ethnic, and religious composition of criminal justice work forces reflects that of the community.

3. Some national, State, and local leaders have not been as vocal as they should be in expressing outrage over criminal acts that deny constitutional rights to persons because of their color, creed, or national origin. Further, their policies have not always been consistent with their words. Whether this is due to unintentional insensitivity, or to a deliberate conspiracy of silence or inaction, it too becomes the ground for believing that illegal acts of racial or religious violence will not be challenged seriously.

4. Although antidemocratic extremist groups contribute much of the rhetoric of hatred and provide an enclave of emotional

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1/ The Commission has called for legislation to require the Justice Department to collect such data. See, for example, U.S. Commission on Civil Rights, news release, "Civil Rights Commission Endorses National Collection of Hate Crimes Statistics," May 15, 1987.

support for those who act out the hatred, the groups themselves are not always directly responsible for acts of racial and religious violence. Many of these acts are carried out by unthinking imitators; others are committed by individuals who happen to hold the same views espoused by group members.

5. Education is one key element in efforts to eradicate racism and prevent violence. Effective educational strategies can be developed by public and private school systems, police training academies, the mass media, universities, religious institutions, and a host of community-based organizations.

6. New legislative initiatives aimed at outlawing specific tactics of racial and religious bigots have been taken by a number of State and local legislative bodies in apparent recognition that adequate legal tools as well as improved educational strategies are important in the fight against overt bigotry.

On the basis of these conclusions, the Commission urges:

1. The Federal Government should develop a mandatory, national reporting system that will produce an accurate and comprehensive measurement of the extent of criminal activity that is clearly based on racial and/or religious motivations.

Implementing this suggestion is no easy task. Uniform

definitions, guidelines, and procedures must be developed if the data are to be reliable, comparable, and useful. Until this difficult step is taken, however, some public policy decisions and program development strategies will not be made or will be undertaken in the absence of adequate information.

2. The criminal justice system, especially law enforcement components, should intensify efforts to ensure that for acts of intimidation or violence, apprehension and punishment is meted out with a view toward deterring such acts by others.

3. The President of the United States should take the lead in denouncing overt acts of racism and anti-Semitism as being the epitome of intolerable and irresponsible behavior on the part of any American, and emphasizing that such behavior will not be tolerated.

The President is in a unique position to exert the power of moral suasion and reinforce the abiding values of democratic traditions. Reviews of the history of violence in America indicate that outbreaks subside when officials make it clear that anti-American behavior is repugnant and subject to full enforcement of the law and constitutional guarantees. President Bush should issue forthright, powerful, and clear statements on this issue.

4. Parents, educators, leaders of religious institutions, and other opinionmakers should work together to develop educational programs designed to produce cognitive and emotional change with respect to racism and anti-Semitism.

Promising efforts in this regard are underway in a number of communities. What may be needed to intensify educational activity is leadership and seed money from the National Endowment for the Humanities and private philanthropies. The need for such education and training on the part of law enforcement officers, who stand as the first line of defense in dangerous and explosive situations, should not be overlooked.

5. The Civil Rights Division of the U.S. Department of Justice should maintain intense prosecution of racially and religiously motivated violence.

Prosecution of cases involving racial violence are vital in the effort to stem bigotry and violence. The U.S. Department of Justice should treat such prosecutions as a critical responsibility of its Civil Rights Division.

We urge upon all Americans a cooperative and relentless effort, by all legal means, to excise from American life the roots of bigotry and violence that deny the rights of racial, religious, and ethnic minorities. We believe swift and effective action is needed, but conclude with a caution against the use of extreme measures wherein the government's interest is not balanced against the deprivation of individual rights.

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

STATUS OF EARMARKS REPORT-------REPORT DATE, SEPTEMBER 15, 1989
OBLIGATIONS AS OF 7/31/89
*(COMMISSIONER PAYROLL DATA THROUGH 9/9/89)

A. REVIEW OF EARMARKS AND COSTS ALLOCATED TO EARMARKS

I. Regional Expenses--Earmark: at least $2,000,000
Associated Costs:

a. Personnel Compensation--salaries, benefits, overtime pay, awards and terminal leave for both current and former employees of Regional Offices.

b. Travel--State Advisory Committee travel, travel of staff in regional offices, travel of central staff to conduct region-related business.

c. GSA Rent--actual rental costs of two regional offices not located in Washington, D.C.; prorated rental costs of headquarters office rental.

d. Other rents--rental of SAC rooms, regional copier machines.

e. Communications costs--prorated costs for postage, FTS and other communications costs.

f. Printing--printing costs for SAC reports, prorated costs of Federal Register printing for SAC meetings, miscellaneous other printing costs.

g. Services--services of court reporters, maintenance contracts and other miscellaneous services for regional offices.

II. Monitoring Costs--Earmark: at least $700,000
Associated Costs:

a. Direct Costs--salaries, benefits, overtime pay, awards, terminal leave and travel for employees performing monitoring functions.

b. Indirect Costs--based on personnel costs, prorated costs for rental payments, communications charges, supplies and other services.

III. Consultants--Earmark: not to exceed $20,000
Costs of hiring consultants.

IV. Temporaries--Earmark: not to exceed $185,000
Salaries and benefits accruing to current and former employees hired on a temporary basis.

V. Schedule C Appointees--Earmark: no more than four full time individuals.

Names and position titles of employees appointed under Schedule C authority.

VI. Commissioners' Assistants--Earmark: equivalent of 150 days each at GS-11/10 rate

Number of days paid to commissioners' assistants based on 8-hour billing increments; salary for each assistant is budgeted for 150 days at a rate of GS-11/10. Payments are shown after timekeeping/payroll processing completed.

VII. Commissioners--Earmark: 75 days for Commissioners; 125 days for Chairman

Number of days paid to commissioners based on 8-hour billing increments; daily rate of each. Payments are shown after timekeeping/payroll processing completed.

VIII. Contracts, Mission Related External Services--Earmark: not to exceed $40,000

Number and dollar amount of all contracts providing mission-related external services.

A. Commissioner	Earmark Amount	Cumulative Payments	Balance 9/09/89	Current Daily Rate	Days Remaining
Allen, W.	38,413	35,798	2,615	$310	8
Berry, M.	23,048	15,049	7,999	310	26
Buckley, E.	23,048	20,882	2,166	310	7
Chan, S.	23,048	16,109	6,939	310	22
Destro, R.	23,048	22,320	728	310	2
Friedman, M.	23,048	18,362	4,686	310	15
Guess, F.	23,048	17,381	5,667	310	18
Ramirez, B.	23,048	16,291	6,757	310	22
Subtotal	199,749	162,192	37,557		

B. Assistants	Earmark Amount	Cumulative Payments	Balance 9/09/89	Daily Rate	Days Remaining	Grade
Woodward, J.	10,678	3,142	7,536	111	68	11
Duran, S.	10,677	6,957	3,720	75	50	7
Toolsie, K.	21,355	20,420	935	111	8	11
Bratton, N.	21,355	14,000	7,355	111	66	11
Lam, G.	21,355	11,985	9,370	111	84	11
Gabriel, L.	21,355	14,453	6,902	111	62	11
Renshaw, M.	10,678	2,045	8,633	111	78	11
Shoap	10,677	66	10,611	67	158	6
Purswell, L.	21,355	10,765	10,590	111	95	11
Lopez, N.	21,355	6,482	14,873	111	134	11
Subtotal	170,840	90,315	80,525			
Total, A + B	370,589	252,506	118,083			

Note: Cumulative payments amount reflects vouchers submitted by report date. (There may be vouchers or paychecks still pending.)

B. CURRENT EARMARK COSTS (Dollars in thousands)

	FY 1989 Earmark	Obligated as of 7/31	Balance	Percent Obligated	Percent Remaining
I. Regional Expenses	2,000	1,627	373	81%	19%
II. Monitoring Costs	700	644	56	92%	8%
III. Consultants	20	10	10	50%	50%
IV. Temporaries	185	160	25	86%	14%
V. Schedule C Appointees listed below, following VIII					
VI. Commissioners' Assistants * (Chart attached, payroll as of September 9, 1989)	171	90	81	53%	47%
VII. Commissioners * (Chart attached, payroll as of September 9, 1989)	200	162	38	81%	19%
VIII. Contracts					
a. Number of Contracts	0	0			
b. Dollar total	40	0	40	0%	100%

V. Schedule C Appointees

a.	Novell/Prado	Special Assistant
b.	Eastman, John	Public Affairs Officer
c.	Miller, Brian	Deputy General Counsel
d.	Jeffrey, Robert C.	Special Assistant
e.	Renshaw, Michael	Special Assistant

U.S. COMMISSION ON CIVIL RIGHTS

FISCAL YEAR 1989

REPORT ON STATUS OF FUNDS

JULY 31, 1989

Obligations for the month of July were $337,115. Cumulative obligations through July were $4,430,382. We have spent 78 percent of an appropriation of $5,707,000 in 83 percent of the fiscal year.

Attached is the Status of Funds which shows by category, budget operating plans for the fiscal year, obligations through July, balances for the remainder of the fiscal year, percentage of obligations to allowances and the percent remaining in each category.

U.S. COMMISSION ON CIVIL RIGHTS

STATUS OF FUNDS AS OF
July 31, 1989

F.Y. 1989
(dollars in thousands)

	Budget Operating Plan #1	Obligated as of 7/31/89	Balance	Percent Obligated	Percent Remaining
Budget Authority					
Permanent Salaries.....	2745.00	2196.00	549.00	80%	20%
Other Than Permanent Salaries.....	541.00	414.00	127.00	77%	23%
Other Personnel Compensation.....	45.00	19.00	26.00	42%	58%
Personnel Benefits.....	450.00	416.00	34.00	92%	8%
Benefits Former Personnel.....	0.00	0.00	0.00	0%	0%
Travel and Trans of Persons.....	240.00	209.00	31.00	87%	13%
Transportation of Things.....	23.00	10.00	13.00	43%	57%
Rental Payments to GSA.....	621.00	494.00	127.00	80%	20%
Rental Payments to Others.....	75.00	123.00	-48.00	164%	-64%
Comm, Utilities and Other Rents.....	265.00	125.00	140.00	47%	53%
Printing and Reproduction.....	161.00	101.00	60.00	63%	37%
Other Services.....	356.00	214.00	142.00	60%	40%
Supplies and Materials.....	114.00	76.00	38.00	67%	33%
Equipment.....	71.00	32.00	39.00	45%	55%
Interest and Dividends.....	0.00	2.00	-2.00	0%	0%
TOTAL.....	5707.00	4431.00	1276.00	78%	22%

* Plan #1 Revision In Process To Cover Difference

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

September 16, 1988

MEMORANDUM TO BARBARA FONTANA
Librarian

FROM: JEFFREY P. O'CONNELL
Attorney Advisor

SUBJECT: NOTICE OF PROPOSED RULEMAKING - COMMENTS

The Commission published a notice of proposed rulemaking, entitled "Enforcement of Nondiscrimination on the Basis of Handicap in Programs and Activities Conducted by the U.S. Commission on Civil Rights," in the Federal Register. The notice provides that "[c]omments received will be available for public inspection at The Robert S. Rankin National Civil Rights Library...."

Four sets of comments were received. The comments are attached hereto so that they will be available in the Library.

PLEASE DO NOT REMOVE FROM THE LIBRARY!

ELMER C. BARTELS
Commissioner

The Commonwealth of Massachusetts

Executive Office of Human Services
Massachusetts Rehabilitation Commission
Statler Office Building
20 Park Plaza
Boston, 02116

August 11, 1988

William J. Howard, General Counsel
U.S. Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, D.C. 20425

RE: Proposed CCR 504 Regulations (45 CFR 707)

Dear Mr. Howard:

On behalf of the Massachusetts Rehabilitation Commission and some 80,000 individuals with disabilities who are served each year by our agency, I am submitting comments on the proposed Commission on Civil Rights regulations which address the problems of discrimination on the basis of handicap, as mandated by Section 504 of the Rehabilitation Act.

I am very disappointed to see the C.C.R. has proposed amendments that significantly weaken the regulatory protections for the disability rights which are mandated by Title V of the Rehabilitation Act. The 504 regulations implement a civil rights law that is of critical importance to the disability community. Passage of the Civil Rights Restoration Act over a Presidential veto, once again, underscores this point. In view of the overwhelming mandate for strong and vigorous federal policies that support anti-discrimination and reasonable accommodation principles, I would urge the Commission to withdraw the proposed regulations and review any policy changes in light of the renewed 504 mandates most recently expressed by Congress and by the U.S. Supreme Court in the Arline case.

Section 504 and its implementing regulations are fundamental to ensuring and enforcing access to governmental programs and services, both at state and federal levels. Vigorous implementation of this law is essential to assuring that citizens with disabilities can effectively participate in mainstream activities and services within their own communities. C.C.R. as the key federal agency for monitoring discrimination should exercise a leadership role with respect to the civil rights of individuals with disabilities.

ELMER C. BARTELS
Commissioner

The Commonwealth of Massachusetts
Executive Office of Human Services
Massachusetts Rehabilitation Commission
Statler Office Building
20 Park Plaza
Boston, 02116

ANALYSIS AND DETAILED COMMENTS CONCERNING PROPOSED CCR 504 REGULATIONS (45 CFR 707)

1. Jurisprudential Considerations. Section 504 and the other statutory provisions of Title V were enacted by Congress in 1973 and amended in 1978 as remedial measures to guarantee the civil rights of citizens with disabilities. The recent Arline decision cited Congressional intent to address the broad problem of discrimination against handicapped persons, encompassing a full range of programs including, but not limited to, employment. [S. Rep. No. 93-1297, pp. 39-40 (1974) and S. Rep. No. 95-890, pp. 19 (1978) cited in F.N.2; also see F.N.3 citing S. Rep. No. 93-1297, pp.16 37-38, 50, Nassau County v. Arline, (55 L.W. 4246, March 3, 1987)].

   Companion laws, based on the federal models, have also been enacted by many states to protect the rights of residents with disabilities. A body of judicial opinions is gradually developing, based on the federal laws and their implementing regulations, as well as on analagous state laws. Early appellate opinions, sometimes based on limited trial records or sketchy presentation of relevant evidence, have placed reviewing courts in an unenviable judicial role of filling in the factual gaps with simple legal rules or dictum. Such rules or dictum must be adjusted by the courts in subsequent cases to fit different facts and more fully developed legal theories. One example of this problem is found in the Davis case which stated that "an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap". (Southeastern Community College v. Davis, 442 U.S. 397, 406, 1979.) This statement was misinterpreted by some legal analysts to preclude any 504 mandate for affirmative action to meet the needs of handicapped persons by an employer or a government program.

   A simple reference to the commentary on the 504 regulations, as promulgated by the Department of Health, Education and Welfare in 1977, would make it clear that the Davis concern for academic requirements that are essential to a program of instruction or a particular degree need not be changed. (42 FR 22692, May 4, 1977) This explanation clearly places the limiting factors of Davis in an academic setting, not a

I urge you to reconsider your basic regulatory approach and fulfill the 504 principles of facilitating equality and social access on behalf of the constituencies your agency is mandated to serve.

Thank you for your attention to these comments and to the more detailed constructive criticisms which are enclosed.

Very truly yours,

Elmer C. Bartels
Commissioner of Rehabilitation

ECB/NFE:sw
Enc.

general service delivery context and reflects the concern of the 504 drafters for tailoring regulations that carefully reviewed the needs for sound educational programming and the rights of access for students with disabilities to create workable policies of reasonable accommodation. Davis is not a general public services case and the principled legal argument set forth therein can not properly be applied to general C.C.R. programs and activities.

The Supreme Court found it necessary to clarify this point in the Alexander case and clarified the confusion arising from the Davis dictum as not precluding reasonable accommodation duties, which means that "reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." (Alexander v. Choate, 469 U.S. 287, F.N. 20 and F.N. 21., 1985.)

The proposed regulations attempt to freeze into definitional language the most restrictive leadings of Davis and Alexander. There is no legal requirement that restrictive judicial interpretations of a remedial statute be incorporated into regulations. The agency is certainly free to extend the full benefits of section 504 to its intended population. In fact, because Section 504 is designed to ensure the rights of handicapped persons, their interests should be the primary concern in regulatory policies. Therefore, we would urge C.C.R. to forego the judicial gloss at this time and allow the Courts to develop their interpretations of Section 504 against experience.

2. Regulatory Impact. Although Executive Order No. 12612 published on October 26, 1987 requires all federal agency rules to consider their impact upon state governmental programs and procedures, no such statement was included with the proposed C.C.R. regulations. Insofar as federal regulatory interpretations of Section 504 may be considered by state courts and agencies interpreting analagous state statutes, this impact should be addressed.

3. Definitions

   a. Complete Complaint - (Section 707.3(c))

      The definition of "complete complaint" is overly restrictive and may lead to delays or C.C.R. inaction on some complaints, without fault of the complainant. While some screening mechanism is undoubtedly needed so that C.C.R. does not waste staff time on frivolous sketchy complaints, the requirements for details about the nature and date of an alleged 504 violation prior to any discovery through the complaint process may not be known to some individuals with handicaps who, nevertheless, have legitimate complaints.

b. Qualified Individual With Handicaps - (Section 707.3(f))

The revised language in this clause reflects an interpretation in Davis which has been implicitly overruled by Alexander and Arline, both of which concede the goverment's duty to make reasonable accommodations. The proposed language over-emphasizes the eligibility or entry-level screening of an individual with handicaps by focusing on a prediction of whether or not that individual "can achieve the purpose of the program or activity without modifications...that would result in a fundamental alteration in its nature" This approach telescopes what should be a three step process:

(1) First, assess whether or not the individual with handicaps meets "the essential eligibility requirements for the receipt of such services" [Compare 45 CFR 84.3 (k)(4)];

(2) Second, describe any modifications necessary for reasonable accommodation of the individual's handicaps to redress any deficits identified at Step (1).

(3) Third, the govermental program or activity may show that such modifications would constitute an undue hardship on the program in terms of:

(a) The overall size of the government program with respect to the number and type of facilities and size of budget;

(b) The type of the government operation;

(c) The nature and cost of the accommodation needed.

Again proposed language discussing "fundamental alterations" in the "nature" of a program is properly limited to educational institutions, and therefore, should not be utilized by C.C.R. Academic institutions, like the nursing school in Davis, have a unique need to establish and maintain entry requirements relevant to credentials which are necessary for thorough professional training in such fields as medicine, law, and engineering. This was recognized in the original HEW regulations governing federally funded programs by a special definition of "qualified handicapped person" applicable only to educational institutions and special regulatory sections for post secondary and elementary and secondary education. (45 CFR 84.3 (K)(2)(3) and subparts D and E)

4. Physical Access (Section 7.08)

(a) General - Existing Facilities (7.08(b)(2))

The first paragraph is negatively worded, and may reflect a misinterpretation of the Grove City case which originally involved government federally funded programs and civil rights issued under Title IX, not 504. Failing

to require handicapped access for all C.C.R. programs and activities is in direct contravention to the stated legal requirements of Section 504 which mandates that all federal programs be accessible to individuals with handicaps. We recommend that this paragraph be deleted from the proposed regulations.

(b) Existing Facilities - General (Section 717.8(b)(2)(ii)) and New Purchases (Section 707.8(c)(2))

The decision making procedure governing denial of a request for reasonable accommodation is designed to assure review by a high level C.C.R. official at some point in process. That basic concept is sound, since only the top officials have full access to resources and knowledge of the whole agency that would permit full consideration of some reasonable accommodation requests. However, the proposed regulations do not include a procedure for informing an individual with handicaps who makes such a request about his/her rights to a decision by such a higher authority. We recommend the inclusion of such a provision. The stated duty to implement options that would not unduly burden C.C.R. programs or activities is commendable. The requirement for choosing service delivery methods that maximize integrated settings is sound and consistent with 504 principles.

(c) New Purchases (Section 707.8(c))

Requiring all newly acquired buildings and facilities to be accessible to individuals with handicaps is consistent with the intent of section 504 with regard to these facilities. However, if C.C.R. programs already occupy rental space it would be appropriate to insist on compliance with Architectural Barriers Act requirements upon lease renewal. This procedure is generally utilized by Massachusetts state agencies and is legally viable, since any potential landlords bid on common specifications which require architectural accessibility, and thereby calculate the costs of modification into their bids. We recommend that buildings and facilities retained by lease renewal be included in this section.

5. Compliance Procedures (Section 707.12)

The procedures for an internal C.C.R. appeal of a 504 grievance are generally appropriate. These could be strengthened by describing the basic parameters for submitting or obtaining evidence used by C.C.R. to decide such an appeal. We would also recommend a statement about complainants' right to judicial review without exhaustion of the C.C.R. internal appeal process. This would help grievants to intelligently and effectively exercise the civil rights that are guaranteed by Section 504.

6. Access to Communications (Section 707.9)

In limiting communications accessibility to the standards interpreted in Southeastern Community College vs. Davis, 442 US 397 (1979), C.C.R. is reducing the intent of Section 504

of the Rehabilitation Act of 1973, instead of enforcing it. Therefore, in order that your proposed regulations carry out the intent inherent in the promulgation of Section 504, the following recommendations are suggested:

a) Section 707.9(b). At the end of the section add: Effective communication for hearing impaired persons is achieved through the provision of qualified sign language interpreters, oral interpreters and assistive listening devices. As an adjunct to these provisions, written materials may be provided. Rarely is a note pad sufficient to provide effective communication.

b) Section 707.9(c)(2)(ii). At the end of paragraph (ii) add: Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings including assistive listening devices, such as FM, induction lop or infrared systems.

c) Definitions - (Section 707.3(b) and (e))
Auxiliary aids - After..."telecommunication devices for the deaf (TDD)" add: "assistive listening devices such as FM, induction loop and infrared systems,"... interpreters...

d) Individual with Handicaps: Individual with Handicaps means any persons who has a physical, sensory, or mental impairment...

The rational for this addition is that deafness is a sensory impairment and may properly be classified as such rather than being lumped into the category of physical impairment.

e) Access to Communications - (Section 707.9(c))
At the end of the section add:
The international symbol for deafness shall be used at each public telephone accessible by amplifier to TDD. The same symbol shall be used at each primary entrance of a facility such as those which provide communication as well as physical accessibility through provision of interpreters, TDD's telephone amplifiers and assistive listening devices and visual signalling devices for fire and other emergencies.

(Prepared by MRC Legal Office 8/11/88)

PARALYZED VETERANS
OF AMERICA
Chartered by the Congress
of the United States

Comments of

Paralyzed Veterans of America

Commission on Civil Rights Enforcement of
Section 504
of the
Rehabilitation Act of 1973, as amended
with regard to federally conducted programs

53 Fed. Reg. 22534 (1988)
(to be codified at 45 CFR Part 707)
(Proposed June 16, 1988)

Submitted by:

Alyse B. Steinborn
Associate Director/Advocacy
August 10, 1988

801 Eighteenth Street, N.W., Washington, D.C. 20006 (202) USA-1300 Fax: (202) 785-4452

These comments are presented on behalf of the Paralyzed Veterans of America (PVA). PVA is a congressionally chartered veterans' service organization and represents over 14,000 veterans who have incurred injuries or diseases of the spinal cord, whether service-connected or nonservice-connected in origin. All of PVA's members are handicapped within the meaning of §504 of the Rehabilitation Act of 1973, as amended.

Ten years after the promulgation of the 1978 Amendment to §504 prohibiting discrimination by the federal agencies and the U.S. Postal Service, differences of opinion still exist between the federal government and handicapped citizens as how to implement this congressional mandate. This failure to carry out congressional intent is evidenced by the government's tardiness in promulgating nondiscrimination regulations in federally conducted programs.

Background

Following passage of the 1973 Rehabilitation Act, amendments added to it in 1974 required that regulations be promulgated under §504 in the same manner as they are required under Title VI of the Civil Rights Act. 1/ In 1977, a regulation guideline was issued by the Department of Health, Education and Welfare (HEW) carrying out its lead agency responsibility to implement §504. 2/ Nevertheless, the efforts by federal agencies to follow HEW and individually publish their own rules was virtually nonexistent.

1/ Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977) Cherry v. Matthews, 419 F.Supp. 922, 924 (D.D.6 1976).

2/ 43 Fed. Reg. 2132 (Jan. 13, 1978).

At the time the 1978 amendments to the Rehabilitation Act were passed, Congress was fully aware of the 1977 guideline regulation promulgated by HEW. Secretary Califano sent a copy to each member of the Congress asking the legislators whether or not the regulation guideline met with congressional intent. When Congress chose to amend the Rehabilitation Act, it corrected what it considered to be an improper statutory interpretation that excluded the federal government from compliance with §504. 3/ As Representative Jeffords introduced the 1978 Amendment to correct this oversight, he stated that his express intent was to "require each department and agency to promulgate regulations covering the new parts of Section 504." 124 Cong.Rec. H.3970 (Daily ed. May 16, 1978.) In discussing the conference report concerning the 1978 amendment, Representative Jeffords remarked that his intent in developing this provision was "in the interest of fairness and equity, to eliminate discrimination against the handicapped wherever it exists." Pursuant to the amendment, each executive agency and the U.S. Postal Service was required to promulgate a regulation for nondiscrimination in programs or activities conducted by the agency. Pub.L. 95-602, 2119, 92 Stat. 2982, (29 U.S.C. 794).

3/ The legislative history to the 1978 amendments indicated that the reason for this addition was that "[i]n September 1977 the Justice Department issued an opinion at the request of the Department of Health, Education and Welfare, declaring that the Federal Government was exempt from section 504. Somehow it did not seem right to me that the Federal Government should require States and localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves. So I developed a provision which is in this conference report that extends coverage of section 504 to include any function or activity in every department or agency of the Federal Government." 124 Cong. Rec. 38551 (1978) (statement of Rep. Jeffords).

On November 2, 1980, President Carter issued Executive Order 12250 transferring to the Attorney General the authority to review and coordinate the implementation and enforcement of §504. The Department of Justice issued its final rule on August 11, 1981 which formally transferred the HEW authority to DOJ through 28 CFR Part 41. The transfer created no substantive change in the government-wide enforcement of section 504.

Regulations from the different federal agencies to implement section 504 were lacking. It was not until Paralyzed Veterans of America v. Smith, CA No. 79-1979 (C.D. Cal. 1983) that federal agencies were ordered to issue regulations for nondiscrimination in federally assisted programs. Federally conducted programs were mandated to "publish expeditiously, and without further delay, a regulation implementing the 1978 amendment to Section 504" federal court in Williams v. United States, 704 F2d 1162 (9th Cir. 1983).

Finally, five years after this court decision, Commission on Civil Rights (CCR) proposes a §504 rule for federally conducted programs. This rule significantly departs from the language used in DOJ's regulation guideline for nondiscrimination in programs receiving federal financial assistance. If the CCR rule is left unchanged, it will be held to a standard of nondiscrimination that is less than what is expected of recipients of federal financial assistance.

PROVISIONS

§707.3(f) Definitions - Qualified individuals with handicaps

> CCR proposes that "Qualified individuals with handicaps" means-... (1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;. . . "

A handicapped person is not entitled to Section 504 protection unless he is found to be "otherwise qualified to participate in the program receiving federal financial assistance." The Supreme Court's interpretation of "otherwise qualified handicapped individual" as found in Southeastern Community College v. Davis 4/ is generally consistent with Congressional intent and the DOJ regulation guideline. PVA is pleased to see that the CCR proposed definition follows Congressional intent and acknowledges that the agency has the burden to determine whether a modification made to accommodate an individual with disabilities will result in a fundamental alteration of the nature of the program. It recognizes that an additional burden should not be placed on the individual with disabilities.

In Davis, a hearing impaired woman brought a §504 action after having been denied access to the school's Associate Degree Nursing Program. The school rejected her application because it found that her hearing disability would prevent her from safely participating in the clinical training program and from rendering adequate care to patients. The Fourth Circuit determined that the school must consider Davis' qualifications without regard to her hearing impairment. The Supreme Court reversed the holding of the Fourth Circuit and found that Davis was not an otherwise qualified handicapped person within the meaning of the statute because she could not meet the college's physical requirements. These physical requirements were found to be legitimate and indispensable. In addition, §504 did not require the university to modify its nursing program to such a degree so as to structure a fundamentally different program. The question the court considered was

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4/ 442 U.S. 397 (1979).

whether Davis could achieve the purpose of the program offered: adequately serve the nursing profession. The court determined that Davis could not perform every function of a registered nurse.

The Court also decided that Section 504 does not require affirmative action by the disabled person to determine whether a fundamental change needs to be made. The language, purpose or history of the provision did not support such an argument. If read together, the preamble and definition sections of CCR's regulation adequately reflects the affirmative obligation of the agency to suggest that a modification to a particular program would be a fundamental alteration and therefore disparately impact the essential purpose of the program. The fundamental alteration portion of this definition should reference 707.8(b) or (c) Physical Access, which specifies the steps taken before a final determination is made as to whether the agency met the necessary burden of proof.

The Davis court never considered whether the plaintiff would effectively perform as a nurse in a different setting or doing a different job. In that respect, the case has limitations which may not be faced in a large federal agency where job structure may provide greater flexibility and opportunity. So long as a handicap is "extraneous to the activity sought to be engaged in, the handicapped person is 'otherwise qualified'." Anderson v. Banks, 520 F.Supp. 472 (S.D. Ga. 1981).

Unlike Davis, not every case which raises the qualified handicapped person issue will be predicated upon meeting specific physical requirements. If specific physical requirements are not required (i.e. one need not be able to walk to effectively use a computer) it must not be used to determine

one's eligibility for a specific program or activity so long as the essential purpose of the program can be achieved.

The use of nonessential criteria has already been criticized by the courts. In Dopico v. Goldschmidt, 687 F.2d 644 (2nd Cir. 1982), the court cautioned against using additional criteria to determine the right of mobility impaired persons to use mass transit. If CCR considers a person's disability as a particular criteria to determine job performance, CCR can use it subjectively to eliminate persons who they perceive may not be able to perform the job. In Davis, the Supreme Court made clear that "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." 5/

The phrase "level of accomplishment" is also troublesome. It contradicts DOJ's interpretation regarding employment where a handicapped person must be able to perform the "essential functions of the job." Moreover, regulations interpreting Title VI, which served as the model for §504, prohibit the use of ". . .criteria or methods of administration which have the effect of subjecting individuals to discrimination. . . " 6/

While subsequent cases have relied extensively on Davis, it has not precluded the Court from taking ". . .modest affirmative steps to accommodate the handicapped." 7/ Determining whether an accommodation is required involves two steps. First, will the disabled person be able to perform the essential

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5/ Also, Pushkin v. Regents of the University of Colorado, 685 F.2d 1372 (10th Cir. 1981) where a medical doctor suffering from multiple sclerosis was denied admission to a psychiatric residency solely on the basis of his handicap.

6/ 45 C.F.R. §80.3(b) (2).

7/ American Public Transit Association v. Lewis 655 F.2d 1272 (D.C. Cir. 1981).

function of a job? In other words, is he qualified? This means that §504 does not require a recipient to modify its program to accommodate handicapped individuals who are not otherwise qualified. The second factor, undue burden, concerns otherwise qualified handicapped individuals because the cost of an accommodation could result in the modification of an existing program. 8/ However, it must be remembered that the cost factor is not conclusive as to whether discrimination exists. The law requires affirmative action to remedy discrimination even when it entails some costs. The regulation is not clear and should explicitly state that modifications of a program must occur if the purpose of the program can be achieved.

As stated previously, Congress had the opportunity to affirm or change existing law in its 1978 amendments. Congress certainly intended to impose the same obligations on the government as on recipients of federal financial assistance. If Congress believed that the "qualified handicapped person" definition did not represent its will, Congress would have sought to change that also. On the contrary, some of the HEW regulations for federally assisted programs which provided funds for services to accommodate handicapped persons were incorporated into the 1978 amendments. This reaffirmation can be construed only as approval of the regulation. 9/

8/ Upshur v. Love, 474 F.Supp. 332 (N.D. Cal 1979)

9/ The United States Supreme Court's unanimous ruling in Consolidated Rail Corporation v. Darrone, 624 U.S. 79, (1984) supported the proposition that the federally conducted regulations should be consistent with the proposed federally assisted rule since the Court agreed after reviewing §504's legislative history that the federal government has the same nondiscriminatory obligations as those which are imposed on the recipients of federal financial assistance.

CCR has interpreted Davis to prohibit discrimination against disabled persons where such prohibition does not impose undue financial and administrative burdens. This is a basic interpretation of the Supreme Court's language, and must be balanced in light of the court cases which clarify the Davis decision. PVA does not wish to unduly criticize this definition because in most respects it protects the rights of people with disabilities who are capable of achieving the essential purpose of programs conducted by CCR if appropriate modifications are made.

§707.3(b) Definitions - Auxiliary aids

> CCR proposes that "'Auxiliary Aids' means services or devices that enable persons with impaired sensory, manual or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices."

Even though the preamble to the proposed rule suggests that the most common of the aids were mentioned in the regulation, the definition of auxiliary aids excludes any reference to aids for people with physical impairments. This definition section should include aids which would eliminate the physical barriers which preclude people with mobility impairments from participating in CCR federally conducted programs or activities. It should also include attendant services which may be needed to assist severely disabled persons during the course of their work day as well as aid them as they travel to and from work.

At the very least, a specific reference to section 707.10 "Auxilary aids" should set forth in this section of CCR's regulations. Section 707.10

succinctly states the agency's responsibility to consider the individuals request when it determines the accommodations necessary to afford people with disabilities equal opportunity to benefit from a program or activity conducted by CCR. PVA is especially encouraged by CCR"S awareness, reflected in the preamble, that people with mobility impairments may need assistance that is consistant with section 504's mandate.

The term "auxiliary" also implies something that is extra or discretionary. PVA encourages CCR to change this section to "Aids for Reasonable Accommodation" and alter the language to ". . .means, services or devices, including aid and attendant services, that enable individuals with disabilities, including those with impaired sensory, manual or speaking skills. . . "

§707.3(d) Definitions - Facility

CCR's definiton of facility fails to incorporate the mandate of the court's decisions in Rose v. U.S. Postal Service, 725 F2d 1249 (9 Cir. 1984). In this case the court includes all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased or used on some other basis by the agency. This should be incorporated into the proposed rules to clarify the defintion of facility.

§§707.4 -707.5 Self-evaluation and remedial measures, and Notice

Self-Evaluation and remedial measures

(a) The agency shall, within one year of the effective date of this part, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation required under paragraph (a) of this section, maintain on file, and make available for public inspection

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

Notice

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make that information available to them in the manner necessary to apprise them of the protections against discrimination assured them by Section 504 and this regulation.

PVA supports the inclusion of self-evaluation and notice provisions. In order to assure meaningful consultation with people who have disabilities it should be made clear that the self-evaluation process is not complete without input from people with disabilities or their representatives. Accordingly, a list of the persons consulted should be included in the file open for public inspection. PVA recommends that CCR also consider including: (1) an assurance to be submitted with the self-evaluation that will include, among others, that the effects of the discriminatory policy will be eliminated; (2) a transition plan and time frame for compliance; and (3) specific modification requirements including those for people with impaired vision or hearing. Notification of agency policy regarding nondiscrimination should also be specifically distributed in recruitment materials as well as general information.

§707.6 General prohibition against discrimination

This section should be revised in order to be consistent with the DOJ federally assisted prototype to include a prohibition of a federal agency to "aid or perpetuate discrimination against qualified handicapped persons by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit or service to beneficiaries of the recipients' program." 10/ This provision is important when a situation occurs where an agency, not covered under §504, is discriminating with the assistance of a federal agency that has §504 responsibilities. It affords the beneficiary an opportunity to bring a complaint against a responsible party rather then preclude him from any relief at all. An example of this situation would be the Federal Communications Commission (FCC) which is not responsible for promulgating §504 regulations. If the FCC, with the assistance of another federal agency, is discriminating against a beneficiary, then that beneficiary will be able to bring an action against the federal agency rather than being precluded from any relief.

§707.9(e) Access to communications-Undue burden

> CCR proposes the following:
> "The decision that compliance would result in...[fundamental] alteration or...[undue financial] burdens must be made by the agency head or his or her designee after considering all agency es available for use in the funding and operation of the conducted program or activity and accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in the alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity."

10/ 28 C.F.R. §41.51(b)(1)(v)

Two problems are raised with this provision. First, it should be recognized that all agency resources should be considered when determining whether or not an accommodation can be made, rather than just the funds attached with the program. In Davis, the Court said that §504 reflects "a recognition by the Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps." Davis at 410. The Court also said that "[w]e do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always be clear" p.412, and "on occasion the elimination of discrimination might involve some costs. . ." 442 U.S. at 411 n.10. Following this, courts have recognized that §504's mandate to end discrimination may involve some costs. That recognition should be reaffirmed in this regulation. The totality of the agency's budget should be the determining factor.

Second, Davis offers little guidance in determining what is an undue burden when reasonable accommodations are contemplated. Also, it is not clear from the regulation how reasonable accommodations differs from an attempt at changing the fundamental nature of a program. Generally, a recipient of federal financial assistance must make accommodations or modifications if the modification or accommodation is reasonable and does not impose an undue hardship on the recipient of federal financial assistance. The regulation should list factors to be taken into account in determining reasonableness as opposed to undue hardship. Even if these factors were used, it would be difficult to make such a determination. Alternatives for compliance should be suggested in the proposed rule. For example, when costs for accommodation could be extended over several years, the burdensome aspect may be

eliminated. It is encouraging to know, however, that CCR will be obligated to accommodate to the maximum extent possible to ensure access in to the programs or activities conducted by CCR.

§707.12 Compliance procedures

Generally, this section is comprehensive but should include:

(a) a provision for obtaining the expertise of the Architectural and Transportation Barriers Compliance Board to help resolve deficiencies in construction or location of facilities;

(b) a provision for judicial review;

(c) a provision to ensure that all other regulations, forms and directives issued by the agency perseded by the nondiscrimination requirements of this regulation;

(d) a provision for the availability of the federal agency to award attorney fees in administrative proceedings; and

(e) a provision for the availability of compensation to the prevailing party.

CONCLUSION

PVA encourages the Commission on Civil Rights to adopt a §504 regulation that is at least as stringent as the DOJ prototype regulation promulgated for the federally assisted programs and activities. When Vice President George Bush announced on March 21, 1983 that ". . .extensive changes of the existing 504 coordination regulations were not required. . .", PVA, along with other organizations representing individuals with disabilities, expected that the major regulatory provisions which protected the civil rights for individuals

with disabilities had the strong support of the Administration. Instead, it has become patently clear that several of the proposed changes in CCR proposed rule represent serious breach of the Vice President's commitment and departure from the strong legal principles which had been enunciated by the Congress and the courts regarding §504.

At the very least, PVA believes the CCR should promulgate a regulation that closely follows the specific language that DOJ uses in its 1980 federally assisted rule. The analysis of that regulation indicates that the provisions will protect individuals with disabilities from discrimination in programs that receive federal financial assistance. The language in this proposed rule indicates that the Commission on Civil Rights is working towards narrowing the scope of civil rights protections for individuals with disabilities. Only a final rule that returns to language used in the DOJ prototype for federally assisted rule can correct this misperception.

Mental Health Law Project

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August 15, 1988

William J. Howard, General Counsel
U.S. Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, D.C. 20425

Dear Mr. Howard:

The Mental Health Law Project submits the following comments regarding the Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Handicap in Programs and Activities Conducted by the Commission, published in the Federal Register on June 16, 1988. These comments are intended to supplement the comments which were filed on behalf of the Civil Rights Task Force of the Consortium of Citizens With Developmental Disabilities, of which the Mental Health Law Project is a member.

Section 504 of the Rehabilitation Act is the only federal civil rights statute that applies to programs and activities conducted by the federal government itself. Initially, the Congress made Section 504 applicable only to programs and activities assisted with federal financial funds, which was identical to the scope of the other civil rights statutes after which Section 504 was patterned. However, in response to the illogical result that state programs had to be more programmatically and structurally accessible than analogous federal programs, many of which served the same populations, the Congress expanded Section 504's coverage in 1978.

While the regulations of each of the federal agencies required to comply with the 1978 expansion of Section 504 are important, the regulations of the Civil Rights Commission have a particular significance, given the responsibility of the Commission to promote the effective enforcement of the civil rights statutes. It is therefore unfortunate that the Commission has adopted the narrow and discriminatory view that it has with regard to its own obligation to accommodate the need of individuals with disabilities.

Both the Preamble and the regulations themselves make it clear that the Commission does not strike the correct balance between the Supreme Court's discussion of "fundamental alteration" in Southeast Community College v. Davis, 442 U.S. 397 (1979), and the intent of Congress with regard to reasonable accommodation, as substantiated by later Supreme Court cases such as Alexander v. Choate, 469 U.S. 287 (1985) and School Board of Nassau County v. Arline, 107 S.Ct. 1123 (1988).

The Congress understood that the class of people with disabilities who were the beneficiaries of Section 504's protections required more than a simplistic "open door" policy if the promise of equal opportunity was to be theirs. That is to say, especially with regard to an agency such as the Commission, that physical, communication, and programmatic barriers to the participation of persons with disabilities are all illegal, given the Commission's obligations under Section 504.

We therefore ask the Commission to reconsider those sections of its proposed regulations which would permit physical and other barriers to the achievement of equal opportunity to persist in

existing buildings, Section 707.8(b), in new or newly leased buildings, Section 707.8(c), and in communications, Section 707.9(e). We know of no programs or activities conducted by the Commission which would suffer a "fundamental alteration" were these barriers to be removed. In fact, it is difficult to imagine how the Commission can fulfill its statutory obligations without removing existing barriers.

With regard to structural barriers, the Commission must also comply with the Architectural Barriers Act both in the buildings that it or General Services Administration owns and those that it or GSA leases. The 1975 Amendments to the Act make that clear, since the Act was amended to remedy the federal government's failure to comply with the Act's requirements after its passage in 1968. The Ninth Circuit's decision in United States Postal Service v. Rose elaborates on this issue. Both the decision and the Act require the Commission to change Section 707.8 of the proposed regulations in light of the fact that the Commission operates out of one building and space leased or borrowed for hearings held around the country. It would be both embarrassing and illegal for the agency to conduct either a public hearing or its day to day business in facilities that are inaccessible.

We appreciate having had the opportunity to comment on the Commission's proposed rules and we look forward to their modification.

Very truly yours,

Bonnie Milstein

Bonnie Milstein
Senior Staff Attorney

Consortium for Citizens with Developmental Disabilities

For further information contact:

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August 12, 1988

William J. Howard, General Counsel
U.S. Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, D.C. 20425

Dear Mr. Howard:

The Consortium for Citizens with Developmental Disabilities (CCDD) submits the following comments with regard to the Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Handicap in Programs and Activities Conducted by the U.S. Commission on Civil Rights published in the Federal Register on June 16, 1988.

Statement of Interest

The Consortium for Citizens with Developmental Disabilities (CCDD) is a coalition of national organizations representing persons with disabilities, families of those persons, service providers, professionals, and advocates. CCDD advocates for the rights of America's 43 million persons with disabilities before Congress and the Executive Branch. Regardless of the specific disability of an affected individual, all persons with disabilities share a common experience of discrimination and look to the federal governemnt for a leading role in eliminating this discrimination.

Because of the mandated role of the Civil Rights Commission in eliminating all forms of discrimination, the CCDD has a strong interest in these proposed regulations. Before addressing the substantive provisions of these regulations section-by-section, it is important to discuss an overriding philosophical consideration that underpins these regulations and thereby undercuts their effectiveness.

Otherwise Qualified

The preamble to the regulations and the regulations themselves take an overly narrow and legally incorrect view of the obligations imposed by section 504 of the Rehabilitation Act of 1973 as amended. The major problem is posed by the Commission's analysis of the obligation to reasonably accommodate qualified persons with handicaps.

The preamble notes that there are language differences between the proposed rule and the Federal Government's section 504 regulations for federally assisted programs. The Commission then justifies these differences as being required by the decisions of the United States Supreme Court in Southeastern Community College v. Davis, 442 U.S. 397 (1979) and Alexander v. Choate, 469 U.S. 287 (1985), as well as the circuit court decisions subsequent to Davis.

There is another Supreme Court decision that bears some mention in analyzing section 504 obligations. This decision is School Bd. of Nassau County, Fla. v. Arline, ___ U.S. ___, 107 S.Ct. 1123 (1987). Although the Arline Court did not overrule either Davis or Choate, the Court made it clear that the simplistic reading of Davis preferred by some was incorrect.

This point is emphasized by footnote 17 of the Arline decision. (107 S.Ct. at 1131, n. 17.) As the Court explained in that footnote, an otherwise qualified handicapped person is one who can perform the essential functions of the job either with or without reasonable accommodations. Moreover, the Supreme Court cited with approval in footnote 17 the very language of the Federal Government's section 504 regulations that the Commission argues were changed by Davis and Choate.

Instead of focusing on the circuit court decisions listed in the preamble, the Commission might like to consider some of the other circuit court rulings. These include decisions holding that in making the qualification determination, both the legitimacy of the program or job requirements and the possibility of reasonable accommodation must be considered. See, e.g., Bentivegna v. United States Department of Labor, 694 F.2d 619 (9th Cir. 1982); Prewitt v. United States Postal Service, 662 F.2d 292, 307 n. 21 (5th Cir. 1981); Simon v. St. Louis County, Mo., 656 F.2d 316 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982). For example, in Simon, the United States Court of Appeals for the Eighth Circuit explained that, "The proper focus . . . is therefore whether the requirements set forth by defendants . . . are necessary and legitimate . . . ."

This point is highlighted by the following statement in the preamble: "The agency is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature." (53 Fed. Reg. 22535.)

If a program of a fundamentally different nature is required in order to provide an applicant with equally effective services, then the agency may be required to make such modifications. For example, braille brochures or audio tapes for those persons with vision impairments are arguably fundamentally different from materials for persons without vision impairments. However, as required by the Government-wide regulations and as complied with by the Commission in this NPRM (53 Fed. Reg. 22534), these modifications are required in order to ensure equally effective access to services.

Therefore, we recommend that the Commission revise both its preamble and its regulations to make them consistent with the Supreme Court's pronouncements in School Board of Nassau County v. Arline and the Section 504 regulations for federally assisted programs. Such consistency requires that the preamble and the regulations emphasize the Commission's responsibility to accommodate the needs of persons with disabilities who wish to participate in the Commission's activities. We cannot imagine, given the nature of the Commission's work, that any such accommodation would result in the "fundamental alteration" of its work or in undue financial and administrative burdens on the Commission. Thus, unless the Commission republishes its Notice of Proposed Rulemaking with examples of what it means, that language should be omitted from the final regulation.

Specific Comments

With these general comments in mind, we can turn to the specific provisions proposed for adoption.

1. Section 707.4 Self-evaluation and remedial measures.

This regulation requires a self-evaluation within one year and then states that "the agency shall proceed to make the necessary modifications." No time limit is specified and the regulation does not even suggest that the modifications will be made with "all deliberate speed." The only requirement is that the agency "proceed." This language should be stricken and the section should read, "The agency shall make the necessary modifications forthwith."

2. Section 707.6 General prohibitions against discrimination.

The preamble to this section contains the following sentence: "Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate." (53 Fed. Reg. 22536, emphasis added.) This sentence ironically occurs relatively closely to the discussion of why the Commission has changed its terminology for referring to qualified individuals with handicaps.

We do not believe that persons are defined by their disabilities. For example, a person is not an "epileptic;" he or she is a person with epilepsy. Especially since the Commission has utilized the language of the Rehabilitation Act Amendments of 1986 with regard to the definition of handicapped persons, the Commission should not use archaic and pejorative language elsewhere in the text.

3. Section 707.6 General prohibitions against discrimination.

a. Subsection (b)(4)

Just as the Commission refers to the obligations imposed by section 501 in the language of section 707.7 (Employment), so the Commission should refer to the Architectural Barriers Act in discussing the obligation to make the sites or locations of facilities or activities physically accessible.

b. Subsection (b)(5)

This subsection is one of the more incomprehensible in the notice of proposed rulemaking. This subsection is phrased in prohibitory language to discourage criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap. In light of the practices of some procurement contractors to evade the requirements of section 503 of the Rehabilitation Act, it would make much more sense to require as follows: "The agency, in the selection of procurement contractors, shall use criteria that ensure that qualified individuals with handicaps are not subjected to discrimination on the basis of handicap." We urge the Commission to amend the final regulation accordingly.

c. Subsection (c)

This subsection tracks the language of the original HEW regulations, but probably should not. This subsection and the comparable provision in the HEW regulation (section 84.4(c)) authorized limitations imposed by both federal statute and executive order. The inclusion of the term "executive order" was not extensively discussed at the time of the promulgation of the HEW regulations and is of questionable validity. Since section 504 is found in a federal law, its requirements cannot be unilaterally modified by an executive order. This reference should therefore be stricken.

4. Section 707.8 Physical access.

a. Subsection (b)(1)

This subsection would grandparent in all facilities owned, leased or used by the agency on the effective date of these regulations. The Rehabilitation Act has been applicable to the activities of the Commission since 1978. It is only negligence or purposeful inactivity of the Commission that has resulted in the failure to issue section 504 regulations until now. Access should not be restricted any longer because of the failure of the Commission to show sensitivity to section 504 issues before this date. Whatever grandparenting in of existing facilities is permitted should terminate with the effective date of the 1978 amendments to the Rehabilitation Act. This is especially important in view of the relaxed interpretation of section 504 obligations embraced by the Commission. This comment is equally applicable to the other provisions of these proposed regulations that would start the clock running for the Commission with the effective date of these regulations.

b. Subsection (b)(2)

This subsection contains two exceptions that would sanction physically inaccessible programs or activities. The first of these exceptions refers to changes that "would fundamentally alter the program or activity." It is not clear what application this language has to physical accessibility in programs or activities of the Commission. How can a ramp, accessible bathroom, elevator or other accessibility aid fundamentally alter a program or activity of the Commission? Such a provision simply has no place here.

The second exception is equally troublesome. This exception refers to changes that "would result in undue financial and administrative burdens." This takes the "undue" standard that has been primarily applied to non-federal recipients of federal financial assistance (such as transit agencies) and sanctions its use in governing the obligations of the federal government. We do not believe that this exception has any application to the federal government at all.

No financial or administrative burden is "undue" if it is necessary to permit an individual with a disability to peacefully petition the government for redress of grievances. No financial or administrative burden is "undue" if it is necessary to permit an individual with a disability to peacefully participate in the operations of an agency that bears partial responsibility for vindicating the rights of that person. No financial or administrative burden is "undue" if it is necessary to permit an individual with a disability to be employed by an agency that has affirmative responsibilities to employ and advance qualified persons with disabilities. This exception should therefore also be stricken.

c. Subsection (c)

The concepts of fundamental alteration or undue burden have even less application to new purchases, leases or other arrangements. Taken literally, the Commission's proposed regulations would authorize the Commission to take into consideration its limited budget (see 53 Fed. Reg. 22538) and then authorize a lease for a new building that is cheaper because it is inaccessible. That contention, memorialized in subsection (c)(2), has no place in the United States in 1988.

5. Section 707.9 Access to Communications.

a. Subsection (b)

Since sections 501 and 504 apply to the Commission's employment activities, subsection (b) should be amended to ensure effective communication with employment applicants and employees as well as the other enumerated classes of persons.

b. Subsection (e)

This section again utilizes "fundamental alteration" and "undue burden" language. These limitations have no place in section 707.9. Access to communications can never fundamentally alter the nature of the service; financial and administrative burdens are due to the societal goal of eliminating barriers and therefore can never be undue.

6. Section 707.10 Auxiliary aids.

Subsection (b) states that, "In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps." (Emphasis added.) The regulation does not provide any guidance as to what criteria the agency will use in deciding whether or not to honor the requests of the individual.

One could easily argue that the agency should defer to the requests of the individual and not merely give weight to those requests. However, if the agency does only give primary consideration to the requests, the agency should not balance the individual's requests against cost considerations where those cost factors may mitigate against the provision of auxiliary aids that would allow the individual to participate in the most integrated setting appropriate to his or her needs. (See proposed section 707.6(d).)

7. Section 707.11 Eliminating discriminatory qualifications and selection criteria.

This section includes an authorization for irrebuttable presumptions of inability to participate based on the Department of Justice's regulation. Whatever the validity of the DOJ provision before Arline, it did not survive that decision.

As noted in the earlier discussion of Arline, individualized determinations are required in making decisions about the qualifications of persons with disabilities. While certain criteria may effectively exclude all persons with certain disabilities, individualized determinations are necessary to ensure that the criteria are legitimate, that the criteria are properly applied, and that with reasonable accommodation the criteria cannot be met. Any negligible savings in administration associated with the use of an irrebuttable presumption are more than outweighed by the benefits from individualized determinations. The offending clause should therefore be stricken.

Conclusion

The Consortium for Citizens with Developmental Disabilities (CCDD) appreciates the opportunity to comment on these proposed regulations. Please feel free to contact any of the listed organizations if you have any questions about these comments. We look forward to working with staff of the Commission in the months ahead in achieving full compliance by the Commission with the requirements of the Rehabilitation Act.

Yours truly,

Alexander Graham Bell Association for the Deaf
American Academy of Otolaryngology Head and Neck Surgery
American Association of the Deaf Blind
American Deafness and Rehabilitation Association
American Diabetes Association
American Foundation for the Blind
American Society for Deaf Children
ACLD, An Association for Children and Adults with Learning Disabilities
Association for the Education of Rehabilitation Facility Personnel
Association for Retarded Citizens
Conference of Educational Administrators Serving the Deaf
Convention of American Instructors of the Deaf
Disability Rights Education and Defense Fund
Epilepsy Foundation of America

Gallaudet University Alumni Association
International Association of Parents of the Deaf
Mental Health Law Project
National Alliance for the Mentally Ill
National Association of Developmental Disabilities Councils
National Association of Protection and Advocacy Systems
National Association of Private Residential Resources
National Association of Rehabilitation Professionals in the Private Sector
National Council on Rehabilitation Education
National Fraternal Society of the Deaf
National Head Injury Foundation
National Rehabilitation Association
Registry of Interpreters of the Deaf, Inc.
Self-Help for Hard of Hearing People
Spina Bifida Association of America
The Association for Persons with Severe Handicaps
Telecommunications for the Deaf, Inc.
United Cerebral Palsy Associations, Inc.
World Institute on Disability