

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. report	Senate Tells EEOC to Rewrite Religious Harassment Guides, Hold Public Hearings (partial) (1 page)	7/26/1994	P6/b(6)

COLLECTION:

Clinton Presidential Records
 Domestic Policy Council
 Stephen Warnath (Civil Rights)
 OA/Box Number: 9592

FOLDER TITLE:

Religious Freedom

ds49

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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Douglas Laycock
Alice McKean Young Regents Chair in Law

June 24, 1994

Mr. Joel Klein
Deputy Legal Counsel
White House Counsel's Office
1600 Pennsylvania Ave.
Washington, DC 20500

Dear Joel:

Thank you very much for arranging Wednesday's meeting on the Religious Freedom Restoration Act. It was a special and unexpected honor to meet the President. All of us who are interested in religious liberty are very much aware of his continuing personal leadership on RFRA, and we are grateful.

We thought it might be helpful to provide a written summary of the key points raised in our meeting. We will add a few others that are important although we did not have time to discuss them.

I. Institutional Issues

1. There was apparently unanimous agreement that someone should be given special responsibility for enforcing the Act. The President said that it is very important to do this. We think that the key person should be someone who does not have conflicting responsibilities to the agencies and who has both the responsibility and clout to say no to an agency's litigating position when necessary. To say no to the agencies is not to hamper government functions; the faithful execution of RFRA is as much a function of the government as the faithful execution of any other law. The Office of Legal Counsel would be an appropriate place to locate responsibility for deciding what position to take on RFRA claims.

2. We anticipate some cases involving the United States but many more cases involving state and local government. It is important that the Department of Justice help defend the constitutionality of the statute in the state and local cases. The Department will also consider getting involved in a few early cases that present key interpretive issues. We will try to alert the Department to such cases.

II. Interpretive Issues

1. The Act explicitly states that the burden on the individual's religion must serve a compelling interest by the least restrictive means. The government can no longer argue that its general policy serves a compelling interest. Rather, it must have a compelling interest in refusing an exception to religious objectors. The government should not inflate its alleged interest by speculating about mass conversions. The typical case involves a religious practice that holds few attractions for persons not already committed to the claimant's faith.

2. The analysis should begin by identifying the harm that government is trying to prevent. Does the government seek to prevent that harm where-ever it appears, however and by whomever it is caused, without exceptions, across the full range of its responsibilities? If so, preventing this harm might be a compelling interest. If not, the government itself has not treated the interest as compelling.

3. Even if the government has pursued a no-exceptions policy, the question remains whether the interest in uniform enforcement is so important that it overrides constitutional rights. We think that often the answer should be no, and that the government has historically been too quick to say yes. As Bill Bryson said, every bureaucrat thinks that what he does serves a compelling interest. He has a narrow mission and his own statute to enforce, and RFRA is not his responsibility. The agency can provide information, but its own assessment of the compelling interest question is not objective or impartial, and it is rarely informed by much experience with constitutional questions or a full understanding of the constitutional values at stake.

We did not have time to discuss general criteria for this decision, and no verbal formula can capture all the cases. But in general we think that the government has a compelling interest only when the burden on religious practice is necessary to prevent significant tangible harms, such as physical injury, real threats to public health, or deprivation of property. Protecting others from inconvenience, annoyance, or offense is not enough. Often the government's principal interest is in its own administrative convenience, or in the symbolic value of a no-exceptions policy, or in the political value of defeating the faith group that wants an exception. These sorts of interests are not enough.

4. Assuming a compelling interest in a no-exceptions policy, it is still important to ask if the government can prevent the harm it fears with a less restrictive means. Least-restrictive-means analysis can sometimes lead to win-win solutions, in which the government can achieve its goal without exception and the religious minority can practice its faith. That these solutions sometimes cost money is not a compelling reason to refuse them.

5. Substantial burdens on the exercise of religion are not confined to specific religious rituals or doctrinal tenets. Some of the most important cases involve economic or regulatory burdens that hamper a church's performance of its religious mission. The zoning cases are an example that played a prominent role in the Congressional debate.

Similarly, although we did not discuss the point, nothing in RFRA requires that the burden fall on a central part of the claimant's faith. Centrality may sometimes be relevant to the compelling interest test; a greater government interest would be required to compellingly

outweigh the right to be married in church than to compellingly outweigh the right to throw rice at church weddings. But we think it clear that there is no threshold requirement of centrality.

6. We agree that believers have no right to demand that the government practice their religion with them or for them. But it should not be dispositive to label a practice "internal government operations," if in fact it has tangible external consequences on the religious practices of individuals. The most troubling case here is *Lyng*, where the government destroyed an ancient place of worship. That destruction burdened religious exercise, even though the government had acquired title to the sacred site.

7. We did not discuss the point, but we think the legislative history is reasonably clear that behavior is religious exercise if religion is a substantial motive for the behavior. The behavior need not be *compelled* by religion. Religion is the motive for creating religious institutions, and these institutions require autonomous management by persons committed to the religious mission. Thus, government should not inquire into the religious motivation of every decision such institutions make, seeking to regulate those decisions that seem secular to the bureaucrat. This is what Brent Walker meant when he referred to issues of church autonomy.

8. We did not discuss this point either, but if the government thinks that a religious claimant is clearly insincere, it should overtly challenge sincerity. Bad law has been made in cases in which the government stipulates the sincerity of a claim that both government and judge believe to be phony, and then the judge denies the claim by watering down compelling interest or raising the threshold for finding a burden. And the claimant never gets a chance to present evidence of his sincerity.

In litigating sincerity, consistency of practice is probative, although none of us are perfect and perfection is not required. Nor is sincerity a backdoor way of introducing a centrality requirement or of secondguessing the logic of religious beliefs. There is ample reason to generally defer to the claimant's statement of his own faith, but where sincerity is the real issue, it should be litigated directly and not by subterfuge.

III. Other Issues

We also discussed other important issues that will principally be litigated under law other than RFRA.

1. Religious free speech issues, especially the Equal Access Act and the EEOC harassment guidelines. We appreciate the Justice Department's amicus brief in *Ceniceros v. San Diego Unified School District*. This is a very important case; the school district has declared a limited forum to exist after the buses leave, but it allows all the secular clubs to meet during lunch hour, when it claims that no forum can exist. This ruse renders the Act a nullity; if the Ninth Circuit approves, we hope that the Department will support a petition for certiorari.

The principal problem with the EEOC Guidelines is vagueness and overbreadth. The case that Doug Laycock mentioned, holding religious stories in the company newsletter to be religious harassment, is *Brown Transport Corp. v. Commonwealth*, 578 A.2d 555, 562 (Pa. Commw. 1990).

2. Other Title VII issues, especially the exemptions in §§702 and 703(e)(2), which allow religious employers to prefer applicants of their own faith. These exemptions were given a dangerously narrow interpretation in *EEOC v. Kamehameha Schools*, 990 F.2d 458 (9th Cir.), cert. denied, 114 S.Ct. 439 (1993).

We did not get an opportunity to mention the good news that the EEOC has entered an Arkansas case on behalf of an employee discharged for refusing to work on the Sabbath, and that it apparently intends to take Sabbath cases much more seriously than in the past. We appreciate this initiative, and hope that your office can encourage it.

3. Pending legislative issues. We discussed without resolving the necessary scope of exemptions in Senator Kennedy's bill to add sexual orientation to Title VII. Another set of issues that will be important to the evangelical and fundamentalist communities is taxation to pay for abortion under a national health care bill, and the scope of any conscience clause for health care providers who will not perform abortions.

We have not taken time to ship this letter around the country for six separate signatures, but each of us has participated in the drafting and approves the final product. The three academic signers are of course writing in their personal capacity as scholars and not on behalf of their institutions. Any of us would be pleased to discuss these issues further as cases unfold and the government's position develops.

Very truly yours,



Michael W. McConnell
William B. Graham Professor of Law
The University of Chicago

Douglas Laycock
Alice McKean Young Regents Chair in Law
The University of Texas

Steven McFarland
Director, Center for Law & Religious Freedom
Christian Legal Society

Edward McGlynn Gaffney
Dean and Professor of Law
Valparaiso University

Brent Walker
General Counsel
Baptist Joint Committee on Public Affairs

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Southern Baptist Convention

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Michael K. Whitehead
General Counsel
Kansas City, Missouri

July 4, 1994

Stephen Warnath
Domestic Policy Office
The White House
Washington, D.C. 20500

Dear Stephen:

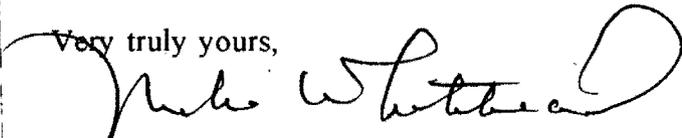
It was a pleasure to meet you on June 22 and to discuss matters of mutual concern regarding the Religious Freedom Restoration Act. Thank you for your contributions to this meeting.

We appreciate the door of communication which has been opened, and trust that continued dialogue between us will serve the cause of religious liberty to which the President is committed, as are Southern Baptists.

If I may assist you with working with Southern Baptists in the future, do not hesitate to contact me. I am usually in my office in Kansas City listed below, but may also be contacted through our Washington office.

May God bless you and your family as you serve the President and our nation.

Very truly yours,



MICHAEL K. WHITEHEAD
General Counsel

June 24, 1994

Mr. Stephen Warnath
Senior Policy Analyst
Domestic Policy Council
Old Executive Office Building, Room 217
The White House
Washington, D.C. 20500

Dear Stephen:

On behalf of the nationwide network of attorneys, law students and laypersons of the Christian Legal Society, thank you again for inviting us to discuss the interpretive issues and applications of the Religious Freedom Restoration Act. Having the ear of both the White House Counsel's office and Justice was a privileged opportunity. We also appreciate the President's expression and demonstration of interest in and commitment to the broadest implementation of RFRA. His support for assignment of RFRA policy to an office independent of agency clients was particularly gratifying. As we did after the DOJ filed its brief with the Ninth Circuit in Ceniceros, CLS will not hesitate to laud the Administration when it acts to protect our First Freedom.

As promised we enclose a summation of the views expressed regarding RFRA and other "hot button" issues for the religious community.

Please do not hesitate to contact me if we may assist you (on- or off-the-record) in analysis of these critically important issues.

Again thank you for your time, consideration and hospitality.

Respectfully yours,



Steven T. McFarland, Director
Center for Law & Religious Freedom

Enclosure

STM/bh

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7-26-94

(No. 141) A-1

BNA's Daily Reporter System

DAILY LABOR REPORT

CURRENT DEVELOPMENTS

SENATE TELLS EEOC TO REWRITE RELIGIOUS HARASSMENT GUIDES, HOLD PUBLIC HEARINGS

The Senate has incorporated a provision in appropriations legislation (HR 4603) that would require the Equal Employment Opportunity Commission to withdraw existing proposed guidelines on religious harassment and to hold public hearings on the issue before any new guidelines are put into effect.

An amendment to the Commerce, Justice, State, and Judiciary appropriations bill, co-sponsored by Sens. Howell Heflin (D-Ala) and Hank Brown (R-Colo), was passed by voice vote on July 22. The bill, which also was passed on a voice vote, now goes to a House-Senate conference to iron out differences in the overall legislation.

An amendment to the House version of the appropriations legislation adopted last month would prohibit EEOC from using funds to implement the proposed guidelines as now drafted (123 DLR A-3, 6/29/94).

The Heflin-Brown amendment codifies an earlier sense-of-the-Congress measure into legislation. It would require the commission to withdraw the proposed guidelines immediately and to draft any new guidelines "to make it explicitly clear that symbols or expressions of religious belief are consistent with the First Amendment and the Religious Freedom Restoration Act of 1993 and are not to be restricted and do not constitute proof of harassment." The amendment also would require EEOC to hold public hearings on any newly proposed guidelines and to open them up for public comment.

Congress has sharply criticized EEOC's proposed guidelines on religious harassment because of potential First Amendment concerns. The commission withdrew the guidelines for additional input in May, and at Senate confirmation hearings last week, Chairman-designate Gilbert Casellas promised to take a close look in reviewing and revising the proposal to strike an appropriate balance on "a very complex, very sensitive issue" (139 DLR AA-1, 7/22/94).

In floor comments prior to the vote, Heflin acknowledged that the new commissioners "will have to deliberate over this issue after their confirmation," but added that it was "valuable and worthwhile to send the message to the commission that any guidelines concerning religious harassment cannot prohibit speech and expressions that are consistent with the First Amendment and the Religious Freedom Restoration Act."

N.J. SUPREME COURT FINDS MANUAL, POLICIES CREATE EMPLOYMENT CONTRACT

Specific termination procedures, coupled with a vague disclaimer in a company's employment manual, created a contract that barred an employee's firing without cause, the Supreme Court of New Jersey ruled, affirming lower court rulings (*Nicosia v. Wakefern Food Corp.*, SupCr NJ, No. A-56-93, 6/30/94).

Justice Alan B. Handler, writing the unanimous opinion for the court, said that absent a clear and prominent disclaimer, an employment manual containing the implied promise that an at-will worker shall only be fired for cause is enforceable against an employer. Handler said in determining whether a promise can be implied, the definiteness and comprehensiveness of the termination policy and the reasonableness of the employees' expectations under the manual are crucial factors.

THE WHITE HOUSE

WASHINGTON

March 11, 1993

Dear Senator ~~Kennedy~~ *Feo*:

I am pleased that you and Senator Hatch, and Representatives Schumer and Cox, will be reintroducing the Religious Freedom Restoration Act (RFRA).

The right to practice one's faith free from governmental interference is among the most fundamental liberties protected by our Constitution. That right was seriously undermined by the Supreme Court's 1990 decision in the Smith case.

RFRA is urgently needed to restore full legal protection for the exercise of religion. I look forward to working with the Congress to secure speedy enactment of this important legislation.

With best wishes,

Sincerely,

Brian

The Honorable Edward M. Kennedy
United States Senate
Washington, D.C. 20510